CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4410

Heard in Montreal, June 10, 2015

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's refusal to let Mike Doyle work at NBSR as per the 2002 St. John lease agreement and not compensating him the loss of earnings and expenses created by that situation.

JOINT STATEMENT OF ISSUE:

Following the twenty year lease of CN St. John yard to New Brunswick Southern Railway (NBSR), an agreement was reached that provided six locomotive engineers positions at St. Johns. Mike Doyle has been working one of these positions since it fell under the supervision of NBSR in 2002.

From April 16th 2013 to May 6th 2013, Mr. Doyle was held out of service without compensation by NBSR medical's department although the chief medical officer of CN confirmed that he was fit to occupy his position. CN subsequently advised Mr. Doyle that he was not fit to work at NBSR anymore and that he must exercise his seniority elsewhere. As a result, Mr. Doyle was forced to exercise his seniority in Moncton, which was the closest available position to this domicile, and Mr. Doyle must consequently travel from St. John to Moncton every working day for a daily distance of 310 kilometers and daily travel time of approximately 3 hours.

The Union contends that, as per the 2002 agreement, Mr. Doyle is entitled to work at NBSR, that he should be re-instated into his locomotive engineer position at NBSR in St. John and that he be compensated for all loss of earnings and continuing expenses triggered by the situation.

The Company disagrees with the Union.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) J. M. Hallé	**(SGD.) D. Laurendeau for J. Orr**
General Chairman	**Senior Vice-President Eastern Region**

There appeared on behalf of the Company:

D. Larouche	– Labour Relations Manager, Montreal
M. Marshall	– Senior Labour Relations Manager, Toronto
J. Girard	– Counsel, Legal Department, Montreal
A. Chalifovx	– Nurse, OHS, Montreal

N. Gagnon – General Manager, Champlain

There appeared on behalf of the Union:

S. Beauchamp – Counsel, Montreal
J. M. Hallé – General Chairman, Quebec City
M. Doyle – Grievor, St. John

AWARD OF THE ARBITRATOR

1. The Grievor is a locomotive engineer who has been in the employ of the Company since May 14, 1979, thirty-six years. He lives in St. John, New Brunswick. He worked at CN's facility there, until the circumstances giving rise to the grievance. He was diagnosed as a diabetic in 1983.

2. In 2002, CN entered into a twenty-year lease with the New Brunswick Southern Railway (NBSR) for the terminal in St. John where the Grievor worked. NBSR assumed overall control and charge of the facility. As part of the lease agreement CN undertook to provide the employees to operate the facility.

3. After CN's signing of its lease with NBSR, the Union and the Company entered into agreements to address the situation. A smaller number of employees were required by NBSR than CN had employed at St. John. The first agreement between the Company and the Union offered eligible employees to choose either an early retirement separation allowance or deferred separation. The second agreement pertained to employees from St. John who elected to exercise their seniority to work out of Moncton, rather than continue working at the St. John terminal for NBSR. This agreement provided those employees with a lump sum payment of $12,000 in lieu of a relocation package under the collective agreement, provided this option was exercised within a period of three years, i.e. until April 22, 2005. The third agreement provided that employees could elect to continue working in St. John under NBSR's control. CN's agreement with NBSR

required CN to provide NBSR with sixteen running trades employees, of whom six would be locomotive engineers. The Grievor was among those who elected to continue at St. John under NBSR. He had the option of accepting a relocation package under the second agreement, but did not accept it, opting instead to remain in St. John at the behest of NBSR.

