**CANADIAN RAILWAY OFFICE OF ARBITRATION**

**CASE NO. 3289**

**Heard in Montreal, Thursday, 12 September 2002 & Tuesday, 8 April 2003**

**concerning**

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**UNITED TRANSPORTATION UNION**

**EX PARTE**

**DISPUTE:**

Suitable accommodation of Conductor D.C. Field pursuant to Canadian Railway Office of Arbitration award 3140.

**EX PARTE STATEMENT OF ISSUE:**

Mr. Field, as a result of CROA 3140, was placed on a utility person assignment in Edmonton. After working that position for some time, and having received no complaints or concerns regarding his work performance, the Company arbitrarily removed him from that assignment and placed him on a hostler job.

Mr. Field worked as a hostler, again with no complaints about his work performance. He was however, removed from this position and required to take training outside the bargaining unit as a crew dispatcher. Mr. Field failed to qualify as a crew dispatcher and is, once again without employment.

The Union contends that the Company has failed to adequately accommodate Dale Field, or to fully comply with the terms of CROA 3140.

The Company disagrees.

**FOR THE UNION:**

**(SGD.) R. HACKL**
**FOR: GENERAL CHAIRPERSON**

There appeared on behalf of the Company:

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| D. N. Kruk | – Counsel, Edmonton |
| S. M. Blackmore | – Manager, Human Resources, Edmonton |
| L. Rea | – Transportation Supervisor, |
| L. Gallegos | – Operations Manager, |

And on behalf of the Union:

H. F. Caley – Counsel, Toronto
B. R. Boechler – Vice-General Chairperson, Edmonton
R. A. Hackl – Vice-General Chairperson, Edmonton
D. C. Field – Grievor

At the request of the parties, the Arbitrator adjourned the hearing *sine dies*.

On April 8, 2003, there appeared on behalf of the Company:

S. M. Blackmore – Manager, Human Resources, Edmonton
D. S. Fisher – Director, Labour Relations, Montreal

And on behalf of the Union:

M. A. Church – Counsel, Toronto
R. A. Hackl – General Chairperson, Edmonton
B. R. Boechler – General Chairperson, Edmonton
W. G. Scarrow – Sr. Vice-Prsident, Ottawa

## AWARD OF THE ARBITRATOR

The sole issue in the instant grievance is whether the Company failed to provide reasonable accommodation to the grievor in respect of his disabilities, and if so, whether he should be compensated for the period between April and October 2002, during which he was without active employment. It is common ground that following the initial hearing of this matter, in September of 2002, pursuant to an agreement between the parties, a functional capacity evaluation of Mr. Field was conducted, as a result of which he was returned to active employment, in his running trade, with no restrictions. The Union now maintains that the Arbitrator should provide a declaration that the Company failed to adequately accommodate the grievor's disabilities for the above noted period, and order his full compensation for wages and benefits lost.

Having reviewed the rather extensive evidence in the file at hand, the Arbitrator is satisfied that there was a degree of failure of duty on the part of the Company in respect of its assessment of the employability of Mr. Field. By the same token, however, the evidence reveals that the grievor himself contributed, in substantial part, to the fact that he went without employment for the seven month period which is the subject of this grievance.

I am satisfied, based on the evidence before me, that the Company did accommodate Mr. Field in respect of his disability following the decision of this Office in **CROA 3140.** It is also not disputed that he was properly compensated pursuant to that award. The evidence discloses that he was provided work both as

a utility person and as a hostler/herder in Edmonton for a substantial period of time. However the reorganization of yard crews, and an expansion in the duties assigned to hostlers/herders caused the Company to conclude that the work available to Mr. Field was then beyond the restrictions which it had been advised by medical authorities must apply to Mr. Field. It appears that at the time the grievor himself took issue with whether he was in fact unable to do the normal work of his trade.

The record reveals that following the grievor's removal from the hostler/herder position in April of 2002 the Company directed Mr. Field to train for a position as a crew dispatcher, a job which would fall outside the Union's bargaining unit. Without dwelling on the details of the evidence, it is clear to the Arbitrator that the grievor did not wish to leave bargaining unit work, and that he deliberately failed both the aptitude test and the substantive portion of the training course for work as a crew dispatcher. When he was finally eliminated from that program the Company advised him that it had no further work for him, as a result of which he remained out of work between April and October of 2002, until the initial hearing of this matter occasioned a reassessment of the grievor's restrictions and his eventual return to full duties.

