

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4412**

Heard in Montreal, June 11, 2015

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the termination of Kamloops Conductor Trainee Marzia Cusin during the Conductor Training Program.

COMPANY'S EXPARTE STATEMENT OF ISSUE:

On November 4, 2014, Conductor Trainee Cusin was advised of the Company's decision to terminate her employment during her training period.

The Union's position is that the termination of Ms. Cusin during the training period was prejudicial and discriminatory.

The Union contends that Ms. Cusin should be reinstated and fully compensated.

The Company disagrees with the Union's contentions.

**FOR THE UNION:
(SGD.)**

**FOR THE COMPANY:
(SGD.) D. Crossa for D. VanCauwenbergh
Director Labour Relations**

There appeared on behalf of the Company:

D. Crossan	– Manager Labour Relations, Prince George
K. Morris	– Senior Manager Labour Relations, Edmonton
P. Hamnell	– Manager Training, Winnipeg
D. Brodie	– Manager Labour Relations, Edmonton

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
R. Donegan	– General Chairman, Saskatoon
J. Robbins	– General Chairman, Sarnia
R. Hackl	– Vice President, Saskatoon

AWARD OF THE ARBITRATOR

1. The Grievor entered service with the Company as a Conductor Trainee on August 12, 2013. On September 2, 2013, following three weeks of classroom training and 1½ days of field training, the Grievor suffered a workplace injury, an ACL rupture with a torn medial meniscus, secondary to a traumatic right knee injury.
2. Following her injury, the Company summarily dismissed the Grievor on the next day, September 3, 2013. The Grievor contacted the Workers' Compensation Board. The WCB contacted the Company and required it to re-engage the Grievor in accordance with its statutory duty of re-employment following a workplace injury.
3. On September 26, 2013, the Grievor was placed back in the conductor training, which she completed on October 11, 2013. She secured Rules Qualifications and all classroom qualifications needed to work as a Conductor.
4. The Grievor underwent knee surgery on November 19, 2013. During the period of her rehabilitation, while on workers' compensation, she had extensive physiotherapy treatment. The Grievor recovered sufficiently from her surgery and rehabilitation to return to work, not as a Conductor, but doing sedentary work.
5. The Grievor was given modified duties by the Company as a Bunkhouse Attendant, as a temporary accommodation, effective from June 30, 2014, when her workers' compensation benefits ceased. The modified position was available to her

while she was subject to her medical restrictions.

6. The Grievor worked as a Bunkhouse Attendant until September 26, 2014, when her physician determined that she was medically fit to return to her Conductor Trainee position without restrictions. However, she would be required to wear a leg brace to reinforce her injured right knee. She was advised by WCB that, if she did not wear the brace she was prescribed, she would not have any compensation entitlement for any recurrence or re-injury she might experience to her right knee.

7. From September 26 to September 29, 2014, the Grievor and her Union representative communicated with the Company to ascertain where and when she would be resuming her Conductor Trainee duties, given that she was cleared to return to normal duties. There was no response from the Company. Instead, on September 30, 2014, the Kamloops Trainmaster contacted the Grievor to advise her that she was considered absent without authorization and placed on AWOL status. According to the Union, the Company had not, up to this point, told the Grievor where she was expected to report, despite her, and the Union's, requests.

8. Following the Union's intervention, on October 3, 2014, the Company agreed to provide the Grievor vacation pay and a leave of absence until the commencement of the next New Hire Training Program, which started on October 13, 2014. The Company says that it was willing to retain the Grievor as a Bunkhouse Attendant until she resumed her Conductor training in October 2014, but the Grievor chose instead to take vacation.

9. Because the Grievor had been away from her Conductor position for over a year, and because she had not completed all of her initial training in 2013, she was given the opportunity to participate in the full training program again.

10. Two days after resuming the Conductor training program, on October 15, 2014, the Grievor was on a tour of the training facility with her classmates that included field testing around rail equipment. The Grievor was not able to climb the ladder of a rail car, to cross equipment, or to put on a handbrake. These are basic requirements of the position.

11. On November 3, 2014, as part of her training, the Grievor made several attempts to entrain and detrain at 1 mph. She could not. The next day, on November 4, 2014, the Company trainers concluded that the Grievor was not able to demonstrate the basic physical work requirements of a Conductor's position. She was notified that she had not met the established standards and expectations of the position and that her employment was terminated. Two reasons were mentioned specifically: she could not entrain and detrain up to 4 mph, and she could not entrain or detrain from a tank car. The reason for this inability is the encumbrance of the knee brace she is required to wear, which prevents her from doing so.

12. In 2014, the Company hired approximately 1,520 Conductor Trainees in Canada, all of whom received the same classroom and field training as the Grievor. Twelve of these Conductor Trainees, among them the Grievor, had their files closed because they

failed to meet the required physical standards during field training.

13. The Union claims that the Grievor's termination was discrimination on grounds of disability, in violation of the *Canadian Human Rights Act*, R.S., 1985, c.H-6 ("the Act"). The Company has acknowledged the Grievor's medical limitation but, the Union submits, the Company has failed to accommodate that condition through alternative evaluation methods. The Union argues that the Company has refused to engage in any meaningful discussion with the Union and the Grievor concerning a means by which the Grievor might continue her career trajectory as an employee of the Company.

