

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3141

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:

Loss of earnings due to restriction being placed on S.L. Smith of Edmonton, Alberta.

COUNCIL'S STATEMENT OF ISSUE:

The grievor commenced employment with the Company in May of 1994, where she worked primarily in yard service at Edmonton's Walker Yard. With the introduction of Belt Pack (LCS) technology, the grievor quickly discovered that the LCS equipment did not interact well ergonomically with her body. Different harnesses were tried, to no avail. As a result, a restriction was placed on the grievor by the Company's Medical Officer, Dr. Rud, prohibiting her from operating LCS equipment.

With more and more assignments being converted to LCS equipment in Edmonton, the grievor was unable to hold an assignment working with a conventional engine any longer. She is also unable to exercise her seniority to other terminals due to the restriction. The Union agreed to temporarily relax seniority provisions in the terminal of Edmonton in order to accommodate the grievor until a permanent solution could be found.

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

The Company is of the opinion that the grievor has been adequately accommodated and that use of LCS equipment is a *bona fide* occupational requirement when the grievor hired on and as such the Company is not required to provide any further accommodation.

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
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R. A. Hackl	– Vice-General Chairman, Edmonton
B. J. Henry	– General Chairman, Edmonton
W. G. Scarrow	– Vice-President, UTU, Ottawa
S. L. Smith	– Grievor

AWARD OF THE ARBITRATOR

The Council alleges that the Company failed to accommodate the grievor's status as a female, specifically when she encountered difficulties operating belt pack equipment. Because she is large breasted, Ms. Smith found it impossible to wear the normal harness which houses the belt pack which is part of the LCS equipment governing the remote control of yard locomotives in switching operations.

The Arbitrator accepts the submission of the Council that the Company does have an obligation to accommodate the grievor as a female, and that it cannot unreasonably impose upon her the wearing or operation of equipment suited to a male, without reasonable efforts at accommodation short of undue hardship. If there was any doubt about that obligation it would, in my view, be entirely removed by the relatively recent decision of the Supreme Court of Canada in **British Columbia (Public Service Employee Relations Commission) v. B.C. Government and Government & Service Employees' Union (Re: Tawney Meiorin)** (1999) 176 D.L.R. (4th) 1 (S.C.C.).

The real issue in the case at hand is, therefore, whether the Company has fulfilled its obligation of accommodation. On the evidence disclosed I am satisfied that it has. No issue is taken with the fact that the normal belt pack harness caused physical problems to Ms. Smith. In fact the construction of the normal shoulder strap put undue stress on her chest area, causing some irritation and bruising. It also appears clear that a modified harness prepared by the Company at some expense, which resulted in the belt pack sitting on the grievor's abdomen, also caused unacceptable discomfort, including bruising to her thighs and unacceptable impediment in her physical movements, particularly in climbing upon equipment during switching operations.

The evidence is clear, however, that the Company did not turn a deaf ear to the concerns raised by the grievor and her bargaining agent. After her initial difficulties with the belt pack the grievor was removed from belt pack assignments, being placed into other productive work, for a period of time. It also appears that a letter from the grievor's physician to the Company caused the Company to believe that among the concerns raised was the possible impact of the radio transmission waves associated with the belt pack. That caused the Company to obtain the opinion of an expert in the field, Dr. O.P. Gandhi, of the University of Utah Faculty of Electrical Engineering, to determine whether there was any danger to the grievor or other employees by reason of radio waves. The resulting report was negative. The Council stresses, however, that the real concerns of the grievor were always ergonomic, and had little or nothing to do with any concern over radio waves.

In response to the ergonomic concern, the Company brought an expert from Montreal to Edmonton on April 15 and 16, 1998 to design a better suited belt pack harness for two Edmonton employees, including the grievor. It appears that the re-designed harness was found acceptable by the other employee, but did not satisfy the needs of Ms. Smith. During the time in question Ms. Smith was not required to work LCS positions, and as belt pack was being gradually introduced there were sufficient non-LCS positions available to her until late August of 1998.

