CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3808

Heard in Montreal Tuesday, 13 October 2009

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE MAINTENANCE OF WAY EMPLOYEES DIVISION

EX PARTE

DISPUTE:

Dismissal of Mr. Derek Patterson.

UNION'S STATEMENT OF ISSUE:

By way of letter dated December 17, 2008, the Company advised the grievor, Mr. Derek Patterson, that his file was being closed effective immediately. The reason for the dismissal was the Company's failure to accommodate the grievor's disability. A grievance was filed.

The Union contends: That the grievance in this case was initiated at Step II of the grievance procedure because of the wording of section 15.6 of the collective agreement, the provisions of the CROA&DR agreement and the long past practice between the parties; That the grievor was injured in 2002 and was in receipt of WCB benefits: That since late 2007 the grievor has not been required to take medication and is capable of returning to full, unrestricted duties with the Company: That the Company has failed in it s duty to accommodate the grievor.

The Union requests that the grievor be reinstated into Company service forthwith without loss of seniority. In the view of the special circumstances of this case, the Union is not requesting an order for compensation.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:

(SGD.) WM. BREHL
PRESIDENT

There appeared on behalf of the Company:

R. Hampel	– Counsel, Calgary
D. Freeborn	– Manager, Labour Relations, Calgary
M. Thompson	– Labour Relations Officer, Calgary
M. Moran	– Labour Relations Officer, Calgary
M. Pilon	– Claims Agent, Montreal
J. Tremblay	– Employee Health Advisor, Montreal
N. Chantous	– Employee Relations Specialist, Montreal

And on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. Brown	– Counsel, Ottawa

K. Deptuck – National Advisor, Teamsters Canada
D. Patterson – Grievor

AWARD OF THE ARBITRATOR

It is not disputed that the grievor, Mr. Derek Patterson, has not worked for the Company since he suffered a job-related injury in 2002. By way of a letter dated November 21, 2007, the Company wrote to the grievor as follows:

> A review of Company records has determined that your employment status has been inactive since February 14, 2002. Unfortunately, despite all efforts which have been made to accommodate you through our Return to Work program, these efforts have not been successful. Therefore, based upon the length of your absence, we have concluded that you will not be returning to active service.
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> In view of the foregoing, please be advised that your employment record will be closed effective December 12, 2007. If you have any new information that could cause us to reconsider our decision, please forward it to me prior to this date.

By reason of certain objections raised by the Union the letter reproduced above, along with similar dismissal letters to other employees was retracted. Meetings ensued between the Company and the Union during the course of which the Union did indicate to the Company that certain employees, including Mr. Patterson, might well be fit for work, and in his case work involving non-safety sensitive duties. By a further letter dated December 17, 2008 the Company again advised Mr. Patterson that it was closing his employment file:

> December 17, 2008
> …
> On November 21, 2007, your were sent a letter a letter advising you that absent new information that could cause us to change our decision, your employment record would be closed effective December 12, 2007. Due to some issues that had arisen with the process that have since been resolved, your file was not closed at that time. This letter is to inform you that it is now being closed effective immediately.

It is not disputed that the information available to the Company, on record since at least 2003, is that the grievor was judged by the WSIB to be permanently disabled. The conclusion which the Company drew from the information provided by the WSIB was to the effect that Mr. Patterson was not willing to undertake accommodated or modified work unless it could be in his home location of Ignace, Ontario. On that basis the Company formed the opinion that it could not accommodate the grievor, short of undue hardship, as it had no light duty positions in Ignace which could be assigned to Mr. Patterson.

Now Mr. Patterson presents different information. He advises that he has in fact performed relatively heavy physical work, at least for two seasons, at a fishing camp in Northern Ontario, that he has ceased taking the medications which he previously was prescribed and that he is now in fact able to work without restrictions. In the alternative, his Union submits that there has not been a fair assessment of his ability to perform either unrestricted or modified duties, something which it maintains should be done prior to the closing of his file. In that regard the Union relies on the decision of this Office in **CROA 3346** which contains, in part, the following comments:

> This Office accepts that it may, in the proper circumstance, be appropriate for an employer to terminate an employee for innocent absenteeism, even though that individual may be disabled and be owed a duty of reasonable accommodation. In that circumstance, however, procedure is of the essence. As part of the continuing duty of accommodation it is essential that the employer make all reasonable efforts to verify, prior to the point of discharge, whether the person in question can be accommodated. Given the decision of the Supreme Court of Canada in **Renaud**, that inquiry necessitates reasonable notice to the employee and to his bargaining agent.
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> Nor is that requirement necessarily burdensome. In some cases it may involve no more than simple verification that there is little or no change in the individual's condition and little prospect for any significant change in the foreseeable future.

