# CANADIAN RAILWAY OFFICE OF ARBITRATION

# & DISPUTE RESOLUTION

# CASE NO. 4297

Heard in Calgary, March 13, 2014

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**DISPUTE:**

Appeal of the confinement of Conductor AB to Yard Service since July 2012.

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

On July 11, 2012, Conductor AB was informed by a CP OHS Nurse that he was permanently restricted to yard work, and further restricted to a yard with coloured targets or signals with viewing distances of less than 80 metres. In spite of Conductor ABs' efforts and the Union's interventions on his behalf, Conductor AB has remained permanently restricted in this regard to date.

The Union contends that the Company's confinement of Conductor AB to Yard Service is contrary to the Collective Agreement, the terms of the RAC CP Medical Rules Handbook, the provisions of the WPP Rules, the Canadian Human Rights Act and past practice. The Union seeks a declaration to this effect. The Union requests that the permanent restriction be ordered removed and that the Company be directed to provide Conductor AB the opportunity for on-track evaluation, consistent with past practice. The Union requests that Conductor AB be ordered whole for all lost earnings with interest. The Union further requests that the Arbitrator direct the Company to cease and desist from further violations. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request

| FOR THE UNION: | FOR THE COMPANY: |
|---|---|
| (SGD.) B. Hiller | (SGD.) |
| General Chairperson | |

There appeared on behalf of the Company:

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| R. Hampel | – Counsel, Calgary |
| D. Guerin | – Director, Labour Relations, Calgary |
| Dr. G. Lambros | – Chief Medical Officer, Calgary |
| K. Seredynski | – Occupational Health Nurse, Calgary |
| Dr. J. Hovis | – Medical Consultant, Waterloo |

There appeared on behalf of the Union:

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| M. Church | – Counsel, Caley Wray, Toronto |
| B. Hiller | – General Chairman, Toronto |
| A.B. | – Grievor, Oakville |

## AWARD OF THE ARBITRATOR

The grievor has been identified as Conductor AB to protect his identity as the grievance involves privacy issues relating to his disability.

The issue in this grievance is whether the Canadian Pacific Railway Company ("the Company") has unfairly restricted the grievor to yard work and whether in doing so it has violated the *Canadian Human Rights Act* ("*CHRA*") by failing to accommodate the grievor's disability to the point of undue hardship.

The Union also alleges that by failing to provide the grievor an opportunity for on-track field evaluation, the Company has violated the Railway Association of Canada's ("RAC") Canadian Railway Medical Rules Handbook ("the Handbook") dealing with positions critical to safe railway operations and past practice.

The parties agree that the grievor suffers from a non-degenerative mild to moderate color vision defect and that this constitutes a disability under the *CHRA*.

## The Restrictions

On July 11, 2012, the Company, through Occupational Health Services ("OHS"), informed the grievor that he was permanently restricted to yard work with colored targets or signals with a viewing distance of less than 80 metres (90 yards). His restrictions were reviewed and updated on February 28 and March 18, 2013. If there is a position outside the yard that does not require the accurate discrimination of colours and/or signals, the grievor's suitability would have to be reassessed. The updated restrictions have no practical effect: the grievor is still precluded from working as a conductor or a locomotive engineer.

## Background

The grievor entered the Company service on August 10, 1998. At the time of hire, the Company was aware of the grievor's disability. The grievor failed the pre-employment "Ishara Plate" vision test. He passed the alternative "Farnsworth D-15" colour vision test, and became a qualified Trainmen/Conductor/Yardman in January 1999.

At the time no standardized and validated railway industry specific test for color blindness was in place. This changed when the RAC adopted the CN Lantern test ("CNLAN test") in 2001. This test was designed to replicate and simulate field conditions for assessing color vision deficient conditions such as the grievor's. New hires must pass the CNLAN test.

In May 2003, as part of his periodic medical assessment, the grievor passed the Farnsworth D – 15 colour vision test for a second time. In January 2004, the grievor's color vision was tested using the CNLAN test. He failed. OHS followed up with the grievor's supervisor who conducted an on-the-job field assessment and confirmed that there were no concerns with respect to the grievor's skills abilities or performance. At that time, the Company's Chief Medical Officer ("CMO") assessed the grievor as fit to continue working. He was of the view, however, that a practical field test was required. The CMO recommended that the grievor be placed on a list so that he could undergo a field test when the process/protocol was confirmed.

