IN THE MATTER OF THE *LABOUR RELATIONS ACT, 1995*

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

ALGOMA STEEL INC.
(hereinafter the "Company")

AND
UNITED STEELWORKERS OF AMERICA, LOCAL 2251
(hereinafter the "Union")

AND IN THE MATTER OF THE GRIEVANCE OF KEENAN SPURWAY
(Grievance No. 06-423)

SOLE ARBITRATOR: Victor Solomatenko

APPEARANCES FOR THE COMPANY: Steve Orr
Peter McNichol

APPEARANCES FOR THE UNION: John Shiels
Merle Evans
Keenan Spurway

A HEARING IN THIS MATTER WAS HELD IN SAULT STE. MARIE, ONTARIO ON
MARCH 8, 2007 (WITH WRITTEN SUBMISSIONS POST HEARING).

AWARD

At the initial hearing of the union's grievance, which alleged that the company was failing to accommodate the grievor, the company raised a preliminary issue wherein

it sought relief from the time limits set out in Article 13.09 of the collective agreement, which states:

> **13.09** A written grievance to be processed to the next step shall state the reasons why the previous reply was unsatisfactory.
>
> If the Company or the Union fail to reply to a grievance within the time limits prescribed, or any extension thereof, the party failing to reply shall be deemed to have conceded the grievance. The foregoing shall not prejudice the parties in any future grievances of a similar nature, providing notification in writing is given the other party within a period of thirty (30) days from the time the grievance was deemed to be conceded.
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> The parties agree to give each other ten calendar days written notice prior to claiming a breach of time limits as provided for in the second paragraph of Article 13.09.

On December 20, 2006, an Interim Award was issued in this matter wherein I stated, at pp. 13 -14:

> . . .I therefore decline to exercise my discretion under subsection 48(16) of the *Labour Relations Act* to extend the time limits and as a result the company is deemed to have conceded grievance #06-423 in accordance with the provisions of Article 13.09.
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> My ruling that the company is deemed to have conceded the grievance does not, however, grant the union the remedy it has requested in its written submissions. The practical result arising out of this ruling is that *the company is deemed to have conceded that it has violated the collective agreement by failing to accommodate the grievor's return to work.* But that does not determine what compensation would be owing to the grievor or to what job he should have been returned.
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> In its written submissions, the union has requested specific amounts for compensation and punitive damages, as well as an order for reinstatement. To begin with, there has been no evidence dealing with quantum of damages and it is not obvious on the face of the grievance what that amount should be. Furthermore, whether punitive damages are even appropriate is an issue that should be fully argued and an opportunity must be given to the parties to do so if they are unable to reach mutual agreement in that regard. The question of the grievor's reinstatement is more properly left within the jurisdiction of the arbitration board dealing with his termination grievance. In the event the parties are unable to resolve the issues involving remedy for this grievance before

January 31, 2007, either party may request to bring the grievance back on for hearing. (*Italics added)*

The parties were unable to resolve the various issues related to the remedy to be applied to this grievance and consequently requested that the matter be brought back for hearing. That hearing was held on March 8, 2007, at which time the parties presented their evidence through their respective witnesses and, subsequent to the hearing, both parties filed written submissions.

The relevant facts are not in dispute and at the hearing on March 8, 2007 the parties for the most part proceeded on the basis of an agreed statement of facts. In addition, the union called on the evidence of Daniel Lewis, who is the union's co-chair of the Worker Re-Entry Team. Peter McNichol is a claims management specialist in the company's Compensation Department. He is also the company's co-chair on the Worker Re-Entry Team and gave evidence on behalf of the company at the March 8th hearing. The Worker Re-Entry Team arises under a Letter of Agreement, which establishes that program and lists a number of jobs "for the purpose of providing work opportunity for employees with partial disablement that is temporary or permanent". The evidence indicates that the Work Re-Entry Team only becomes involved in those situations that require a case resolution because the company was unable or unwilling to accommodate an employee's return to work. Otherwise, a return to work with accommodation can occur without the intervention or input of the Worker Re-Entry Team.

The grievor was hired on August 3, 2005 and was placed in the Transportation Department to drive heavy equipment. On September 11, 2005, he sustained a workplace injury to his back, but he continued to work until October 3, 2005. It was common

ground that during this period the company offered the grievor some work, but his physician advised him to stay off work. It appears that October 3, 2005 was the last day actually worked by the grievor. At some point, a claim was filed with the Workplace Safety and Insurance Board (WSIB) and the grievor was in receipt of WSIB benefits for the period from January 5, 2006 until September 27, 2006. The union's efforts to have the grievor returned to work during that period will be noted shortly.

