CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3296

Heard in Calgary, Tuesday, 12 November 2002
concerning
CANADIAN NATIONAL RAILWAY COMPANY

and
UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:
Appropriate accommodation of Stacey Smith-Torhjelm during her pregnancy.

EX PARTE STATEMENT OF ISSUE:
Stacey Smith-Torhjelm, on June 9, 2000, informed the Company she was pregnant with an expected delivery date of February 9, 2001. She requested that she be provided suitable accommodated duties. The Company proposed that the grievor work as an assistant conductor on a job whose primary task was the switching of the Imperial Oil plant in Edmonton. The grievor had previously (before she knew she was pregnant) exercised her rights under Part 11 of the *Canada Labour Code* and refused to work at this location due to perceived health risks. The Transport Canada Safety officer ruled that no danger was imminent.

The Company suggested that the grievor should work this position as a means of accommodation while she was pregnant. The grievor refused, citing health risks to her unborn child. The Company maintains that, even though no mention was made of pregnancy in their report, Transport Canada had declared there was no health risks present for a pregnant woman or unborn child.

The grievor, who had been out of work since June 9, 2000, was placed on a weed control position from August 8 through August 25, inclusive. She was further employed from October 2 to 20, 2000 as a United Way canvasser and October 23 to December 24, 2000 as a utility person in Clover Bar.

The Union contends that the Company has failed to accommodate the grievor during her pregnancy contrary to the *Canadian Human Rights Act* and [that the grievor] has suffered a significant financial loss as a result.

The Union requests that she be fully compensated and made whole. The Company disagrees.

FOR THE UNION: (SGD.) R. HACKL for: GENERAL CHAIRPERSON
There appeared on behalf of the Company:
D. Kruk - Counsel, Edmonton
S. Blackmore - Human Resources Manager, Edmonton
K. Guiney - Manager, Human Resources,
R. Shalha - Human Resources Manager, Winnipeg
And on behalf of the Union:
M. A. Church - Counsel, Toronto
R. Hackl - Vice-General Chairperson, Saskatoon
B. R. Boechler - Vice-General Chairperson, Edmonton

AWARD OF THE ARBITRATOR

The issue in the instant grievance is whether the Company has failed to accommodate the grievor by reason of her pregnancy, contrary to the provisions of Part 11 of the Canada Labour Code and the Canadian Human Rights Act.

The facts are not in substantial dispute. The grievor has been employed in yard service with the Company, as a yard conductor and yard helper at Edmonton since May of 1990. Because Ms. Smith-Torhjelm was not able to wear the locomotive remote control beltpack utilized in yard switching, she has been accommodated by assignment to the only non-beltpack job available in the Edmonton Yard. That assignment involves switching at the Imperial Oil Refinery Strathcona Yard. Although she had considerable experience in working at that location, upon a recall from layoff in mid-May of 2000 the grievor had concerns as to whether working at that location might cause her problems, as she then believed that she might be pregnant. Her pregnancy was subsequently confirmed. After some effort she prevailed upon the Company to obtain material safety data sheets (MSDS) for the chemicals being handled at the refinery. It is not disputed that those sheets, intended to apply to refinery employees who are directly involved in the handling of the products, do confirm that certain of the substances and chemicals handled at the refinery can have adverse effects on a foetus. It is not disputed, however, that the MSDS standards are addressed to refinery employees who are in direct and proximate contact with the material in question, including the loading and unloading of rail cars, and were not developed to deal with the circumstance of railway employees working at the site switching and spotting rail cars.

Upon her return from layoff the grievor conveyed her concerns to local supervisors who took the position that there was no imminent danger in the grievor continuing to perform switching assignments at the Imperial Oil refinery. That prompted Ms. Smith-Torhjelm to exercise a refusal to work under section 128 of Part 11 of the Canada Labour Code. Accordingly, Transport Canada Safety Officer J.S. McLean performed a full investigation of the facility on May 30, 2000. It is common ground that he was made aware of the grievor's belief that she was pregnant. Ultimately the report of Mr. McLean found that there were no risks and ruled that there was an absence of danger. Included in his investigation was a report provided to Mr. McLean by the senior staff industrial hygienist of Imperial Oil Ltd., Dr. Ian Drummond. That report, filed before the Arbitrator, contains results of surveys conducted in respect of Imperial Oil employees loading and unloading rail cars at the facility, presumably in closer proximity to the substances than a CN employees working at large in the yard.

