

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

CASE NO. 3947

Heard in Calgary, Tuesday 9 November 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

EX PARTE

DISPUTE:

The Company's refusal to accommodate medically restricted employee Robert Jordan of Edmonton, Alberta.

UNION'S STATEMENT OF ISSUE:

The grievor, Robert Jordan, suffered an injury while working as a conductor on October 28, 2008. He was disabled as a result and a WCB claim was initiated.

The grievor, while he was on WCB and in accordance with WCB policies, commenced a pre-planned vacation on March 7, returning March 21.

The Company took issue with the grievor's vacation despite the fact that it was consistent with WCB policies. Following the grievor's return from vacation, he attended another evaluation on March 23. WCB, after reviewing the information provided in the March 23rd evaluation, stopped the grievor's WCB claim. The matter is under appeal.

The grievor, still not medically cleared for work, was placed on AWOL status, resulting in an employee investigation. During this investigation, the Company presented and relied on evidence that the Union submits is improper and unsubstantiated. Further, the Company has presented "evidence" that is not contained in the WCB file and the Union disputes the validity of this evidence. Particular reference must be made to a Company document that states that "CN has not and will not provide an accommodation to this employee."

Based on the foregoing, the Union submits that the Company has acted improperly and in a discriminatory manner with respect to their obligations to accommodate Mr. Jordan. The Union requests that he be suitably accommodated and made whole for all losses.

The Company disagrees.

FOR THE UNION:
(SGD.) R. A. HACKL
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

P. Payne	– Manager, Labour Relations, Edmonton
K. Morris	– Sr. Manager, Labour Relations, Edmonton
D. Ryhorchuk	– Assistant General Manager, Edmonton
S. Hanna	– Occupational Health Services, Edmonton
C. Cousineau	– Manager, Edmonton – Witness
D. Demery	– Manager, CMC, Edmonton – Witness
F. Peshev	– Human Resources Associate, Recruitment Selection Coordinator, Edmonton – Witness

There appeared on behalf of the Union:

M. Church	– Counsel, Toronto
R. A. Boechler	– Vice-General Chairman, Edmonton
B. Willows	– General Chairman, Edmonton
R. Ermet	– Vice-General Chairman, Edmonton
R. Jordan	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor suffered an injury to his hand while lining a switch on October 28, 2008. After some initial medical attention, he was accommodated performing modified duties as the “Utility Foreman” driving a transportation vehicle used in the movement of train crews in and around the Edmonton terminal. Ultimately the nature of the grievor’s injury became such that he could no longer, it appears, drive the vehicle. In the result, after November 28, 2008 he was removed from that function. It appears that he was then placed on workers’ compensation benefits. It is common ground that the grievor remained absent from the workplace for a substantial period of time, undergoing surgery and physiotherapy through March of 2009, at which time he took a scheduled vacation to Mexico. It is not

disputed that while he left the country his WC benefits were suspended, according to normal policy.

In fact it appears that the grievor's vacation caused concern to the CN Risk Management claims agent in charge of his file causing her to write an internal memorandum stating, in part, "CN Rail has not and will not provide an accommodation for this employee. His position is secured once he is able to complete all his critical job demands." In fact, that appears to have been an isolated and intemperate statement not reflecting the Company's overall approach in its dealings with the grievor. The grievor was ultimately authorized to receive vacation pay for his three week absence.

Shortly after his return, on March 31, 2009, the Workers' Compensation Board advised the Company that in fact Mr. Jordan's injury was no longer found to have been caused by a workplace injury. Thereafter he once again underwent surgery on his right wrist and remained absent from work. It appears that for a time, until August of 2009, the grievor received Great West Life Short Term Disability benefits, until they were exhausted. The Arbitrator is satisfied that a report from an agent of Great West Life confirmed to the Company that the grievor could not be placed in a safety sensitive position. Closer examination of the evidence would indicate that that appears to have been because of certain medications which he was then taking. On that basis he was not returned to the position of utility foreman chauffeuring crews.

The record confirms that new clerical positions did become available within the Company in late 2009 and early 2010, a period in time which coincided with the

grievor's filing of his grievance on or about December 18, 2009. The record discloses that the Company arranged for an interview with the grievor respecting the position of Crew Dispatcher on December 29, 2009 and a subsequent interview in February for the position of Train Movement Clerk, as well as a further interview for the position of Traffic Coordinator in March of 2010. The evidence before the Arbitrator, which is not contradicted, is that the grievor did not have the skills or aptitudes necessary for the first two positions. It appears that he did work for a time as a traffic coordinator, but ultimately ceased performing those modified duties, apparently because repeated use of his right hand in the operation of a camera joy stick caused him pain.

Can it be said, on the whole of the evidence, that the Company has failed to take reasonable steps to find the grievor accommodation in modified duties, short of undue hardship? The Arbitrator is satisfied that on the whole of the material it must be concluded that the Company did not fail in its obligation to make reasonable efforts to accommodate Mr. Jordan with respect to his physical limitations. It should be stressed that for considerable periods of time the grievor was not forthcoming with respect to necessary information concerning his ongoing condition and that at least on one occasion the Union failed to contact the Company officer responsible for finding the grievor an accommodation. More significantly, I am satisfied that whenever there was a possibility of a clerical or sedentary position which might be appropriate for the grievor at Edmonton the Company did make all reasonable efforts to attempt to accommodate Mr. Jordan in those positions, albeit without ultimate success.

The duty of accommodation is not a guarantee of job insurance. Accommodation might or might not succeed, depending on the facts. In the case at hand I am satisfied that the unfortunate physical constraints suffered by the grievor, including the medication which he was taking at least for a time, placed severe constraints on work which he could perform in an operation which is highly safety sensitive and obviously has limited opportunities for sedentary work. When the whole of the record is closely examined the Arbitrator is compelled to conclude that there was no violation of the Company's obligation under the **Canadian Human Rights Act** to attempt to reasonably accommodate the grievor's physical disabilities. On that basis the grievance cannot succeed.

It should be added, however, that the above conclusion does not bring the Company's obligation to an end. The grievor is still an employee and is still owed the duty of reasonable accommodation, to the extent that that is feasible, to the point of undue hardship. It also appears that he has had recent surgery which, it is hoped, may improve his situation. It is obviously incumbent on the Company, the Union and the grievor himself to continue the effort at attempting to find him reasonable accommodation within the workplace.

November 15, 2010

(signed) MICHEL G. PICHER
ARBITRATOR