CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2768

Heard in Montreal, Wednesday, 11 September 1996

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Awarding of position to test crossing protection.

BROTHERHOOD'S STATEMENT OF ISSUE:

The grievor, Mr. L. Minshall, went on WCB benefits in February of 1993. In April of 1993 the grievor was deemed fit to perform modified duties by WCB. However, no modified duties were ever provided for the grievor.

The Union contends that: **1.)** There were modified duties positions available that could have been awarded to the grievor but were not. **2.)** In particular the position of automatic crossing protection tester was available and awarded to another employee. **3.)** In failing to award any modified work to the grievor, when several positions were available, the Company has dealt unjustly with the grievor in violation of article 18.6 of agreement #41 and #42.

The Union requests that: The grievor be compensated for lost wages, including overtime, that he could have received had the Company properly offered him modified work during the time in question.

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

COMPANY'S STATEMENT OF ISSUE:

The grievor, Mr. L. Minshall, went on WCB benefits in February of 1993 and was not provide with "modified duties".

The Union contends that: **1.)** There were modified duties positions available that could have been awarded to the grievor but were not. **2.)** In particular, the position of automatic crossing protection tester was available and awarded to another employee. **3.)** In failing to award any modified work to the grievor, when several positions were available, the Company has dealt unjustly with the grievor in violation of article 18.6 of Agreement #41 and #42.

The Union requests that: The grievor be compensated for lost wages, including overtime, that he could have received had the Company properly offered him modified work during the time in question.

The Company contends that: **1.)** The violation of article 18.6 alleged by the Brotherhood is not arbitrable. **2.)** Even if article 18.6 were arbitrable, which it is not, article 18.6 was not violated.

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

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) J. J. KRUK	(SGD.) R. MARTEL
SYSTEM FEDERATION GENERAL CHAIRMAN	FOR: DISTRICT MANAGER, ENGINEERING SERVICES

There appeared on behalf of the Company:

R. Martel	– Labour Relations Officer, Toronto
G. Wilson	– Counsel, Calgary
J. Favreau	– Manager, Track Maintenance, Toronto
P. Robertson	– Workers' Compensation Administrator, Toronto
R. Baxter	– Track Maintenance Supervisor, Toronto

And on behalf of the Brotherhood:

D. W. Brown	– Sr. Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. McCracken	– Federation General Chairman, Ottawa

AWARD OF THE ARBITRATOR

As a preliminary matter the Company argues that the instant case is inarbitrable. It submits that the Brotherhood's allegation, which is entirely based on the claim that the grievor has been unjustly dealt with contrary to article 18.6 of the collective agreement, is a claim which cannot be progressed to arbitration, as distinct from a grievance in respect of the interpretation or alleged violation of a term of the collective agreement, as contemplated under article 18.6. The Brotherhood submits that this Office is bound by a determination of the Quebec Superior Court, quashing a prior award of this Office, that any claim by any employee that he or she has been unjustly dealt with, for whatever reason, including reasons entirely unrelated to any specific provision of the collective agreement, is fully arbitrable.

The issue of the distinction between the grievance of a substantive right in respect of the interpretation, application or administration of the specific terms of a collective agreement, on the one hand, as compared with a more general claim or appeal by an employee that he or she has been "unjustly dealt with", as reflected in the terms of collective agreements in Canada, has been much discussed by boards of arbitration, including this Office. Historically, both in the railway industry and in other industries in Canada, employers and unions have made a distinction between the procedural rights which attach to grievances against violations of specific terms of a collective agreement, as compared with general claims or appeals by employees that they have been unjustly dealt with in a manner which may be entirely unrelated to any right, duty or obligation to be found under the terms of a collective agreement. In many collective agreements, for obvious reasons of promoting industrial relations peace, parties have provided that even though an employee's allegation that he or she has in some manner been dealt with unjustly is in respect of some matter which is not dealt with under the collective agreement, the employee and the union may have that claim or appeal dealt with up to and including the final step of the parties' own internal grievance procedure. As a general rule, however, such appeals do not proceed further, and are not contemplated to be subject to final and binding arbitration, which is reserved, both by the **Canada Labour Code**, and by the intention of the parties, to the resolution of disputes with respect to the meaning and application of the specific terms of a collective agreement which, by law, must be reduced to writing. (*See Canada Labour Code, RSC 1985, c. L-2, s. 3(1).*)

