CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3530

Heard in Montreal, Tuesday, 13 December 2005

Concerning

CANPAR TRANSPORT LTD.

and

UNITED STEELWORKERS OF AMERICA (LOCAL 1976)

DISPUTE:

The Company not allowing Mr. Gary Naturkach (Edmonton) to return to work as a P&D driver at Canpar.

JOINT STATEMENT OF ISSUE:

After a lengthy absence due to a non compensable back injury, the grievor returned to work at Canpar as a driver representative. The grievor was placed on a "trial" by the Company. On May 21, 2005, he was advised that he had failed to meet the Company's productivity expectations. He has not been offered any form of work since that date.

The Union filed a grievance regarding the above mentioned matter stating that the grievor was physically fit on March 22, 2005. The Union also grieved that the Company's actions have caused the grievor to become unemployed an dare unjust and violate article 6.1 of the collective agreement.

The Union has requested that the grievor be immediately reinstated and has further requested that he be made whole for all lost monies and benefits caused by his loss of employment.

The Company denied the grievance. The Company contends that the grievor failed a "trial" return to work program due to the effects of his injury. The Company further contends that the grievor has not been terminated and that they have initiated a search for a permanent accommodation to suit his restrictions.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) A. KANE	(SGD.) P. D. MACLEOD
REGIONAL VICE-PRESIDENT	VICE-PRESIDENT – OPERATIONS

There appeared on behalf of the Company:

P. D. MacLeod	– Vice-President – Operations, Mississauga
D. Verbin	– Supervisor, Edmonton
L. Pothier	– Supervisor, Human Resources, Mississauga

And on behalf of the Union:

A. Kane	– Staff Representative, Vancouver
R. Summerside	– Vice-President, F.S.T., Montreal

AWARD OF THE ARBITRATOR

The record discloses that the grievor suffers degenerative disc disease and sciatic radiculopathy. After an extensive absence Mr. Naturkach returned to work on the basis of a work hardening trial. While initially the trial was to be for only one week, in fact it ultimately extended over a period of nine weeks. During that time the grievor was to demonstrate that the could perform the functions of a P&D driver to the satisfactory level of productivity, within the limitations of his physical condition.

It does not appear disputed that the route to which the grievor returned was somewhat different from the route he had previously worked. The Arbitrator is satisfied, however, that the extension of the trial period was ample to allow for any issues of familiarity.

At issue in the instant case is whether the Company has violated its obligation of accommodation to the grievor by removing him from work as a P&D driver when it formed the opinion that he was not able to meet the productivity standard for the job. The Union does not challenge the Company's right to establish productivity standards for the various delivery routes. In essence, in the case at hand its representative argues that the work opportunities given to the grievor were insufficient for him to be able to demonstrate that he could meet the standard. Among other things, the Union's representative submits that the grievor was given insufficient freight, or an insufficient density of freight, to handle on the route in question so as to meet the normal productivity standard.

The Company's representative explains that the productivity standard for a route is established by examining the normal productivity of an employee on the route. Based on the productivity achieved by other employees, the stops per hour for the route which the grievor was assigned for the nine week trial period was 7.5 stops per hour. That average, based on an average of sixty-one total stops and an average of 8.1 hours paid, was calculated over a twenty day period from February 22 until March 21, 2005, during which three other employees handled the route.

During the first four weeks of his trial, from March 22 until April 19, 2005 the grievor averaged fifty-six total stops for a productivity rate of 6.5 stops per hour and an average of 8.6 hours over the nineteen days in question. On fourteen occasions during that period he recorded overtime. Between April 20 and May 31 the grievor averaged fifty-four stops per day with a productivity rate of 6.7 stops per hour. In contrast, the person who took over the route after the grievor's failed trial registered a productivity rate of 8.1 stops per hour for the first two weeks of June and 7.7 stops per hour for the second two weeks of the same month.

As difficult at it may be, the evidence regrettably discloses that the grievor was not able to meet the productivity standard for the route during the period of his trial. The Arbitrator is satisfied that elements such as the number of parcels and stops assigned to him, which did indeed fluctuate, also fluctuated during the work performed by other employees on the route. There was nothing artificial or extraordinary about the work load assigned to Mr. Naturkach. Unfortunately, on a consistent basis he recorded a productivity rate substantially inferior to the productivity rate which could reasonably be expected of an employee assigned the route in question.

In determining whether the duty of accommodation was fulfilled in the case at hand, the Arbitrator is satisfied that the Company must demonstrate that the grievor was placed in a position that was reasonable in the circumstances and that his trial period was not unduly restrictive. The conditions of work during his trial period, which extended over a reasonable number of weeks, were not substantially different from those experienced by other employees whose work established the productivity standard.

The duty of accommodation does not compel the employer to keep an employee in a position which he or she is not able to fill to a reasonably satisfactory level of productivity. While some slight allowance may be made for an individual's disability, the Arbitrator is compelled to agree with the Company's representative that in the case at hand a 15% shortfall in productivity, given that the grievor would be in receipt of the same wages as other employees, is a demonstration of undue hardship.

The foregoing conclusion does not, of course, foreclose the ongoing obligation of the Company and the Union to continue to seek to accommodate the grievor's disability, if that can be done short of undue hardship. As indicated in the Company's submissions to the Arbitrator, that process is apparently ongoing.

For all of the foregoing reasons the grievance must be dismissed.

December 20, 2005

(signed) MICHEL G. PICHER
ARBITRATOR