CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3060
Heard in Montreal, Thursday, 10 June 1999
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)

EX PARTE

DISPUTE:

The entitlement of employee M. Rousseau to be placed on the furlough board, rather than being placed on laid off status by the Company.

EX PARTE STATEMENT OF ISSUE:

Ms. Rousseau is a protected freight employee. At the time of implementation of the Conductor-Only Agreement, Ms. Rousseau was a medically restricted employee, and was performing work as a switch tender.

On September 27, 28 and 29 and October 28 and 29, 1991, and on subsequent dates, Ms. Rousseau was unable to hold work as a switch tender, and was placed on laid off status by the Company.

It is the Union's position that the grievor is a protected employee and that she ought to have been placed on the furlough board rather than being placed on laid off status. The Union is contending that the Company's actions are contrary to the collective agreement and the *Canada Human Rights Act.* The Union is requesting the payment of full compensation to Ms. Rousseau.

The Company disputes the Union's position on this matter and has therefore declined to make payments to Ms. Rousseau.

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FOR THE COUNCIL:
(SGD.) R. J. LONG
GENERAL CHAIRPERSON
There appeared on behalf of the Company:
D. C. McDonnell - Sr. Counsel, Montreal
D. Laurendeau - Labour Relations Associate, Montreal
J. D. Pasteris - Manager, Labour Relations, Montreal
And on behalf of the Council:
P. Sadik - Council, Toronto
R. J. Long - General Chairman, Brantford
J. Orr - Secretary, GCA, London
R. Doiron - Local Chairman, Montreal

R. Michaud - Provincial Legislative Chairman, Montreal

AWARD OF THE ARBITRATOR

The facts in relation to this grievance are not in dispute. By reason of her seniority, the grievor, Ms. Michelle Rousseau, is a protected employee under the terms of the Conductor-Only Agreement. If she is unable to hold work she is generally entitled to placement on a furlough board, a position which guarantees the continuation of her wages and benefits at an agreed rate. Employees who are on the furlough board are required to protect any work for which they are qualified which may become available.

It is common ground that the grievor is qualified as a conductor, brakeperson, yard foreman and yard helper. On February 21, 1987 she sustained a back injury which caused a permanent disability. As a result of her condition, she has continuously worked in the position of switchtender, a largely sedentary job. In September and October of 1991 Ms. Rousseau was displaced from her switchtender position by a senior disabled employee, for a total of some five days. She then claimed the right to be placed on the furlough board. The Company denied her a furlough board position, as a result of which she was placed on layoff. It does not appear disputed that soon thereafter she resumed her switchtender position, which she has occupied to the present time.

The issue is whether the Company violated the collective agreement or, as the Council alleges, the Canadian Human Rights Act, R.S.C. 1985 c. H-6, by denying the grievor access to the furlough board for the days in question.

Furlough boards are generally governed by the terms of article 91 of the collective agreement which provides, in part, as follows:

> 91.1 Furlough Boards will be established and maintained at each home station to manage protected freight employees who are surplus but who, pursuant to articles 55.1 and 55.6 hereof are not subject to being laid off or cut off.
>
> 91.3 (c) The temporary absence of an employee from his or her position on the furlough board such as an annual scheduled vacation or as a result of being disabled or on authorized leave of absence will not create a temporary vacancy.
>
> 91.5 It will be incumbent upon each employee on the furlough board to:
>
> (a) report to the proper Company officer when he or she is disabled and unable to respond if required in accordance with clauses 91.8 to 9 1. 11 inclusive
>
> (b) to maintain his or her rules and medical qualifications; and

(c) to keep the proper officer of the Company advised of their address, in writing, so that he or she may be readily contacted.

The Council alleges, firstly, that the Company has violated article 9.1 of the collective agreement and denied the grievor her fundamental protections under article 55 of the collective agreement, whereby she is not subject to being laid off. In the Council's submission while the grievor has a permanent medical restriction, she is not "disabled" within the meaning of article 9 1.5. The Council maintains that the only provisions for the exclusion of an employee from the furlough board are found in article 91.4 which provides as follows:

> 91.4 Positions on the furlough board may be occupied only by protected freight employees except that:
>
> (a) a protected freight employee who is eligible for early retirement and the Company's pension rules may not occupy a position on the furlough board;
>
> (b) a protected freight employee may not occupy a position on the furlough board when it would result in a non-protected employee holding a position in any class of service under this agreement.