By way of letter dated September 25, 2006, WSIB advised the grievor that in accordance with a Functional Capacity Evaluation he had reached his maximum medical recovery as of September 13, 2006 and there was no assessable permanent impairment to his back. As a result, his entitlement to WSIB benefits ceased as of that date. The union had filed the grievance on August 24, 2006 and, as previously noted, the grievor's employment was terminated on October 4, 2006. The issue of his termination is subject of another grievance, which I am advised is already before another arbitrator. In terms of monetary compensation for this grievance, the union stated that for purposes of these proceedings it was not seeking any damages for the period that the grievor was in receipt of WSIB benefits. Instead, it was only requesting the equivalent of 48 hours pay at his pre-injury rate for the period from September 25, 2006 until his termination on October 4, 2006.

The union is also requesting a ruling that these 48 hours apply towards the grievor's seniority. The parties have extensive and detailed provisions in Article 7 of the collective agreement, which deals with various aspects of seniority. The threshold requirement for an employee hired after January 1, 1995, such as the grievor, is that pursuant to Article 7.02.10, he does not become established until he "has worked 520

hours within any period of 120 consecutive days". As previously indicated, the last day that the grievor had worked was October 3, 2005, at which time he had not worked sufficient hours to have become established.

At the hearing on March 8, 2007, the union withdrew its request for punitive damages and damages for pain and suffering. The only monetary redress it was now seeking was compensation for the period from September 25, 2006 to October 4, 2006. The main remedy that the union was seeking at this time, however, was in essence a declaration of a date upon which the grievor is deemed to have been returned to work, which would in turn determine that he has become established for purposes of the seniority provisions of the collective agreement. At this juncture, it would be useful to review the evidence outlining the grievor's efforts to be returned to work subsequent to his injury.

Although the letter was not entered into evidence, the parties have agreed in their statement of facts that on April 6, 2006, Peter McNichol had sent a letter to the grievor wherein he advised the grievor to make his physiotherapist aware that the company had a very active modified work program and that the company was anxious to have him returned to work. It would seem that this letter was written in anticipation of the grievor attending at the physiotherapist's for an evaluation. The physiotherapist examined the grievor on April 18, 2006 at which time he completed a Functional Abilities Form for Timely Return to Work (which is a WSIB form) wherein he indicated that the grievor was able to return to work with certain restrictions. A Fitness to Work Certificate, which is a document generated by the company, was completed on April 24, 2006 and it indicated that the grievor was able to return to work as of April 19, 2006.

Bill Taylor was the grievor's front line supervisor and the documents filed by the parties indicate that he either decided or simply indicated that he was unable to accommodate the grievor at that time. There was no evidence, however, why he was unable to accommodate the grievor's restrictions. Daniel Lewis testified that injured employees with restrictions similar to those of the grievor had been accommodated in the past and, in his view, the grievor should also have been accommodated as of April 24, 2006. On May 31, 2006, the grievor obtained another Functional Abilities Form from his physiotherapist and the parties are in agreement that the stipulated restrictions in that form were reduced from the previous evaluation.

A Fitness to Work Certificate was completed on June 8, 2006 which indicated that the grievor was able to return to work as of that date. On the June 8th Certificate, Taylor indicated that he could accommodate the grievor. Later in the day on June 8, 2006, the grievor was advised that a direction had come from Human Resources that he would not be returning to work. Merle Evans is the local union vice-president and he contacted McNichol to determine why the grievor was not being returned to work. He was advised that the matter was now in the hands of the Superintendent of Labour Relations, Laurie Wilson. The evidence suggests that Wilson had more or less taken control of what would appear to be a routine return to work situation as of April 27, 2006. At that time, in response to the union's request to schedule a case resolution meeting to try to accommodate the grievor, McNichol stated that he had been advised to await instructions from Wilson.

During the hearing on March 8, 2007, the company took the position that it would be unusual to have a case resolution meeting before the employee had reached

"maximum medical recovery". Lewis testified that he has never seen a case resolution in which the employee had reached maximum medical recovery and in fact the committee is never aware whether the person has reached maximum medical recovery at the time of a case resolution. It was also his uncontradicted evidence that there have been many accommodations or returns to work without the Team's knowledge or input. As he stated, the Work Re-Entry Team or committee is only called upon for a case resolution where the company has indicated that it will not or is unable to accommodate a return to work.

McNichol's evidence on this question was not entirely clear. Although he initially stated that there was no case resolution meeting for the grievor because he had not reached maximum medical recovery, McNichol did acknowledge during cross-examination that employees have been brought back before having reached maximum medical recovery, if there was work available. Furthermore, there was no evidence that the issue of maximum medical recovery had ever been raised with either the union or the grievor prior to this hearing. McNichol confirmed in his evidence that Wilson had instructed him that Human Resources was involved in the grievor's situation as early as April, 2006.

