CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3173

Heard in Calgary, Thursday, November 16, 2000

Concerning

CANPAR

And

UNITED STEELWORKERS OF AMERICA

TRANSPORTATION COMMUNICATIONS LOCAL 1976

DISPUTE:

Johann Wilson (Vancouver) regular numbered route assignment.

JOINT STATEMENT OF ISSUE:

The Union filed a grievance regarding the above mentioned matter on March 29, 2000. The Company denied the Union's request to settle the matter on. To date the Company has denied the Union's request to settle the matter.

The Union contends that the Company is in violation of article 5.2.14 of the collective agreement, and has discriminated against the grievor on the proscribed grounds of religion as outlined in the *Canadian Human Rights Act*. The Union has grieved that the grievor is able to meet the core responsibilities of his bulletin and should not have been made to vacate his regular numbered route assignment. The Union has grieved that the grievor's request would not place an undue hardship on the Company.

The Company contends that the grievance is untimely, and that they have at least attempted to accommodate the grievor. The Company has argued that the grievor is unable to complete his assigned duties under his bulletin, and have stated that the Union's suggestion regarding an accommodation acceptable to the grievor unworkable.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) A. KANE	(SGD.) P. D. MACLEOD
GOVERNING BOARD REPRESENTATIVE	VICE-PRESIDENT, OPERATIONS

Appearing on behalf of the Company:

M. D. Failes	– Legal Counsel, Toronto
P. D. MacLeod	– Vice-President, Operations, Toronto
E. Donnelly	– Regional Manager, British Columbia
D. Dobson	– Supervisor, Vancouver

Appearing on behalf of the Union:

A. Kane	– Governing Board Representative, Vancouver
B. Plante	– Local Chairman, Calgary
J. Wilson	– Grievor

AWARD OF THE ARBITRATOR

The issue in the case at hand is whether the grievor has been reasonably accommodated, by reason of the Sabbath observance requirements of his faith as a Seventh Day Adventist. It is common ground that prior to becoming a member of the Church, Mr. Johann Wilson, a Vancouver P&D driver, worked an 8:00 a.m. bulletined route in West Vancouver, on a regular basis. In that capacity he worked forty hours per week with an 8:00 a.m. start time, employed in loading and unloading his vehicle, performing the pick-up and delivery of parcel freight and any other miscellaneous duties that might be assigned. His regular work frequently involved working past sunset on Friday, the commencement of the Sabbath for Seventh Day Adventists.

The Company became aware of the grievor becoming a Seventh Day Adventist in November of 1999. A number of possibilities were discussed between Mr. Wilson and the Company with respect to work assignments which might be given to him as a means of accommodating the fact that he could not work beyond sunset on Fridays. It appears that among the alternatives considered was the assignment of Mr. Wilson to do pick-ups and deliveries on the Coquitlam route, which appears to be more centrally located, and allows for the substitution of other drivers, without difficulty, in the late afternoon of Fridays. It appears that Mr. Wilson performed work on the Coquitlam route from November of 1999 through March of 2000, at which point he became unhappy with that assignment, and registered his displeasure with his Union.

The Union filed the instant grievance by way of a letter from then Local Chairman Al Kane dated March 29, 2000. Among other things, the grievance complains of the fact that Mr. Wilson's start time was altered from 8:00 a.m. to 9:00 a.m., on the Coquitlam route, and that he has effectively been given the status of an unassigned driver. The thrust of the Union's submission in these proceedings is that reasonable accommodation of Mr. Wilson's situation could and should have been achieved by leaving him undisturbed on his West Vancouver route, and making adjustments on Fridays to have another driver from an adjacent location complete deliveries and pickups on that route in the late afternoon. The Union's representative stresses that that arrangement would in fact be necessary only during the winter period of the year when the sun sets early, and might not be necessary during months of longer daylight.

Counsel for the Company submits that the proposal advanced by the Union as part of this grievance is in fact not viable from an operational standpoint. He notes that the West Vancouver route is in a location which becomes difficult of access during the late afternoon rush hour period. Stressing that the route consistently requires late day pick-ups in West Vancouver, Counsel maintains that to accommodate the grievor on that route would necessitate the hiring of an employee to be available for the time necessary to cover the area on Friday afternoons, including a considerable loss of productive time getting from the terminal to West Vancouver in rush hour traffic. Those difficulties and extra costs, he submits, do not arise if the grievor is assigned to a route which is more central to the Vancouver Terminal, as is the case with the Coquitlam route which Mr. Wilson worked from November of 1999.

The data filed in evidence by the Company confirms that in fact the grievor did not lose any meaningful work opportunities or wages as a result of being assigned to the Coquitlam route. Between December of 1998 and October of 1999 Mr. Wilson had a total of 1,891.5 regular work hours available to him. After the adjustment, from December of 1999 to October of 2000, he recorded virtually the same amount, registering a total of 1,886 regular hours available to him. It also appears to be common ground that overtime opportunities are no less available to Mr. Wilson in the alternative assignment which he was given, than he would have enjoyed on the West Vancouver route.

The evidence before the Arbitrator does not disclose an attitude of indifference on the part of the employer. It does not appear disputed that in fact, prior to the filing of the grievance, some five separate options were offered to Mr. Wilson as a means of accommodation. In answer to the suggestion of the Union's representative that the unassigned route of Coquitlam, and the later start time of 9:00 a.m. operated as a hardship, counsel for the Company points to the fact that among the routes offered to Mr. Wilson was the Oak Ridge delivery route, a regular bulletined assignment similar to West Vancouver, commencing at 8:00 a.m. For reasons he best appreciates, Mr. Wilson declined that offer.