4. In late March 2013, the Grievor had an episode of dizziness or weakness while at work. There had been a previous such episode at work in 2011. He was medically assessed by the NBSR Chief Medical Officer, Dr. Barrett. The assessment was conducted under s. 4.7 - Diabetes of the Railway Medical Guidelines, pursuant to the *Railway Safety Act*, RSC 1985, c 3. Dr. Barrett's conclusion was that the Grievor did not meet the requirements to work in the safety critical position of a locomotive engineer at NBSR. The Grievor was told on April 18, 2013 by NBSR that there was no CN position he could occupy on their property. Dr. Barrett's report reads:

> I have had the opportunity to review the file and, after due consideration, it is my opinion that Mr. Doyle should be indefinitely restricted from working for New Brunswick Southern Railway as an Engineer or in any other safety sensitive role because of the safety risk inherent in his disease. This conclusion is reached while realizing that Mr. Doyle is diligent in the management of his disease. The regulations require that "All employees with diabetes will be assessed individually with respect to their suitability for a particular SCP [safety critical position]." As such, the Regulations contemplate the possibility that some employees may not be suitable for safety critical positions. Unfortunately, I feel that this is the case with Mr. Doyle.

5. The Grievor also underwent a medical assessment by CN's chief medical officer, who concluded the opposite, that the Grievor could resume his work in the safety critical position of a locomotive engineer.

6. The Union claims the Grievor was held out of service between April 16 and May 5, 2013. The Company disputes this. It says the Grievor was told forthwith of his entitlement to displace a less senior locomotive engineer at another CN workplace. The Grievor sought advice from the Company on any potential relocation package and whether he might be entitled to long-term disability. He was given advice on these matter soon after being told he could no longer be

employed by NBSR. He took until May 3, 2013 to consider his options and decide that he would exercise the opportunity to displace into Moncton. The Company submits he could have exercised the option immediately upon being advised that his service at the St. John site was over.

7. To address the conflicting assessments of the Grievor's fitness to work as a locomotive engineer, a conference call was held on April 22, 2013 between the NBSR doctor, CN's medical department and other stakeholders. There was no resolution. Given that NBSR has control over the St. John workplace, NBSR followed Dr. Barrett's advice and maintained its position that the Grievor could not work there as a locomotive engineer.

8. On May 3, 2013 the Grievor exercised his seniority to an assignment in Moncton, the closest CN location to St. John. The Grievor began working from Moncton on May 5, 2013. This involved a three-hour daily commute of 308 kms.

9. The Grievor has continued to commute between his home in St. John and Moncton.

10. Shortly before the hearing of this matter, the Company again sought to persuade NBSR to reconsider its decision to exclude the Grievor from its operation. On February 10, 2015, Senior Vice President of Eastern Operations for CN, John Orr, wrote to NBSR, asking NBSR to lift the Grievor's disqualification and to allow him to return to work for them.

11. NBSR's Vice President, Wayne Power, responded to CN on February 11, 2015. Although declining any obligation to take the Grievor back, Mr. Power agreed to ask his medical expert to contact CN's Chief Medical Officer, Dr. Leger, to discuss the Grievor's situation again.

12. On March 10, 2015, Dr. Leger spoke with NBSR's doctor, Dr. Barrett, who maintained his

opinion that the Grievor could not perform safety-sensitive work at NBSR.

13. The Union submits that the Company has breached Article 23 of the collective agreement between the parties, particularly its last sentence. That Article reads:

> 23. CN Locomotive Engineers must be qualified with respect to Canadian Railway Operating Rules, and while providing services to NBSR, will be governed by those rules and federal regulations applicable to the movement and handling of trains, locomotives and other equipment. CN Locomotive Engineers will also be governed as per CN Medical rules.

14. Further, the Union argues the Grievor has been constructively dismissed and that he is entitled to damages for his wrongful dismissal. The Union also contends that the Grievor's displacement to Moncton is a violation of the *Canadian Human Rights Act* because it amounts to discrimination on a prohibited ground, his disability, and that he is entitled to damages for this violation. The Union argues that the work location of St. John is an essential term of the employment contract between the Company and the Grievor, and that the Company breached that term by offering the Grievor employment in Moncton.

15. The Company objects to the Union seeking to rely on the *Canadian Human Rights Act* and on any alleged failure by the Company to accommodate the Grievor. The Company points out that at no stage was that claim raised in the grievance or in the Joint Statement of Issue.

16. I agree with the Company. It is not open for the Union to raise a new basis of challenge to the Company's conduct at this late stage. The Union's claim of a violation of the *Canadian Human Rights Act* is not part of the Joint Statement of Issue and I decline to consider it.