Notwithstanding the result of the safety officer's report, the grievor nevertheless refused to work again at the refinery yard. While it appears that immediately after Mr. McLean's inspection and report the grievor booked off and was thereafter on layoff for a short period, when she returned to work on June 9, 2000 she had a note from her doctor stating that she should be assigned away from exposure to toxic chemicals and intense hydrocarbon fumes. The grievor then provided to Company District General Manager Ed Posnyak copies of section 204 and 205 of the Canada Labour Code, which involve reassignment and job modification for employees who are pregnant. Those sections of the Canada Labour Code, Part 111, provide as follows:

204. (1) **Reassignment and job modification** - An employee who is pregnant or nursing may, during the period from the beginning of the pregnancy to the end of the twenty-fourth week following the birth, request the employer to modify her job functions or reassign her to another job if, by reason of the pregnancy or nursing, continuing any of her current job functions may pose a risk to her health or to that of the foetus or child.

(2) **Medical certificate** - An employee's request under subsection (1) must be accompanied by a certificate of a qualified medical practitioner of the employee's choice indicating the expected duration of the potential risk and the activities or conditions to avoid in order to eliminate the risk.

205. (1) **Employer's obligations** - An employer to whom a request

has been made under subsection 204(l) shall examine the request in consultation with the employee and, where reasonably practicable, shall modify the employee's job functions or reassign her.

(2) **Rights of employee** - An employee who has made a request under subsection 204(l) is entitled to continue in her current job while the employer examines her request, but, if the risk posed by continuing any of her job functions so requires, she is entitled to and shall be granted a leave of absence with pay at her regular rate of wages until her employer

(a) modifies her job functions or reassigns her, or

(b) informs her in writing that it is not reasonably practicable to modify her job functions or reassign her;
and that pay shall for all purposes be deemed to be wages.

(3) **Onus of proof** - The onus is on the employer to show that a modification of job functions or a reasonable reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable.

(4) **Employee to be informed** - Where the employer concludes that a modification of job functions or a reassignment that would avoid the activities or conditions indicated in the medical certificate is not reasonably practicable, the employer shall so inform the employee in writing.

(5**) Status of employee** - An employee whose job functions are modified or who is reassigned shall be deemed to continue to hold the job that she held at the time of making the request under subsection 204(l), and shall continue to receive the wages and benefits that are attached to that job.

(6) **Employee's right to leave** - An employee referred to in subsection (4) is entitled to and shall be granted a leave of absence for the duration of the risk as indicated in the medical certificate.

The doctor's note provided by the grievor, dated June 9, 2000 and signed by Dr. E. Benjamin Toane is as follows:

To whom it may concern
Re: Stacey Torhjelm

This woman is pregnant with an expected date of confinement of

February 9, 2001. Due to her pregnancy and environmental concerns associated with her employment, I would recommend that she be reassigned away from exposure to toxic chemicals and intense hydrocarbon fumes. It is also my advice that she refrain from use of the belt pack during her pregnancy.

Yours sincerely,
(signed) E. Benjamin Toane, MD

The Company's response to the grievor's doctor's note and the invoking of her protections under sections 204 and 205 of Part III of the Canada Labour Code came in the form of a letter dated June 16, 2000 signed by Mr. D. Eddison, Vice-President of the Pacific Division. In that letter Mr. Eddison expressed the Company's view that the Imperial Oil Refinery assignment did constitute reasonable accommodation to the grievor, noting the decision of the Transport Canada safety inspector. He then added that there were no other duties available for the grievor's reassignment in Edmonton concluding, in part: "At this time, the Company does not have any position on which you can be accommodated, other than the Imperial Assignment."