As a second basis of argument, the Council submits that the Company's actions violate the **Canadian Human Right Act.** It cites sections 7 and 15 of the Act which read as follows:

> 7. It is a discriminatory practice, directly or indirectly,
>
> (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. 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.

The Council submits that on the facts disclosed the grievor has been effectively denied work or access to wages by reason of her physical disability. That, it submits, is discrimination on a prohibited basis. In the Council's view the refusal to place Ms. Rousseau on the furlough board is tantamount to a refusal to continue to employ her, to the extent that she is compelled to suffer a layoff. The Council asserts that there has been a failure to accommodate the grievor's medical restriction in denying her a position on the furlough board with its related wages and benefits.

The Council maintains that the obligation to protect work while on the furlough board must be adjusted for the grievor, by way of accommodation, so that she must be available to perform the work of the only position for which she is physically qualified, that of a switchtender. The fact that she has qualifications as a conductor, brakeperson, yard foreman or yard helper, positions which she is physically disabled from performing, should not be held against her, in the Council's submission.

At first blush it would seem that the administration of the furlough board operates in a manner that is discriminatory or adverse to the grievor by reason of her disability, or physical restrictions. However, after close examination of the applicable law, the Arbitrator has some difficulty with the position advanced by the Council, both as regards the collective agreement and the Canadian Human Rights Act. In approaching the issues in dispute, it is essential to bear in mind the fundamental nature of the furlough board provisions of the collective agreement. Furlough board standing is a form of continued employment, in lieu of layoff, for which wages and benefits are paid. While the employee on the furlough board may have no immediate assignment which he or she fills, it is the employee's obligation to remain available and to respond to calls for any work for which the individual is qualified. So understood the furlough board is a wage protection provision made available to protected employees of a given seniority, in exchange for meeting certain obligations on their part, which generally includes performing any work for which they are qualified, as needed.

It is evident from the language of article 91.5 that the parties intended that an individual must keep the Company advised of any disability or illness which would prevent the employee from responding to a call for work if required. Similarly, employees are required to maintain rules and medical qualifications. Article 91.3(c) reflects the understanding of the parties that an employee is to be removed from the furlough board if he or she is subject to a leave of absence. The examples cited in article 91.3(c) are a scheduled vacation, leave by reason of a physical disability, or an authorized leave of absence. What the article contemplates is that employees who are on a leave, for whatever reason, and are therefore not available to perform any and all work for which they are qualified, cannot hold a position on the furlough board for the period of their leave.

On the basis of the language of the collective agreement, therefore, the Arbitrator cannot find any violation of its provisions in the actions of the Company in respect of Ms. Rousseau. Article 91.3 contemplates that employees who are on any form of leave, and therefore cannot fulfill all of the obligations to protect work for which they are qualified, are to be viewed as absent from the furlough board. From a purposive point of view that understanding does not appear surprising. To the extent that the furlough board represents a means of providing wages to employees in exchange for being fully available for work for which they are qualified, persons who are on scheduled vacation, authorized leave of absence or a

disability leave of absence cannot logically be viewed as entitled to the payment of wages for full availability. While they may be entitled to other benefits, such as short or long term disability payments or payments in relation to certain forms of leave such as maternity or scheduled vacation, they cannot properly claim the payments of wages in exchange for full availability.

The requirements for furlough board standing are not unlike those which have applied elsewhere in the industry to employees who have the wage protection of "employment security", a benefit found generally among the nonoperating trades. For example, in **CROA 2397** it was found that an employee with medical restrictions was properly laid off, and could not claim an entitlement to employment security payments because her physical disability prevented her from being available to protect work for which she was qualified, an obligation inherent in the bargain underlying the employment security protection. It has also been determined by this Office that an employee who cannot hold work by reason of a physical disability cannot claim layoff benefits *(see, e.g.,* **CROA 2533** *and* **2891).** Upon a review of the jurisprudence and the language of the collective agreement, I cannot find any violation of the collective agreement in the denial of a furlough board position to the grievor.