In December 2004 OHS established a formal protocol to address all employees with color deficient vision who had been hired prior to implementation of the CNLAN test. Under the protocol, at the time of an employee's periodic medical assessment, a complete vision test would be performed by the employee's optometrist, a questionnaire would be completed by the employee's supervisor regarding his work performance, a questionnaire would be completed by the employee himself detailing any concerns or changes in his condition, a train crew evaluation form ("TCEF") would be completed by the employee's supervisor, and the CNLAN test would be conducted every second periodic medical as per RAC guidelines.

In December 2004, OHS requested a TCEF assessment from the grievor's supervisor. There were no concerns.

In June 2006, the grievor began his training to become a locomotive engineer. The grievor rode daily to Smith Falls, Hamilton and MacTier with locomotive engineer peers and coaches, and periodically with managers. There were no concerns with the grievor's ability to call signals, or any other safety-related concerns whatsoever. Ten months later, in April 2007, the grievor qualified as a locomotive engineer.

In March 2008, when the grievor attended for his periodic medical assessment, his supervisor had no concerns. When filling out OHS's questionnaire, in response to the question about having any concerns regarding his ability to perform his duties, the grievor answered: "yes, only with respect to my color vision deficit." When the grievor spoke to OHS, he advised that he had no concerns about his ability to perform his job. That job, as a Yard Foreman/Conductor meant that the grievor was working both in the yard and on the main line.

In January 2012, the grievor was again required to undergo his periodic assessment. During that process, OHS became aware that the grievor had been encouraged to apply for a road foreman supervisory position. That position, among other things, would involve conducting Train Crew Evaluations. He was required to undergo the CNLAN Test and further assessment. The grievor took the CNLAN test on February 12, 2012, and failed just as he had eight years before. The grievor's test results were consistent with his previous tests and his colour vision deficit remained stable. The grievor withdrew his application for the position.

The CMO had never encountered an employee who had expressed, on successive questionnaires, a concern about his ability to perform his duties due to his color vision deficiency. The grievor's self-assessments weighed heavily in OHS's determination to impose permanent restrictions on the grievor.

On July 11, 2012, the OHS nurse conveyed to the grievor that he was permanently restricted to yard duty, in yards with colour targets or with signals in which the viewing distances are less than 80 metres (90 yards). She also told him that other conductors or locomotive engineers with the same condition as him had remained in one or the other position or by choosing a specific run and having continued on-the-job evaluations with a Company official. The grievor expressed his desire to do just that and the OHS nurse informed the grievor that he could work that out with local management.

On July 13, 2012 the grievor spoke with Trainmaster Humphrey, who agreed that he could engage in a familiarization and evaluation on the North Pool as a conductor but not as a locomotive engineer. The Company removed the grievor from the Locomotive Engineer Weekly Placement Process list ("WPP").

On August 2, 2012 the OHS nurse forwarded to the grievor an email outlining his restrictions and included a caveat to the evaluation process: the results would require a final review by the CMO.

On August 12, 2012, the Union filed a grievance on Conductor AB's behalf.

On August 28, 2012 Trainmaster Humphrey confirmed with the grievor that he could begin to familiarize on the North Pool Line as of September 2, 2012. He took a familiarization trip without incident or concern on September 4, 2012. The next day, Trainmaster Humphrey notified the grievor that he would be removed from the familiarizations as a result of OHS's intervention.

On September 9, 2012, with no other viable options, the grievor moved into a Vaughn Utility position.

At the arbitration, the Company explained that there had been a misunderstanding about how the grievor should be assessed for his color vision deficiency. According to OHS, any field test would have to involve testing under all weather conditions, all lighting conditions and through all seasons, and would still be subject to review by the CMO.

Since the field assessment identified as appropriate by OHS would take approximately a year, the Company explained that the grievor's training on the North

Pool was discontinued because resources for such a long-term assessment “were not available.” The Company was not prepared to expend those resources.

Rather than continue with the training, the CMO reviewed the file, the grievor’s optometrist report was obtained and a further CNLAN test was performed on February 12, 2013. The grievor’s color vision defect remained stable and on February 28, 2013, and again on March 28, 2013, the CMO updated the restrictions imposed on the grievor.

In March 2013 OHS informed the grievor that if local management was agreeable, on-track evaluations could recommence. The grievor set those up only to be told within a week that because he did not have the required seniority to be evaluated on non-signaled territory, no testing would be performed.

In early April 2013 the grievor transferred to the Lambton Yard because the Vaughn assignments had been abolished. On his first day, Mr. Duquette, Assistant Director Operations, asked the grievor to use the main line, which involves signal work. He was approved and cleared for such work. The grievor worked on the main line on several occasions.

