CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3505

Heard in Edmonton, Thursday, 14 July 2005

concerning

CANADIAN PACIFIC RAILWAY

and

TEAMSTERS CANADA RAIL CONFERENCE MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

The return to work and accommodation of Mr. Dan Baker.

JOINT STATEMENT OF ISSUE:

Mr. Baker was preparing to transfer thermite-welding supplies from a boxcar to his truck in October of 1999. While in the process of opening a boxcar door, he injured his back. He commenced losing time on October 27, 1999.

Mr. Baker was returned to work as a welder in November of 2003.

The Union's position: **(1)** Mr. Baker was initially cleared to return to work by the Workers' Compensation Board on January 22, 2001, with a suggested graduated return to work plan, for a 4-week duration. **(2)** The Company did not return Mr. Baker to work at this time and as such did not fully discharge their duty to accommodate Mr. Baker between January 22, 2001 and November of 2003. **(3)** The Company is in violation of their duty to accommodate and Appendix B-12 of the collective agreement.

The Union requested remedy: Mr. Baker should be fully compensated for all lost wages between January 22, 2001 and his actual commencement of work in November of 2003.

The Company's position: The Company maintains that the duty to accommodate was fully discharged and Mr. Baker's return to the workplace was accommodated as soon as a reasonable arrangement could be crafted. The Company also asserts that the Union's request for compensation is unwarranted and contrary to Section 19.4 of the collective agreement. The Company therefore denies the Union's request and declines the grievance.

FOR THE UNION:

(SGD.) WM. BREHL
NATIONAL COORDINATOR

FOR THE COMPANY:

(SGD.) S. SEENEY
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

S. Seeney	– Manager, Labour Relations, Calgary
J. James	– Employee Health Advisor

And on behalf of the Union:

Wm.J. Brehl	– President, Ottawa
G. Doherty	– Local Chairperson, Brandon
G. McDougall	– Local Chairperson, Brandon
J. Spikula	– Director, Eastern Canada

AWARD OF THE ARBITRATOR

The position of the Union would suggest that the grievor was cleared as fit to return to work by reason of the decision of the Workers' Compensation Board on January 22, 2001. That, however, does not tell the full story. At that time the work related injury which he had sustained was judged to have run its course. However, he remained substantially disabled by reason of a separate degenerative back condition not related to his workplace injury. A report received by the Company from the grievor's personal physician, Dr. C. McFarlane, on January 30, 2001 stressed that the grievor was not capable of performing duties critical to his own safety or to the safety of others and was awaiting an appointment with a neurosurgeon. Mr. Baker was then advised by the Company's Occupation Health Services to submit a Sun Life claim which he did, following which he received benefits from January 25 through November 7, 2001.

A subsequent report from Dr. McFarlane on October 26, 2001 advised the Company that he had, at best, an indefinite date of return to work and that he was unable to do prolonged sitting, standing and bending and was subject to the possibility

of sudden, severe low back pain as well as hip or leg pain which could be incapacitating. Dr. McFarlane then indicated that back surgery was a possibility. Perhaps most significantly, on October 29, 2001, the Company's physician, Dr. R.E. Albak, communicated with Dr. McFarlane proposing what he believed were the appropriate functional limitations on the grievor, including that he could do no prolonged sitting or standing, no repetitive bending and no lifting greater than thirty pounds. The grievor's physician concurred with that assessment.

The uncontradicted evidence before the Arbitrator is that those limitations could not be accommodated in Brandon, Manitoba, where the grievor had previously been employed. The Arbitrator is also satisfied that the grievor had indicated to the Company that he was not willing to be accommodated in a position outside Brandon, largely by reason of his wife's employment and his family's situation. The material also confirms that Company pursued the possibility of retraining for the grievor with the WCB, only to be advised that given the grievor's educational and skills background the available funds would not allow him to recoup his pre-accident salary through retraining.

Essentially the situation remained static for months thereafter. For example, a consultation report prepared by Dr. D. Birt, on referral from Dr. McFarlane, confirms the ongoing debilitating state in which the grievor found himself and contains the statement "He doesn't feel that he'd be able to return to his previous job". When the grievor contacted the Company's Health Advisor, Ms. Joanne James, on March 8, 2002, she advised him of the report received from Dr. McFarlane and indicated that she would

contact the WCB case manager to investigate his entitlement to benefits and retraining. The response from the WCB was that the grievor's background prohibited any realistic training opportunities.

On or about September 3, 2002 Ms. James explained to the grievor, who inquired as to the state of his case, that his restrictions could not be accommodated in Brandon, and because he had indicated that he would not be interested in relocation no realistic job search could be initiated. Not long thereafter, on November 19, the grievor indicated to Ms. James that he was applying for a disability pension. It appears that on April 28, 2003 Mr. Baker advised Ms. James that his specialist had declined to complete a return to work form, indicating that he was not fit to do any physical labour or able to bend or sit for prolonged periods. It does not appear disputed that Ms. James then reiterated to the grievor the difficulty flowing from the fact that he refused to relocate from Brandon.

Shortly thereafter, the grievor again indicated his intention to submit disability pension forms. Those forms required that he undergo an initial medical assessment. That assessment, completed by Dr. McFarlane, contained, in part, the statement: "My specialist colleagues seem to feel he will never be able to return to his prior employment." Notwithstanding, the grievor was referred for a Functional Abilities Evaluation (FAE) as part of his application for a disability pension. That evaluation resulted in an opinion of the Company's Chief Medical Officer to the effect that the grievor would be fit for light duties with restrictions. Eventually, on August 13, 2003 the

grievor's personal physician, Dr. McFarlane, agreed with the work restrictions suggested by the Company's Chief Medical Officer, Dr. John Cutbill. When the grievor continued to take a position that he would not relocate from Brandon, consideration was finally given to his request to be given the opportunity to perform the duties of a frog welder's position at Brandon. Following a conference call involving Ms. James, Dr. R. Albak, the grievor, local Brandon, Manitoba managers of the Company and Union representatives, it was agreed to gradually return Mr. Baker to work in the frog welder position. He returned to work on November 3rd and has worked full time in that position without incident since that time.

On a careful review of the above history, the Arbitrator cannot agree that the Company failed in its duty to accommodate the grievor. As is evident from the foregoing, the Company's flexibility with respect to the placement of Mr. Baker in any alternative position was seriously circumscribed by his insistence on remaining in Brandon. While the Union's representative would characterize the grievor's position as no more than having expressed a preference to stay in Brandon, the thrust of the material leaves little doubt but that he communicated to the Company's Employee Health Advisor that he would not relocate as part of the exercise of accommodation. Significantly, there is no evidence to contradict the assertion of the Company that there were simply no positions in Brandon suitable to the extensive restrictions on the grievor was they were periodically described by his own physician, Dr. McFarlane. On the whole, I am satisfied that the Company remained vigilant as to the grievor's condition and made every reasonable effort to assist him in returning to work, within the

limitations of undue hardship. Given the rather extreme diagnoses and prognoses being communicated to the Company by the grievor's own physician over a substantial period of time, it is difficult to see what more the Company could be expected to do in the circumstances, especially in light of the grievor's indication that he would not relocate from Brandon.

For the foregoing reasons the Arbitrator is satisfied that the Company did fulfil its obligation with respect to its duty of accommodation towards the grievor. No violation of the collective agreement, including Appendix B-12, or of the **Canadian Human Rights Act** is disclosed. The grievance must therefore be dismissed.

July 19, 2005

(signed) MICHEL G. PICHER
ARBITRATOR