17. The Union submits that the Company could not force the Grievor to exercise his seniority at a different location for medical reasons that were not accepted by CN's chief medical officer. It

argues that there was no reasonable basis for the Company to refuse to continue to employ the Grievor at St. John.

18. The Union seeks compensation for the Grievor for the time he was out of service (April 16 to May 5, 2013); for his daily travel costs between St. John and Moncton; for the three hours per day of travel time; plus general damages for stress, pain and suffering, affronts to his dignity, inconvenience, and other hardship; and special compensation for reckless and wilful behaviour by the Company. In addition, for the Grievor renouncing his right to reinstatement, the Union seeks two years' salary as damages for the Company allegedly constructively dismissing him. Given that the Grievor has full eligibility for retirement on September 30, 2015, the Union seeks a retiring allowance effective until then.

19. The Company responds that it provides a service to NBSR. NBSR is its customer. CN's obligation is to supply labour to NBSR. NBSR has determined, on the medical advice it received from Dr. Barrett, that the Grievor is not fit to perform his duties as a locomotive engineer, a safety critical position. The Company submits that its only option was to find the Grievor alternative work, through the exercise of his entitlement to displace a less senior locomotive engineer at a location of the Grievor's choosing. The Grievor did so and displaced into a position in Moncton.

20. I have carefully reviewed the facts presented by the parties, and their submissions. I am persuaded of the following. The Grievor could no longer continue working at NBSR's St. John site through no fault of the Company. The Company's obligation under the lease agreement with NBSR is to provide skilled labour to NBSR within NBSR's requirements. It does not control NBSR's operations.

21. The medical assessment by NBSR's Chief Medical Officer was undertaken bona fide and

it constitutes a professional opinion, even if that expert opinion is not shared by CN's medical office. The provision in Article 23 of the collective agreement, that CN Locomotive Engineers are governed by CN Medical rules, does not assist the Union. This is because the NBSR Chief Medical Officer, Dr. Barrett, has the authority to determine who will work in safety critical positions on its operations. CN has no control over that and cannot force its opinion on NBSR. It cannot do more than attempt to persuade Dr. Barrett to alter his opinion, as it has done on more than one occasion.

22. Faced with the situation that NBSR would not retain the Grievor within its operation, CN did what was appropriate in the circumstances. It offered the Grievor the opportunity to bump into a CN workplace where he could continue to work as a locomotive engineer. The closest for him was Moncton.

23. As a locomotive engineer of the Company, the Grievor has no reasonable expectation that he will never move from his preferred work location of St. John. His seniority gives him entitlements over more junior employees, but the possibility of movement and transfer across the system, relocation and displacement, are features of the position. It is common in the industry to move from one terminal to another on the basis of seniority, as the Grievor did when he displaced into the Moncton terminal. The Grievor has enjoyed a very long period of steady work out of St. John, but there was never any guarantee that that would continue indefinitely. The circumstances that resulted in the Grievor losing his position in St. John were unforeseen, but they did not create any obligation on the Company to keep the Grievor working there when there was no longer a position for him.

24. The Grievor made a decision not to relocate to Moncton, but to commute. While recognizing the considerable inconvenience to the Grievor of commuting such a long distance,

he could have chosen to move to Moncton to work there, or to reside there temporarily while at work. On the facts, there has been no constructive dismissal by the Company, nor has there been any breach of the collective agreement. Faced with the situation brought about by a third party, NBSR, the Company acted according to the collective agreement by giving the Grievor the opportunity to displace a less senior locomotive engineer so that he could work from a different location.

25. I find that the Company is not liable to pay the Grievor during the period between April 16 and May 5, 2013. He had the option to displace an employee in Moncton during that period, as he did from May 5, 2013. His delay in doing so was occasioned by his considering his options, and not because he was kept from service by the Company.

26. I find therefore there has been no breach of the collective agreement by the Company, and I find there has been no constructive dismissal of the Grievor by the Company. The grievance is accordingly dismissed.

July 7, 2015

CHRISTOPHER ALBERTYN
ARBITRATOR