CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3499

Heard in Edmonton, Tuesday, 12 July 2005

concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Whether Locomotive Engineer Longworth was properly restricted to a non-safety sensitive position due to a medical condition and whether the Company fulfilled their duty to accommodate him.

JOINT STATEMENT OF ISSUE:

On or about May 2001, Engineer Longworth suffered a non-work related injury. While convalescing from this injury, he was diagnosed as suffering from a new medical condition which prevented him from working in any position at Canadian Pacific Railway for a period of time.

On April 15, 2003, Occupational Health Services arranged for Engineer Longworth to attend an independent medical examination. On May 5, 2003, the report of the independent medical examiner was received by Canadian Pacific's Occupational Health Services for review and the grievor was subsequently declared fit for work in non-safety sensitive positions only.

On June 9, 2003 Occupational Health Services advised Engineer Longworth and the local Return to Work Committee (RTW) Committee of the following restriction regarding Engineer Longworth's ability to return to work.

> We have received more medical information at this time and Dr. Adams has reviewed it. His recommendations are as follows: Engineer Longworth remains "unfit for safety critical/safety sensitive work. He is fit for non-safety sensitive duties only. His restrictions are indefinite at this time."

The Employer subsequently advised the grievor and the Union that it did not have any alternate work available for Engineer Longworth.

The Union submits that the Company's Occupational Health Services made an error in its medical assessment in restricting Engineer Longworth to a non-safety sensitive position and should have allowed him to return to work in his safety critical position of locomotive engineer.

The Union contends that: **(1.)** The employer did not follow the appropriate course of action as specified in the railway medical guidelines to determine if Engineer Longworth was fit for work in a safety critical position. **(2.)** The medical evidence did not provide a sufficient basis to conclude that Engineer Longworth was not able to work in a safety critical position or to conclude that he was unfit for work in a safety critical position. **(3.)** Further, the medical evidence did not support a conclusion that Engineer Longworth suffered from "indefinite" work restrictions. **(4.)** Given the diagnosis that Engineer Longworth suffered from a disability resulting in work related restrictions, then as part of its duty to accommodate Engineer Longworth, the Employer should have taken further steps to identify the nature and duration of the restrictions.

In the alternative, if the employer was correct in its decision that Engineer Longworth was unfit for work in a safety critical position, the Union contends that the Employer did not take sufficient or adequate steps to accommodate Engineer Longworth's disability in a non-safety critical position, particularly having regard to the fact that his restrictions were of indefinite duration and scope.

The Union contends that on September 30, 2002, the medical evidence from his physician indicated that Engineer Longworth was fully recovered and was no longer suffering from a medical condition that prevented him from fulfilling his occupation of locomotive engineer.

Throughout the latter part of 2002 and early 2003, the Union submits that Engineer Longworth tried to return to his regular duties at CP Rail but was refused by the Company on the basis that the Company's Occupational Health Services needed to confirm his fitness for work.

The Union states that the Employer should compensate Engineer Longworth for lost wages and benefits as a result of its refusal to allow Engineer Longworth to return to work or as a result of its failure to accommodate Engineer Longworth.

The Company disputes the Union's position and submits that the grievor was identified as having a medical condition that precluded his working in a safety critical position. It further contends that it has taken all reasonable steps to accommodate Engineer Longworth's disability recognizing that he was only cleared to work a non-safety sensitive position in May of 2003. Upon the grievor being cleared of locomotive engineer in March 2004. Accordingly, the Company does not agree with the Union's position of the need to accommodate at this time.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. R. ABLE	**(SGD.) R. HAMPEL**
GENERAL CHAIRMAN	**FOR: GENERAL MANAGER – OPERATIONS**

There appeared on behalf of the Company:

R. V. Hampel	– Manager, Labour Relations, Calgary
C. Ayton	– Labour Relations Officer, Calgary
Dr. J. Cutbill	– Chief Medical Officer, Calgary
J. Bartciewicz	– Occupational Health Services, Calgary
C. Gosling	– Manager, Commuter Rail, Vancouver
Dr. Robinow	– Witness

And on behalf of the Union:

C. Cook	– Counsel, Calgary

D. Able – General Chairman, Calgary
G. Ranson – Local Chairman, Vancouver
S. Knaiz – Local Chairman, Edmonton

AWARD OF THE ARBITRATOR

Upon a review of the material filed and the submissions of the parties the Arbitrator is unable to conclude that the Company failed to accommodate the grievor, as alleged by the Union.

The record discloses that the grievor suffered a non-work related injury in the year 2000. He was subsequently diagnosed with other medical conditions which rendered him unfit for duty in any position with the Company after May of 2001. He was then restricted to working only in a non-safety sensitive position effective June 2003. Mr. Longworth was eventually returned to his former position as a locomotive engineer, without any restrictions, in March of 2004.

While the Union's position appears to have changed somewhat during the preparation of its brief and the presentation of its case at the hearing, its counsel essentially argues that the Company failed to do anything for the grievor in the period between July of 2003 and May of 2004.