The distinction between substantive rights conferred by a collective agreement and procedural rights in respect of the consideration of both grievances and claims that an employee has been unjustly dealt with have long been recognized by boards of arbitration, not only in this Office, but in other industries in Canada as well. In **CN Telecommunications and Telegraph Workers, Local 43**, 1975 11 L.A.C. 2(d), 152 (Rayner), the board of arbitration found that the right of an employee to file a grievance if he or she felt "unjustly dealt with" conferred a procedural right to the benefit of the parties' internal grievance process, but that protection from being unjustly dealt with in any matter, including matters not dealt with under the collective agreement, was not intended to be a substantive right which could be grieved to arbitration. The board there found that the intention of the collective agreement was that claims of an employee to have been unjustly dealt with, without reference to any specific provision of the collective agreement, were to be limited in their consideration to the various steps of the grievance procedure, and could not proceed to arbitration as they did not relate to any alleged substantive violation of a term of a collective agreement. Similarly, in **Canada Post Corporation and the Canadian Union of Postal Workers**, an unreported award of Arbitrator Innis Christie dated August 10, 1988, the board of arbitration concluded that the provisions of the collective agreement there under consideration, which permitted a union representative to present a grievance alleging that an

employee had been "treated in an unjust and unfair manner" was not, by the language of the collective agreement, intended to confer substantive rights which could be pursued to arbitration. In that case the Union sought to use the "unjustly dealt with" provision to reverse the termination of a probationary employee who did not have just cause protection under the terms of the collective agreement.

As noted by Arbitrator Christie, and reflected in prior decisions of this Office, it is obviously problematic for boards of arbitration to be adjudicating concepts of justice "at large", without reference of any provisions within the terms of a collective agreement, absent clear and unequivocal language reflecting the intention of the parties that they should do so. There are, moreover, substantial reasons with respect to labour relations stability as well as the clarity and finality of rights and obligations in a collective bargaining relationship, which caution against such unlimited jurisdiction. That includes the open-ended burden on a union which may find itself charged with violating the duty of fair representation if it should fail to take any employee's allegation of unjust treatment, whatever its basis, to a full arbitration hearing. As a result, the awards of this Office have for many years found that provisions in collective agreements allowing for complaints by employees that they have been unjustly dealt with are, absent contrary language in the collective agreement, generally not intended to be taken to arbitration unless they can also qualify as a grievance in respect of the interpretation, application or alleged violation of a specific provision of a collective agreement. That is reflected in **CROA 924, 2157** and **2235**.

However, in a decision dated January 22, 1993, in evocation of an award of this Office, Tessier, J. of the Quebec Superior Court ruled otherwise, as regards the provisions of the collective agreement between the parties to the instant dispute. The Court declined to find any distinction between "a grievance concerning the interpretation or alleged violation of this agreement" appearing in article 18.6 and the concept of "an appeal by an employee who believes he has been unjustly dealt with" within the same article, as regards to right to proceed beyond the three steps of the grievance procedure, to arbitration. In effect, the Court, which at p. 8 of its decision referred to the second concept as "grievance appeal for unjust treatment" concluded, in effect, that article 18.6 confers upon all employees who fall under the collective agreement the right to seek redress at arbitration for all matters, including matters entirely outside the collective agreement, in respect of which they believe they have been unjustly dealt with. In other words, contrary to all prior Canadian arbitral jurisprudence, the Quebec Superior Court has found that the second part of article 18.6 was intended to confer a substantive right, and not merely a procedural right, on all employees who fall under the collective agreement, and that they are at liberty to process all claims of unjust treatment, however based, to arbitration. It follows, as a practical consequence, that the duty of fair representation may compel the Brotherhood to process many such claims to arbitration, regardless of the uncertainty, cost or time involved.

