

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2998

Heard in Calgary, Tuesday, 10 November and Montreal, Thursday, 10 December 1998

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

CanPar employee Mr. Larry McIntyre (CanPar Hamilton) being placed on a leave of absence without pay due to a medical disability May 01, 1998.

EX PARTE STATEMENT OF ISSUE:

The Union contends that Mr. McIntyre was cleared for full duties by Dr. R. Ogilvie (Mr. McIntyre's orthopaedic surgeon) and the Company's doctor, Dr. R. Gordon, before returning to full active duty March 09, 1998.

The Union requested the Company reinstate Mr. McIntyre to his position as a Driver Representative without loss of seniority, compensation or benefits to the conclusion of this case. The Company denied this request, claiming Mr. McIntyre was not fit to return to perform the essential duties of his pre-injury job.

The Union contends that the Company has discriminated against the disabled worker. The Union further contends that the Company has not met its obligation to accommodate the injured worker short of undue hardship.

The Union requested the Company with two (2) solutions to accommodate the injured worker on June 25, 1998. The Union requested that Mr. McIntyre be reinstated to a modified position, or to a new position that was bulletined at the Hamilton terminal that was seen by the Union as a reasonable accommodation to the worker, without undue hardship to the employer. The Company has not responded to our request.

FOR THE UNION:

(SGD.) D. NEALE
DIVISION VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
P. D. MacLeod	– Vice-President, Operations, Toronto
S. Derbyshire	– Supervisor, Calgary
P. Kitchener	– Supervisor, Hamilton

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
D. Neale	– Division Vice-President, Hamilton
A. Kane	– Assistant Division Vice-President, Vancouver
N. McMeekon	– Witness
L. McIntyre	– Grievor

On Thursday, 10 December 1998, there appeared on behalf of the Company:

M. D. Failes – Counsel, Toronto
P. D. MacLeod – Vice-President, Operations, Toronto
B. Neill – Vice-President, Human Resources, Toronto
P. Kitchener – Supervisor, Hamilton
J. Coleman – Regional Manager, Toronto

And on behalf of the Union:

D. Ellickson – Counsel, Toronto
D. Neale – Division Vice-President, Hamilton
L. McIntyre – Grievor

AWARD OF THE ARBITRATOR

The facts pertinent to this dispute are not contested. In July of 1990 the grievor, employed as a Driver Representative with the Company at its Hamilton Terminal since 1982, sustained a serious knee injury. After a number of unsuccessful attempts to return to work he was on extended medical leave in 1995, and during the period from 1995 to 1997 was assessed as having a permanent disability by the Workers' Compensation Board. It appears that his entitlement to Workers' Compensation benefits eventually ceased, and the grievor sought to return to work on an accommodated basis.

Although a note from his physician provided in January of 1998 indicated that the grievor was fit to return to full duties, the Company had residual concerns about his fitness to perform the work of a Driver Representative. Following an independent medical assessment by Dr. Robert G. Gordon whose report is dated February 12, 1998, Mr. McIntyre returned to work for a time. However, the deteriorating condition of the grievor's knee as he worked following his return caused the Company further concern. A further opinion, again obtained from Dr. Gordon caused the Company to conclude that the grievor was not able to perform the driver representative duties, as he was reduced to approximately 70% of efficiency. To perform the work would involve continuous lifting and bending of his knee which would risk further deterioration in his condition. On that basis the Company notified the grievor, by letter dated May 1, 1998 that he was being removed from service and placed on a medical leave of absence without pay.

The Union objected to the grievor being removed from his duties, which caused the Company to seek a further independent medical opinion. At the Union's urging the Company agreed to have Mr. McIntyre examined by an orthopaedic surgeon, Dr. Norton Lithwick. In a letter dated July 10, 1998 Dr. Lithwick commented, in part "There is no question that this man's previous work would cause significant deterioration of his knee joint. He would be best served by working in a relatively sedentary occupation."

The dispute presently before the Arbitrator concerns whether the Company failed to reasonably accommodate the grievor's physical disability. The employer admits that it was deficient in that regard, at least for the first weeks following the date the grievor was placed on his medical leave of absence commencing in early May. Thereafter, however, it submits that it did take reasonable steps to endeavour to find appropriate employment for Mr. McIntyre. By way of example, Counsel for the Company points to a letter dated June 9, 1998 sent to the grievor by Ms. Lynn Pothier, the Company's Health & Safety Co-ordinator. That letter reads in part:

We have received the restrictions as provided by the Kaizen Institute of no repetitive bending, lifting or carrying, unable to walk or stand for prolonged periods of time or climb a lot of stairs. Maximal lift should be restricted to 25 lbs. And capable of a light level of work only. Further, we have reviewed the work available in our Hamilton terminal and have been unsuccessful in matching a job to your restrictions.