The grievor then bid for a Lifter 3 position, which involves switching out railcars and building trains, thereafter transferring them in high-speed signal territory throughout the terminal and two other yards - Toronto and Vaughn. As a lifter, the grievor was

given authority to do "whatever was asked" of him, which included performing signal work such as backing trains out of Vaughn and calling signals to Lambton Yard.

When Lambton Yard shut down in May 2013 the grievor was moved to Hamilton where he performed tasks such as the switching of railcars in the yard and travelling to outer yards including Aberdeen. He also serviced customers throughout signal territory on main tracks and areas where commuter trains were running.

On August 22, 2013, upon reporting to work, the grievor was assigned for the day to work in the capacity of locomotive engineer. The grievor was told that he had clearance from the Superintendent of Operations. The grievor expressed concern that he had not been familiarized with the territory. He also shared that he suffers from a colour vision defect. Calls were then made and the grievor was sent home.

In anticipation of the arbitration of this matter initially scheduled for December 2013, and in light of the grievor's restrictions, on November 27, 2013, the parties agreed to complete a preliminary two-week field assessment on his assignment. After the initial assessment the parties were to reconvene, review the assessment and consider next steps. The arbitration was postponed because of the parties' agreement.

Notwithstanding the parties' agreement, and through no lack of effort on the grievor's part, the Company failed to comply by carrying out only one assessment on December 9 – 10, 2013. The grievor correctly identified all signals and there were no concerns.

There is no dispute that the grievor has worked in all occupational capacities including utility, yard helper, yard foreman, trainperson, conductor, yard service helper/yard service employee/hump operator, and locomotive engineer. He has worked in every yard, on every customer siding, on all main tracks, in both freight and passenger services, as required in the Greater Toronto Area. The grievor has passed every evaluation, has never had an accident or incident of any nature, nor has he received any discipline in any form. His safety record is excellent, his attendance exceptional and he has never failed to fulfill the requirements of productivity or safety during his tours of duty.

At the hearing, the grievor was forthright and direct in response to questions about his "self assessed" concerns about performing his duties. The grievor explained the context in which he provided the answers to the questionnaires completed in 2008 and 2012.

In 2008, when the grievor filled it out the questionnaire as part of the Company protocol for the first time, he identified that his colour vision deficit was a concern – it will always be a concern to him as he carries out his duties in safety critical positions. The response reflects the grievor's conscientiousness surrounding what he appreciates is a most serious issue.

The grievor explained that the "specific concern" he referenced in 2012 relating to the position of locomotive engineer was made in the context of what he took to be the Company's view that he was not able to perform the road foreman position he had been encouraged to apply for due to his failed CNLAN test. The grievor made clear that the specific reference was not due to his belief that he could not perform his duties as a locomotive engineer (which duties he has performed for years).

**Decision**

The Company maintains that OHS' initial decision to restrict the grievor to yard work only, was proper. Moreover, the Company points out that it reassessed the grievor in February 2013 and clarified that if there was a position outside the yard that did not require the accurate discrimination of colours and/or coloured signals, the grievor would be reassessed.

For all practical purposes, the restrictions imposed by the Company preclude the grievor from working as a conductor or as a locomotive engineer. This, in turn, has impacted and will continue to impact significantly the grievor's earning potential.

On a review of the record before me, I have considerable difficulty with the Company's approach to accommodating the grievor's disability.

The Handbook and *CHRA* (which is incorporated in the collective agreement) must be considered. The relevant provisions are reproduced below.

The Handbook, Section 4, Subsection 4.3 – Vision, 3. Monitoring requirements, 3.1 – frequency states the following:

> …
>
> Those who do not pass the CNLAN or RTC vision test on retesting are required to undergo further assessment including a practical test developed by each railway company.
>
> …

In addition, section 4, Individual Assessment reads:

> The CMO may authorize an individual who does not meet the criteria to occupy a SCP if the CMO has reasons to believe that the individual can perform their duties in a safe manner despite their visual disorder.
>
> In doing so, the CMO will take into consideration the following:

- the specific requirements of the position;
- the opinion of an ophthalmologist or optometrist who has examined the individual; and
- any relevant ability, skill or experience of the individual.