The issue in this grievance is whether the Company has, as the Union contends, failed to reasonably accommodate the grievor's religious faith, and treated him contrary to article 5.2.14 of the collective agreement and the protections of the **Canadian Human Rights Act**. The collective agreement provision in question provides, in part:

5.2.14 Number Routes

Regular numbered routes will be established.

Each regular numbered route will be assigned to a Driver Representative, on a continuing basis.

This does not preclude the Company from making adjustments to routes due to fluctuations of traffic.

An employee removed from his/her regular route will be returned immediately upon re-establishment of said route. …

The above provisions reflect a compromise reached between the parties. It is common ground that employees cannot bid routes on the basis of their seniority. They can, however, expect to hold their assigned regular numbered route on a continuing basis.

I am satisfied on the material before me that there was no substantial undermining of the grievor's rights in respect of article 5.2.14. As noted above, the grievor has been assigned to a regular numbered route, in respect of the Coquitlam run. To the extent that that assignment can be said to involve a less stable assignment with more frequent changes in delivery and pick-up destinations, the evidence also confirms that the Company offered Mr. Wilson an extremely stable numbered route with an 8:00 a.m. start time, in the form of the Oak Ridge route, which he declined.

At the heart of this dispute is the position of the Union that the Company has deprived Mr. Wilson of the accommodation he would prefer, which is the tailoring of the West Vancouver route to allow him to continue in that assignment, with relief on Friday afternoons. The position of the Company is that it is not the obligation of the employer to necessarily fashion the accommodation which the grievor prefers, but only to offer an accommodation which is reasonable, which causes no real difficulty to Mr. Wilson and which avoids undue hardship to the Company. The Company maintains that it is under no obligation to suffer hardship itself by being compelled to hire an additional employee, or to re-adjust Mr. Wilson's previous West Vancouver route in ways that are not operationally viable, for example by hoping to count on the availability of drivers on adjacent routes to cover West Vancouver on Friday afternoons.

The Arbitrator is satisfied that the approach adopted by the Company is in keeping with its obligations under the **Canadian Human Rights Act**. It now seems well-established that when an employee seeks accommodation by reason of a status that is protected under the **Canadian Human Rights Act**, it is incumbent upon the employee concerned to contribute positively to the process, and to accept an offer of reasonable accommodation, even though it might not be the specific accommodation which the employee would prefer. That is reflected, in part, in the decision of the Supreme Court of Canada in **Central Okanagan School District No. 23 v. Renaud** [1992] 2 S.C.R 970. In that decision, for a unanimous court, Sopinka J. wrote as follows:

> To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.
>
> This does not mean that, in addition to bringing to the attention of the employer the facts relating to the discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

In addition, a recent decision of the Ontario Court of Appeal confirms that where an employer can fulfil the duty of accommodation by offering appropriate scheduling changes, it need not demonstrate that an alternative form of accommodation, such as a leave of absence of pay, would necessarily result in undue hardship. (See **Ontario**

(Ministry of Community and Social Services) v. Grievance Settlement Board, a decision of the Ontario Court of Appeal issued on September 18, 2000 [2000] O.J. No. 3411.)

In answer to the question which is at issue, the Arbitrator is compelled to conclude that the employer has indeed made reasonable accommodation for the grievor's employment in light of his religious beliefs and obligations. It has continued to provide to him full employment, albeit on a different route and schedule, without any loss of working opportunities or potential earnings, in the form of overtime or otherwise. It has provided him relief on Friday afternoons without fail.

Nor can the Arbitrator conclude that the alternatives offered to Mr. Wilson constituted, as the Union suggests, a significant decline in the quality of his working life so as to violate the duty of accommodation. Even if it is accepted that the Coquitlam route, with its later start time and more frequent changes in delivery and pick-up destinations can be said to be somewhat less desirable than West Vancouver, it would not be unreasonable to expect the grievor to contribute to the process of accommodation by accepting that adjustment. Moreover, in the case at hand, the unrebutted evidence is that among the options offered to Mr. Wilson by the Company was a stable, regular bulletined route, Oak Ridge, which had the same 8:00 a.m. start time as his prior assignment in West Vancouver. In all of the circumstances it is difficult to imagine more fair treatment, involving several offers which would fully accommodate the grievor's religious obligations. On the Coquitlam route, Oak Ridge, or any other route which was offered, the Company was fully prepared to relieve Mr. Wilson of his duties well before sunset on Fridays.

While it may be arguable that different formulas of accommodation might be fashioned, some of which could be more appealing to Mr. Wilson, it is not the obligation of the Company under the **Canadian Human Rights Act** to necessarily offer an employee seeking accommodation the precise accommodated assignment that he or she might demand. If the employer offers to the employee a work opportunity involving substantially similar working conditions and earnings opportunities, as was manifestly done in the case at hand, in a manner which does not involve any significant adversity to the employee, it has fulfilled its obligation of reasonable accommodation. Moreover, although I do not consider that it was necessary for the Company to prove it, as confirmed by the Ontario Court of Appeal. In the instant case the continued assignment of the grievor to the West Vancouver route would, in my opinion, constitute undue hardship upon the Company, given the dislocation and additional expense which that alternative would involve.

For all of the foregoing reasons the Arbitrator is satisfied that the Company has not violated article 5.2.14 of the collective agreement, and has not discriminated against Mr. Wilson contrary to the **Canadian Human Rights Act**. The offers made to him for alternative assignments to accommodate his religious obligations are manifestly within the ambit of reasonable accommodation as contemplated within the **Act**. The grievance must therefore be dismissed.

November 20, 2000

(signed) MICHEL G. PICHER
ARBITRATOR