We would appreciate receiving your input in this regard. Do you have any suggestions to offer which may help us to determine the type of work you feel you are capable of doing. **We would be willing to look outside the Hamilton terminal on your behalf.**

(emphasis added)

Counsel further points to a communication from the Company's Vice-President of Operations, Mr. Paul MacLeod to the Union's Division Vice-President, Mr. David Neale on June 19, 1998 which reads, in part:

... In addition, we are certainly prepared to consider accommodating Mr. McIntyre in a position which is suitable for him. Although there are obviously no such positions in the Hamilton Terminal, if Mr. McIntyre would like us to review available options in other locations or, if either the Union or Mr. McIntyre have any suggestions as to suitable positions please advise me.

The evidence reflects that Mr. MacLeod and the Company's Vice-President, Human Resources, Mr. Brent Neill, met with Mr. McIntyre and Mr. Neale on June 25, 1998. While somewhat contradictory evidence was given by the parties with respect to what was said during the course of that meeting, the Arbitrator is satisfied that to a certain extent the parties found themselves talking past each other. It does not appear disputed that the primary focus of Mr. McIntyre and his Union representative was to attempt to obtain for Mr. McIntyre access to a newly established lead hand position at Hamilton, presumably in the belief that it would require less physical activity. The Company's representatives made it clear that the lead hand job in fact involves a full burden of lifting parcels and performing pick-up and delivery duties, and that it would not be an appropriate modified duties position. Significantly, both Company representatives took the impression that Mr. McIntyre was not willing to consider working at any location other than Hamilton or Brantford. According to their recollection at one point when Kitchener was suggested as a possibility Mr. McIntyre indicated that that would be too far from his home.

The possibility of Mr. McIntyre working at other locations appears to have first been discussed in substantive terms at the initial hearing of this grievance in Calgary in November of 1998. At that time the Company indicated that there might be more sedentary work available for Mr. McIntyre in either Toronto or Mississauga. Subsequently a position in the Queen's Quay Parcel Facility at Toronto was identified, and Mr. McIntyre has been working at that location, approximately one hour's travelling time from his home, since then.

It is well established that not only the Company but also the grievor and his bargaining agent bear a degree of obligation in attempting to identify a position, modified or otherwise, which would reasonably accommodate the grievor's disability, short of the point of undue hardship. On the basis of the material before me I am satisfied that the grievor cannot, without undue hardship to the Company and hazard to himself, for the present hold a Driver Representative position, or any position which involves repeated bending and lifting. The position now occupied by Mr. McIntyre at the Queen's Quay Terminal, which essentially involves standing at a particular station and scanning parcels on a conveyor, is an appropriate accommodated position given his physical restrictions.

When regard is had to the whole of the evidence, the Arbitrator is persuaded that it is not appropriate in this case to direct any payment of compensation to the grievor for an alleged violation of the duty of accommodation by the Company. While the Company admits that technically it was remiss in not acting sooner to find suitable duties for the grievor during the period between May 1 and June 25, 1998, the fact is that Mr. McIntyre was also a contributor to the delay in ultimately resolving this problem. As noted above, on at least two occasions the Company made overtures in writing to Mr. McIntyre and his Union representative, indicating its willingness to consider assigning him to work at other locations without any constructive response from the grievor. I am satisfied that on June 25th Mr. McIntyre did create the clear impression in Mr. MacLeod, as well as Mr. Neill, that he was not interested in positions outside Hamilton or Brantford. That indication on his part plainly blunted the Company's efforts at conducting a broader job search.

In the result, therefore, the Arbitrator is satisfied that in light of the grievor's own conduct the Company did take reasonable steps to accommodate his condition. An order of compensation is not appropriate, as the delay in finally obtaining accommodated work for Mr. McIntyre was largely due to his own apparent reluctance to move beyond Hamilton or Brantford, at least prior to the November hearing. In my view this is also not an appropriate case for a declaration. I am satisfied that the Company acted responsibly in declining the grievor's wish, which persists to the present, to be returned to Driver Representative duties.

One further comment should be made. While Mr. McIntyre's condition has been evaluated as a permanent partial disability for Workers' Compensation purposes, the parties should appreciate that should there be a real improvement in his condition, medically substantiated, which would allow him to perform heavier duties than those which are now assigned to him, it will continue to remain an obligation of both the Company and the Union, as well as Mr. McIntyre, to consider his fitness to return to such work, should that day arrive. In the interim, however, the Arbitrator is satisfied that the Company has reasonably accommodated the grievor's disability. On that basis, therefore, the grievance must be dismissed.

December 17, 1998

(signed) MICHEL G. PICHER
ARBITRATOR