Has there been a violation of the **Canadian Human Rights Act** in the treatment of Ms. Rousseau? Does the denial to her of wages and benefits in the form of furlough board protection constitute discrimination which is unlawful and prohibited by the Act? This Office, and Canadian arbitrators generally, have had much occasion to consider the application of human rights statutes in the workplace. It is generally accepted that where an employee or trade union establishes a *prima facie* case of discrimination on the basis of the prohibited ground of disability, the onus then shifts to the employer to establish that the requisite physical fitness is a *bona fide* occupational requirement **(BFOR) (CROA 1585).** It is also clear that where general standards of fitness have an adverse impact on persons with a physical disability, causing adverse impact discrimination or indirect discrimination, there is an obligation upon the employer to accommodate the disability of the employee to the point of undue hardship **(CROA 2768, 2998** *and* **3002).** Since 1998 section 15(2) of the Act has merged the duty of accommodation into the **BFOR** analysis (S.C. 1998, c. 9). The cases have generally proceeded on the basis that it is improper for an employee to be discriminated against, where such discrimination threatens the individual's very status as an employee or access to work.

A distinction has been drawn, however, by both arbitrators and the courts when the alleged discrimination against the disabled does not concern an individual's status as an employee but an entitlement to wages, benefits or other normally earned payments. In applying human rights statutes adjudicators have developed a distinction between access to employment and the claim of a disabled employee that discrimination has deprived him or her of wages and benefits.

That distinction was touched upon by this Office in **CROA 2935,** which involved the same parties as the instant case. The Council there grieved that employees absent from work on long term disability leaves were discriminated against contrary to the **Canadian Human Rights Act** by being denied participation in early retirement opportunities made available to active employees under agreements negotiated following job abolishments which were part of a material change implemented by the employer. In that award the arbitrator emphasized that the fundamental bargain in relation to the creation of early retirement opportunities was to minimize the adverse impact on employees by encouraging the withdrawal from the workplace of active senior employees, thereby freeing up work opportunities for remaining junior employees who might otherwise face a layoff. The underlying rationale of the agreement to provide early retirement opportunities was obviously not served if those opportunities were taken up by inactive employees on long term disability leaves of absence. Effectively recognizing that the early retirement opportunities were tantamount to a buying out of employees who were actively employed, the arbitrator concluded that it was not unlawful discrimination if employees who were inactive by reason of disability could not participate in the terms of the special agreement. In that award the following comments appear:

> Nor can the Arbitrator find any substance in the suggestion that the administration of these provisions is in some way contrary to the provisions of the **Canadian Human Rights Act.** It is generally recognized that the **Canadian Human Rights Act,** and similar provincial statutes, are intended to protect the status of employees who may suffer physical disabilities or illness, against discriminatory treatment. On that basis, employer actions which may undermine the seniority or eventual job security rights of disabled employees have been found to be discriminatory, and contrary to the **Canadian Human Rights Act.** In contrast, boards of arbitration have been careful to distinguish the issues of earned wages and benefits, recognizing that the denial of normal wages and benefits for time worked, to employees who are not at work, is not of itself discriminatory, or contrary to the Act. In the circumstance at hand, the Arbitrator cannot see how employees who are on long term disability leaves of absence can complain, on the basis of discrimination, that they have been denied early retirement incentives any more than they could legitimately claim the discriminatory denial of overtime opportunities. *(See* **Re Versa Services Ltd. and Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees Union** (1994), *39 L.A.C (4th) 196 (R.M. Brown).)*

Generally arbitrators have not found discrimination where the facts disclose that an individual's physical disability disqualifies that person from fulfilling obligations which are a condition precedent to the payment of wages, benefits or other earned advantages. One view of the notions underlying that distinction was elaborated in a recent article authored by Arbitrator R. M. Brown: *"Human Rights in Employment: Of Participation and*

Compensation" (1998) 4 Canadian Labour & Employment Law Journal *283.* The author expands upon the rationale of the **Versa Services** decision, noting that it was upheld by the Ontario Divisional Court, in the following passage at p. *300*

> Acknowledging there was indirect discrimination as defined in *O'Malley,* the award in *Versa Services* held the law of adverse effect discrimination is different for compensation than for participation. While indirect discrimination which limits access to work is unlawful, unless accommodation would involve undue hardship, such discrimination relating to remuneration is not unlawful, even if accommodating those aggrieved would not be onerous. This ruling was upheld by a unanimous bench of the Ontario Divisional Court.

