

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

CASE NO. 3826

Heard in Calgary, Thursday, 12 November 2009

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

EX PARTE

DISPUTE:

The ongoing matter of the parties' meeting and arranging a proper workplace accommodate for Mr. K. Carlson.

UNION'S STATEMENT OF ISSUE:

On October 23, 2007, Mr. Carlson informed his supervisor that he was diagnosed with a fractured vertebra by his physician and was permanently restricted from performing his regular assigned duties as a labourer. His physician recommended that he be accommodated with sedentary work. The Union made what it believed were reasonable recommendations in accommodating Mr. Carlson on appropriate work at the Prince George Terminal.

The Company arranged clerical testing on two separate occasions which the Company said would allow him access to clerical work. Mr. Carlson did not pass these tests. The Union contends that the Company did the opposite of what is contemplated in its duty to accommodate by placing barriers before the grievor in accessing clerical work which the grievor had sufficient seniority to hold. The Company informed the Union that the other prospects it recommended for accommodate were not possible or feasible.

The Union requests that the Company reinstate Mr. Carlson and accommodate him on a position which meets his medical condition and restrictions, and compensate him or all wages and benefits from June 15, 2008.

The Company disagrees with the Union's position. The Company maintains that it has exhausted all efforts to accommodate Mr. Carlson on sedentary work within the bargaining unit at Prince George and has therefore declined the Union's grievance.

FOR THE UNION:

(SGD.) B. KENNEDY

NATIONAL REPRESENTATIVE

There appeared on behalf of the Company:

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|--------------|---------------------------------------|
| B. Laidlaw | – Manager, Labour Relations, Winnipeg |
| R. Campbell | – Manager, Labour Relations, Winnipeg |
| S. Boomhower | – Manager, TRS, Prince George |
| F. Peshev | – Human Resources Associate, |

And on behalf of the Union:

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| A. Rosner | – National Representative, Montreal |
| B. Kennedy | – President, Council 4000, Edmonton |
| R. Fitzgerald | – National Representative, Toronto |
| J. Louro | – Local Chairman, Prince George |
| R. Shore | – Regional Representative, Mountain Region, Edmonton |
| K. Carlson | – Grievor |

AWARD OF THE ARBITRATOR

Upon a review of the materials filed the Arbitrator is compelled to conclude that the Company did not provide to Mr. Carlson reasonable accommodation in relation to his injury, short of undue hardship. In effect, it denied him the opportunity to be trained as a train movement clerk (TMC). The record discloses that internal applicants for the positions have not, in the past, been required to undergo suitability testing, something which is apparently now administered for newly hired individuals. However, the Company insisted on requiring the grievor to undergo such testing, in what I am satisfied was in such a fashion as to effectively discourage him and eliminate him from consideration. Indeed, the record appears to be relatively devoid of any serious attempt on the part of the Company to take the initiative to find the grievor an appropriate

position, whether within his own bargaining unit or elsewhere. Significantly, it appears that six new train movement clerks were hired at Prince George in the period between March and November of 2008.

The Arbitrator is impressed with the argument of the Union to the effect that at a minimum, given his thirty years of service and his general experience in a number of functions, Mr. Carlson should have been afforded at least a trial period to demonstrate that he could perform the duties of a TMC, even if that might require some minor adjustment in some parts of the function with which he might be less familiar. Unfortunately, what the record indicates is that the grievor was effectively treated under the standard fashioned for assessing newly hired employees.

The record before the Arbitrator also indicates that upon a second testing the grievor appears to have passed a segment of the test which he was unsuccessful in on the first time he attempted it. However, he became frustrated and left the testing centre when additional tests were proposed to him. In all of the circumstances the Arbitrator views the instant file as one of shared responsibility, to the extent that the grievor withdrew from the testing process.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator finds and declares that the Company did not fulfill its duty of accommodation to Mr. Carlson and directs that he be reinstated to active duty forthwith, with compensation for one-half the pay he has lost from the date of his eligibility for reinstatement into an

accommodated position until the date of his reinstatement. The Arbitrator further directs that the Company and the Union meet to develop a return to work plan consistent with the grievor's restrictions, including the opportunity for him to be given a reasonable opportunity to demonstrate his capacity to perform the work of a train movement clerk, with such minor adjustments as may be necessary.

I retain jurisdiction in the event of any dispute between the parties concerning the interpretation or implementation of this award.

November 24, 2009

(signed) MICHEL G. PICHER
ARBITRATOR