

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3219

Heard in Calgary, Wednesday, 14 November 2001 and Tuesday, 12 November 2002

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

EX PARTE

DISPUTE:

Appropriate accommodation of Conductor Lorraine Broadley of Edmonton, Alberta.

COUNCIL'S STATEMENT OF ISSUE:

On March 7, 1992, Ms. Broadley suffered an injury during the course of her duties. Ms. Broadley was subsequently retrained as a switchtender.

The Company abolished the switchtender positions in Edmonton in early 1999. The grievor continued to work as a spare traffic coordinator until September 1999 at which time the traffic coordinators' spareboard was abolished. The grievor, even though her seniority would allow her to hold work in yard service, was prohibited to do so due to her medical restrictions.

Despite numerous applications and requests for accommodated duties from the grievor and the Union she has been provided with only minimal work and no meaningful attempts at accommodation have been made by the Company.

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

The Union requests that the Company be ordered to provide Ms. Broadly with suitable employment and to compensate her for all wages and benefits lost.

FOR THE COUNCIL:

(SGD.) R. HACKL

FOR: GENERAL CHAIRPERSON

On Wednesday, 14 November 2001, there appeared on behalf of the Company:

D. N. Kruk	– Counsel, Edmonton
S. J. Blackmore	– Labour Relations Associate, Edmonton
R. Eisenman	– Transportation Supervisor
L. Rea	– Transportation Supervisor, Edmonton
R. Reny	– Human Resources Associate, Vancouver
S. Zeimer	– Human Resources Associate, Vancouver

And on behalf of the Council:

D. Ellickson	– Counsel, Toronto
B. J. Henry	– General Chairperson, Edmonton
R. Hackl	– Vice-General Chairperson, Edmonton
B. Boechler	– Vice-General Chairperson, Edmonton
S. Hartley	– Local Chairperson
L. Broadley	– Grievor

At the request of the parties, the Arbitrator adjourned the hearing *sine die*.

On Tuesday, 12 November 2002, there appeared on behalf of the Company:

D. N. Kruk	– Counsel, Edmonton
S. J. Blackmore	– Manager, Human Resources, Edmonton
L. Rhea	– General Supervisor, Calgary

And on behalf of the Council:

M. A. Church	– Counsel, Toronto
R. Hackl	– Vice-General Chairperson, Edmonton
B. Boechler	– Vice-General Chairperson, Edmonton
M. Valade	– Observer
L. Broadley	– Grievor

AWARD OF THE ARBITRATOR

The record before the Arbitrator discloses that over a number of years the Company did take measures to accommodate Ms. Broadley's physical disability. It did so, in part, by allowing her to work as a switchtender and as a traffic coordinator in Edmonton. The record discloses that she was also permitted to work, for a period of time between December of 2000 and April of 2001, in a clerical position in the Network Operations Centre. The grievance remains unresolved, however, largely by reason of the reduction of positions at Edmonton, including switchtender and yard coordinator positions, for which the grievor is qualified and which she could claim in the normal course by reason of her seniority. It is not disputed, however, that the employer's duty of accommodation, short of undue hardship, is ongoing.

On the material before me I am satisfied that in one respect the Company did fail the exercise of that obligation. The record discloses that in April of 2002 the grievor was selected for training for the position of crew dispatcher. She followed the training from April 15 to May 22, 2002. Unfortunately, she scored 78% on one segment of the course. The passing grade was 85% and a score of 80% was the normal standard necessary for a candidate to be allowed a rewrite. For reasons which it best appreciates the Company formed a strong opinion, expressed without reservation in a negative and destructive letter written by CIP Claims Agent Randy J. Roach to the Workers' Compensation Board of Alberta, dated May 24, 2002. The opinion of Mr. Roach, expressed unreservedly, is that Ms. Broadley knowingly and deliberately failed the qualification test to avoid having to work. Based on his opinion that the grievor acted fraudulently, Mr. Roach urged the Workers' Compensation Board to disentitle her to any further benefits. That is what it did, and she has remained without income since that time.

The Company's representations to the Arbitrator at the hearing did not deal in any substantive way with the evidence which may have caused Mr. Roach to reach his conclusion. While his letter to the Workers' Compensation Board refers to the grievor's conduct and alleged reluctance during the training program, no evidence whatsoever was adduced in support of those allegations. Moreover, they would appear to be entirely at odds with the balance of the material before the Arbitrator, which suggests that the grievor has faithfully applied for virtually all openings and work opportunities for which she is qualified and physically able.

On balance, the Arbitrator is compelled to conclude that the employer failed in its obligation of accommodation to the grievor as relates to the events surrounding her attempt to qualify as a crew dispatcher. Given the employer's knowledge of her inability to hold any position other than a sedentary job, the refusal to allow her to rewrite the test by reason of her having been 2% below the normal standard seems harsh in the circumstances, and to have been taken without any regard to the duty of accommodation. While the Union has not submitted that the Company, through the letter of Mr. Randy J. Roach, conspired to rid itself of the burden of an injured employee, and the Arbitrator need make no finding in that regard, it does appear that there was a failure to accord Ms. Broadley

reasonable consideration with respect to the possibility of re-writing the qualifying test for the position of crew dispatcher. For the purposes of clarity, the Arbitrator expressly rejects the suggestion implicit in Mr. Roach's letter that she was able to deliberately aim her performance to a point 2% below the threshold as means of avoiding work and thereby continuing to receive workers' compensation benefits.

The Arbitrator therefore remits this matter back to the parties, with a direction that the grievor be allowed the opportunity to again undertake the training and examination for qualification as a crew dispatcher. Should she succeed in that endeavour she shall be entitled to hold work in that position on the basis of having qualified in the normal course following her training period in April and May of 2002, assuming a successful rewrite at that time.

The foregoing direction does not, obviously, prevent the parties from examining alternative means of accommodating the grievor, should they be able to reach some other agreement in that regard. Should there be any dispute between the parties as to the interpretation or implementation of this award, the matter may be spoken to.

November 19, 2002

(signed) MICHEL G. PICHER
ARBITRATOR