CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3267

Heard in Montreal, Thursday, 13 June 2002

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

DISPUTE:

The accommodation of Ms. N. Dougherty of Calgary.

JOINT STATEMENT OF ISSUE:

Ms. N. Dougherty of Calgary was employed in the running trades as a conductor/yard foreperson until November 19, 1997 when she sustained a work related injury to her left knee which has resulted in her inability to return to her pre-injury employment in the running trades due to medical restrictions placed upon her.

The Council contends that Ms. Dougherty has a right to be accommodated within the workplace within a position other than that of a running trades employee provided she can demonstrate the necessary skills to perform other work within the Company. Specifically, the Council is of the opinion that the employer is required to accommodate an injured employee unless there is a bona fide occupational requirement preventing such accommodation. The Council further contends that in situations where the Company has a need to hire new employees and there are existing employees who are in need of accommodation that such existing employees should be given the first opportunity to prove that they are capable of performing the work for which the Company is hiring without the need of going through a hiring process per se. In this regard the Council contends that Ms. Dougherty should have been given an opportunity to train as a crew dispatcher when the Company was hiring new crew dispatchers and that she should have been given this opportunity without the need to qualify for the opportunity by way of a skills assessment interview process.

The Company contends that it has the right, as it did in the case of Ms. Dougherty, to conduct a skills assessment interview to determine if an employee in need of accommodation has the required skills to fill a given position. Moreover, the Company further contends that Ms. Dougherty does not have the required skills to work as a crew dispatcher and placing her in that position would constitute an undue hardship.

The Council has asked that Ms. Dougherty be placed into training forthwith as a crew dispatcher and that upon successful completion of her training that she be considered to be senior to all others who have been selected for that position since the time of the original declination by the Company to place her into training as a crew dispatcher. The Company contends that such a remedy cannot be awarded by the arbitrator as the position of crew dispatcher is in another bargaining unit.

The Company denies all the union contentions and has declined the Council's request.

FOR THE COUNCIL:

(SGD.) L. O. SCHILLACI
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) J. C. COPPING
FOR: GENERAL MANAGER OPERATIONS

There appeared on behalf of the Company:

K. Fleming	– Counsel, Calgary
C. M. Graham	– Labour Relations Officer, Calgary
D. Guérin	– Labour Relations Officer, Calgary
D. T. Cooke	– Manager, Industrial Relations, Calgary

And on behalf of the Council:

M. Church	– Counsel, Toronto
D. Finnson	– Vice-General Chairperson, Calgary
J. G. Caruso	– Grievor

And on behalf of the Intervenor:

P. Conlon	– Chairman, Board of Trustees, USWA, Local 1976, Toronto

AWARD OF THE ARBITRATOR

The Company, and the intevenor union, United Steelworkers of America, Local 1976, raise a preliminary objection to the jurisdiction of the Arbitrator to grant the remedy sought by the Council. The Council requests an order of the Arbitrator directing the Company to accommodate the grievor's disability by placing her in the position of crew dispatcher, a job which falls within the separate bargaining unit of the Steelworkers. It requests that she be given seniority in that bargaining unit from the date at which the Council maintains she should have been taken into employment as a crew dispatcher when people were being newly hired into the position.

The facts are not in dispute. Ms. Dougherty worked as a conductor/yard foreperson in Calgary from the time of her entry into Company service in August of 1994 until November of 1997. She then sustained a work related injury to her knee which, it is not disputed, resulted in her inability to perform any work within the running trades by reason of permanent medical restrictions.

As a result of discussions between the Council and the Company, the employer agreed to allow the grievor to apply for the position of crew dispatcher, within the bargaining unit represented by the Steelworkers. It is common ground that a number of positions were being filled at the time, some by newly hired employees. Ms. Dougherty was interviewed for the position on July 18, 2000 and was advised on July 21 that she was not selected for the position. The material filed by the Company, which is unrebutted, is that assessments of the grievor by the Company, including one made in relation to an earlier application for a position as train performance monitoring analyst (TPMA), a job falling within the bargaining unit of the Rail Canada Traffic Controllers, indicates that she has substantial deficiencies in the qualifications for the position of crew dispatcher. During the process of her assessment for the TPMA position the grievor was found to lack a commitment to tasks, and to have deficiencies in decision making and problem solving skills, as well as versatility. That assessment was made in the matrix of tests established by external consultants designed to assess five areas of competency deemed essential to that position.