The Company's efforts at re-designing the belt pack harness continued however. In September and October of 1998 the Company retained Ms. Heidi Robinson of Ergoworks Inc. to review the problem. The Company then had a harness supplier fit the grievor for a custom designed belt pack harness, with an initial fitting taking place on January 22, 1999 and field tests on February 12, 1999 followed by further design adjustments. That resulted in a re-tailored belt pack harness being presented to Ms. Smith on March 3, 1999.

Matters came to a head in early March. It appears that as of March 7 the grievor could no longer hold non-LCS work, by reason of her seniority. Additionally, on March 7, she refused to work the belt pack, invoking Part II of the **Canada Labour Code**, citing her own belief that the belt pack caused her health and ergonomic problems. That refusal resulted in an inspection and ultimately a written report by a Transport Canada Safety Officer whose opinion, dated March 11, 1999 confirmed the conclusion that there was no danger to the grievor in the operation of the equipment. A subsequent appeal to the Canadian Industrial Relations Board was eventually withdrawn on September 2, 1999.

It appears that on March 10, 1999 the grievor attended work and attempted to utilize the belt pack unit. Some two hours into her tour of duty she stopped working and booked off, saying that she could not physically continue. It appears that she kept herself unavailable for duty on a number of days thereafter. It also appears that the grievor was held out of service for a period of some six days while the Company conducted a formal investigation into the circumstances surrounding her booking off by reason of discomfort in using the belt pack harness.

Ultimately the parties came to an understanding which allowed the grievor to again perform non-LCS work, notwithstanding that her seniority might not otherwise allow her to hold such assignments. In a letter dated May 12, 1999 the agreement between the Company and the grievor's union is reflected in a letter dated May 12, 1999, addressed to the grievor by Senior Operations Officer Rodney Shulha. It reads, in part:

Details of this agreement include your bidding all non-LCS assignments within the Greater Edmonton Terminal. If the occasion arises where your seniority will not allow you to hold a non-LCS assignment, then the junior employee holding a non-LCS position will be displaced and you will hold that assignment until the next Board Change. In this manner, you will not have to work with LCS equipment while not incurring adverse affects. (sic)

In the result, the grievor was permitted to work, out of seniority, a switching assignment at a refinery. She apparently continued to perform that function without incident until she became pregnant. It appears that her pregnancy necessitated her removal from the refinery assignment, for health reasons. That matter is the subject of another grievance which has no bearing on the instant dispute. It does not appear disputed that following the forthcoming birth of her baby the grievor will have the opportunity to return to the refinery assignment.

What, then, does the totality of the evidence disclose? It appears beyond dispute that the grievor has encountered substantial physical difficulty with the belt pack and belt pack harness initially provided to her. The evidence is clear, however, that the Company did make serious efforts, at some expense, to re-design the harness and belt pack equipment to better suit Ms. Smith. Unfortunately those efforts were not successful. When it eventually became clear that she was unable to hold non-LCS work, an accommodation was reached whereby she was permitted to hold the refinery switching assignment, out of seniority order, an arrangement which continued until such time as she became pregnant.

In the Arbitrator's view, subject to the days for which the grievor was held out of service for investigations, the evidence discloses that the Company has made reasonable efforts at accommodating the grievor in the face of the difficulties which she had with both the standard belt pack equipment and the attempted re-designs of the harness initiated by the Company. In general it appears to the Arbitrator that the Company has acted in good faith throughout, attempting to respond to the grievor's concerns as best it could. The only exception to that, in my view, is the questionable holding out of service of Ms. Smith during the investigations conducted by the Company. While the Arbitrator does not question that those investigations may have been appropriate, it appears to me in the circumstances of the case that the grievor should not then have been held out of service without compensation. The Arbitrator therefore directs that the grievor be compensated for the days she was held out of service for any investigations relating to her difficulties with the belt pack equipment. In all other aspects the grievance must be dismissed.

September 18, 2000

(signed) MICHEL G. PICHER
ARBITRATOR