The Arbitrator has substantial difficulty with the position taken by the Company at that point in time. The objective evidence then available included the following:

In the Material Safety Data Sheet users guide for the Imperial refinery the embryo is defined as: "the fertilized ovum from conception to the third month of pregnancy." A number of the substances for which safety data are provided indicate that prolonged or repeated exposure, "... may be toxic to the embryo/foetus." That notation appears, for example, with respect to stadis 450 anti-static additive (benzine), light reformate naphtha, diethylene glycol monomethyl ether, turbine aviation fuel and the fuel additive OGA401V. In some cases, as with carbon monoxide and methyl alcohol the respective notations are: "... may cause birth defects (teratogenic effects) in off-spring, and "Prolonged and/or repeated exposure to laboratory animals to high doses and concentrations produced birth defects (teratogenic effects). The relationship of these results to humans has not been fully established."

- The reporting letter provided to Transport Canada's Regional Operating Officer, Mr. McLean, from Imperial Oil Ltd.'s Sr. Staff Industrial Hygienist, Dr. Ian Drummond, provides thorough information with respect to the normal exposures experienced by Imperial Oil employees in the loading and

unloading of rail cars at the facility. It does not, however, contain any reference to whether the exposures in question might involve any particular risk to a pregnant employee or to an embryo/foetus.

• The report of Transport Canada's inspector, Mr. J.S. McLean, likewise makes to specific mention of the risks, if any, to a pregnant employee or to an embryo/foctus.

• The recommendation of the grievor's personal physician is specifically expressed in terms of her pregnancy and avoidance of exposure to toxic chemicals and intense hydrocarbon fumes.

The issue before the Arbitrator is not whether the assignment at the Imperial refinery constituted, in objective terms, an unacceptable health risk to the grievor and her embryo/foetus. The issue is whether, given the invoking of sections 204 and 205 of Part III of the Canada Labour Code, the Company fulfilled its obligation towards Ms. Smith-Torhjelm. The obligation of the employer is to examine the request and, where reasonably practicable, to either modify the employee's job functions or, alternatively, to reassign her, at the same rate of wages and benefits. Where modification or reassignment are not practicable the employer is under the obligation to advise the employee in writing and to allow the employee a leave of absence for the duration of the risk.

The purpose of those provisions is relatively obvious. They implicitly acknowledge the sensitive nature of pregnancy and provide a simple procedure to allow a pregnant employee access to an alternate assignment, or a leave of absence, without the delay or uncertainty of any challenge to a bona fide doctor's certificate. Even if a difference of opinion were possible, the benefit of the doubt must go to the expectant mother, and effect must be given to her doctor's recommendation.

The chronology before the Arbitrator would indicate that the Company did nothing to attempt to reassign the grievor between June 9 and August 8, 2000. It is only after the grievor filed a complaint with the Canadian Human Rights Commission on July 5, 2000 and the Union filed this grievance on July 11, 2000 that the Company finally assigned Ms. Smith-Torhjelm to work on a weed cutting assignment between August 8 and 25, 2000. It appears that she was next given productive work as a United Way canvasser for a period of three weeks, commencing October 2, 2000, after which she was assigned as a utility person between October 23 and December 8, 2000. When she then presented a new

doctor's note indicating that she should be assigned to a sedentary desk job she was given desk duties between December 8 and 16, 2000. Thereafter, until the birth of her child on February 5, 2001 she was advised that the Company had no work for her.

The evidence further discloses that eventually the grievor invoked yet another right under the Canada Labour Code. On October 22, 2000 she submitted a written letter invoking the amendments to the Canada Labour Code, and in particular section 132, which apparently came into effect on September 30, 2000. Those provisions of the Code allow a pregnant or nursing employee to refuse work which she believes poses a risk to her health or to the health of her foetus or child. Section 132 reads as follows:

132. (1) **Ceases to perform job** - In addition to the rights conferred by section 128 and subject to this section, an employee who is pregnant or nursing may cease to perform her job if she believes that, by reason of the pregnancy or nursing, continuing any of her current job functions may pose a risk to her health or to that of the foetus or child. On being informed of the cessation, the employer, wit the consent of the employee, shall notify the work place committee or the health and safety representative.

(2) **Consult a medical practitioner** - The employee must consult with a qualified medical practitioner, as defined in section 166, of her choice as soon as possible to establish whether continuing any of her current job functions poses a risk to her health or to that of the foetus or child.

