CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4313

Heard in Montreal, May 14, 2014

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Employee A on November 29, 2013.

UNION'S EXPARTE STATEMENT OF ISSUE:

Following an extended period by which Mr. A was accommodated as an Assistant Traffic Coordinator, the Company eliminated his position. Subsequent to this decision, the parties engaged in tripartite discussions to locate suitable accommodation for Mr. A in the geographical area of Capreol, Ontario. An accommodated janitor position was identified in Capreol and offered to Mr. A on September 4, 2013. Mr. A reported to work as a janitor for two days in September, 2013, after which he was absent from work. On November 29, 2013, Mr. A received a letter from the Company advising that his "employment relationship with CN is hereby terminated as of today."

The Union contends that the Company has a duty to accommodate Mr. A 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 November 29, 2013 termination letter alleges just cause for discipline. The Union contends that there is no cause for termination and termination, without an investigation, is fatally flawed. In the alternative and without prejudice, in the event that the Company establishes that this was purely an administrative termination, the Company's abrupt, unilateral decision to terminate Mr. A's employment is unjustified, procedurally flawed and fundamentally contrary to its statutory duty to accommodate. In either event, the Union contends that the termination of Mr. A's employment is unjustified and contrary to Agreement 4.16, the *Canada Labour Code,* the *Canadian Human Rights Act* and CROA&DR jurisprudence.

The Union requests a declaration that the Company has breached Agreement 4.16, the *Canadian Human Rights Act* and *the Canada Labour Code,* and that Mr. A be reinstated into Company service forthwith without loss of seniority and that he be made whole for any and all losses incurred as a result of this matter.

The Company disagrees with the Union's position. The Company contends that it fully accommodated Mr. A. The Company further submits that this was an administrative closure of his employment file.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. Robbins	**(SGD.)**
General Chairperson	

There appeared on behalf of the Company:

S.P. Paquette	– Counsel, Montreal
C. Cousineau	– Manager, Edmonton
M. Marshall	– Senior Labour Relations Manager, Toronto
G. Hare	– Transportation Manager, NOD, Capreol
M. Jones	– Transportation Manager, SOZ , Oakville
R. Baker	– Regional Mechanical Officer, Toronto
A. Daigle	– Labour Relations Manager, Montreal
S. Fusco	– Senior Human Resources Manager, Toronto

There appeared on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairman, Sarnia
J. Lennie	– Vice General Chairman, Port Robinson
Employee A	– Grievor, Capreol

AWARD OF THE ARBITRATOR

Employee A has worked for the Company in the running trades at Capreol Ontario since 1988. He was eventually diagnosed with a seizure disorder which required the issuance of work restrictions. In 2009, following his termination for disciplinary reasons, the grievor was reinstated into his employment by an Arbitrator's award in **AH 585**. At that point the grievor's previous position as assistant yard master was no longer available in the Capreol yard. In the result, given his need for accommodation, he was offered what the Company describes as a "bundled position" in Capreol with shipping/receiving as well as janitorial responsibilities. Subsequently, in December of 2011, the grievor's physician, Dr. Healy, effectively overruled the grievor

from performing the shipper/receiver and janitorial duties. In the event, the accommodated position was affectively abolished, in accordance with a letter dated September 21, 2011 as it was concluded that the grievor was producing little more than two hours of productive work per day. There followed a period of leave from work during which the grievor received short term disability benefits after which he was further absent by reason of hip surgery.

In September of 2012 the Company formed the view, which I am satisfied is supported by appropriate medical opinions, that the grievor could not hold a running trades position. Effective September 17, 2012 the Company therefore offered the grievor accommodated work performing light janitorial duties. The work in question was apparently for three hours per day, with the grievor being advised by way of letter dated September 25, 2012 that he would remain eligible for a Great West Life top up which would apparently endure at least until October of 2014.

The record reflects that the Company made a number of efforts to find the grievor work suited to his physical incapacity, which was primarily characterized by the potential for unpredictable seizures. As the result of an IME on October 10, 2012 the grievor was found fit for only light sedentary work, although the Company maintains it did not become aware of that opinion until August 2013.

