CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4016

Heard in Edmonton, Alberta, Wednesday, 15 June 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE
RAIL CANADA TRAFFIC CONTROLLERS

DISPUTE:

The Union filed a grievance in September of 209 on behalf of Rail Traffic Controller Jones concerning a number of issues surrounding Ms. Jones' return to work on April 1, 2009, from Long Term Disability Leave. Among other things, the Union is claiming the difference in wages from January 14, 2008 until March 31, 2009. The Company disputes the timeliness of the grievance covering lost wages for the period January 14, 2008 until March 2, 2009

JOINT STATEMENT OF ISSUE:

Rail Traffic Controller Jones was on disability leave and in receipt of benefits from May 17, 2005 to March 2, 2009. In January of 2009, Ms. Jones advised the Company that her benefits were ending effective March 2, 2009 and requested to return to work. Ms. Jones was subsequently returned to work on an accommodated position on April 1, 2009.

The Union contends that Ms. Jones' requested return to work through Great West Life, the long term disability benefit provider, in January 2008 under a graduated return to work program and the Company denied her request. The Union contends that the grievance for the difference in lost wages between January 14, 2008 and March 2, 2009 is timely and should proceed to arbitration.

The Company disagrees with the Union's position and denies the Union's contentions and, in any event, the Company maintains that the provisions of article 9.3 of agreement 7.1 apply.

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

There appeared on behalf of the Company:

S M. Blackmore – Manager, Labour Relations, Edmonton

There appeared on behalf of the Union:

S. Brownlee	– General Chairwoman, Stony Plain
B. Lussier	– Local Chairman,
G. Griesser	– General Secretary, Stony Plain

PRELIMINARY AWARD OF THE ARBITRATOR

The Company raises a preliminary issue as to the arbitrability of this grievance. It submits that the Union has failed to observe the time limits provided for within the collective agreement, and has done so in such a manner as to effectively prejudice the Company should the matter be found to be arbitrable. For the sake of clarity, it should be stressed that the arbitrability objection raised by the Company deals only with a certain period of time for which the grievance seeks compensation. The Company does not object to the arbitrability of some compensation to the grievor, albeit it does not admit liability, for the period immediately preceding the filing of her grievance, given the provisions of article 9.3 of the collective agreement which provides as follows:

> **9.3** The settlement of a grievance shall not under any circumstances involve retroactive pay beyond a period of ninety (90) days prior to the date that such grievance was submitted at Step 1 of the Grievance Procedure.

It is common ground that on May of 2005 Ms. Jones was disabled and thereby unable to work. She remained absent, ultimately qualifying for long term disability benefits. In December of 2007 her family physician found that she was fit to return to work effective January 14, 2008, albeit not in a safety sensitive position as a Rail Traffic Controller.

While it appears that there was some discussion between the parties in early 2008 with respect to the grievor's possible return to work, the Company took the position that there was no appropriate work available to her. It appears that nothing more ensued, as she continued to receive her long term disability benefits. It is only in January of 2009, with the grievor's benefits about to expire effective March 2, 2009, that the grievor advised the Company that she wished to return to work on an accommodated basis. That was in fact done and she was reinstated into an accommodated position effective April 1, 2009.

Some months later, on September 2, 2009, the Union filed a grievance on behalf of Ms. Jones. Among other things, that grievance sought to have her compensated for the difference in lost wages dating back to January of 2008, until March 3, 2009.

The Company's representative stresses that the collective agreement was not respected as regards its mandatory time limits. In that regard she refers the Arbitrator to article 9.2 of the collective agreement which provides, in part, as follows:

> 9.2 A grievance concerning the interpretation, or alleged violation of this Agreement, (including one involving a monetary claim which has been declined or altered by an immediate supervisor or designate), or an appeal by employees who believe that they have been unjustly dealt with, shall be processed in the following manner:
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> Step I
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> Within twenty-eight (28) days from the date of cause of grievance, or in the case or in cases of appealing discipline, within twenty-eight calendar days from the date the employees are advised of the discipline assessed against them, the Local Chairperson may appeal the decision in writing to the appropriate Company officer. The appeal shall include a written statement of grievance and where it concerns the interpretation or alleged violation of the Agreement, the statement shall identify the Article and paragraph of the Article involved. A

> decision will be rendered in writing within twenty-eight (28) days of receiving appeal.
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> …
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> 9.3 The settlement of a grievance shall not under any circumstances involve retroactive pay beyond period of ninety (90) days prior to the date that such grievance was submitted at Step I of the Grievance Procedure.
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> 9.4 Any grievance not progressed by the Union within the prescribed time limits shall be considered settled on the basis of the last decision and shall not be subject to further appeal. Where a decision respecting a written claim for unpaid wages is not rendered by the appropriate Company officer within the prescribed time limits, the claim will be paid. The application of this rule shall not constitute an interpretation of the Agreement.

In the Company's submission the grievor obviously did not respect the twenty-eight day time limit of article 92 which is mandatory at Step I of the grievance procedure and in fact the grievance was filed close to twenty months after the earliest date of the Union's claim on behalf of the grievor.

The Union's representative makes a two-fold submission. Firstly, she submits that the Company's alleged failure to accommodate the grievor from the first notice received from her physician in January of 2008 should be viewed as a breach of a continuing nature, so that time limits would not run from the original date of the physician's notice. Alternatively, she invokes the discretion of the Arbitrator under the provisions of the section 60(1.1) of the **Canada Labour Code** R.S.C. 1985, c. L-2 which provides:

> The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.

The Arbitrator cannot accede to the position of the Union in this particular grievance. As appears from the record, for reasons which she best appreciates, the grievor made no effort to file or press any grievance during the entirety of 2008 after the Company's determination that there was no work available for her, having particular regard to the fact that she could not perform safety sensitive work. It appears that only after her return to work in 2009, when non-safety sensitive work was found for her, that she decided to grieve her treatment of some twenty months prior.

In my view the grievor knew, or reasonably should have known, that under the provisions of the collective agreement any compensation in relation to a grievance she might file must be retroactively limited to ninety days prior to the submission of the grievance at Step I. Secondly, bearing in mind the consideration which a board of arbitration must bring to bear in the exercise of its discretion under sub-section 60(1.1) of the collective agreement, no reasonable explanation is given for the delay in the filing of the grievance in question. It would also appear that there would be prejudice to the Company should relief be sought outside that period, as it had no indication during the more than one year period prior to the grievor's actual reinstatement that she felt there was any violation of her rights, whether under the collective agreement or under the **Canadian Human Rights Act**. As the Company could not protect itself absent the knowledge of any objection by the grievor during all of that time, the potential for retroactive compensation at this time would, in my view, be plainly prejudicial.

The Company's objection is therefore allowed, in part. The Arbitrator finds and declares that the grievance is not arbitrable with respect to compensation for the period outside the ninety day limitation period calculated from the date the grievance was filed, in conformity with article 9.3 of the collective agreement. For the reasons touched upon above, this is not an appropriate case for the exercise of the Arbitrator's discretion to extend the time limits, and the Union's request is, to that extent, declined.

June 20, 2011

(original signed by) MICHEL G. PICHER
ARBITRATOR