At p. *301* the following observations appear:

> Arbitrators have generally followed the tack taken in *Canadian Airlines* and *Versa Services.* There is only one reported award to the contrary. Some of the mainstream decisions neither mentioned the distinction between access and remuneration nor acknowledged the existence of a disparate impact. Nonetheless, without regard to undue hardship, these awards upheld compensation practices which adversely affected employees absent due to disability or on pregnancy and parental leave. The most recent decision on point, *Soldiers Memorial Hospital,* addressed the issues squarely. The Arbitrator dismissed a grievance, filed on behalf of employees on disability leave, claiming remuneration which was not available to those away from work for other reasons. The award noted that giving handicapped people such preferential treatment might discourage management from offering them a job in the first place. Refusing to employ someone because of a disability is illegal, but policing hiring decisions is notoriously difficult.

Finally, at p. *303* Arbitrator Brown summarizes the distinction between issues of access to the workplace and the entitlement to wages and benefits:

> The prevailing approach of arbitrators is not to treat compensation in the same way as participation insofar as indirect discrimination is concerned. In particular, the vast majority of arbitrators have rejected human rights complaints about remuneration schemes of general application with a differential impact on handicapped people or women, without considering whether those adversely affected could be accommodated without undue hardship.

In a more recent decision, involving the judicial review of the award of the majority of a board of arbitration chaired by Arbitrator Mitchnik in Soldiers Memorial Hospital, the Ontario Court of Appeal took issue with the analysis and approach of Arbitrator Brown in Versa Services. In Soldiers Memorial Hospital, reported as Ontario Nurses' Association v.

Oriflia Soldiers Memorial Hospital (1999) 42 O.R. (3d) 692 (Ont. C.A.), the Mitchnik board and the reviewing courts dealt with a collective agreement provision whereby nurses on unpaid leaves of absence resulting from a disability were denied the accumulation of seniority and service credits after a certain time. They were also eventually required to pay the premiums for their employee benefit plans. The majority of the board of arbitration found that the denial of premiums and service credits did not constitute discrimination contrary to the **Ontario Human Rights Code,** R. S. 0. 1990, c. H. 19. The board concluded, however that the denial of accrued seniority did constitute discrimination in violation of the **Code.**

Both parties in Soldiers Memorial Hospital moved for judicial review of the decision of the board of arbitration. The union sought to quash the board's decision with respect to the denial of premiums and service credits while the employer challenged the conclusion that the denial of seniority accrual was contrary to the Code. The employer prevailed before the Divisional Court, which ruled that none of the collective agreement provisions violated the **Code.** That conclusion was appealed by the union to the Ontario Court of Appeal which ultimately allowed the appeal, in part, effectively restoring the result of the arbitration award. The Court concluded that the denial of premiums and service credits, both of which relate to the compensation of employees for work performed, was not discriminatory in a manner contrary to the **Code,** as the denial of compensation advantages applied not only against the disabled, but against all employees who were not available to perform work. In that circumstance there was no discrimination found against the disabled, who were treated no differently than other employees on different forms of leaves of absence. The Court of Appeal found, however, that the truncating of seniority rights, rights which are fundamental to an employee's access to work opportunities in matters such as promotion, lay off and recall, did constitute discrimination contrary to the **Code.**

It appears that the Court of Appeal took issue with the reasoning of Arbitrator Brown in the Versa Services case on the arguably narrow basis that he misinterpreted section I I of the Ontario Human Rights Code by concluding that it allows for drawing distinctions between issues of compensation and participation. For the Court, Rosenberg J.A. asserted what he views as an example of adverse effect discrimination being prohibited in matters of compensation, referring to the decision of the Supreme Court of Canada in Chambly, Commission scolaire r6gionale v. Bergevin [1994] 2 S.C.R. 525, 115 D.L.R. (4th) 609. The learned judge's reasoning appears to be that if the Jewish teachers who were the subject of the Chambly case could not be denied a paid religious holiday by reason of their religion, similar protections involving compensation should be available to other groups protected by human rights legislation, including the disabled.

