CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3714

Heard in Montreal, Wednesday, 10 December 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED STEELWORKERS OF AMERICA (LOCAL 2004)

DISPUTE:

Mr. Michael Pindus was unjustly dealt with regarding his WSIB accommodation.

JOINT STATEMENT OF ISSUE:

Mr. Pindus suffered an injury on the job, March 17th, 2004 in Armstrong, Ontario. In early/mid November 2005 Mr. Pindus advised WSIB and CN that he was prepared to return to work on modified duties. Mr. Pindus' re-entry into the workforce was delayed until February 6, 2006. The Union submitted a grievance in accordance with article 18.6 and Appendix V of agreement 10.1.

The Company submits that the grievor delayed his own return to work.

The Union requests that Mr. Pindus be compensated for all lost wages, seniority and benefits from November 8th, 2005 to February 6th, 2006.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) M. PICHÉ	**(SGD.) S. M. BLACKMORE**
GENERAL CHAIRMAN	**MANAGER, LABOUR RELATIONS**

There appeared on behalf of the Company:

S. Blackmore	– Manager, Labour Relations, Edmonton
A. De Montigny	– Sr. Manager, Labour Relations, Montreal
R. Haggart	– Assistant Regional Chief Engineer, Toronto
L. Smolska	– Manager, General Claims, Montreal

And on behalf of the Union:

M. G. Piché	– Staff Representative, Toronto
K. Fraser	– Grievor

J. Dinnery – President, Local 2004, Saskatoon
B. Bickford – Observer
M. Lacroix – Observer
M. Pindus – Grievor

AWARD OF THE ARBITRATOR

The sole issue in this grievance is whether the grievor should be compensated for wages and benefits lost for the period between November 8 2005 and February 6, 2006.

It is common ground that the grievor suffered an extensive absence from work by reason of an injury for which he received some workers' compensation benefits. The record establishes, to the satisfaction of the Arbitrator, that the Company in fact offered suitably accommodated work to the grievor as a shop assistant at Macmillan Yard commencing in November of 2004. The grievor declined to accept that offer, apparently taking the position that he should be accommodated in a position within his home town of Windsor, Ontario. It may be noted that his injury in fact resulted from an accident when the grievor was working in March of 2004 at or near Armstrong, Ontario.

It appears from the material before the Arbitrator that the grievor finally indicated to the Company that he was willing, by default, to take up the job offer at Macmillan Yard. However, he stipulated that personal demands must be met before he would accept to commence work at that location. Some of his demands were somewhat remarkable, including that he should be paid for the time that he would be required to

travel between Windsor and Toronto, presumably on weekends. By an agreement executed January 31, 2006 certain concessions, such as the payment by the Company of train transportation to and from Windsor and a gradual increase in working hours, were agreed to. Shortly thereafter Mr. Pindus returned to work. The thrust of the Union's position is that the Company essentially delayed accommodating Mr. Pindus, and that on that basis he should be compensated for the approximately three months' delay in his return to work.

Upon a careful review of the record, the Arbitrator cannot agree. Firstly, it should be noted that the grievor was not entitled to necessarily be accommodated in a position in Windsor, Ontario (see **CROA 2998** and **3036**). Secondly, there is compelling reason to conclude that the Company offered him reasonable accommodation as early as November of 2004. It may be noted that the WSIB-CSPAAT division denied the grievor loss of earnings benefits for the period November 8, 2005 through February 6, 2006 because Mr. Pindus was non-compliant with the arrangement for his accommodation and that he insisted on placing additional conditions onto the modified job which had been found to be suitable.

At a minimum, it must be concluded that the grievor acted in a manner inconsistent with the "work now – grieve later" rule, thereby unduly increasing the Company's liability for wages and benefits by his own refusal to accept the work at Macmillan Yard until his conditions were met. The proper course would have been for the grievor to take the work offered to him, albeit under protest, and to resolve the

outstanding issues he maintained would be necessary for full and proper accommodation through the grievance procedure. In the circumstances of this case it is useful to recall the words of the Supreme Court of Canada in the **Renault** case, cited in **CROA 3036**:

> … When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

In the result, the Arbitrator is satisfied that for the period in question the Company did offer the grievor reasonable accommodation in the form of modified work duties as Macmillan Yard in Toronto. Given the grievor's own refusal to take up that offer, given that he could have done so while reserving his right to grieve what he felt were additional appropriate conditions, the loss of wages and benefits cannot be viewed as the Company's fault. For these reasons the grievance must be dismissed.

December 15, 2008

(signed) MICHEL G. PICHER
ARBITRATOR