CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3608

Heard in Calgary, Tuesday, 13 March 2007

concerning

CANPAR TRANSPORT LTD.

and

UNITED STEELWORKERS OF AMERICA, LOCAL 1976

DISPUTE:

Ten (10) demerits issued to Calgary employee Ryan Thomson for absence.

JOINT STATEMENT OF ISSUE:

The grievor had his leg placed in a case after breaking his ankle while on the job. Alberta WCB subsequently allowed his claim for benefits on that basis.

After a period of recovery a workplace assessment was held with the grievor, the Company and a WCB contracted rehabilitation consultant in hopes of finding a suitable modified position for the grievor until he was physically fit to return to his pre-injury job. The grievor disagreed with the appropriateness and the risk factors involved with the modified duties that the Company and the consultant felt would be suitable. A second workplace assessment was arranged. The grievor believed that the findings of the second workplace assessment did not remove him from the risk factors he had already protested.

The grievor remained off work until he was given medical clearance from his doctor to return to his pre-injury job. The grievor had notified WCB that he wishes to exercise his right to appeal their decision regarding the suggested modified duties.

The Company subsequently issued ten demerits after holding a formal investigation on March 24, 2006 regarding the grievor's absence from March 15, 2006. The Appeals Commission for Alberta's Workers' Compensation Board subsequently denied the grievor's appeal for benefits on November 3, 2006.

The Union has grieved that the discipline issued is unjust and violated article 6.1 of the collective agreement. The Union has further grieved the **Canada Labour Code** and the Alberta's **Workers' Compensation Act** prohibit an employer from disciplining an employee whose injury arose out of or in the course of their employment. The Union further argued that the grievor is entitled to appeal the decision regarding the WCB workplace assessment and that while doing so the absence should have been considered as legitimate.

The Company contends that the discipline is justified as the WCB has deemed the modified duties appropriate and the grievor had an obligation to report to work after the assessment was completed.

The parties have been unable to resolve the dispute to date.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) A. KANE STAFF REPRESENTATIVE	(SGD.) P. D. MACLEOD VICE-PRESIDENT, OPERATIONS

There appeared on behalf of the Company:

P. D. Macleod – Vice-President, Operations, Mississauga
E. Sunley – Regional Manager – Prairie Region
K. Greenfield – District Manager Alberta

And on behalf of the Union:
A. Kane – Staff Representative, Vancouver

AWARD OF THE ARBITRATOR

On March 3, 2006, the grievor, who is a union officer and member of the health and safety committee, sustained a broken right ankle during the course of his duties. Modified work was arranged for the grievor starting on March 15, 2006, but the grievor disagreed with the appropriateness of the work given the nature of his injury. The grievor subsequently notified the company that he would not return to work until his WCB case worker approved his return to work. The WCB case worker did so on March 20, 2006. The grievor reported to work on March 21, 2006, but took the position that the work modifications were still not suitable for his return to work. The WCB contracted the services of a third party, the Columbia Rehabilitation Centre, on March 21, 2006. The clinician employed by the Columbia Rehabilitation Centre determined that the work modifications were appropriate for the grievor to perform his assigned modified duties. The grievor's wage loss benefits were terminated by the WCB as of March 21, 2006. The grievor disagreed with the WCB finding claiming that the work was inappropriate and that there were safety risks associated with the modified duties. He filed an appeal of the WCB decision the following day, March 22, 2006 and continued to refuse modified duties.

The Company advised the grievor on March 24, 2006 that he was to return to modified duties or provide proof to support his continued refusal and absence from work. The grievor did not report for modified duties after March 24, 2006. An interview was held with the grievor on March 29, 2006 where the grievor claimed the modified duties were unsafe and unsuitable. He was assessed 10 demerits on March 29, 2006 for his absence from work since March 15, 2006. The WCB reviewed the matter on May 11, 2006 and found that the modified duties were safe and suitable. The grievor appealed that decision to the Appeals Commission and his appeal was denied on November 3, 2006.

The WCB, as the union noted, continued to pay the grievor wage loss benefits up to and including March 20, 2006. The company agreed with the union at the arbitration hearing that the period between March 15, 2006 and March 20, 2006 was a *bona fide* period of absence even though both the Notice of Discipline refers to the grievor's "continued absence from March 15, 2006". The arbitrator is satisfied that neither the grievor nor the union have suffered any prejudice under the circumstances. The substantive allegation remains that the grievor remained off work after March 21, 2006 until March 29, 2006 after refusing modified duties.

The grievor's main dispute with the Company on March 21, 2006 was over the safety of the warehouse premises as a result of the injury to his right foot. In particular, he took the position that his assigned duties in the warehouse would be unsafe given that his casted right foot with open toes did not conform to the company's footwear policy. There is no dispute that the grievor's own doctor had cleared him to return to work and that an independent clinician retained by the WCB assessed the area on March 21, 2006 to ensure that the modified duties proposed for the grievor were in keeping with his physical limitations. It is worth noting that the third party clinician who assessed the work area on March 21, 2006 stated that he was not an expert in safety issues. That being said, however, the clinician also noted that safety issues were to be decided by the WCB and the employer. The WCB policy in that regard reads:

> For work to be considered suitable modified employment, the following conditions must be met:
>
> The work:
>
> - Accommodates the workers' compensable medical restrictions so the worker can perform the duties without endangering his/her recovery or safety or the safety of other

The WCB determined on March 21, 2006 that the grievor's footwear did not inhibit him from being able to safely perform his modified duties. It was not until seven days <u>after</u> the company disciplinary investigation on March 29, 2006, however, that the grievor approached Occupational Health and Safety about his safety concerns over the open-toed footwear and was advised that it did not fit safety guidelines to be in a cast while performing his modified duties at the warehouse. He then passed on that information to the WCB while pursuing his appeal of the original WCB decision that he was capable of performing modified duties. The WCB ultimately disagreed with this assessment upholding the original decision that there was no need for approved footwear while performing his specific modified duties. The WCB took into account all the legislative requirements of both the provincial health and safety legislation and the **Canada Labour Code** in arriving at its findings.

In the view of the arbitrator, the safety issue was properly considered by both the employer and the WCB when the modified duties were approved and the grievor was told to report to work on March 21, 2006. There was no documentation before the employer at that time, from occupational health and safety or otherwise, to contradict the findings of the WCB that the grievor could safely perform his modified duties. The grievor was therefore in no position to remain off work during the appeal process. The principle of "work now-grieve later" applies under the circumstances in the absence of any evidence that the grievor's safety was being compromised as a result of his assignment to modified duties.

The employer has a right to expect that an employee, even one who is partially disabled such as the grievor, will fulfill the duties that he or she is capable of performing as part of their ongoing employment relationship with the employer. The arbitrator finds that the discipline was not unjust. The ten (10) demerits for his absence from March 21 to March 29, 2006 was not an unreasonable penalty assessment for the grievor's absenteeism under the circumstances.

The grievance is dismissed.

March 23, 2007

(signed) JOHN M. MOREAU, Q.C.
ARBITRATOR