In respect of the crew dispatcher position, for which she was considered in June and July of 2000, although Ms. Dougherty received an acceptable mark in an initial written questionnaire, a subsequent interview again found her to be lacking in certain essential qualifications. Among those were cooperativeness, problem solving and communication skills. In addition, it was concluded that the grievor is "not goal oriented and would not work well in a team environment." On the basis of that assessment the Company determined that Ms. Dougherty was not qualified for the position of crew dispatcher.

It may be noted that a number of employees from the Company's disability management program were invited to apply for crew dispatcher positions. Of eleven original disabled candidates, seven progressed to the interview stage and three were finally selected for the training program. The objective evidence would, therefore, sustain the view that the Company has made reasonable efforts to make the crew dispatcher positions available to qualified employees with disabilities.

The grievance raises a jurisdictional issue not previously resolved by this Office. Counsel for the Council submits that the Arbitrator has jurisdiction to direct a remedy which would go beyond the framework of the collective agreement, and effectively place the grievor into employment in the separate bargaining unit of the Steelworkers. That, he submits, flows from the provisions of section 60 of the **Canada Labour Code** which provides, in part, as follows:

> **60. (1)** An arbitrator or arbitration board has
>
> …
>
> **(a.1)** the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is conflict between the statute and the collective agreement;

Counsel for the Council submits that the Arbitrator has, by virtue of the above provision, the power to make a direction, notwithstanding the limits of the collective agreement, consistent with the Company's obligation of accommodation of the grievor's disability, as mandated by the **Canadian Human Rights Act**. In support of that principle he cites the decision of Arbitrator Fisher in **Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 79** (1993), 30 L.A.C. (4th) 357. In that case Arbitrator Fisher found that he did have jurisdiction to direct the employment of a disabled individual in a position outside the bargaining unit, by virtue of his jurisdiction to apply the provisions of the **Ontario Human Rights Code**, which are similar to those of the **Canadian Human Rights Act**. Reference is also made to the relatively exhaustive analysis of the issue by Arbitrator Christie in **Re Queen's Regional Authority and International Union of Operating Engineers, Local 942** (1999), 78 L.A.C. (4th) 269. In that award Arbitrator Christie sustained the objection of the grieving union that the Company had improperly moved a disabled employee into its ranks, across bargaining unit lines. He did so, however, on the basis that there had not been an adequate effort at considering the restructuring of jobs in the employee's original bargaining unit as a first means of accommodation. At p. 285 Arbitrator Christie commented:

> I have concluded that the P.E.I. *Human Rights Act*, interpreted and applied as the Supreme Court of Canada has interpreted and applied similar legislation, does impose a duty on employers and unions to accommodate protected employees across bargaining unit lines. However, I should be slow to conclude in any particular case that the duty prevails to that extent. Thus I will find that the duty to accommodate across bargaining unit lines overrides collective agreement rights of any significance only where the need to accommodate is clear, in that the claim of the person to be accommodated obviously outweighs the claims of those whose rights are displaced and where there is no other reasonable way to fulfil it.

In the case at hand the Council makes a compelling case for the jurisdiction this Office to make a direction for the accommodation of an employee across bargaining unit lines. If such a jurisdiction does exist, a matter on which I make no finding, like Arbitrator Christie, it would be my view that the resort to so extraordinary an alternative must be based on the parties first demonstrating that accommodation within the employee's original bargaining unit could not be achieved without undue hardship. Secondly, it would also have to be shown that no undue hardship is inflicted by the movement of the disabled employee into another bargaining unit. Undue hardship would arguably result in the receiving bargaining unit if an individual already employed within that bargaining unit should lose their employment, suffer a significant reduction in wages or otherwise undergo significant adverse consequences as a result.

In the instant case I find it unnecessary to resolve those issues or the overall jurisdictional question as they might relate to the circumstances of the grievor. I come to that conclusion because I am satisfied, based on the evidence before me, that the Company gave Ms. Dougherty full and fair consideration for being hired into the position of crew dispatcher, and came to the conclusion, in good faith and based on legitimate business concerns unrelated to her disability, that she was not qualified for the position. In that circumstance, regardless of the jurisdictional issue discussed above, I cannot conclude that the Company violated the duty of reasonable accommodation in declining to place the grievor into the position of crew dispatcher at Calgary. The position of crew dispatcher requires a high level of communication skills as well problem solving and decision making abilities. The Arbitrator is satisfied that it was appropriate for the Company to decline that position to the grievor, based on its proper assessment of her qualifications. Nothing in this award should be construed, of course, as in any way restricting the possibility of further positions being identified, for which the grievor may be qualified, which might constitute an appropriate accommodation of her disability.

For all of the foregoing reasons the grievance must be dismissed.

June 14, 2002

(signed) MICHEL G. PICHER
ARBITRATOR