The unchallenged representation of the Company is that on December 5, 2012 Ms. Carole Cousineau, manager of the Company's return to work and WCB team, had discussions with the grievor with respect to returning to work. He then indicated he did not believe he had the physical capacity to perform the janitorial work being offered and that he was unwilling to return to any work outside the bargaining unit of collective agreement 4.16. It also appears that in later discussions he indicated to the Company that he would be willing to relocate for work, but only to Toronto.

I am satisfied that the Company made appropriate and reasonable efforts. For example, the unchallenged representation before me is that in February of 2013 Ms. Cousineau canvassed all possible positions in Ontario with CN Human Resources. Additionally, on February 18, 2013 Ms. Cousineau offered the grievor the possibility of holding a flag position with the Company's engineering department in Alberta and British Columbia, clearly a sedentary position which he could have performed. While the possibility of work in Alberta as a flagman seemed to be a reasonable one, and discussions continued in respect of that position, on March 20, 2013 the grievor verbally advised Ms. Cousineau that he was refusing to take the Alberta flagman position as he would be compelled to work under a non-bilingual supervisor and would consider himself "dumped in the middle of nowhere". He then indicated he would entertain a Rule 42 Foreman's position in Toronto, something which the Company maintains was simply not available.

The material confirms that later, on about March 28, 2013, the Company communicated to the Union's provincial legislative director, Dawn Ashley, that it would consider assigning the grievor to work as a first aid trainer. That assignment would have involved the grievor working in locations other than Capreol. On the same day the issue was broached with Mr. Ashley, the grievor told Ms. Cousineau that he would not accept that position and that he was effectively refusing to work outside of the transportation department or outside of Capreol. Little in the way of constructive alternatives were determined until August of 2013 when the Company decided that it could dispense with a contractor's services to create bundled tasks to establish a full time janitorial position for the grievor in the Capreol yard. It appears that position was offered to the grievor by way of an email addressed to him on September 4, 2013. Initially the grievor agreed to accept that position on or about September 9, 2013.

Having reported to work on September 11, 2013 the grievor formed the view that because the work involved janitorial duties in a number of buildings, including the round house, a location which he alleges was affected by mould and asbestos, he refused to continue in the position which was being offered.

On the whole, after an extensive review of much detailed evidence, I am compelled to the conclusion that the Company did all in its power to identify positions or reasonable accommodation for the grievor, given his physical disability, and also given the very restricting limitations which he placed upon his availability, in that he would only work within Capreol, and preferably within the same bargaining unit.

I am satisfied that the Company's obligation did not require it to limit its exploration of alternative positions to the grievor's own bargaining unit, and that positions such as the janitorial assignment which it did offer him, albeit within the bargaining unit of another union, were properly within the Company's efforts to determine an appropriate accommodation for employee A.

Having endeavoured since the fall 2012 to find the grievor an appropriate position, without success, and in light of his refusal to entertain work outside of Capreol, on November 29, 2013 the Company determined that it had little alternative but to administratively terminate the grievor's employment.

It is axiomatic that in the exercise to find reasonable accommodation there is a responsibility shared by the employer, the Union and the employee himself, or herself. On a review of the evidence before me I am satisfied that the Company made every reasonable effort to find the grievor accommodated employment, and that that effort was severely constrained by the grievor's refusal to work other than in Capreol. Nor can the Arbitrator ascribe significant weight to the grievor's wish to work exclusively within his own bargaining unit, it being effectively agreed that no work suited to his limitations could be found within the bargaining unit at Capreol. In the end, for reasons he best appreciates, employee A simply refused to accept the accommodated janitorial duties offered to him by the Company. While it may be that those duties were less than full time, it does not appear disputed that he would have had the benefit of a Great West

Life top up and would, in any event, be better positioned to move to any other position at Capreol which might become available.

In the result, I cannot find that the Company violated its duty to offer the grievor reasonable accommodation to the point of undue hardship, to perform work at Capreol consistent with his physical limitations. For reasons he best appreciates, the grievor simply insisted on establishing unrealistic parameters for the work which he would accept and ultimately frustrated the accommodation process by his own actions.

For all of the foregoing reasons the grievance must be dismissed.

May 20, 2014

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MICHEL G. PICHER
ARBITRATOR