When regard is had to the objective evidence, the Arbitrator has substantial difficulty understanding on what basis the Company would have refused the grievor the opportunity to train and work in LCS beltpack operations in yard assignments. On the face of the physical restrictions which the grievor had, it is far from clear that he would have been unable to wear and operate a beltpack mechanism and perform the duties of yard switching associated with it. At a minimum, I am satisfied that the Company was under an obligation to then obtain a professional medical assessment of the grievor's disabilities to determine whether, in fact, his restrictions would extend to prevent him from training and ultimately working in beltpack operations.

When Mr. Field was removed from the hostler/herder function it was then open to him to grieve the Company's failure to provide him other work within his bargaining unit, or to allege that there was a failure of the employer's obligation to accommodate his disabilities. He could, and in the Arbitrator's view should, have followed that course while in good faith accepting to be assessed and trained for the crew dispatcher's position, even if that was not his first wish. No less than an employee who might be wrongfully dismissed, the grievor was under an obligation to mitigate any losses which might arise by reason of the conflict

between himself and the Company concerning his capacity to do the work of his trade. Unfortunately, by his ill-advised course of conduct, which included deliberately failing a test which I am satisfied was amply within his abilities, he contributed substantially to his own misfortune. In coming to that conclusion the Arbitrator notes that the grievor, who had previously been virtually flawless in rules examinations, registered at the third percentile, being below 97% of all other candidates, in the rules aspect of the crew dispatchers' course. In addition, his multiple answers to a number of questions on the initial assessment form can only be understood as a deliberate expression of the grievor's own bad faith with respect to the process.

In the circumstances, the Arbitrator is satisfied that this is an appropriate case for an order of compensation and a declaration. However, it is also appropriate that there be a division of responsibility commensurate with the shared fault of the Company and the grievor in what transpired. For the foregoing reasons the grievance is allowed, in part. The Arbitrator declares that the Company did fail to properly consider the grievor's eligibility for further bargaining unit work after his removal from service as a hostler/herder. At a minimum it should have obtained an assessment of the grievor's eligibility to perform LCS beltpack work in yard operations, an assessment which only occurred after the initial scheduling of this grievance and an agreement between the parties to properly assess the grievor's physical capacities. With respect to the issue of compensation, however, having regard to Mr. Field's own failure to mitigate his losses, and to participate in good faith in the identification of accommodated work alternatives, including the position of crew dispatcher, the Arbitrator is satisfied that the compensation payable to the grievor should be no greater than half his loss of wages and benefits. The Company is therefore directed to compensate the grievor for half the wages and benefits lost for the period between his removal from active employment in April of 2002 until his reinstatement in October of 2002.

April 11, 2003

**(signed) MICHEL G. PICHER**
**ARBITRATOR**

**AGREED PROCESS**

1. Adjourn *sine die*
2. The Union to advise the Company within seven (7) days of a list of assignments which grievor believes he can perform.
3. The Company will provide the Union with any job description or physical demand analysis documents relating to the identified assignments.
4. The documents in (3) will be provided to Medysis.
5. The grievor will be fully functionally evaluated for his physical fitness to perform the identified assignments by Medysis (including doctor, therapist and technicians). The itemized report of Medysis to be provided to both parties.
6. If grievor is cleared for an assignment he will be assigned subject to seniority.
7. If the grievor is not cleared as fit for any of the identified assignments he will obtain a separate opinion from an occupational medicine physician respecting his fitness to perform any of the identified assignments. The itemized result of the doctor's report to be provided to both parties.
8. If as a result of step (7) the grievor obtains a favourable report from the independent physician the Company will consider that opinion.
9. If the parties remain disagreed after step (8) the matter may be brought back to arbitration or resolved by such other process as the parties may agree on.

*10.* Depending on the result of the above steps, the parties may bring the matter back to the Arbitrator respecting the issue of compensation

September 12, 2002