The grievor obtained additional Fitness to Work Certificates, dated June 29, 2006 and August 16, 2006. In both instances the only restriction in the Certificates was that he was not to return to driving heavy equipment. The grievor obviously was not accommodated on the basis of these Certificates either.

Submissions

In addition to compensation for 48 hours of regular pay for the period from the cessation of his WSIB benefits until the date of his discharge, the union requested that the grievor be deemed to have been accommodated as of April 24, 2006. According to the union, the grievor would thus have fulfilled the requirement of working 520 hour in a period of 120 days and would therefore have been established prior to the termination of his employment.

The company's position at this stage of the proceedings was that no redress was applicable to this grievance since no loss to the grievor had been proven as arising out of its conceding the grievance. Its first argument was that the grievor is not entitled to any compensation for the period after September 25, 2006 basically on grounds that, since he was deemed by WSIB to have achieved maximum medical recovery as of September 13, 2006, no accommodation was required as of that date.

The company also took the position that April 24, 2006 is beyond the limit of calculation of any redress that might be available to the grievor in this instance. In this respect, the company relied on the following provisions of the collective agreement:

> **13.06.30** The Arbitrator shall not alter, modify or amend any part of this Agreement, or make any decision inconsistent with its provisions.
>
> **13.06.40** Subject to Article 13.06.30, the decision of the Arbitrator shall be binding on the Company, the Union and the employees. Any recompense may be made retroactive to the date on which the written grievance was received by the superintendent and for up to twenty-one additional days if the employee could not reasonably have known of the fact or event giving rise to the grievance prior to the date he first discussed it with his foreman or other appropriate management representative.

According to the company, the word "recompense" in Article 13.06.40 includes "any amends for loss to the grievor", not merely monetary compensation as argued by the union.

The company also argued that, regardless whether this may be viewed as a continuing grievance, I am bound by Article 13.06.40 in terms of awarding redress and in this respect has referred to *Re California Marble & Tile Ltd. and Tilesetters International Union, Local 3PW* (1995), 49 L.A.C. (4th) 174 (Glass) and *Re Bendix Automotive of Canada Ltd. and United Automobile Workers, Local 195* (1973), 3 L.A.C. (2d) 21 (Weatherill). The company thus maintained that I should not deem that the grievor has worked any hours not actually worked. It argued that the purpose of the establishment period under Article 7.02.40 is to grant the company the right to evaluate and determine whether it wants to retain an employee. According to the company, to grant the grievor these hours towards his establishment period removes its right to evaluate the grievor and would be inconsistent with the terms of the collective agreement.

The union's response to these arguments by the company was basically that the company is attempting to contract out of its obligations under the *Human Rights Code*. In this respect, the union noted the no discrimination provisions of Article 3 of the collective agreement, which also includes a specific reference to the Code. The union argued that my remedial jurisdiction both under the *Labour Relations Act* and the *Human Rights Code* includes the power to make the grievor whole and on this point has referred to *Re Toronto Star Newspapers Ltd. and International Association of Machinists & Aerospace Workers, Local 235* (1995), 51 L.A.C. (4th) 10 (H.D. Brown) and *Re Otis Canada Inc. and International Union of Elevator Constructors, Local 50* (2005), 135 L.A.C. (4th) 193 (Rowan).

Decision

The starting point is that by virtue of my Interim Award, dated December 20, 2006, the company has been deemed to have conceded that it violated the collective agreement, as alleged by the union in its grievance dated August 24, 2006. That in turn means that the company has conceded that it has been failing to accommodate the grievor's return to work in a job commensurate with his fitness to work certificate. Consequently, whatever defenses the company may have had to that initial allegation are irrelevant at this time since the company is deemed to have conceded its "liability" and the only determination I need make at this time is the "quantum" of the remedy.

At this stage of the proceedings, the company has attempted to introduce what might be described as the proverbial red herrings. Most notable of that attempt was the introduction of the concept of the employee having to reach "maximum medical recovery" before the case resolution procedure is invoked. To begin with, that proposition, even if it had validity, should have been introduced long before the company was deemed to have conceded its liability for the allegations set out in the grievance, not afterwards. In any event, even McNichol acknowledged in his testimony that, as the union has alleged, employees are in fact returned to work without having reached maximum medical recovery.

More importantly, however, the company is in essence attempting to escape its obligation under the human rights legislation to accommodate a disability up to the point of undue hardship. That statutory obligation is even incorporated into the collective agreement in the no discrimination provisions of Article 3. Nothing in the legislation or the jurisprudence suggests that the obligation to accommodate arises only after the employee has attained maximum medical recovery. The only relevant questions are

whether the employee is medically fit to return to work and whether there was work available, consistent with the medical authorization to return, in which he could or should have been placed. In the instant case, by the company's own procedures, the grievor had a Fitness to Work Certificate as early as April 24, 2006. Secondly, his front line supervisor indicated that he could accommodate the grievor as of June 8, 2006. Yet, the grievor was never returned to work prior to his discharge on October 4, 2006.

