

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3532

Heard in Montreal, Tuesday 13 December 2005

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Failure to accommodate Todd Kilba of Kamloops. British Columbia.

JOINT STATEMENT OF ISSUE:

Todd Kilba is an employee in Kamloops, B.C. In 1999, due to the onset of symptoms of multiple sclerosis, Mr. Kilba was accommodated as the third man on a crew working in the yard. As his symptoms progressed, Mr. Kilba required additional accommodation. In April of 2002, he was accommodated in an office position analyzing data from locomotive event recorders. He continued in this capacity until July of 2004, at which time he was informed that he would have ninety days to "... work towards his removal from the Company payroll ..."

Mr. Kilba was further informed that the Company was relocating its offices in Kamloops and the new facility would no longer be wheel chair accessible. Accordingly, he was told the Company would no longer be able to accommodate him. Mr. Kilba's accommodation ceased at the end of August 2004.

The Company has claimed that the cessation of Mr. Kilba's accommodation was due to "significant changes to the [Company's] operation combined with Mr. Kilba's increased restrictions."

The Union contends that the Company has a duty to accommodate Mr. Kilba's disability up to the point of undue hardship. The Union contends that the Company has failed to discharge this duty and has failed to demonstrate that to do so would constitute undue hardship. The Union contends that changes to the operation are entirely within the Company's control and that the existing requirements of a disabled employee must be taken into account when the Company plans or enacts any such changes. The Union further contends that there have not been any changes in Mr. Kilba's restrictions or abilities in over two years and therefore cannot be considered a bona fide concern or factor with regards to the Company's obligation to accommodate Mr. Kilba.

The Union requests that Mr. Kilba be provided with suitable accommodation and made whole for all losses incurred.

The Company disagrees.

FOR THE UNION:

(SGD.) R. A. HACKL

FOR: GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) K. MORRIS

FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

- B. Laidlaw – Manager, Labour Relations, Winnipeg
- K. Morris – Manager, Labour Relations, Edmonton

And on behalf of the Union:

- D. Ellickson – Counsel, Toronto
- B. Boechler – General Chairperson, Edmonton
- R. Hackl – Vice-General Chairperson, Edmonton
- T. Kilba – Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that for a number of years the Company has accommodated the grievor, Mr. Todd Kilba of Kamloops, by reason of his disability. Because of the grievor's condition of multiple sclerosis, he was progressively forced to less demanding tasks. By 2002 his work was essentially restricted to sedentary duties at the Kamloops administration building. It does not appear disputed that between that time and 2004 Mr. Kilba worked more and more from his home, apparently utilizing a computer provided for that purpose by the Company. It seems that the grievor's condition includes fatigue which requires him to take breaks from his work to rest. As a result, while he appears to complete the work assigned to him, he may do so over a period of more than eight hours.

In July of 2004 Company officers advised Mr. Kilba that the employer was no longer able to accommodate him. He was then advised that his accommodation would come to an end within thirty days, and that he should explore the option of short-term and long-term disability benefits. Albeit reluctantly, Mr. Kilba did eventually receive those benefits, but he has consistently maintained that there is no deterioration in his condition which would justify the termination of his accommodation.

In this case the onus is upon the Company to show that it was unable to accommodate the grievor by reason of his disability, to the point of undue hardship. When the totality of the evidence is examined the Arbitrator has some difficulty with the position of the Company. There is nothing in the material before me to suggest that the Company ever requested the grievor to undergo a functional abilities assessment to establish whether there had been any deterioration in his condition so as to affect his ability to perform the tasks which were being assigned to him. There is, in addition, no evidence to indicate that the grievor was ever told that he was not performing the work assigned to him in a satisfactory and productive way. Lastly, there is no evidence presented to confirm that there has in fact been any deterioration in the grievor's physical condition which might have impacted his accommodation.

What the record does disclose is that there was a change in the person who was grievor's general supervisor and, secondly, that the Company decided to move its administrative operation to a building which did not contain a wheelchair accessible office or work station for the grievor. What the evidence suggests, on the balance of probabilities, is that the alteration in the Company's situation may have made the accommodation of Mr. Kilba more difficult. However, before the Arbitrator the Company has made no extensive argument to substantiate

that fact or to suggest it is an explanation for undue hardship in the continued accommodation of the grievor.

In approaching this matter the Arbitrator considers it important to make only those determinations as can fairly be based on the evidence adduced. Nothing in this award should be seen as limiting the Company's ability to obtain the necessary medical or other information as may be appropriate to properly assess the feasibility of accommodating the grievor's condition on an ongoing basis. For the purposes of this grievance, however, on the evidence presented the Arbitrator has no alternative but to agree with the Union that the Company has not, to this point, demonstrated that the employer cannot accommodate the grievor's disability to the point of undue hardship.

The Arbitrator cannot accept the request of the Union for an award of punitive or exemplary damages, or for damages for the denial of dignity to Mr. Kilba. While the evidence before the Arbitrator may fall short of discharging the burden of proof which the Company bears, this is not a circumstance where the Union has established reckless or willfull disregard of the grievor's rights on the part of the employer.

The grievance is therefore allowed, in part. The Company is directed to reinstate the grievor into his employment forthwith, with full compensation for all wages and benefits lost. The grievor's return to work does not, however, prevent the employer from obtaining such medical or other information as may be necessary to closely evaluate the feasibility of ongoing accommodation in the future. Nor is the Company precluded from monitoring the value of the work that can be done by the grievor. It should also be stressed that any further consideration of

accommodation for Mr. Kilba must involve not only the Company, but also the grievor and his bargaining agent.

The matter is remitted to the parties on the foregoing terms. Should the parties be in disagreement as to the interpretation or implementation of this award, the matter may be spoken to.

December 20, 2005

(signed) MICHEL G. PICHER
ARBITRATOR