IN THE MATTER OF AN ARBITRATION

BETWEEN

ALGOMA CENTRAL RAILWAY INC.

("the Company" / "the Employer")

- AND -

UNIFOR, LOCAL 100

("the Union")

SHP-723

CONCERNING THE ACCOMMODATION GRIEVANCE of CAR MECHANIC GREGORY BOCK ("the Grievor")

Christopher Albertyn - Sole Arbitrator

APPEARANCES

For the Union:

Brian Stevens, National Rail Director Unifor

Ashok Venkatarangam, Vice-President, Great Lakes Region

Gregory Bock, Grievor

For the Company:

Jennifer Darby, Labour Relations Associate

Hearing held in TORONTO on May 17, 2016.

Award issued on June 16, 2016.

AWARD

DISPUTE:

1. The dispute is whether the accommodation of Car Mechanic Gregory Bock between December 4, 2013 and February 26, 2014 was unreasonably delayed and inequitable.

STATEMENT OF ISSUE:

2. The parties were unable to agree upon the Statement of Issue. From their *ex parte* Statements, the following Statement of Issue will apply:

> On December 2, 2012 while at his workplace in Sault Ste. Marie, Mr. Bock, an ACR Car Mechanic, suffered a significant blow to the head from falling ice off the roof of a building. As a consequence of this workplace injury Mr. Bock was absent from work from December 10, 2012 to December 27, 2013. On December 4, 2013, Mr. Bock presented a medical note to the Company to return to work. The Company thought the medical note as too vague. It required more specific information. On December 5, 2013, the Company requested further medical information, on its Return to Work Restriction Form (RTWR) in order to search for a suitable workplace accommodation. Mr. Bock provided the completed form to the Company on December 11, 2013. The Company found an accommodated position within Mr. Bock's restrictions, starting on December 27, 2013, and offered the position to Mr. Bock on December 18, 2013. On December 27, 2013, Mr. Bock returned to work in an accommodated janitorial position working five hours/day, 5 days/week. He remained in the accommodated position

until February 25, 2014. On February 26, 2014 Mr. Bock was returned to his Car Mechanic position, with accommodation.

It is the Union's position that the Company violated Articles 6, 9 and 24 of the collective agreement as well as the *Canadian Human Rights Act*. The Union is requesting the Company make Mr. Bock monetarily whole for all lost wages from December 4, 2013, until December 26, 2013. In addition, the Union requests Mr. Bock receive a "top up" in his wages, to the full 44-hour threshold, from his return to work on December 27, 2013 until February 25, 2014.

It is the Company's position that it has discharged its duty to accommodate the grievor by providing a timely and suitable accommodation inclusive of all work available during the time of the accommodation. Further, the Company submits there has been neither a violation of the collective agreement nor the *Canadian Human Rights Act*.

FURTHER FACTS:

3. On December 3, 2013 the Grievor, Gregory Bock, phoned his Mechanical Supervisor, Scott Mazerolle, and advised him that he had a doctor's note confirming that he was fit to return to work. At that point he had been off work for a year as a result of the workplace injury he suffered, described above.

4. On the next day, December 4, 2013, the Grievor gave a medical note, dated November 24, 2013, to Supervisor Mazerolle. The note stated that the Grievor was fit to return to work on December 1, 2013 with restrictions of: no excessive bending and twisting from the waist up.

5. Mr. Mazerolle forwarded the doctor's note to the Company's Workers

Compensation Officer, Mark County, for review. Mr. County contacted the Grievor on December 5, 2013, to inform him that the Company required more detailed medical information to facilitate his return to work. The Grievor was given the Return to Work Restrictions (RTWR) form and asked to have his physician complete it and return it to the Company as soon as possible.

6. The Grievor submitted the completed RTWR form on December 11, 2013. After his injury in December 2012, before the Grievor went off for a long period of time, he was briefly accommodated in a clerical position. That position was no longer available in December 2013. It had been filled by another accommodated employee. The Company therefore began a search for an alternate accommodated position in the Sault Ste. Marie terminal.

7. Between December 12 and 16, 2013, the Company reviewed the Grievor's restrictions and tried to find a suitable accommodated position for him to return to work.

8. On December 17, 2013, a conference call was held between the Company and the Union to discuss the Grievor's restrictions and a temporary janitorial position (Facility Cleaner) that the Company could made available to accommodate the Grievor. The position entailed 5 hours of work per day, 5 days/week. It was set up to supplement existing contract janitors. The shift offered was 17:30hrs to 22:30hrs with rest days of Monday and Tuesday. The rate of pay for the position was in line with the Grievor's pre-disability hourly rate of $30.51 per hour.

