CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3551

Heard in Montreal, Thursday, 13 April 2006

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Claim on behalf of Mr. N. Lewko.

JOINT STATEMENT OF ISSUE:

In late 2003, the grievor, Mr. Norm Lewko, applied for job security benefits pursuant to article 4 of the Job Security Agreement (JSA). By way of letter dated January 13, 2004, the claim was denied. The reason for the denial was the fact that the grievor, a medically restricted employee, was unable to exercise his full seniority in accordance with article 4.1(i)(d) of the JSA. As a result, on February 16, 2004 a grievance was filed.

The Union contends that: **(1.)** Because of his medical conditions, the grievor was unable to exercise his seniority into positions that, but for his disability, he would have been able to fill; **(2.)** The Company is in breach of article 4 of the JSA; **(3.)** In denying Mr. Lewko job security benefits, the Company is in violation of the prohibitions against discrimination on the grounds of disability contained in the **Canadian Human Rights Act** (particularly sections 7 and 10 thereof).

The Union requests that the Company compensate the grievor for the job security benefits which he was denied.

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

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) WM. BREHL	**(SGD.) M. MORAN**
PRESIDENT	**LABOUR RELATIONS OFFICER**

There appeared on behalf of the Company:

M. Moran	– Labour Relations Officer, Calgary
B. Rota	– Labour Relations Officer, Calgary

And on behalf of the Union:
Wm. Brehl – President, Ottawa
D. Brown – Counsel, Ottawa

AWARD OF THE ARBITRATOR

In the case at hand the issue is the denial of benefits to Employee N. Lewko for the period November 29, 2003 through March 28, 2004.

The material facts are not in dispute. By reason of a progressive deterioration of his physical condition, particularly in his hands, by reason of osteoarthritis, Mr. Lewko became unable to perform the physical work of tasks generally performed by members of the bargaining unit during the winter months. Therefore, for example, work as a track maintainer or leading track maintainer, requiring heavy physical labour in outdoor conditions in the cold could not be performed by Mr. Lewko. Typically, he came to be assigned for the extra gang season, generally from the spring through the fall, as a time keeper. When the season ended he was laid off and was not considered entitled to benefits under the Job Security Agreement. The Company took the position that he did not meet the qualifying conditions of article 4.1(d) in that he could not exercise his seniority to hold available work. The Company relied on prior jurisprudence of this Office to the effect that job security benefits are not payable if in fact an employee's inability to hold work is not due to a lack of work, but to physical disability, a concept reviewed and affirmed in **CROA 2533**.

In its argument in the case at hand the Union makes a submission apparently not previously considered in this Office. It submits that in determining whether the grievor was the subject of discrimination it is not appropriate to assess his circumstances vis-à-vis a comparator group of employees who are also on various forms of leaves of absence. The Union's representative submits that the proper comparator is employees who, like the grievor, were laid off at the season's end and, albeit were physically able to perform work, were never recalled to work because work was not available, and therefore received the benefits of the Job Security Agreement. Put differently, the Union submits that if the facts disclose that even if he had been physically fit there would have been no work available to the grievor, so that in fact his disability is an irrelevant consideration, he must be in no less advantageous a position that other employees who are able bodied and likewise would not have been recalled to work. In the Union's view it is not until disability has translated into unavailability and he has truly demonstrated that he is unable to work that the grievor should suffer the consequence of his inability, and any other treatment is in effect discriminatory as compared with the treatment of other employees who may never be compelled to protect work.

The Arbitrator is satisfied that the analysis offered by the Union's representative is in fact correct. It should not be until such time as an individual's disability is proven in fact to be the cause of his inability to protect work that he or she becomes disqualified from the benefits of the Job Security Agreement. An employee with a disability who is so situated should not be any less protected than able-bodied employees so long as those able-bodied employees are also not called to protect work. There is, however, an obvious limitation on the right so pleaded. As soon as an employee junior to the grievor

responds to a call to work to which the grievor would be unable to respond by reason of his disability, the entitlement to job security benefits must cease, as the condition of being unable to exercise his seniority to protect work then becomes realized.

When that paradigm is applied to the facts of the case at hand, however, the Union's case cannot succeed. The unchallenged evidence of the Company confirms that in fact during the period which is the subject of this claim, at the time of Mr. Lewko's layoff on November 28, 2003, there were fully seven employees junior to him holding work on his seniority district as either leading track maintainers or track maintainer "A". In other words, the conditions had matured whereby the grievor was in fact unable to protect work by reason of his disability. This was not a situation where employees junior to him were advantaged by receiving job security benefits while also being unable to protect work because work was unavailable. The Union's first argument must therefore be rejected, on the specific facts of this case, although the principle which it argues would appear to be sound.

There is, however, a second dimension to the grievance, which the Arbitrator is satisfied must succeed. That evidence would indicate that the Company turned its mind to the issue of the grievor's accommodation by reason of his disability as far back as 1999 and 2000, when work restrictions were placed upon him. Indeed, it does not appear disputed that his assignment as timekeeper on extra gangs was in furtherance of accommodating the grievor's disability. What emerges, however, is that there does not appear to have been any specific ongoing or subsequent effort to identify, at each annual seasonal layoff, whether during the winter months there might be work available

for the grievor to perform, with allowance for accommodation of his condition. The Arbitrator is satisfied that this is an appropriate case for a declaratory remedy, and a direction that in future seasons the Company specifically turn its mind, together with the Union and the grievor, to consideration of whether there might be work available for him to perform by way of accommodation during the off season. That is simply in recognition of the ongoing obligation of accommodation in which all of the parties must participate. That is not to say that there is an affirmative obligation on the part of the Company to find some appropriate employment. Its duty is to give the fullest exploration and consideration of the availability of positions which might accommodate the grievor's disability during the winter months, to the point of undue hardship. I do not, however, consider that this is an appropriate case for an order of compensation for the alleged failure of an on-going accommodation search. Firstly, it would appear that neither the grievor nor his trade union made any clear request for such an exercise and, secondly, the grievance itself appears to focus on the payment of job security benefits, not the furtherance of a search for accommodation.

The Arbitrator therefore finds and declares as follows: the grievor is not entitled to the payment of benefits under the Job Security Agreement by reason of the fact that at the time of his layoff employees junior to himself held work which his seniority would have allowed him displace into, but which his disability prevented him taking. His inability to hold work was, therefore, by reason of his disability, and not any other factor and he did not meet the conditions of the Job Security Agreement so as to be entitled to its benefits. However the Arbitrator must find, and therefore declares, that the Company did fail in its obligation to seek alternate accommodated employment for the grievor at

the conclusion of his work season, at the time of his layoff in November of 2003, through March of 2004. In future similar circumstances the Company is directed to engage, along with the Union and the grievor himself, in a search exercise to determine whether such accommodation can be achieved.

April 20, 2006

(signed) MICHEL G. PICHER
ARBITRATOR