> However, that communication with the employee and his or her union is important not only to the extent that conditions may have changed for the employee. There may also have been changes within the workplace, whether by the introduction of new technology, different procedures, new vacancies or otherwise, such that the ability to accommodate the individual may have changed since his or her case was last considered. These are not theoretical considerations, as is amply demonstrated in the case at hand. The Company's own brief to the Arbitrator reflects that in fact three of the employees whose files were closed objected, and eventually were returned to active employment, with appropriate accommodation. I am satisfied that in such a circumstance, as a matter of law, the proper course is not for the Company to discharge the employee and then make the inquiry as to whether their action was correct, but to give the appropriate notice in advance. That approach is also more in keeping with the collective bargaining regime to the extent that some individuals may be less able than others to advocate for themselves, particularly where their bargaining agent has been given no notice of their termination and no meaningful opportunity to engender the three party discussion about possible accommodation mandated by the courts.
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> The foregoing observations obviously do not stand for the proposition that a disabled employee can never be terminated for innocent absenteeism. This award merely confirms the fact that the disabled employee is, as the Brotherhood argues, entitled to a duty of reasonable accommodation, to the point of undue hardship, as long as he or she remains an employee. Termination can therefore not occur unless it can be demonstrated at the point of termination that reasonable accommodation to the point of undue hardship is still not possible, and that there is no reasonable basis to believe that the employee will be able to return to meaningful service in the future.
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> The grievance is therefore allowed. The Arbitrator finds and declares that the Company was not entitled terminate the employment of any employees who were disabled within the meaning of the **Canadian Human Rights Act**, without first providing to the employees and to the Brotherhood reasonable notice of the Company's intention, affording both of them the opportunity to participate with the Company in a consideration, at that time, of whether a return to work, with or without accommodation, was then possible. Following proper notice, where it can be shown that such a return to work is not possible at that time or likely in the future, the employer will be entitled to close the employment file of the individual concerned.

On the facts of the case presented the Arbitrator sees some merit in the Union's position. While I do not accept that it is incumbent upon the Company to initiate a medical examination of the grievor prior to closing his employment file, clearly it remained under an ongoing obligation to accommodate his condition, short of undue hardship, if it was possible to do so prior to

closing his file. Understandably, there was no substantial inquiry in that direction made by the Company, not surprisingly as the grievor in fact provided no further information to it, notwithstanding the invitation to do so. It appears that it is only after the closure of his file that the grievor, through his Union, brought forward his claim of changed circumstances. The Union also challenges the suggestion that the grievor ever indicated to the Company that he would not consider relocation for accommodated work, explaining that his desire to work in Ignace was expressed only in the context of a reorientation program within the WSIB.

For the purposes of clarity, the Arbitrator accepts, as argued by the Company, that the initial obligation was upon Mr. Patterson to communicate with the Company to indicate a significant change in his medical condition or medical restrictions. His failure to do so would, in my view, have justified the Company in closing his employment file without further inquiry. I also accept the Company's position that no further inquiry should be undertaken by the Company absent a medical opinion, something more than the grievor's own verbal assertion, to confirm that there was a material change in his physical condition and that he is fit to perform productive duties, whether on an unrestricted or a modified basis.

How, then, is the instant case to be resolved? In the Arbitrator's view a fair result would be to place the grievor at the same position he was in at the point in time when the Company's letter requesting further information was provided to him. A conditional order of reinstatement would be appropriate, conditioned upon the grievor obtaining a medical opinion indicating that there has been a significant change in his condition and that he is now fit to perform either modified or unrestricted duties. The presentation of that information to the Company would then

allow for the grievor's reinstatement into his employment, subject to a proper assessment of the possibility of accommodation, should that be necessary. If the medical opinion should indicate that he is fit to work without restrictions, his reinstatement should be into his prior employment. In either case, his reinstatement will be subject to such reasonable verification as the Company might require, by medical examination or otherwise.

The grievance is therefore allowed, in part. The Arbitrator directs that should the grievor provide to the Company, within sixty days of the date of this award, a written medical opinion confirming that he is fit for modified duties or for unrestricted duties, he shall be reinstated into his employment and be made the subject of joint discussions involving the Company, the Union and the grievor with respect to an appropriate accommodation, should that be necessary. For the purposes of clarity, should the grievor take the position that he will not work in any location other than Ignace, and he does have physical restrictions which prevent him from performing his regular duties, the Company's obligation of reasonable accommodation may well be satisfied.

The Arbitrator returns the matter into the hands of the parties for the purposes of implementing the foregoing, and retains jurisdiction in the event of any dispute.

October 29, 2009

(signed) MICHEL G. PICHER
ARBITRATOR