9. On the next day, December 18, 2013, the Company sent a letter to the Grievor with an offer of this accommodated temporary position, for his review. The letter requested that he advise, by December 23, 2013, if he would accept the position. The job offer letter explained that the accommodated position would be available on December 27, 2013, when the Company was able to make the position available.

10. On December 19, 2013, as a result of the Union's request, the Company sent an amended temporary job offer letter clarifying that the Grievor would remain covered under the terms and conditions of the collective agreement.

11. The Union sent the Company an email on December 23, 2013, requesting an extension for the Grievor to provide a response. The Company granted the extension.

12. On the next day, December 24, 2013, the Union sent an email on behalf of the Grievor, advising that he would accept the temporary offer of accommodation.

13. The Grievor commenced work on the accommodated position, as offered, on December 27, 2013.

14. The Union sent a letter on January 14, 2014, requesting that the Company provide the Grievor with 8 hours/day of work and more preferential rest days. The Company replied that there was not sufficient work available to comprise an 8

hour day that the Grievor could perform within his restrictions, and that the rest hours could not be changed.

15. On February 14, 2014 the Grievor provided fresh medical information, as a result of which he was returned to his regular Car Mechanic position on February 26, 2014, with accommodation.

THE ISSUES:

16. The first issue is: did the Company unreasonably delay the Grievor's accommodation by providing him with work only on December 27, 2013 when he first advised he was fit to return to work on December 3, 2013?

17. The second issue is: between December 27, 2013 and February 26, 2014, should the Grievor have been better accommodated, by being given 8 hours of work a day and paid at his Car Mechanic rate?

AWARD:

18. The Union claims that the 16-day delay between the Grievor providing the necessary medical information and the start of his work as a janitor was too long, and that he ought to be compensated for it. I do not agree. Once it had the Grievor's medical information, the Employer acted promptly to find him work within his restrictions. The Sault Ste. Marie work location has a limited number of accommodated positions. Other employees were already being accommodated. Four of the 13 car mechanics in Sault Ste. Marie were on permanent accommodation, as car mechanics, they being 31% of the active work force at the

time. The Grievor needed temporary accommodation. The Company found a position within a week of receiving the RTWR form and it then engaged with the Union to advise the Grievor thereof. The Company's effort was much within the reasonable range of due diligence to find a suitable position that did not cause it undue hardship. While it might have been better to have engaged the Union when the Company first started searching for a position, the Company did involve the Union once it had found a position. Some time was taken by the Grievor considering the offer and between December 23 and 27 there were holidays and rest days. That is why the job started only on December 27.

19. Taking account of all these circumstances, I find that the delay in finding the Grievor his accommodated position was reasonable. Although the Union could have been involved earlier in the accommodation process than the Company permitted, the Union was advised of the Employer's efforts to find work for the Grievor.

20. In all the circumstances, I find that there was no infringement of the Grievor's rights under the collective agreement or under the *Canadian Human Rights Act*. This portion of the grievance is therefore denied.

21. The next issue is the Grievor being given only 5 hours of work a day, not 8 hours, and his being paid at the janitorial rate, not his own car mechanic rate. The reason the Grievor worked the fewer hours is explained by the Employer.

22. The Grievor was accommodated during the off-peak season (November to

May). The Passenger Depot is used daily 7 days/week during the high season (June 26 – Oct 14), but, for the rest of the year, in the off-peak season, it is used only 3 days/week. Consequently, when the Grievor was accommodated, the duties of his janitorial position were based on the Company's operational requirements for the off-peak season.

23. On this basis, I find that the Grievor could be accommodated only for the hours he worked and that, to have expected the Company to provide more hours, would have meant that the Company would be paying him for work it did not need. That would have been an undue hardship. So, giving the Grievor 5 hours, instead of a full shift schedule, was not a violation of his rights under the collective agreement or the statute.

24. Next is the rate at which the Grievor was paid – a rate below the car mechanic rate. He was paid for the work he performed, janitorial work, not car mechanic work. He was only entitled to the janitorial rate. (See *Canada Safeway Ltd v. Retail, Wholesale and Department Store Union, Local 454,* (2004) S.J. No. 153, 2004 SKQB 102., particularly para. 26). Accordingly, by paying the Grievor at a lower rate during his accommodation – a rate more appropriate to janitorial work – the Company did not violate the collective agreement or the statute.

25. In all the circumstances, I find the Company duly accommodated the Grievor. There was no violation of Article 6, Discrimination, nor of the other Articles of the collective agreement cited in the grievance, nor of the *Canadian Human Rights Act*. The grievance is dismissed.

DATED at TORONTO on June 16, 2016.

Christopher J. Albertyn
Arbitrator