(3) **Provision no longer applicable** - Without prejudice to any other right conferred by this Act, by a collective agreement or other agreement or by any terms and conditions of employment, once the medical practitioner has established whether there is a risk as described in subsection (1), the employee may no longer cease to perform her job under subsection (1).

(4) **Employer may reassign** - For the period during which the employee does not perform her job under subsection (1), the employer may in consultation with the employee, reassign her to another job that would not pose a risk to her health or to that of the foetus or child.

(5) **Status of employee** - The employee, whether or not she has been reassigned to another job, is deemed to continue to hold

the job that she held at the time she ceased to perform her job functions and shall continue to receive the wages and benefits that are attached to that job for the period during which she does not perform the job.

In support of her invoking of section 132 of the Code effective October 22, 2000 Ms. Smith-Torhjelm submitted the same medical note from her physician reproduced above, dated June 9, 2000.

The evidence before the Arbitrator confirms that the grievor remained in employment, in alternative assignments, from October 23 through December 15. Thereafter she apparently left on vacation through December 23, 2000, and was told that following her vacation there was no work available for her, a condition which continued through the birth of her child on February 5, 2001.

What then does this rather complex sequence of evidence disclose? In the Arbitrator's view the merits of the grievance are best understood by viewing the events in chronological segments. Firstly, I have some difficulty in finding any failure of obligation on the part of the employer for the period between May 18 and June 9, 2000, assuming that the claim could extend that far. During that time the grievor invoked the right to refuse unsafe work under the general provisions of section 128 of Part 11 of the Canada Labour Code. The Company then complied with the procedures contemplated under the Code and relied on the ruling of Transport Canada Officer McLean to the effect that there was no danger to the grievor in performing switching operations at the Imperial Oil Strathcona Refinery. In reliance on that report the Company made no attempt to accommodate or reassign the grievor. It may be noted that Ms. Smith-Torhjelm then decided to appeal the decision of the Transport Canada officer. Significantly for the purposes of any remedy in these proceedings, in April of 2001 the grievor withdrew her appeal of the Safety officer's report. In the circumstances the Arbitrator has difficulty making any finding against the Company as regards its alleged failure to accommodate the grievor between May 18 and June 9, 2000. The best evidence with respect to that period of time would indicate that the only professional opinion available to the Company, that of Transport Canada Officer McLean, supported the conclusion that there was no danger to the grievor working at the refinery.

Circumstances changed dramatically, however, effective June 9, 2000. At that point Ms. Smith-Torhjelm invoked her rights under sections 204 and 205 of the Canada Labour Code, provisions which

expressly contemplate the reassignment of a pregnant employee for reasons of health and safety, where the employee's request is supported by the certificate of a qualified medical practitioner. The grievor's request at that time was supported by a note from her personal physician recommending that she not be assigned where she might have exposure to toxic chemicals and hydrocarbon fumes. For reasons which it best appreciates, from that date until August 8, 2000 the Company made no attempt to reassign the grievor. On the balance of probabilities, the Arbitrator is compelled to conclude that during that time the Company in fact failed to address its mind to the merits of her request made under sections 204 and 205 of the Code, as is apparent from the letter of the Company's Vice-President, Pacific Division dated June 16, 2000. That letter essentially disregarded the medical certificate and fell back on the report of the Transport Canada safety inspector. It also made the somewhat questionable assertion that no alternative work was, in any event, available in Edmonton. That assertion is doubtful in light of the Company's ability to find a number of alternative assignments for the grievor in the period between August 8 and December 15, 2000. In the result, the Arbitrator is satisfied that for the period between June 9 and August 8, 2000 the Company did fail to properly apply its mind to the grievor's request for an alternative assignment in accordance with her rights under sections 204 and 205 of the Canada Labour Code.

