

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2703

Heard in Montreal, Wednesday, 14 February 1996

concerning

CANPAR

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The Union and Richard Johnson (the "grievor") grieve that CanPar (the "Company") has violated articles 5.3.2 and 5.3.3. and its obligation under the Canadian Human Rights Code by refusing to create a position at the Hamilton Terminal consisting of duties which are within the grievor's physical limitations.

JOINT STATEMENT OF ISSUE:

The grievor has been employed by CanPar since October 1980 and in September of 1989 became a dockman at the Gray's Road terminal to accommodate permanent physical restrictions incurred from an injury on duty in 1985.

On March 24, 1992 the grievor incurred a second injury on duty and was unable to perform any work from that date until September 10, 1992.

The Gray's Road terminal was created in response to an agreement between the Company and Roadways Package Service (RPS). When RPS was granted a licence to operate in Canada, the agreement and the Gray's Road terminal were no longer necessary and the Gray's Road terminal was closed. The terminal was closed in the first week of September 1992, and employees exercised their seniority to replace junior employees in other terminals at that time.

On September 8, 1992, the grievor was unable to return to his pre-injury position but remained permanently disabled and unable to lift 10-15 pounds and was unable to perform any job which involved repetitive flexing, standing or rotation of the spine. On September 16, 1992, the Company was advised that the grievor would be proceeding with the claim with the Workers' Compensation Board that the Company had failed to comply with its reinstatement obligation under section 54 of the Workers' Compensation Act.

Because the grievor's position at the Gray's Road had been abolished with all other positions when the terminal was closed, the grievor claimed the right to exercise his seniority and displace a junior employee at the Hamilton terminal by letter dated September 24, 1992. On September 24, 1992, the grievor attended at the Hamilton terminal and presented the letter. He was advised there was no work available for him at that terminal.

The grievor's and the Union's position is that on the evening of September 24, 1993, the grievor drafted and delivered a letter filing a grievance. He left the letter in an outside brass mailbox to which Canada Post delivers mail. He left it there as the terminal was closed and locked and no one was present. On September 26, 1992, the grievor discovered the letter in a CanPar envelope in his mailbox. On Monday, September 28, 1992, the grievor contacted John Bechtel, business representative of the Transportation Communications Union and explained the situation. Mr. Bechtel later advised the grievor to complete his Workers' Compensation Board claim to reinstatement before pursuing the grievance.

The Company's position is that the grievor never filed or raised the grievance at any time until October 22, 1993, and the Company otherwise has no knowledge of any of the facts in the preceding paragraph.

The Hamilton terminal employs approximately 16 drivers, two part-time warehouse employees and a non-unit supervisor. As detailed below, the grievors physical limitations prevent him from performing all of the duties of any

single employee. The Union and the grievor's position is that he had a legal right to be reinstated and that his employment could have been accommodated by rearranging the duties to accommodate his physical restrictions.

The grievor complained to the Workers' Compensation Board. A hearing was held December 15, 1992. By decision dated December 23, 1992, the Reinstatement Officer found there was an obligation on the Company to re-employ an injured worker for a period of one year after the date on which the Workers' Compensation Board notifies the employer that the worker is medically able to perform the essential duties of the worker's pre-injury employment. The Reinstatement Officer's ruling as attached.

CanPar appealed the decision to W.C.A.T. A hearing was held September 8, 1993 and an interim ruling issued October 6, 1993, a copy of which is attached. Canadian Pacific withdrew the appeal on October 5, 1993. The statutory obligation to reinstate pursuant to the Workers' Compensation Act in fact expired September 24, 1993 and all WCB payments to the grievor ceased at that time. The grievor received notice of the withdrawal of the appeal on October 19, 1993 and contacted Dennis Dunster on October 22, 1993.

Pursuant to the agreement reflected in letters between counsel, the parties have agreed to treat the grievance as having been filed on October 22, 1993.

There had been no further communication from the grievor or the union with respect to the reinstatement of the grievor from the date of the Reinstatement Officer Hearing until the fall of 1993 at which time a grievance was filed and the Union advised the Company that they believed there was an obligation on the Company to create a position for the grievor at the Hamilton terminal consisting of the following duties:

- 1 monitor maintenance of vehicles
- 2 cash out drivers
- 3 answer phones throughout the day
- 4 do over the counter sales throughout the day
- 5 correct addresses on parcels
- 6 repackage damaged parcels
- 7 prepare packages to return parcels to shippers
- 8 office clean-up
- 9 order supplies
- 10 tracing
- 11 do damage reports
- 12 scheduling for employees off sick
- 13 scheduling for holidays
- 14 general office work

No one employee performs exclusively some or all of these functions. It is the Company's position that duties which have been identified are either partially performed through mechanical means (e.g., an answering machine is used to answer the phones throughout the day) or performed by a variety of other persons such as drivers, warehouse and supervisory personnel as part of their overall functions. It is the position of the Union and of the grievor that any one of the persons on the attached list with less seniority than the grievor could have been laid off and duties redistributed efficiently.

It is the Union's position that the Company is under an obligation under articles 5.3.2 and 5.3.3 of the collective agreement and under the Canadian Human Rights Code to accommodate the disability of the grievor by creating the position outlined above for the grievor and placing him in that position. The Union also seeks compensation from September 23, 1993 to the date the grievor is returned to work.

It is the Company's position that there is no obligation to create a position for an employee and, in the alternative, if such an obligation exists the creation of a position request in this case is unreasonable. It is also the Company's position that the grievance is untimely while it is the Union's position that the grievance is timely under the collective agreement.

On March 31, 1993, CanPar (Division of Canadian Pacific Express & Transport Ltd.) was sold to Westminster Holdings and is now a wholly owned subsidiary of that Company.

FOR THE UNION:

(SGD.) D. J. DUNSTER
EXECUTIVE VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) P. D. MACLEOD
DIRECTOR, TERMINALS

There appeared on behalf of the Company:

P. Young	– Counsel, Toronto
P. D. MacLeod	– Director, Terminals, Toronto
P. Kitchener	– Supervisor, Hamilton

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
R. Johnson	– Grievor

PRELIMINARY AWARD OF THE ARBITRATOR

The sole issue in the instant case is the arbitrability of the grievance. The Arbitrator is satisfied that the grievance at hand does concern an allegation of an ongoing breach of the collective agreement made by the trade union. I am not prepared to accept that the grievor filed a grievance with the Company in September of 1992 by purporting to leave a letter claiming a right to certain work at the terminal, which apparently was never received by the Company. However, different considerations arise in respect of a subsequent document prepared and filed with the Company by the Union.

The record discloses that on December 15, 1993, at a time when the grievor was still an employee, and had been the subject of extensive Workers' Compensation litigation, the Union's Executive Vice-President D.J. Dunster wrote the Company's Director, Mr. P.D. MacLeod, stating, in part, "the Union and Richard Johnson hereby grieve that CanPar has violated articles 5.3.2 and 5.3.3 by refusing to permit Richard Johnson to displace junior employees in the Hamilton terminal (or indeed any other terminal)." As is evident from the contents of that letter, the Union objected, among other things, to discrimination on the basis on disability, and claimed modified duties for the grievor. In the result, I am satisfied that the Union did file a timely grievance, in December of 1993, with respect to what, if proved, would be an ongoing breach of the Employer's continuing duty to provide reasonable accommodation for the grievor's physical disability.

In the result, the Arbitrator is satisfied that the instant grievance is arbitrable. The General Secretary is therefore directed to list this matter for hearing on its merits.

February 16, 1996

(signed) MICHEL G. PICHER
ARBITRATOR

(The case was subsequently adjourned sine die.)