The industrial relations consequences of such an interpretation have been exhaustively analyzed and commented upon in prior awards of this Office, most recently in **CROA 2363**, where this Office rejected a claim by another union, in respect of another railway, seeking to arbitrate an employee's claim that he had been "unjustly dealt with". (*See also* **CROA 2235**.) There is, therefore, little purpose in reiterating the industrial relations policies which have, for many years, caused employers and unions alike to prefer that general claims of injustice, unrelated to the alleged violation of any specific provision of a collective agreement, not be arbitrable. Nor is there much to add to the reasoning of boards of arbitration, reflected in decades of jurisprudence, that the distinction between substantive rights and procedural rights under collective agreements must be understood and respected, and that absent clear and unequivocal language to the contrary, arbitration under the **Canada Labour Code** is reserved to resolving disputes with respect to the interpretation and application of the substantive provisions of a collective agreement.

For the time being, the Quebec Superior Court has ruled otherwise. Although these matters are presently under appeal, this Office is bound to respect the most recent judicial ruling. It is so bound, both in respect of this agreement, and of another agreement governing the same union and the Canadian National Railway Company following a similar decision of Piché, J. of the Quebec Superior Court, issued on February 13, 1992. On that basis, therefore, the initial objection taken by the Company, namely that the grievance is not arbitrable to the extent that is seeks to vindicate a general claim of unjust treatment, not based on any particular provision of the collective agreement, must be rejected.

I turn to consider the second objection raised by the Company. The Employer submits that the Brotherhood cannot assert a violation of article 18.6 of the collective agreement, as it has done in the text of its *ex parte* statement of issue, as that article was never raised in either the original grievance document nor at any of the three steps of the

grievance procedure. In this regard the Company relies upon article 18.7 of the collective agreement which provides as follows:

> **18.7** A grievance under Clause 18.6 shall include a written statement of the grievance and where it concerns the interpretation or alleged violation of the collective agreement, the statement shall identify the section and paragraph of the section involved.

The Company stresses that in the original formulation of the grievance the only allegations are violations of articles 6.1, 30.5 and Appendix B-12 of the collective agreement, a provision which governs the possible discussion between Company and Union with respect to exploring modified duties for a disabled employee. It argues that to now recast the grievance by alleging solely a violation of the "unjustly dealt with" standard of article 18.6 is improper, as it would effectively by-pass the entire grievance procedure for consideration of a claim so grounded. In other words, the Company submits, the advancing of the "unjustly dealt with" argument for the first time at arbitration changes the nature of the grievance substantially, to the prejudice of the Company.

In the Arbitrator's view, the dispute between the parties on this issue gives substance to the concern that treating the "unjustly dealt with" provision of article 18.6 as a substantive right creates an unruly horse to ride. The Brotherhood's representatives argue that, in effect, there is no meaningful difference between the provisions of Appendix B-12 to the collective agreement, which concern the search for modified duties for disabled employees, and the claim as formulated at arbitration, which is that the Company has failed to accommodate the employee's disabilities, and therefore has dealt unjustly with him in contravention of what the Court has confirmed is a substantive right found under article 18.6 of the collective agreement.

In the Arbitrator's view, the position of the Company must succeed. Neither this Office, nor any board of arbitration in Canada, of which I am aware, has been given any guidance either in the terms of a collective agreement or by the decision of a Court, as to how a determination of a claim that an employee has been "unjustly dealt with" is to be resolved. Pending the final determination of both cases emanating from this Office, presently on appeal in the Courts, at a minimum the Arbitrator must take seriously, and fully entertain, properly progressed allegations by employees that they have, in some way, been unjustly dealt with, even though their substantive or specific claim may not relate to any particular provision of their collective agreement. If that is to be done, it seems manifest that boards of arbitration, and the parties before them, should, at a minimum, have the benefit of the development of the parties' positions and arguments through the grievance procedure, prior to giving consideration to the merits of their dispute as to what constitutes just or unjust treatment. As noted above, before the Court's decision, general allegations of unjust treatment were limited to consideration in the grievance procedure. Now the Brotherhood seeks to arbitrate a claim of unjust treatment which has never been claimed or discussed in those terms at any stage of the grievance process. That is not what the collective agreement contemplates.