It is arguable, I think, that much of the above debate is more academic than real. The notions of equality of treatment which arise in relation to employees denied a religious holiday for which they are paid not to work

are substantially different from those involving the wage claims of persons who are disabled from performing work. Moreover, for the purposes of this grievance, there would appear to be no practical difference in the conclusion that would flow from the approach taken by Arbitrator Brown in Versa Services and that taken by Rosenberg J.A. in Soldiers Memorial Hospital, even discounting the fact that this grievance does not involve the interpretation of the Ontario Human Rights Code. The analysis of the Ontario Court of Appeal with respect to comparator groups leads to the common sense conclusion that if the general rule is that employees who are not at work cannot claim wages or benefits, employees on disability leaves of absence cannot claim discriminatory treatment for the denial of wages or benefits. In that regard the reasoning of the Ontario Court of Appeal at pp. 703-04 is instructive:

> Disabled nurses do not receive this compensation because they are not providing services to their employer. It is not prohibited discrimination to distinguish for purposes of compensation between employees who are providing services to the employer and those who are not. It would be prohibited discrimination for the employer to provide different compensation to different groups of employees providing services, if the distinction were based on a prohibited ground. That was the problem in ***Brooks.*** Under the disability plan in that case, employees who were unable to work due to sickness or accident were provided with benefits or, in the words of Dickson, CA.C., compensation. However, pregnant employees who were unable to work in the 17-week period surrounding the birth were excluded from the plan even when the reason for their inability to work was unrelated to the pregnancy. Instead, these employees were required to draw upon the less generous pregnancy benefits under the ***Unemployment Insurance Act,*** 197 1, S.C. 1970-71-72, c. 48. The court found that this distinction, drawn on the basis of pregnancy, was sex discrimination. A critical element in finding discrimination was establishing the appropriate comparator group. The employer argued that since pregnancy is not a sickness or accident it need not treat pregnant employees the same as employees who are unable to work due to sickness or accident. Dickson C.J.C. rejected this approach. Rather, he looked at the underlying rationale of the disability plan, which he described at p. 1237 S.C.R.. p. 334 D.L.R. as "the laudable desire to compensate persons who are unable to work for valid health-related reasons". Having decided to provide such a plan, the employer was not entitled to distinguish between persons who are unable to work for valid health-related reasons of the basis of sex.

Stressing the fact that the underlying bargain in the collective agreement is that the employer is to pay for benefit premiums in exchange for active work on the part of employees, the Court commented further as follows at p. 705:

> In the case presently before the court, the purpose of the employer contributions to benefit plans is to provide an additional form of

> compensation in exchange for work. Having chosen to provide this form of compensation, the employer could not discriminate on a prohibited basis. However, the employer could distinguish based on the reasons for providing the compensation: work. On its face, discrimination would exist if the employer provided different levels of compensation for work because of handicap. Likewise, it would constitute discrimination if the employer provided different levels of compensation for not working because of handicap. But, in this context it makes no sense to compare working employees with those not working. As Sopinka J. said, comparing the benefits allocated to employees pursuant to different purposes is not helpful in determining discrimination.

While it is arguable that the foregoing passages, and the decision of the Ontario Court of Appeal in Soldiers Memorial Hospital, are not binding for the purposes of this award, which relates to the application of the Canadian Human Rights Act, in fact there is little to distinguish the substance of that legislation from the provisions of various provincial human rights codes. Moreover, tribunals and courts should not be astute to find distinctions between pieces of federal and provincial human rights legislation, given the over-arching requirements of the Canadian Charter of Rights and Freedoms, and the general principles emerging from the jurisprudence of the Supreme Court of Canada. At a minimum, the Soldiers Memorial Hospital case must be viewed as persuasive authority. I think that it is particularly persuasive for recognizing the importance, as stressed by Rosenberg J.A., of focusing on the purpose of employee wages or benefits in considering whether there has been discrimination.

Taking that approach, what conclusion is to be drawn in the instant case? If the furlough board system is characterized as a form of income insurance, there is a strong case to find unlawful discrimination. If to hold a furlough board position is to be paid for not working, it would appear arguably discriminatory to deny its protections to the disabled while making them fully available to those who are able-bodied. However, that approach misconstrues the fundamental purpose of the furlough board and the bargain which underlies it.

Employees who hold a position on the furlough board are not paid not to work. Rather, they are paid to be within a telephone call of any work for which they may be needed and for which they are qualified. Like a professional athlete on the bench, they are paid to be fully available if needed and called upon. Not surprisingly, employees who are on leaves of absence, for whatever reason, and who are not available to perform work for which they are qualified, are not entitled to hold a position of the furlough board and to receive the wages and benefits which attach to its obligations. In that circumstance a person in the position of Ms. Rousseau is not denied a furlough board position because she is disabled, but rather because she is on an effective leave of absence which renders her unavailable to perform all of the work for which she is qualified.

