CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 3704

Heard in Montreal, Thursday, 16 October 2008

Concerning

VIA RAIL CANADA INC.

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

EX PARTE

DISPUTE:

Whether the Corporation is obligated to pay Ms. Toni Lisk for Short Term Disability benefits when her claim dated June 4,2004 was denied by Great West Life.

UNION'S STATEMENT OF ISSUE:

Ms. Lisk is a Service Manager working as the sole employee on Train #85/881. She continued to suffer a disability which required she have cortisone shots twice per year. On June 4th, 2004 she submitted a claim and was off work for approximately 10 days.

It is the Union's position that the Corporation should be held liable for the claim. The Union argues that the denial of the claim was as a result of the Corporation's acting in a manner that was arbitrary, discriminatory and in bad faith. Specifically, the Employer led the insurance Company to believe that Ms. Lisk was engaged in a fraud when Manager Brian Casey wrote on the claim that Ms. Lisk wanted to take a vacation. In addition, the Corporation withheld exculpatory evidence when they refused to correct the job description sent to the insurance carrier which led the insurance carrier to believe that Ms. Lisk's position of Service Manager was purely sedentary. The Union believes that had the true nature of her position been disclosed the claim would have been paid.

The Corporation contends they have no jurisdiction to pursue the matter in behalf of Ms. Lisk. The Corporation maintains that is cannot be held liable for the insurer's decision to decline Short Term Benefits if the medical information submitted does not support the claim or to interfere in the extension of time limits to process an appeal. The Corporation has declined the grievance as the matter is not arbitrable.

FOR THE UNION:

(SGD.) D. OLSHEWSKI
NATIONAL REPRESENTATIVE

There appeared on behalf of the Corporation:

L. Béchamp	– Counsel, Montreal
D. Stroka	– Sr. Advisor, Labour Relations, Montreal
D. Rasinger	– Sr. Manager, Customer Experience, Toronto
B. Hosif	– Manager, Ter. Operations, Toronto
J. Pastor	– Advisor, Labour Relations, Montreal
J. Rankin	– Agent, Labour Relations, Montreal

And on behalf of the Union:

D. Andru	– Regional Representative, Toronto
D. Olshewski	– National Representative, Winnipeg
R. Fitzgerald	– President, Council 4000, Toronto
S. Auger	– Regional Representative, Montreal

AWARD OF THE ARBITRATOR

As a preliminary submission the Corporation submits that the issue in dispute is not arbitrable. In essence its counsel submits that the collective agreement obligation between the parties only concerns negotiated levels of benefits but that the Corporation has not undertaken liability for the payment of any benefits, and that the denial of claims is not a matter which can be dealt with within the jurisdiction of this Office. The Union relies on the decision in **CROA 3085** to submit that in fact the benefits provided through the insurance carrier are a part of the collective agreement.

A review of **CROA 3085** indicates that it is of limited value for the purposes of the Union's argument. In that case the Union sought compensation for the estate of a deceased employee based on the alleged failure of the Corporation to give the employee proper notice her personal obligation to pay insurance premiums, as a result of which her life insurance benefit was drastically reduced. That case did not, in fact,

involve the adjudication of the merits of the claim, but rather the issue of whether the Corporation had failed in its collective agreement obligation to properly administer the claims process and provide the necessary information to employees. Given the determination related below, the Arbitrator does not consider it necessary to rule upon the issue of arbitrability, as I am satisfied that the grievance cannot succeed even if it were arbitrable.

As distinguished from the facts of **CROA 3085**, I have some difficulty in the instant case in finding any failure on the part of the Corporation which can be said to have adversely impacted the handling of the claim of the grievor. While it is true that the claim form forwarded on behalf of the grievor contains a notation from a supervisor indicating that the claim might not be meritorious, because the grievor sought to take vacation for the period of the medical leave of absence, that is not the basis upon which the insurer decided against the claim. In essence, the finding of Great West Life is that the grievor's normal duties and responsibilities were not precluded by reason of the physical disability which she suffered.

It does not appear disputed that for a given period of time, as a result of medical treatment in relation to an elbow injury, the grievor would be limited in her ability to do any significant or heavy lifting. The position of the Union is that her duties as a Service Manager on the Corporation's passengers trains did require her to assist passengers with their baggage during the process of entraining and detraining as well as, on occasion, manipulating the doors of passenger cars. The Corporation maintains that in fact she would have had the assistance of as many as three other on-board service employees, and that she could have performed her duties with such accommodation

and assistance as they could provide. The Union's representative suggests that that view is unrealistic given the exigencies of station stops and moving significant numbers of passengers in a short period of time.

The Arbitrator is satisfied that the information which the Corporation provided to the insurance carrier was not incorrect or misleading, and that it did not fail in its obligation in that regard. Most significantly, for the specific purposes of this case, the Arbitrator has substantial difficulty with the fact that the grievor proceeded with this grievance without first exhausting her right of appeal to Great West Life. While the Union's representative explains that on the basis that he did not receive what he considered to be an appropriate job description from the Corporation to submit as part of an appeal, that does not change the merit of the grievor's failure. In essence, if it was the position of the grievor that her actual duties did involve a degree of physical burden which was not reflected in the documents provided to the insurer by the Corporation, there was nothing to prevent her or her bargaining agent from making all necessary representations to the insurer in that regard. The failure to even attempt to do so calls into serious question the appropriateness of the matter proceeding, at some time and expense, through the grievance and arbitration procedure. Even accepting, for the sake of argument, that the Corporation did not provide sufficient information to the insurer as to the degree of lifting which the grievor's job might entail, it must be recognized that to the extent that she failed to utilize her own right of appeal, Ms. Lisk in effect did the same thing.

On the whole of the material before me I am not satisfied that the grievance can succeed. This is not a circumstance where it can be found that the Corporation did in

fact fail to provide the necessary information to the insurance carrier so as to effectively frustrate or undermine the claims process. Alternatively, even if it can be said that the information provided by the employer was in some way insufficient, the fact that the claim remains declined must, at least in part, be attributed to the grievor's own failure to appeal and provide such further information as would be appropriate. As noted in an earlier award of this Office, before resorting the grievance and arbitration process employees should first exhaust processes of appeal which are otherwise available to them (**CROA&DR 3465**, preliminary award dated January 17, 2005).

For all of the foregoing reasons the grievance is dismissed.

October 20, 2008

(signed) MICHEL G. PICHER
ARBITRATOR