14. The Company submits that the Grievor's inability to perform the duties of a Conductor in a safe and efficient manner gave the Company cause for serious concern for her safety and that of her fellow employees and for the Company's legitimate business interests.

15. Given that the reason for the Grievor's termination was her inability to perform what the Company required of her, and given that her inability was because of her disability, there is a prima facie case of discrimination under the Act. The Company can meet this case if the functions which the Grievor cannot perform of the Conductor position are bona fide occupational requirements, necessary for the safe and efficient operation of the railway, and that an individual accommodation of the Grievor with a different standard would impose an undue hardship on the Company. To determine the issue the following three questions must be answered, as described in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and*

Service Employees' Union (B.C.B.S.E.U.), [1999] 3 S.C.R. 3 (“*Meiorin*”):

- 1) Has the employer adopted standards that discriminate against an individual for a purpose rationally connected to the performance of the job?
- 2) Has the employer adopted the particular standard in an honest and good faith belief that it was necessary to fulfill a legitimate work related purpose?
- 3) Is the standard reasonably necessary to the accomplishment of that legitimate work-related purpose, which includes demonstrating that it is impossible to accommodate individual employees without imposing undue hardship upon the Employer?

16. The Union challenges the standards the Employer claims are essential for carrying out the functions of a Conductor, in particular climbing and alighting from a train moving at up to 4 mph and doing the same on a tank car. The Union refers to a Company bulletin that expressly prohibits entraining and detraining from moving equipment, except in circumstances of emergency. The Company responds that the bulletin was issued by the BC North Sub Region and is not of general application, and did not apply to the Grievor.

17. The purpose of testing prospective Conductors to entrain and detrain at a low speed is to ensure that they are capable of doing so in the event of an emergency. That purpose is rationally connected to the position, albeit not a regular requirement. Tank cars are regularly used in the composition of trains. A Conductor needs to be able to enter them. That is a bona fide requirement for the work of a Conductor.

18. The Union relies on the third question in *Meiorin* as regards the Grievor's inability to access a tank car. The Company should accommodate the Grievor to the point of undue hardship for her work on a tank car. The Union submits that the Company failed

to evaluate what alternative requirements could be applied to the Grievor, or whether the Grievor's work-related knee injury could be accommodated.

19. I find that to accommodate the Grievor as a Conductor would be an undue hardship because of her inability to work on a tank car. That responsibility is an essential feature of the position, and accommodating a Conductor to not have to work on a tank car is not reasonably feasible.

20. The Union points out the Company's failure to consider other employment, besides that of a Conductor. The Union submits that, if to accommodate the Grievor as a Conductor is an undue hardship, the Company had an obligation to explore alternative employment opportunities for the Grievor.

21. Under Article 108A.10(d) of Agreement 4.3, the applicable collective agreement, a probationary employee, like the Grievor, can be terminated, "if found unsuitable prior to the completion of the training program". The Employer relies on this provision to justify the Grievor's termination. It says, following **CROA&DR 1568**, that it must just show that the Grievor's termination was for a valid business reason, and not arbitrary, discriminatory or in bad faith. That is correct, subject to the application of the Act to the circumstances of this case and the Union's argument that the Grievor's termination was, in fact, discriminatory.

22. In this case the Grievor showed that she was not able to perform some of the most basic and essential functions of the position of a Conductor. The Company's

concerns that she could injure herself or fail to perform her duties properly, so putting the operation at risk, were legitimate. In the circumstances the Company was not obliged to keep the Grievor in service as a Conductor.

23. To what extent is this conclusion affected by the Company's obligations to the Grievor under the Act? The Grievor's inability was occasioned by the injury to her knee and the requirement that she wear a brace. Her disability was the cause of her inability to perform the necessary requirements of the position. This means that she lost her employment because of her disability. A disability must be accommodated short of undue hardship to the employer.

24. Having determined that the Company was not obliged to retain the Grievor as a Conductor, was the Company obliged to find a different accommodated position for the Grievor, something other than the work of a conductor? As the Union submits, I find that the Company had an obligation to explore alternative employment opportunities for the Grievor. Although the Grievor was not yet an employee – she was still a trainee Conductor, a probationer – the Company still had an obligation under the Act to explore alternatives to her probationary position. It ought, with the Union and the Grievor, to have explored another probationary position for her, within her abilities, to determine whether such a position could be found that would not cause it undue hardship.

25. For these reasons, I find that the Company did not act in a manner that was arbitrary, discriminatory or in bad faith when it terminated the Grievor's probationary employment as a Conductor. I find, though, that the Company discriminated against the

Grievor, contrary to the Act, by failing to explore alternative accommodation. It must explore with the Union and the Grievor whether she can perform a position other than a Conductor, such as she did as a Bunkhouse Attendant.

26. The Grievor's accommodation is referred back to the parties for resolution.

27. The grievance is therefore partially upheld. I remain seized of its implementation.

July 22, 2015



CHRISTOPHER ALBERTYN
ARBITRATOR