

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 3372

Heard in Montreal, Tuesday, 14 October 2003

concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL  
WORKERS UNION OF CANADA (CAW-CANADA)**

**EX PARTE**

### **DISPUTE:**

The alleged violation of the Canadian Human Rights Act and Article 32.9 of the Supplemental Agreement, as a result of the Company's failure to provide suitable accommodation to Mr. Robert Thompson in order to provide him employment.

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

Mr. Thompson was employed by Canadian National as a Gate Attendant at the Brampton Intermodal Terminal. This position had been awarded to Mr. Thompson in order to accommodate his physical disability to his neck and back. In June of 1999, the Company informed Mr. Thompson that all Gate Attendant positions at Brampton Intermodal Terminal had been abolished and that there was no further employment for him that would accommodate his disabilities. Mr. Thompson was placed back onto WSIB benefits in July of 1999 and he subsequently entered a Labour Market Re-entry Plan training as a truck dispatcher.

On October 24, 2001, the Company and the Union entered into an agreement commonly called the Roadrailer Agreement by which Roadrailer work began being performed under the terms of the Supplemental Agreement, as modified by the Roadrailer Agreement. The Roadrailer Agreement provided that preference in filling vacancies at Roadrailer would be given to disable employees under the jurisdiction of the CAW 5.1. Mr. Thompson expressed an interest in filling one of the Roadrailer assignments.

On January 21, 2002, the Union grieved the Company's failure to provide to Mr. Thompson a Roadrailer assignment or other suitable position.

It is the Union's contention that the Company has discriminated against Mr. Thompson on the basis of his physical disability, as the result of not providing him suitable employment. It is further the Union's contention that the Company has not fulfilled its duty to accommodate Mr. Thompson's disability, as required by the Human Rights Act. The Union requests in settlement of this issue that Mr. Thompson be provided a Roadrailer assignment or other suitable employment with the Company and that he be compensated for all wages and benefits lost as a result of the Company's failure to appropriately accommodate his disability.

It is the Company's contention that there is no suitable accommodation available for Mr. Thompson's disability and requests that the Arbitrator dismiss the Union's grievance.

**FOR THE UNION:**

**(SGD.) R. JOHNSTON**  
**PRESIDENT, COUNCIL 4000**

There appeared on behalf of the Company:

- S. Fisher – Human Resources Associate, Toronto
- C. Michelucci – Human Resources Manager
- L. A. Leus – Manager, People Development
- L. Smolska – Workers Compensation Coordinator

And on behalf of the Union:

- J. R. Moore-Gough – National Representative, Chatham

### **AWARD OF THE ARBITRATOR**

Upon a careful review of the evidence the Arbitrator is satisfied that the Company has fairly turned its mind to the question of whether the grievor can be reasonably accommodated, to the point of undue hardship, in the position of gate clerk in its Roadrailer operations at the Brampton Intermodal Terminal (BIT).

The record before the Arbitrator indicates that Mr. Thompson has had an extremely unfortunate record of difficulties in attempting to adjust in prior accommodated positions, including the relatively similar position of gate attendant at the BIT, a position abolished in June of 1999. Of equal concern is the difficulty which the grievor has demonstrated with respect to both mathematical and verbal skills, notwithstanding efforts which have been made to upgrade his abilities in that regard. Finally, there is some basis for concern with respect to the keyboarding load which would be involved in the Roadrailer gate clerk position. The record confirms that, in a prior attempt at accommodation, Mr. Thompson encountered serious difficulties with keyboarding totalling 45 minutes per day. The gate clerk in Roadrailer operations must, according to the unchallenged physical demands description filed by the Company, perform computer keyboard work on forty occasions in excess of one minute and on fifty-six occasions in excess of two minutes over a typical day. In the result, 26% of the total day is involved in keyboarding.

In this grievance the Union has brought forward little supporting evidence. There is nothing in the way of documentation from a physician or an occupational therapist to indicate that the grievor's limitations, both physical and cognitive, would bring him within the ability to perform the job functions of the gate clerk in Railroader operations on a full time basis.

On the whole, the evidence confirms that the Company has given the grievor extensive consideration, over a period of years, with respect to accommodating his disabilities in employment, and is fully aware of his limitations. I am satisfied that the employer reasonably came to the conclusion that the grievor's limitations would not allow him to perform the duties and responsibilities of a gate clerk's position. In the circumstances, therefore, I am satisfied that to compel the Company to assign that position to Mr. Thompson would constitute undue hardship.

For the foregoing reasons the grievance must be dismissed.

October 21, 2003

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