CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4273

Heard in Montreal, December 12, 2013

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Failure to accommodate Conductor Sonja Dodd during and after her pregnancy.

UNIONS EXPARTE STATEMENT OF ISSUE:

On January 12, 2012, Ms. Dodd informed the Company of her need for accommodation due to her pregnancy. Ms. Dodd was accommodated as a Relief Coordinator Support Services until June 8, 2012, when the Company advised that her accommodation had ceased. Since that time, the Company has not provided Ms. Dodd with any further accommodation.

The Union contends that the Company has a duty to accommodate Ms. Dodd's pregnancy to the point of undue hardship. The Union contends that the Company has failed to discharge this duty and has failed to demonstrate that to do so would constitute undue hardship. The Union contends that the Company's actions are contrary to the Collective Agreement, the Company's Return to Work Policy, the *Canada Labour Code* and the *Canadian Human Rights Act*.

The Union seeks a finding that the Company has breached the Collective Agreement, the Company's Return to Work Policy, the *Canada Labour Code* and the *Canadian Human Rights Act*, and a direction that the Company cease and desist from said breaches. The Union further seeks an order that Ms. Dodd be made whole for her losses with interest due to the Company's breaches, without loss of seniority, in addition to such other relief as the Arbitrator sees fit in the circumstances.

The Company disagrees and denies the Union's request.

FOR THE UNION:
(SGD.) W. Apsey on behalf of B. Hiller
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

D. Guerin	– Director Labour Relations, Calgary
B. Sly	– Director Labour Relations, Calgary
S. Afonso	– Return to Work Specialist, Toronto
D. Burke	– Manager Labour Relations, Calgary

There appeared on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
B. Hiller	– General Chair, Bowmanville
D. Ashley	– Provincial Chairperson, Hamilton
B. Brunet	– General Chairman, Montreal
J. Campbell	– Vice General Chairman, Peterborough
C. Clark	– Vice General Chairman, Montreal
S. Dodd	– Grievor, Toronto

AWARD OF THE ARBITRATOR

By reason of her pregnancy the grievor provided the Company with a Functional Abilities Form (FAF) dated January 26, 2012 stating the working restrictions which must apply by reason of her pregnancy. Thereafter a return to work meeting was held to discuss alternative accommodation for the grievor. It appears that during that meeting a number of alternative possibilities were discussed, including the grievor operating as a hostler in the herder/ helper position, that she be assigned as a crew bus driver, that she perform the duties of health and safety representative or that she function as flagman or time keeper in the engineering department. The helper position (TR1) was first taken on and Ms. Dodd occupied that position commencing February 1, 2012. Shortly after commencing in a helper capacity, the grievor declared that she was unable to perform the duties in question. As there was then a temporary vacancy in a management position as Relief Coordinator Support Services (CCS), by reason of the incumbent being on a leave of absence, the grievor was placed in that position until May 1, 2012.

As May 1 approached the Company's representatives asserted the view that there was no alternative suitable employment available to the grievor, in light of her restrictions. When the temporary vacancy the grievor was occupying came to an end on or about April 27th, 2012 the Company submits that it could find no other appropriate assignment for her. In the result, as of June 8, 2012 she was placed on leave of absence, receiving WI Benefits, said to represent up to sixty percent of her earnings. She received those funds between June 9 and August 30, 2012 when her maternity leave commenced.

The Company raises a preliminary objection. It submits that the Union has improperly raised violations of the Collective agreement and the ***Canadian Human Rights Act***, as these were not specifically brought forward during the course of the grievance process.

I have some difficulty with the Company's preliminary objection. It is clear that the original letter of grievance made it clear that the issue was the failure to accommodate the grievor's medical condition, pregnancy. While it is true the grievance referenced the Company's policy as well as the ***Canada Labour Code*** as having been violated, it also expressly reserved the right to refer to and allege violations of related statutes which might be applicable. Overall, I do not see in the material before me that the Company can claim prejudice or surprise by reason of the Union invoking discrimination provisions of the ***Canadian Human Rights Act*** in the circumstances of this case. In my view to exclude the Union's Exparte Statement of Issue and confine the issues to those

within the Company's would be unduly technical and inappropriate in these circumstances, for reasons touched upon by the courts in the Blouin Drywall decision (*Blouin Drywall Contractors Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (1975) 8 O.R. (2d) 103) (ONT C. A.).*

With respect to the merits of the grievance, however, I find the Union's case more difficult. As is evident from the testimony of Return to Work Specialist Silvia Afonso, the effort to find appropriate work for the grievor was significant and ongoing between January and June of 2012.

From the time she was notified on or about June 8, 2012, that there was no longer any accommodation available for her, the grievor continued to press, both on her own and through her Union representatives, for the opportunity to perform accommodated work. She was in fact compelled to take a leave of absence during which she received weekly indemnity benefits, which represented a significant decline in income. Finally, some two weeks before the grievor's due date, the Company offered her the opportunity to drive a crew bus during the midnight shift. She attempted to do so, but some four hours into the first shift she found that the working conditions, coupled with her advanced state of pregnancy, made that something less than a viable working option.

Counsel for the Union submits that the Company failed in its obligations under the ***Canada Labour Code*** and the ***Canadian Human Rights Act*** by not properly

accommodating the grievor's condition of pregnancy. On behalf of the Union she seeks an order of compensation for the period from June 8th, 2012 through September 1, 2012.

Apart from the provisions of the ***Canadian Human Rights Act*** which prohibit discrimination, counsel for the Union draws to the Arbitrator's attention the provisions of Section 204. (1) of the ***Canada Labour Code*** which provides as follows :

> An employee who is pregnant or nursing may, during the period from the beginning of the pregnancy to the end of the twenty-fourth week following the birth, request the employer to modify her job functions or reassign her to another job if, by reason of the pregnancy or nursing, continuing any of her current job functions may post a risk to her health or to that of the foetus or child.

I agree with counsel for the Union that it was not sufficient for the Company to determine whether there were vacant positions into which the grievor could be placed. The duty of accommodation goes further, requiring the employer to consider whether various job functions can be bundled together to create a sufficiently productive accommodated position. Additionally, the obligation of scrutiny on the part of the employer, and for that matter on the part of the Union, extends beyond the bargaining unit and can encompass managerial responsibilities or work in relation to another bargaining unit, subject only to the limitation of undue hardship.

Having reviewed the evidence in the instant case, I am compelled to the conclusion that the Company did not exert sufficient efforts from the period of June onwards, and that in all likelihood, as argued by the Union, there were several possibilities which could have led to the creation of an accommodated position for the

grievor. With respect to the duration of the period of compensation, however, I am not persuaded that it should extend to the actual date of delivery. In my view the grievor would have been properly accommodated by assigning her to suitable alternative duties extending to one week prior to her due date.

The grievance is therefore allowed, in part. The Arbitrator finds and declares that the Company did fail to accommodate the grievor's condition of pregnancy for the period of June 8 and August 21, 2012. I direct that she be compensated forthwith for the period in question, but I do not consider that this is an appropriate case for an order of general damages for pain and suffering as requested by the Union.

December 16, 2013

MICHEL G. PICHER
ARBITRATOR