The third period of time which must be addressed in this chronology is from August 8, 2000 through the date of the birth of the grievor's child on February 5, 2001. It would appear that except for the month of September, the Company was able to find reassigned employment for Ms. Smith-Torhjelm between August 8 and December 15. She worked in weed cutting, the United Way campaign, as a utility person and at a desk job through various parts of that period of time. It appears that it is only after the Christmas vacation period that the Company took the position that it had nothing further it could assign her by way of work. Significantly, however, as regards the period from December 23, 2000 through February 4, 2001 the grievor did succeed in obtaining an order for the full payment of her wages. A ruling of Human Resources Development Canada, in the form of a payment order dated January 10, 2002, directed the Company to pay Ms. Smith-Torhjelm her wages and benefits for the period attributable to the time between December 24, 2000 and February 4, 2001, apparently for the Company's failure to reply in writing to her request made under sections 204 and 205 of the Code. In the result, insofar as regards any meaningful order of compensation, if the Arbitrator assumes, without finding, that

there was a failure of the obligation of the Company for any of the time between December 24, 2000 and February 4, 2001, the grievor appears to be in receipt of the equivalent of full wages and benefits for that time. The evidence also establishes that, with the exception of the month of September, the Company did make efforts at accommodating the grievor by alternative reassignments between August 8 and December 15, 2000.

In the result, what the evidence discloses is a failure on the part of the Company to properly turn its mind to the request made by the grievor under sections 204 and 205 of the Canada Labour Code for the period between June 9 and August 8, 2000, and for the period between August 25 and October 2, 2000. With respect to both of those time periods the Arbitrator is without sufficient evidence to determine whether there was then alternative work available for the grievor, albeit that her subsequent accommodation through the period of October, November and December would suggest that some reassignment may have been possible. In the circumstances I am satisfied that the more appropriate remedy is to declare a failure on the part of the Company to address its mind to the issue for the time period in question, and to remit the matter to the parties to consider the appropriate remedy, if any, for the time in question.

As part of its request for relief the Union seeks a number of extraordinary remedies, including an affirmative direction ordering the Company to develop and implement policies consistent with the Canadian Human Rights Act and the Canada Labour Code for the accommodation of pregnant and nursing women, an order directing the Company to apologize to the grievor and a further order for the payment of $3,000.00 by way of punitive damages for injury to the grievor's dignity, feelings and self-respect. With respect, the Arbitrator does not deem it appropriate to grant the relief so requested.

Firstly, assuming that the jurisdiction to grant such remedies would be available to the Arbitrator by an exercise of the remedial jurisdiction under the Canadian Human Rights Act, the facts in the case at hand are less than compelling for such extraordinary remedies. Firstly, as noted above, the Company did respond properly to the grievor's first refusal of what she considered to be unsafe work, made under section 128 of the Code. Thereafter it relied in good faith on the conclusions in the report of the officer of Transport Canada, as I am satisfied it was entitled to do at least until such time as the grievor separately invoked the provisions of sections 204 and 205 of the Code, with a medical certificate in support of her claim, on

June 9, 2000. While the Company did fail to respond properly to that request, its failure was not egregious, nor was it indefinite. Some eight weeks after the invoking of the section 204/205 right, commencing August 8, 2000, the Company did provide the grievor with a series of alternative work assignments which extended through the better part of the late summer and fall of 2000. The evidence in respect of the measures taken by the Company over that period of time would certainly not support the suggestion that the Company acted in bad faith or out of complete indifference to the health and safety concerns of a pregnant employee. This is not a case which justifies extraordinary recourse to remedial orders in the nature of directives for affirmative action, apologies or punitive damages.

What the evidence does disclose, however, is that for a period of time the Company did fail to respond properly to the invoking of the grievor's rights under sections 204 and 205 of the Canada Labour Code, and did not properly address its mind to the request which she made effective June 9, 2000, supported by the medical certificate of her physician. It would appear that for a period two months, between June 9 and August 8, and thereafter for slightly more than one further month, between August 25 and October 2, the Company may not have made sufficient efforts to find alternative employment for the grievor. For the purposes of clarity, the Arbitrator does not make an affirmative finding in that regard, but deems it appropriate to remit the matter to the parties to examine the data with respect to the complement of employees at Edmonton during the periods in question, the nature and volume of work then available, and the reasonable possibility of reassignment to the grievor in the circumstances which then existed. In the event that the data discloses that work was available which reasonably could have been assigned to the grievor she shall be entitled to compensation for all wages and benefits lost. Should the parties be unable to agree as to the grievor's entitlement to compensation for the period in question the Arbitrator retains jurisdiction, and the matter may be spoken to.

December 6, 2002 (signed) MICHEL G. PICHER
ARBITRATOR