On the company's own evidence, the grievor should have been returned to work as of June 8, 2006 at the latest. In the circumstances, however, I find that the grievor should have been returned to work on April 24, 2006, commensurate with the Fitness to Work Certificate of that date. At no time has the company given any indication as to why the grievor could not have been accommodated as of that date. The jurisprudence in this area places the onus on the employer to demonstrate why it is unable to accommodate. In this instance, the parties have a protocol arising out of a written agreement which lists a variety of jobs which would be suitable for employees in the grievor's position. The union's evidence was uncontradicted that employees have been returned to work to some of these jobs with restrictions similar to those of the grievor's as of April 24, 2006. The company chose not to avail itself of that protocol, notwithstanding the repeated requests and inquiries from the union to do so.

The result of deeming that the grievor should have been returned to work as of April 24, 2006, is that he will in effect be considered to have become established prior to his discharge on October 4, 2006. That is, he will be deemed to have worked 520 hours within a period of 120 consecutive days. The company advanced a number of arguments to avoid that result.

One of the company's arguments in this regard appears to be a unique variation of the anecdote of the young man, charged with the murder of his parents, who begged the court's clemency on grounds that he was now an orphan. As previously noted, the company has argued that to grant the grievor these hours towards his establishment period deprives the company of its right to determine if he is a suitable employee. In reality, it is the company that has deprived itself of that opportunity. By its own evidence, it was in a position to have had the grievor back to work at least as of June 8, 2006. It cannot now at this date argue that its rights are being deprived under the collective agreement when it was the party that deprived itself of the opportunity to evaluate the grievor.

The company's other main argument was based on the limitation in Article 13.06.40 with respect to "recompense". In my view, the use of the word recompense in that provision is in the context of monetary damages, as argued by the union. In any event, the governing factor for redress in this case is based on the principle of making the aggrieved person whole. The duty to accommodate arises out of human rights legislation, which overrides any provision in a collective agreement that may have the effect of abridging or negating the person's rights granted under the human rights legislation. Thus, even if it could be said that "recompense" included more than monetary damages, Article 13.06.40 could not and does not abridge or negate any remedy that is available to the grievor by the operation of human rights legislation.

In cases of this nature, the arbitral approach has been to make the grievor whole with respect to the company's failure to accommodate him at the appropriate time: see, e.g., *Re Toronto Star, supra,* (at pp. 16-17). It may be true that had the grievor in fact

been reinstated in April or June, 2006 he may not have established himself as an acceptable or suitable employee. However, the facts were undisputed that the company had several opportunities to return the grievor to work and thereby evaluate him several months prior to his termination. Having deprived the grievor of the opportunity to establish himself by failing to accommodate him, the company simply is no position to now claim the benefit of its failure to accommodate.

The remaining issue which the company did not pursue in final argument, but raised both prior to the hearing and during its opening comments, is the question whether the company has properly provided notice pursuant to the second paragraph of Article 13.09 in order that this grievance, which was deemed to have been conceded under Article 13.09, will not prejudice the parties in any future grievances of a similar nature. In its letter dated January 23, 2007, which dealt with various matters related to redress for the grievor, the company took the position that the 30 day period within which it was required to provide written notice started from the date of my Interim Award. I concur with the union's submission that this is not the intent of that provision, nor a reasonable interpretation of it.

To begin with, my previous ruling that the company is deemed to have conceded the grievance is not a remedy arising out of the exercise of my discretionary arbitral remedial powers. It is simply a statement of the result of the operation of the collective agreement. The company knew that to be the case from the very outset because the basis of its preliminary objection leading to the Interim Award was that I exercise my discretion such that the operation of the collective provisions would *not* proceed. Furthermore, at no time prior to the Interim Award, did the company seek relief from the

operation of the 30 day limit requirement set out in Article 13.09. On the other hand, the union complied with the requirement to give 10 calendar days written notice before claiming the breach of the time limits, which thereby invoked the operation of Article 13.09 pursuant to which the company was deemed to have conceded the grievance. The company simply did not respond to any of this. As a result, the thirty day notice period expired long before the date of the Interim Award and the company cannot now claim that the result of this grievance is without prejudice to future grievances of a similar nature.

In summary, I therefore award that the grievor is deemed to have been returned to work as of April 24, 2006. I further award monetary compensation for the period from the cessation of his WSIB benefits until the date of his discharge at his pre-injury rate of pay for 48 hours, which shall also apply towards his seniority. I shall remain seized to deal with any difficulties that the parties may incur in the implementation of this award.

DATED AT TORONTO, ONTARIO THIS 12th DAY OF JUNE, 2007.

Victor Solomatenko
Arbitrator