It is true, as counsel for the Council submits, that the furlough board rules can impact certain individuals, such as the grievor, more negatively than others. He cites the example of an employee who has a partial disability, but whose disability would prevent him or her from performing only work for which he or she is not formally qualified. Counsel argues that if that individual can have the benefits of holding a position on the furlough board, the less advantageous treatment of the grievor is discriminatory by reason of her disability.

With respect, the Arbitrator cannot agree. That argument fails to appreciate the legitimate and discrimination-neutral bargain which is the essence of the furlough board arrangement, namely that employees receive the wages and benefits of the board if they are fully available to perform all work for which they are qualified, when called to do so. While I agree with counsel for the Council that the appropriate comparator group for the purposes of determining discrimination in the instant case is not all employees, I am satisfied that in the instant case the appropriate comparator group is identical to that identified by the Court in the Soldiers Memorial Hospital case, namely employees who are unavailable to perform service for which they are qualified, whatever may be the cause of their unavailability. Moreover, on the facts of the instant case, if being able-bodied to perform all work for which an individual is qualified can be viewed as direct discrimination against the disabled, I would conclude that the requirement of full availability in exchange for the full payment of the wages and benefits of the furlough board is a *bona fide* occupational requirement.

If it can be said that the furlough board rules cause either direct or indirect adverse effect discrimination against the disabled (a conclusion which I would reject for the reasons related above) the issue would then become whether there is an obligation, as counsel for the Council argues, to accommodate the grievor short of undue hardship. How, then, could that be done? The only work which Ms. Rousseau can perform is the sedentary duties of a switchtender. Indeed that work has been made available to her by specific accommodation of her disability for many years'. There are relatively few automated switchtender positions available within the Company's operations, as compared to the more commonly available road and yard work of conductors, brakepersons, yard foremen and yard helpers, all of which the grievor is qualified for and unable to perform by reason of her disability. To oblige the Company to pay wages and benefits to an employee whose likelihood of being called to active work is negligible by reason of the limited work opportunities he or she might be called upon to fill is, in my view, a legitimate consideration to be taken into account in assessing the issue of undue hardship.

It should be stressed that this is not a situation where accommodation in the form of modification of the physical exigencies of work as a conductor, brakeperson, yard foreman or yard helper are a viable consideration. In the result, as a general rule, for a person in the situation of the grievor to hold a furlough board position is to require

the employer to indefinitely pay wages and benefits to an individual whose window of opportunity for active work is extremely narrow. Given the underlying purpose of the furlough board, such an obligation would, in my opinion, constitute undue hardship for the Company within the meaning of that concept as it has evolved in the jurisprudence. To put the matter differently, and to paraphrase the comments of Rosenberg J.A. at p. 715 of the **S**oldiers Memorial Hospital case, requiring full availability for work in exchange for compensation is a reasonable and *bona fide* requirement, and little or nothing can be done to accommodate employees who are unable to meet that requirement by reason of illness or disability.

Based on all of the foregoing, I am satisfied that the collective agreement has not been violated, to the extent that the furlough board provisions properly require as a condition of holding a furlough board position that an employee be fully available to perform all work for which he or she is qualified. Additionally, to the extent that furlough board standing is unavailable to all employees who are on leaves of absence, there has been no discrimination against the grievor by reason of her disability, contrary to the **Canadian Human Rights Act.** It might also be noted that whether Ms. Rousseau was properly to be treated as laid off, or whether she should have been afforded such benefits as might be found under the collective agreement for employees on short term or long term disability, is not an issue which has been argued before me. As noted by Arbitrator Brown, however, there is much to be said for the notion that the disabled are better protected by wage replacement schemes, whether legislated or bargained, than by the broad sweep of human rights legislation, where issues of compensation are concerned. Finally, from a human rights standpoint, it should also be stressed, as touched upon above, that Ms. Rousseau has for many years benefited from the employer's enlightened accommodation of her disability, and apparently continues to enjoy that benefit.

For all of the foregoing reasons, the grievance must be dismissed.

June 25, 1999

MICHEL G. PICHER
ARBITRATOR