

CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 2339
Heard at Montreal, Wednesday, 10 March 1993
concerning
CANADIAN NATIONAL RAILWAY COMPANY

and
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
EX PARTE
DISPUTE:

In July 1990, Extra Gang Labourer Mr. J. MacRae was denied a position of Track Maintainer.

BROTHERHOOD'S STATEMENT OF ISSUE:

Mr. MacRae originally entered the Company's service on May 5, 1980 as a Trackman. He held various positions as Trackman or Track Maintainer until October 16, 1989 at which time he resigned from the Company. He was rehired on May 29, 1990 into the classification of Extra Gang Labourer. He subsequently applied for the position of Track Maintainer and, after undergoing the Company medical, was denied the position on the basis of defective colour vision.

The Union contends that: 1) The Company's position that Mr. MacRae must be completely colour efficient in order to perform the duties of Track Maintainer is in violation of all applicable provisions of the collective agreement.

The Union requests that: That Mr. MacRae be awarded the position of Track Maintainer at Sarnia with seniority from the date of the award and that he be compensated for all lost wages.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) R. A. BOWDEN

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

K. R. Peel

Assistant Regional Counsel, Toronto

R. Lecavalier

Counsel, Montreal

D. C. St-Cyr

Manager, Labour Relations, Montreal

And on behalf of the Brotherhood:

D. B. Brown

Senior Counsel, Ottawa

P. Davidson

Counsel, Ottawa

R. A. Bowden

System Federation General Chairman, Ottawa

R. Phillips

General Chairman, Ontario

AWARD OF THE ARBITRATOR

The position which the Company took by way of explanation of its decision to deny the track maintainer's position to Mr. MacRae was expressed in a letter of its Vice-President dated January 28, 1991, addressed to the General Chairman of the Brotherhood. That letter reads, in part, as follows:

QQINDENT_It is the Company's view that General Board Order No. 09 is quite specific concerning vision and hearing regulations to be adhered to by Canadian Railroads. In this regard, General Board Order No. 9 requires that an incumbent to the position of Track Maintainer must have normal colour perception.

General Board Order No. 0-9 lists a number of classifications of employees for whom normal colour perception is a requirement. In the case at hand the Company relies on Class E of the Order which lists the following classifications:

QQINDENT_Train Dispatchers, Station Agents, Assistant Agents and Telegraph and Telephone Operators concerned with movement of trains, Signal Foremen and Maintainers, Signal Helpers, Bridge and Track Foremen, Track Patrolmen, Drawbridge Tenders, Car Department employees assigned to duty in train yards or subject to duty on main lines where train movements are included, Welders and Welders' Helpers in the Maintenance of Way Department, and operators of on-track self-propelled maintenance equipment.

As can be seen from the foregoing text, while track foremen and track patrolmen are listed as regulated classifications, there is no reference to track maintainers as falling within the category of employees for whom normal colour perception is a requirement. It may be noted that there are, as well, many track maintenance positions, including trackman and extra gang labourer which cover employees working in road and yard locations, for which the requirement of normal colour perception is not established. In other words, it is not disputed that for some employees working in track maintenance normal visual colour differentiation is not a necessity. A review of the classifications of employees contained in Class E of Board Order No. 0-9 confirms to the Arbitrator that the position of track maintainer is not identified as one which, under the regulation, requires normal colour perception.

That conclusion, moreover, appears to be supported by at least one prior instance in which the Company agreed to the demotion of a track foreman to the position of track maintainer precisely because he did not have sufficient visual acuity with respect to the recognition of colours. In a letter dated July 29, 1985 the Company's Chief Engineer wrote as follows to the System Federal General Chairman in Winnipeg with respect to the employee in question:

QQINDENT_Dear Mr. Schneider:

QQINDENT_This will acknowledge receipt of your letter dated 23 July 1985 concerning the demotion of Mr. D.W. Close to a Track Maintainer position due to his colour blindness.

QQINDENT_This matter will be the subject of discussion with the Labour Relations Department within the next few days, and they should be in a position to answer your Step IV grievance shortly.

The Company seeks to support its case on an alternative theory. It submits that, apart from the federal regulation, the standard of normal colour perception for a track maintainer is a reasonable requirement which may be established within the prerogatives of the Company. The Brotherhood does not dispute the entitlement of management to establish reasonable standards with respect to the physical or other qualifications which attach to any given position. It argues, however, that such qualifications must bear some reasonable relation to the work and responsibilities involved. With that submission the Arbitrator must agree. The question then becomes whether normal colour perception is a necessary requirement in the day to day responsibilities of a track maintainer. The representations of the Brotherhood's representatives, which stand un rebutted by any evidence advanced by the Company, are to the effect that there are no duties exercised by a track maintainer for which the recognition of colours is a necessary attribute. Specifically, it notes that the throwing of any switches on a main line must be performed under the direction of a Dispatcher, and that no colour signals are involved in switches in yard or siding locations. Additionally, it stresses that track maintainers are not involved in the operation of motorized track vehicles and that any involvement they may have in basic flagging functions do not require normal colour perception.

The Company seeks, additionally, to rely on the provisions of article 7.12 of agreement 10.8 which provides, in part, that "the training and corresponding tests to be given will be established by the Company." The suggestion of Counsel for the Company is that it was entitled, under that provision, to establish a test for colour recognition as a part of the qualifications for the position of track maintainer.

I have some difficulty with that submission. Article 7.12 must be interpreted in the context within which it appears. It is part of article 7 which deals specifically with the subject of training. By the very language of article 7.12 it is clear that the tests there referred to, or more specifically "corresponding tests" are tests which correspond to the training established. The article does not, on its face, deal with the establishment of medical or physical qualifications. As noted above, the Arbitrator accepts that the establishment of such qualifications does fall within the prerogative of the Company, provided that such qualifications bear some reasonable relationship to the duties and responsibilities of the position. In the case at hand, for all of the reasons touched upon above, I cannot find that the Company has established that normal colour perception is a qualification which bears any reasonable relationship to the normal duties and responsibilities of a track maintainer. This, moreover, appears to have been recognized in the Company's own actions in relation to the demotion of Mr. Close, noted above.

In the Arbitrator's view the case at hand falls within the principles reviewed by this Office in CROA_874. As the arbitrator noted in that case, which involved an issue of the fitness to work of an employee who had to wear a hearing aid, it is incumbent upon an employer to establish the reasonableness of the standards required of employees in such a case. In the instant case, as in CROA_874, those elements of the Company's case have not been made out. Should the Company be able to establish, on good and sufficient evidence, that normal colour perception is a reasonable requirement for the position of track maintainer, its position might be sustained. On the evidence before me, it has not done so. For these reasons the grievance is allowed. The Arbitrator directs that the grievor be reinstated into his position as a track maintainer, with compensation for all wages and benefits lost.

March 12, 1993

(Sgd.) MICHEL G. PICHER

ARBITRATOR