It appears to be common ground that the grievor's difficulties commenced in the summer of 2000 when, while riding a bicycle, he suffered an accident which resulted in broken ribs. Thereafter he commenced to experience dizziness, a condition which persisted for many months thereafter and is generally described as "disequilibrium". In

fact, over time, various medical opinions diagnosed the grievor as suffering from post-traumatic stress disorder, depression, anxiety and a personality disorder involving impulsive and hostile tendencies, especially towards his employer. Perhaps most significantly, there appears to be no dispute that he suffered from conversion disorder, a psychiatric condition which can cause physical manifestations prompted by emotional distress or unconscious conflict. It does not appear disputed that the grievor's disequilibrium was eventually diagnosed as being so caused.

It is common ground that the disequilibrium problem had run its course and that the grievor was fit to return to work in a safety sensitive position in March of 2004. As noted above, the Union's claim is that the Company failed to accommodate him in a non-safety sensitive position from June of 2003 until his return to work in March of 2004.

The Union questions, among other things, why the grievor was not considered eligible for two "aspire hire" positions both in late 2003. One involved a position of training specialist responsible for ensuring rules compliance by running trades employees. The second was for an electrician's apprentice. It also suggests he should have been given a general clerk/crew bus driver position. The Arbitrator has no difficulty with the Company's rationale for declining the offering of those positions to the grievor. Given his animosity towards the Company, as reflected in the medical reports, it is not surprising that the Company did not place Mr. Longworth in a position where he would be responsible for training running trades employees in rules compliance. Moreover, his ongoing disequilibrium would make very questionable the advisability of his being

assigned as a crew bus driver, even though that might be designated as a non-safety sensitive position. Moreover, he did not have a valid driver's licence. Additionally, given the general medical opinion to the effect that while the grievor's condition of disequilibrium was indefinite, it could fairly be viewed as temporary and likely to resolve itself. Therefore, there seemed little utility in occupying a valuable trade apprentice's position by assigning it to someone who would in all likelihood be leaving it before long. I am satisfied that to place Mr. Longworth in any of the three positions identified would have involved a degree of undue hardship beyond what the law would impose upon the employer. I am also satisfied that to place the grievor in a position of car checker, as argued by the Union, was not reasonable to the extent that it would involve working in proximity to moving equipment in a yard setting.

The evidence discloses that by July of 2003 the Company had made exhaustive inquiries as to the possibility of any positions in the Vancouver area which the grievor's physical and emotional limitations would allow him to fill. None could then be found. The flexibility in finding accommodation for Mr. Longworth was necessarily limited by his insistence that he did not wish to relocate outside the Vancouver area.

In the Arbitrator's view there is an aura of legal technicality and unrealism to the argument put forward by counsel for the Union. He stresses, based on the jurisprudence, that the onus is upon the Company to seek a position which would accommodate the grievor's limitations, an obligation which he correctly characterizes as ongoing. He submits that in the case at hand, because the Company has not adduced

evidence of any efforts to find a position for the grievor in Vancouver after July of 2003 it must be concluded that it failed in its obligation of accommodation.

With respect, the Arbitrator cannot agree. The ultimate burden of proof in this grievance lies upon the Union. At the end of the day it bears the legal burden of establishing that the Company failed in its obligation to accommodate. While it is true that as a matter of onus, it is the Company which has the best knowledge of the available jobs and has the first obligation of attempting to find a position suitable to the employee, it is not enough for the Union to simply assert that the apparent failure of any continued or successful searches by the Company necessarily resulted in prejudice to the employee. It is far from clear on the evidence before me that any vacancies arose in the Vancouver area which would have been appropriate to the grievor, nor am I persuaded that the Union was without reasonable ability to obtain its own information with respect to the vacancies, if any, which may have opened up during the period between July of 2003 and March of 2004. As the courts have stressed, the duty of accommodation is a collaborative process which involves the good faith participation of employer, employee and trade union alike. While the Arbitrator would not dispute that it is not for the Union to be the primary source of proposed assignments which might accommodate a disability, the process is plainly not well served when a Union simply falls back on the position that it is the obligation of the Company to identify opportunities and claim damages for a period during which there is no evidence, from any party, to indicate that opportunities for reasonable accommodation were in fact available.

From a technical standpoint the Arbitrator agrees with counsel for the Union that the Company remained under an affirmative obligation, after June of 2003, to remain vigilant for the identification of any position which might become open to the grievor and which could accommodate his limitations. I am not, however, prepared to convert the apparent lack of evidence with respect to what might have been done after June of 2003 into what the Union seeks, namely an award of monetary compensation to the grievor, given the Union's own failure to produce any evidence to suggest that there were any positions which in fact might have been available to accommodate Mr. Longworth in Vancouver, given his obvious refusal to consider accommodation anywhere else. Nor does the evidence before me reveal any effort on the part of the Union itself to demand any further search on the part of the Company in the period which the Union now claims involved an abandonment of the Company's obligation. Additionally, the Union's case is not assisted by the grievor's own refusal to consider accommodation at any other location.

On the whole, I am satisfied that the Company did make extensive efforts with respect to obtaining the best information possible concerning the grievor's condition. It quite properly questioned the opinion of Dr. Leech-Porter, given on November 12, 2003 until it was reviewed by Dr. Oliver Robinow. It acted reasonably with respect to his possible accommodation in a non-safety sensitive position after June of 2003, until his reinstatement into his own safety sensitive position when he was eventually found fit to return to safety sensitive work in March of 2004. In the result no violation of the collective agreement or of the **Canadian Human Rights Act** is disclosed.

The grievance must therefore be dismissed.

July 19, 2005

(signed) MICHEL G. PICHER
ARBITRATOR