

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3574

Edmonton, Thursday, 13 July 2006

concerning

CANPAR

and

UNITED STEELWORKERS OF AMERICA, LOCAL 1976

DISPUTE:

Claim by the Union that accommodated position should be considered as bargaining unit work.

JOINT STATEMENT OF ISSUE:

The grievor had been away from work due to a permanent partial disability caused by a January 30, 2003 back injury. He returned to an accommodated position on or about November 29, 2005.

The Union has filed a grievance regarding this matter arguing that the Company has violated article 3.1 of the collective agreement. The Union has argued that the accommodated work the Company has provided the grievor is performed by other bargaining unit employees on a daily basis and should be considered as bargaining unit work. The Union has argued the worker should be afforded his right, seniority standing and benefits provided for in the collective agreement.

The Union has also grieved that the Company has violated Appendix E of the collective agreement by not meeting with the Union prior to offering the grievor his current accommodated position.

The Union has grieved that the terms and conditions noted in the Company's November 22, 2005 agreement with the grievor should be considered non-binding and void. The Union has grieved that the Company has violated article 5.2.15 of the collective agreement. The Union has submitted that the responsibilities of the accommodated position should pay \$19.21 and not the \$12.00 per hour the Company is currently paying.

The Company has denied the Union's grievance. The Company contends that they have not violated the collective agreement as the duties of the accommodated position are not bargaining unit work. The Company contends that the terms and conditions of the above-mentioned November 22, 2005, agreement with the grievor should remain in effect.

The Company submits that because the accommodated position is outside of the bargaining unit there was no requirement for it to consult with the Union prior to offering the grievor the terms and conditions of the accommodated position. The Company argues that as the work is outside of the bargaining unit, it is a matter between it, Alberta WCB and Mr. Coquet.

The Union and the Company have not been able to resolve the dispute to date.

FOR THE UNION:

(SGD.) A. KANE
STAFF REPRESENTATIVE

FOR THE COMPANY:

(SGD.) P. D. MACLEOD
VICE-PRESIDENT, OPERATIONS

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Vice-President, Operations, Mississauga
K. Greenfield	– District Manager, Alberta
S. Derbyshire	– Manager, Administration, Calgary

And on behalf of the Union:

A. Kane	– Staff Representative, Vancouver
R. Thompson	– Unit Chairman, Calgary

AWARD OF THE ARBITRATOR

The material establishes that the grievor suffered a compensable back injury on January 30, 2003 and that he eventually became diagnosed with a permanent disability which prevents his performing the normal duties of any regular bargaining unit position. It became clear in or about August of 2003 that his restrictions would confine the grievor to sedentary work, on a permanent basis.

On October 20, 2003, the Company communicated with the grievor and senior Union officials in an effort to commence the process of accommodation, by identifying suitable jobs for his restrictions. Mr. Coquet informed the Company that he was unwilling to move out of Calgary, and that the only kinds of jobs he could perform would

be such as security guard, staffing and information desk, or similar sedentary work. The Union's representative suggested that the grievor might be placed in a then vacant supervisory position at Calgary, but the Company's view was that he was not qualified for that role.

Eventually, on or about November 22, 2005, the Company offered the grievor a position outside the bargaining unit, in part-time clerical functions, for four hours per day. The tasks assigned to him are described as "various clerical functions such as cashing out drivers, ensuring scanners were downloaded, verifying Centre summaries and the flash, handling RTSs and over the counter freight, bank deposits and answering the telephone." It is not disputed that the hours of work were limited to four hours per day at the hourly rate of \$12 per hour, a lower rate than the grievor would have earned as a P&D driver. It is also not disputed, however, that his Workers' Compensation benefits would top him up to an overall earnings position close or equivalent to what he would have earned in his prior driver's job.

It also appears that initially the Company erroneously removed the grievor from the seniority list, an error which it subsequently corrected. By the operation of the collective agreement, having accepted a position outside the bargaining unit, the grievor would retain his seniority for a period of not less than six months, with the ability to revert to the bargaining unit if he should choose, during that time.

The position of the Union is that the grievor should still be treated as being within the bargaining unit, as the functions which he performs are functions which are done by bargaining unit members. It also alleges a violation of Appendix E of the collective agreement, a letter of understanding concerning special arrangements for physically disabled employees. That letter reads, in part, as follows:

This has reference to discussions during current negotiations regarding the desirability of undertaking special arrangements for an employee who becomes permanently physically disabled during the course of his employment and is unable to perform the regular duties of his assigned position and is unable to exercise his seniority on a position, which he is capable of performing.

This letter will confirm our understanding that, in such circumstances, the Vice-President Operations and/or the Vice-President Human Resources and the President of TC Local 1976 (USWA) will meet to see if arrangements can be made to provide employment to the employee concerned within the bargaining unit. The parties may by mutual agreement place a disabled employee on a position that his qualifications and ability allow him to perform, notwithstanding that it may be necessary to displace an able-bodied employee in the bargaining unit so as to provide suitable employment. The permanently assigned employee so displaced will be allowed to exercise seniority onto a position within the bargaining unit that he is qualified for and has the ability to perform.

The Arbitrator cannot sustain the grievance. Firstly, the Union cannot establish that the clerical functions assigned to the grievor are functions exclusively performed within the bargaining unit. On the contrary, while those functions are periodically and occasionally performed by bargaining unit members as being incidental to their core functions, they do not constitute part of the core functions of the classifications in the bargaining unit which essentially relate to the work of driver representatives, dockpersons, warehousepersons, linehaul drivers, delivery persons and straight truck driver/representatives. The jobs of the bargaining unit are, in their essential functions, either related to loading and unloading freight or driving vehicles in relation to pick-ups,

deliveries or long haul transportation. It is not disputed that the grievor is incapable of any of those functions by reason of his permanent disability. The assignment to him of incidental clerical tasks, tasks which are performed by drivers as well as by clerical staff and supervisors, does not bring him within the bargaining unit, as contended by the Union's representative.

Nor can the Arbitrator find any violation of the collective agreement in the course of action followed by the Company. Clearly the Union was brought into the accommodation process at the outset, insofar as the effort to find the grievor suitable work within the bargaining unit is concerned. I am satisfied that the Company's obligations in respect of accommodation in that regard, as well as its duties in accordance with Appendix E of the collective agreement, were fully met. Nor was there any failure of the Company's obligation of reasonable accommodation.

In all of the circumstances no violation of the collective agreement is disclosed, and the grievance must be dismissed.

July 17, 2006

(signed) MICHEL G. PICHER
ARBITRATOR