

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 3140

Heard in Montreal, Thursday, 14 September 2000

concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS  
(UNITED TRANSPORTATION UNION)**

**EX PARTE**

### **DISPUTE:**

Appropriate accommodation of Conductor D.C. Field of Edmonton, Alberta.

### **COUNCIL'S STATEMENT OF ISSUE:**

In August of 1994, the grievor sustained an injury while detraining. He returned to work in May of 1995 and, after completion of a one-month work hardening program, resumed full duties albeit with temporary medical restrictions in place. In September of 1997, he was removed from full duties and placed on a Utility Person position at Clover Bar Yard. Shortly thereafter his restrictions were declared to be permanent.

The grievor was replaced by a non-restricted employee in July of 1998 and moved to another Utility Person position, this time in Walker Yard. In March of 1999, he was removed from service with no alternative positions provided to him.

The Union submits that the Company has violated the collective agreement, *Canadian Human Rights Act*, and has failed to properly accommodate the grievor.

The Union requests that the Company be ordered to provide the grievor with suitable employment and to compensate him for all wages lost, as well as for all other financial losses incurred as a result of this matter.

The Company contends that as the grievor is in receipt of Workers' Compensation Board benefits and is being retrained by the WCB, no further measures are required.

### **FOR THE COUNCIL:**

**(SGD.) R. A. HACKL**

**FOR: GENERAL CHAIRMAN**

There appeared on behalf of the Company:

J. Curtis McDonnell	– Counsel, Montreal
S. J. Blackmore	– Labour Relations Associate, Edmonton
R. Valliere	– Terminal Superintendent, Edmonton
L. Rea	– Transportation Officer, Edmonton

And on behalf of the Council:

M. Church	– Counsel, Toronto
R. A. Hackl	– Vice-General Chairman, Edmonton
B. J. Henry	– General Chairman, Edmonton
W. G. Scarrow	– Vice-President, UTU, Ottawa
D. C. Field	– Grievor

## **AWARD OF THE ARBITRATOR**

Upon a review of the material filed the Arbitrator has concerns as to the Company's approach to the accommodation of the grievor's disability.

The evidence discloses that following his return to work in May of 1995 the grievor did undertake productive work for the Company, notwithstanding his physical restrictions. Specifically, he was placed in hump and transfer jobs in yard service, as those were the least physically challenging. According to the evidence before the Arbitrator he acquitted himself well in those functions. However, in May of 1996 the Company refused to train the grievor in belt pack equipment, based on its belief that the weight of the belt pack equipment would be unduly onerous. That conclusion appears questionable given the weight of the equipment and the actual limitations of Mr. Field. However it does appear that his permanent restrictions, which include limitations on walking, prolonged standing, repetitive climbing and climbing on moving equipment, could have a bearing on certain functions which he might be able to perform.

The evidence establishes, however, that following his removal from hump service the grievor worked as a transfer conductor from May of 1996 to September of 1997, apparently without incident. He was informed in September of 1997 that he was being replaced by a non-restricted employee, apparently because the Company preferred to have such an individual in his position. The grievor was then transferred to a utility person position at Clover Bar Yard where he worked from September of 1997 to July 1998, when he was again replaced by a non-restricted employee. He was then moved to a utility person position in Walker Yard driving an eight passenger van. Upon the expiry of the lease of the van the Company reverted to utilizing taxi service. Following a period of vacation, on April 8, 1999 the grievor was informed that there was no work available for him.

Mr. Field has not been terminated by the Company. Rather, the Company took steps to have him enter a retraining program, at its expense, administered by the Workers' Compensation Board of Alberta. Mr. Field is presently undergoing retraining at the WCB for work as a computer technologist.

The Company takes the position that the grievance is in fact premature, and that any decision as to the ultimate accommodation of Mr. Field must await the completion of his retraining with the WCB. The Arbitrator has some difficulty with that submission. Clearly, in keeping with the requirement of the **Canadian Human Rights Act**, the Company was under an ongoing obligation to accommodate the grievor's disabilities from the outset. Before the Arbitrator is evidence of a number of relatively unexplained actions on the part of the Company whereby Mr. Field was removed from productive service without any apparent explanation, save that the Company preferred to have a medically unrestricted employee performing the work which he had been successfully performing. A good example of that circumstance would be his removal from the transfer assignment, a job which he apparently fulfilled without incident or difficulty, and likewise his removal from the utility position at Clover Bar, when he was again replaced by an employee without restrictions. There is no evidence brought on the part of the Company to suggest that the grievor was in fact unable to fulfil the duties of either of those positions.

While the Company makes the argument that the grievor did not object when he was removed from the transfer assignment and the Clover Bar utility job, that would appear to be consistent with his own approach of being co-operative with the Company, and raising no complaint as long as he remained in gainful employment. It is only when the final utility job ceased to exist, and he found himself without work, that Mr. Field filed the instant grievance, effective May 2, 1999. In the Arbitrator's view the issue is not, as the Company would have it, whether there has been a failure of accommodate only since that date, but rather whether the Company did in fact fail to accommodate Mr. Field through the succession of job opportunities which it gave to him, and subsequently removed. Included in the analysis would be the apparent failure to consider him for training as a rail traffic controller, a situation which apparently became available in June of 1999.

On the whole, the Arbitrator is not persuaded that the Company has diligently pursued its duty to accommodate the grievor's disabilities. I so declare, and in light of the submissions of the parties made at the hearing, I retain jurisdiction in respect of any issue of compensation which may arise, as well as the ultimate form of accommodation which may yet be determined in respect of the grievor.

September 18, 2000

**(signed)MICHEL G. PICHER**  
**ARBITRATOR**