> The CMO may require that a practical test be performed before allowing an individual to occupying a SCP

The relevant provisions of the *CHRA* read:

> 3. (1) for all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offense for which a pardon has been granted or in respect of which a record suspension has been ordered.
> …
>
> Employment
>
> 7. It is a discriminatory practice, directly or indirectly,
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> (a) to refuse to employ or continue to employ any individual, or
> (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.
> …
>
> 15. (1) it is not a discriminatory practice if
>
> (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a *bona fide* occupational requirement;
> …
>
> (2) For any practice mentioned in paragraph (1) (a) to be considered to be based on a *bona fide* occupational requirement and for any practice mentioned in paragraph (1) (g) to be considered to have a *bona fide* justification, it must be established that accommodation of the needs of an individual or class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

The Handbook, consistent with the *CHRA*, which prescribes the CNLAN test a standard test to determine the individual's ability to identify colors used in rail wayside signals, mandates that an alternative to that standard, for those who do not pass the CNLAN test, be developed.

Similarly, and equally consistent with the *CHRA*, the Company must take an individual approach to determining whether an employee, such as the grievor, who did not pass the CNLAN test, can nonetheless perform his duties as a conductor or locomotive engineer.

As the Company points out, it is properly the CMO's role to make the determination as to the grievor's fitness for duty requirements. Indeed, as stipulated by the Handbook, the CMO was in a position to require a practical test if he had reason to believe that the grievor could perform his duties in a safe manner notwithstanding his failed CNLAN tests.

It must be emphasized that the grievor failed the CNLAN in 2004 and 2012, with his color vision defect remaining stable. During that period the grievor qualified as a locomotive engineer (which involved significant training as well as supervision), and worked on all main tracks in both freight and passenger services as required in the Greater Toronto Area. The grievor has never had an accident or incident of any nature, his safety record is excellent, he has passed all evaluations with no concerns about his skills, abilities or performance in any respect. This, notwithstanding his colour deficiency.

The Company acknowledges that the CMO put significant weight on the grievor's self-reported concerns about his ability to perform his duties on successive questionnaires filled out in 2008 and 2012.

In light of the grievor's evidence at the hearing about his self identified "concerns" (which I accept without reservation), my view is that, had there been dialogue and clarification on that issue, the CMO's determination may have well been different – perhaps leading to the same determination reached for conductors and locomotive engineers with the same condition as the grievor – namely, that they are given the option to remain in a specific position or a specific run with continued on-the-job evaluations with a Company official.

Notwithstanding the above, of considerable concern is what appears to the Company's unwillingness to engage in additional field-testing for the grievor.

With respect to OHS's intervention resulting in the grievor being pulled from his familiarization on the North Pool line in September 2012 I note the following comments articulated in the Company's brief:

> It appears that there was a misunderstanding with the field as to how a person should be assessed for color vision deficiency. Ms. Seredynski advised the field that although there is no formal field assessment for this type of medical condition, any "field test" would need to involve field testing under all weather conditions, all lighting conditions, and through all seasons and would still be subject to review by the CMO. Thus any assessment on new territory for Conductor AB would take approximately one year to conduct. The field immediately discontinued the assessment as the resources for such a long-term assessment were not available and the CN Lantern Test was the accepted "Field Test" equivalent, which Conductor AB had failed on multiple occasions.

The above excerpt is essentially a concession by the Company that the CNLAN test is not a necessary pre-condition to ensure that the grievor is fit to work as a conductor or a locomotive engineer.

In *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance*), [1999] S.C.J. No. 46, the Supreme Court wrote:

> If the prima facie discriminatory standard is not reasonably necessary for the employer to accomplish its legitimate purpose or to put it another way, if individual differences may be accommodated without imposing undue hardship on the employer, than the standard is not a BFOR.

The Company has taken the position that it did not have the resources needed for the grievor's proposed alternative field-testing (which it now appears may have been impacted by an erroneous understanding of the grievor's self-identified concerns about his colour vision defect). In my view, carrying out that field test (which may not, in fact, be necessary on a reassessment of the grievor's individual circumstances and considering his evidence at the hearing) would not have imposed undue hardship on the Company.

Moreover, notwithstanding other attempts to conduct field assessments with the grievor, the Company failed to live up to its agreement to complete a preliminary 2-week field assessment, when the parties themselves determined that such a field assessment was an appropriate first step towards the resolution of this grievance.

Considering all of the above, and taking account of the Company's legitimate interests (which interests the grievor shares with the Company) and considering both the Handbook and the *CHRA*, I find that the Company has not met its ongoing duty to accommodate the grievor's disability and I so declare. In the circumstances, I direct the

parties to reconvene to schedule a preliminary two-week field assessment to be undertaken forthwith. Thereafter, the parties, with OHS's involvement, are directed to meet to pursue next steps.

I retain jurisdiction in respect of any issue of compensation that may arise, as well as the ultimate form of accommodation, which may yet to be determined for the grievor.

April 1 , 2014

CHRISTINE SCHMIDT
ARBITRATOR