

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

CASE NO. 4055

Heard in Calgary, Tuesday, 8 November 2011

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the Company's failure to accommodate Conductor Tim Toth.

JOINT STATEMENT OF ISSUE:

Tim Toth is an employee in Lethbridge, Alberta. In April 2007, Mr. Toth was involved in a railway accident at Bow Island resulting in both physical and psychological disabilities. Since that time Mr. Toth has undergone a considerable amount of treatment under the care of his health professionals. He has been assessed and provided restrictions by the Company's OHS department, which determined as of 2008 that he is capable of returning to modified duties in a non-safety sensitive and non-safety critical capacity.

Since 2008 Mr. Toth has made consistent efforts in seeking a return to work to a suitable position within his medical limitations. He has undergone retraining and obtained a certificate in Occupational Health and Safety. Significantly, Mr. Toth has applied for numerous Company posted positions which would be within his restrictions. In spite of Mr. Toth's efforts, the Company has not placed Mr. Toth in a position within his restrictions.

The Union contends that the Company has failed to accommodate Mr. Toth's disability and return to work contrary to the terms of the collective agreement, the Company's Return to Work policy and the *Canadian Human Rights Act* and seeks an order to this effect.

The Union seeks a determination that the Company has not, to this point, demonstrated that the employer cannot accommodate the grievor's disability to the point of undue hardship. The Union further seeks an order that Mr. Toth be provided with suitable accommodation and made whole for all losses incurred.

FOR THE UNION:

(SGD.) D. OLSON
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) D. FREEBORN
FOR: ASSISTANT VICE-PRESIDENT

There appeared on behalf of the Company:

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| D. Freeborn | – Manager, Labour Relations, Calgary |
| M. Thompson | – Labour Relations Officer, Calgary |
| R. Varney | – Director, Return to Work Programs, Calgary |
| J. Bartkiewicz | – Manager, OHS Programs, Calgary |

There appeared on behalf of the Union:

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| M. A. Church | – Counsel, Toronto |
| D. Olson | – General Chairman, Calgary |
| D. Fulton | – Vice-General Chairman, Calgary |
| G. Crawford | – Local Chairman, Calgary |
| T. Toth | – Grievor |

AWARD OF THE ARBITRATOR

Upon a review of the evidence and materials presented the Arbitrator has substantial difficulty with the allegation of the Union to the effect that the Company has failed to make reasonable attempts to accommodate the grievor's physical and psychological disabilities. On the contrary, the unchallenged submission of the Company is that on a great number of occasions the grievor was advised by the Company's Director of Return to Work Programs, Mr. Rod Varney, of various job opportunities and job avenues within the Company. While there appears to have been some unfortunate failure in communication, due in part by errors committed by a Union representative no longer involved in the file, it seems clear from the record before me that for a substantial period of time the grievor declined to provide medical documentation being requested by the Company, apparently on the instruction of his representative that the Company was in possession of the knowledge by reason of WCB documentation, which was not true.

Of greater concern to the Arbitrator is the fact that the grievor communicated to the Company that he was not willing to accept accommodation in a job which would

involve a lower level of earnings than that which he had previously had as a conductor. In particular, Mr. Toth declined to accept an opening into a position as a Rail Traffic Controller because, in part, to do so would involve him taking a more junior position in another trade union.

It is well settled that an employee who seeks to be reasonably accommodated by reason of a disability must be prepared to contribute to the accommodation process. Nor is a disabled employee entitled to be accommodated in the position of his or her choice or in a position which is necessarily at the same earning level as that employee's prior position. It is of course open to an individual to decline accommodated positions which are offered, but in the face of such declinations it is less than compelling for that same individual to assert that the Company has made no reasonable effort to accommodate him or her.

Having reviewed the entirety of the record, I am satisfied that the Company has not violated its obligations under both the collective agreement and the **Canadian Human Rights Act** to attempt to reasonably accommodate the grievor by reason of his disabilities.

On the foregoing basis the grievance cannot be allowed. That said, however, the Arbitrator emphasizes that the grievor continues to be an employee entitled to accommodation, subject to reasonable cooperation on his part. There appears to have been some degree of miscommunication between the parties, for example in relation to

possible placement of the grievor in an AIR position which would not require him to work on or near moving trains. If an accommodation is possible in that regard, it is the Arbitrator's hope that the parties will explore that possibility as well as others. As they do so, however, it is clearly incumbent upon the grievor to respond to all communications sent to him by the Company and to be prepared himself to make reasonable adjustments.

For the foregoing reasons the grievance must be dismissed.

November 14, 2011

(signed) MICHEL G. PICHER
ARBITRATOR