I must agree that in the instant case the raising of the "unjustly dealt with" allegation virtually at the arbitration room door does frustrate the intention of the grievance procedure contemplated within the collective agreement and does constitute a last-minute change of position inconsistent with the intention of the collective agreement, and in particular of article 18.7. That provision must be taken to reflect an agreed measure of fairness, whereby the employer is put on notice at the time of the grievance, or thereafter in the grievance process, with respect to the identity of any specific section of the collective agreement which is alleged to have been transgressed. On that basis I would, therefore, sustain the objection of the Company and strike the Brotherhood's allegation with respect to the alleged violation of article 18.6 of the collective agreement.

I am not persuaded, however, that that would dispose of the grievance. It appears to the Arbitrator that there is substance in the first two paragraphs of the Brotherhood's contention, as reflected in the Brotherhood's *ex parte* statement of issue, which sufficiently corresponds with statements found in the original grievance, namely that the grievor "... has not been allowed to perform duties that he is qualified to perform and quite capable of performing ...". In substance, the original grievance document and the first two paragraphs of the Brotherhood's *ex parte* statement of issue generally reflect the same claim, which is that the Employer failed in its obligation to reasonably accommodate the disabilities of the grievor. It would, in my view, be unduly technical to conclude that the grievance before me cannot be considered on the more general basis of the Employer's duty of accommodation and discriminatory treatment which have been asserted from the outset by the Brotherhood.

I turn, therefore, to consider whether there has been a failure on the part of the Company to reasonably accommodate Mr. Minshall's physical disabilities. On the record before me I cannot find that that claim is made out. The Brotherhood's case rests, in substantial part, on a ruling by the Workers' Compensation Appeal Tribunal (WCAT) in a claim made against the Company by Mr. Minshall for an alleged failure to return him to duties, in conformity with section 54 of the **Ontario Workers' Compensation Act**, which resulted in a finding against the Company.

Firstly, it should be stressed that this Office does not consider that the decision of the WCAT renders *res judicata* the question raised in this grievance. At issue here is not the statutory entitlement of Mr. Minshall to be reinstated into employment with the Company under section 54 of the **Ontario Workers' Compensation Act**. The issue before the Arbitrator is whether the Company failed unduly in seeking to accommodate, to the point of undue hardship, the grievor's disabilities by failing to offer him opportunities of employment. Whatever evidence may have been presented before the WCAT, the evidence before the Arbitrator overwhelmingly establishes, without any rebuttal by contrary evidence from the Brotherhood, that the Company made repeated offers of temporary positions to Mr. Minshall in the period which relates to this claim. Mr. Pat Robertson, the Company's Workers' Compensation Administrator in Toronto, and Track Maintenance Supervisor Bob Baxter, were both present at the hearing and gave substance to the representations found in the Company's brief to the effect that repeated offers of temporary light duty assignments were made to Mr. Minshall, and were met with the response of his WCB case worker that such temporary positions would not be acceptable and that only permanent work would be acceptable. The Arbitrator accepts the evidence of the Company, again unrebutted by the Brotherhood, that there were no permanent positions available to the grievor which could have been performed with reasonable accommodation, short of undue hardship. It should also be noted that during all of the period in question the grievor remained in receipt of full Workers' Compensation Benefits, as well as funds for the WCB Vocational Rehabilitation Program, at the expense of the Company.

On the whole, the Arbitrator cannot find that the instant case discloses a failure of reasonable accommodation by the Employer, whether that duty is founded on its statutory obligations under the **Workers' Compensation Act**, or by the implicit application under the collective agreement of the requirements of the **Canadian Human Rights Code**. On the contrary, notwithstanding the conclusion of the WCAT, the only evidence before me confirms that the Company sought on a number of occasions to offer temporary positions to the grievor, and also offered to train him as a machine operator in the expectation that the combination of that work and other temporary assignments would keep him gainfully employed year round. I do not see in the evidence before me a failure on the part of the Company to discharge its obligation to reasonably accommodate the physical disabilities of Mr. Minshall.

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

September 14, 1996

(signed) MICHEL G. PICHER
ARBITRATOR