

**CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3354**

Heard in Edmonton, Wednesday, 9 July 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

Appeal the failure of Canadian National Railways to provide reasonable and appropriate accommodation of Locomotive Engineer Jim C. Smith of Terrace, BC by way of employment at the home terminal of Locomotive Engineer J. Smith at Terrace, BC.

BROTHERHOOD'S STATEMENT OF ISSUE:

The Brotherhood has proceeded ex parte.

That on November 17, 1997, Locomotive Engineer Smith was injured while on duty at work. The grievor participated in various "work hardening" and physiotherapy programs, being in consultations with and under the care of various medical professionals. Similarly, the grievor has received Workers' Compensation Board benefits and participated in related programs offered and required by that Board.

However, Locomotive Engineer Smith, since approximately January 2001, has not been in receipt of any real wages for the preponderance of that time, and additionally has been without benefits since March 2001.

The Brotherhood has taken the position, and submits that Locomotive Engineer Smith must be accommodated in his home terminal of Terrace, BC, as to do otherwise would be in violation of the collective agreement, the *Canadian Human Rights Act* and the Company's legal obligation with respect to properly accommodating the grievor.

The Brotherhood requests that the Company be directed to accommodate Locomotive Engineer Smith by way of appropriate employment at the terminal of Terrace. Moreover, the Union asks that the grievor be reconciled sufficiently and fairly with respect to all wages and benefits lost, or in other words, be placed into a position where he would have been had the Company properly provided him with suitable employment, subsequent to January 2001.

The Company disagrees with the Brotherhood's position.

FOR THE BROTHERHOOD:

(SGD.) D. E. BRUMMUND

FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. Kruk – Counsel, Montreal

R. Reny – Senior Human Resources Manager, Vancouver
 S. M. Blackmore – Human Resources Manager, Edmonton
 D. VanCauwenburgh – Human Resources Manager, Winnipeg
 T. Brown – Superintendent,
 J. Mackenzie – Recruitment and Service Associate, Edmonton
 T. Percy – Risk Management Officer, Edmonton
 T. Gordon – Return To Work Coordinator, Edmonton

And on behalf of the Brotherhood:

B. McHolm – Counsel, Saskatoon
 D. E. Brummund – Sr. Vice-General Chairman, Edmonton
 B. Willows – Vice-General Chairman, Winnipeg
 J C. Smith – Grievor

AWARD OF THE ARBITRATOR

The record before the Arbitrator confirms that in November of 1997 Locomotive Engineer Smith suffered a back injury at work. That injury has resulted in what appears to be a permanent disability, notwithstanding efforts at rehabilitation and unsuccessful attempts to return him to work as a locomotive engineer in Terrace, B.C.

It may be noted that there appears to be some conflicting opinion and medical evidence in the grievor's file, as his own physician has long held that he could not perform the work of a locomotive engineer, while an initial ruling of the Workers' Compensation Board of British Columbia held that he could work as a locomotive engineer, albeit that view was overturned by a Workers' Compensation Board review panel on March 14, 2003. That decision is presently the subject of an appeal initiated by the Company. In the Arbitrator's view there is little purpose in examining the Workers' Compensation dispute history in great detail. The grievor's rights in respect of benefits under that scheme will ultimately be determined by the appropriate tribunal, and the merits of his entitlement to such benefits as might be available under the Workers' Compensation program will thereby be determined.

The sole issue in the case at hand is whether the Company has discharged its obligation under the **Canadian Human Rights Act** to provide reasonable accommodation for the grievor's disability. For the purposes of that exercise it can be assumed, and the Company appears to accept, subject to the outcome of any WCB proceedings, that Mr. Smith is in fact disabled from performing the normal duties of a locomotive engineer, and is entitled to be accommodated as a result. The Company asserts that it has made all reasonable efforts to accommodate the grievor, and that his own inflexibility has limited the Company's scope in that regard.

The Arbitrator must agree. As confirmed by the Supreme Court of Canada in **Central Okanogan School District No. 23 v. Renaud**, [1992] 2 S.C.R. 970, the obligation of accommodation involves the cooperative participation of the employer, the trade union and the employee. That was reflected in an award of this Office in **CROA 3173**:

The Arbitrator is satisfied that the approach adopted by the Company is in keeping with its obligations under the **Canadian Human Rights Act**. It now seems well-established that when an employee seeks accommodation by reason of a status that is protected under the **Canadian Human Rights Act**, it is incumbent upon the employee concerned to contribute positively to the process, and to accept an offer of reasonable accommodation, even though it might not be the specific accommodation which the employee would prefer. That is reflected, in part, in the

decision of the Supreme Court of Canada in **Central Okanagan School District No. 23 v. Renaud** [1992] 2 S.C.R. 970. In that decision, for a unanimous court, Sopinka J. wrote as follows:

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

This does not mean that, in addition to bringing to the attention of the employer the facts relating to the discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

See also **CROA 3036**.

It is not disputed that Terrace, British Columbia is a small location with a limited number of Company positions. There are no office jobs or sedentary positions at that location. The unrebutted submission of the Company is that there are twenty-nine active running trade employees at Terrace, and twenty-four maintenance of way employees engaged in track maintenance. The Arbitrator accepts the representations of the Company that in approaching the issue of accommodation the grievor insisted for a considerable period of time that he must be accommodated at Terrace. Following a number of unsuccessful attempts to return him to service as a locomotive engineer at that location, the Company came to the view that it could not accommodate Mr. Smith at Terrace, and that it was under no obligation seek alternative positions elsewhere until such time as it was clear that he would be willing to move. The record also discloses that there has been no constructive proposal put forward by the Brotherhood to attempt to identify any position, whether in Terrace or elsewhere, which the grievor might be suited to occupy. Indeed, the brief submitted on behalf of the grievor by the Brotherhood continues to assert, in part, "Locomotive Engineer Smith must be accommodated in his home terminal of Terrace, B.C., as to do otherwise would be in violation of the collective agreement, the **Canadian Human Rights Act**, and the Company's legal obligation with respect to properly accommodating the grievor."

The Arbitrator cannot agree. This is clearly a case where it was incumbent upon both the Brotherhood and the grievor to seek cooperatively to identify positions elsewhere within the Company's operations which would appropriately accommodate the grievor's disability. I accept the Company's representations that no work of value to the employer could be found at Terrace which could be performed by Locomotive Engineer Smith. The duty of accommodation to the point of undue hardship clearly does not compel an employer to create a position which is of no productive use to it, regardless of its size or revenues.

The material before the Arbitrator indicates that at present the grievor has agreed to undertake a trial in an accommodated position as a yard coordinator at Prince George and is currently

working in that capacity. The Arbitrator appreciates that there is some hardship to Mr. Smith in the prospect of working for the Company at a location other than Terrace. His family resides in Terrace and, it appears, his wife has employment there. The duty of accommodation does not, however, extend to making the Company the insurer of all aspects of the grievor's economic and family life. The obligation of the employer extends to, and is limited to, workplace and employment accommodation. The Arbitrator cannot sustain the Brotherhood's submission that accommodation should result in an order of the Arbitrator compensating the grievor for the possible loss of his spouse's employment, differential costing between real estate markets in Terrace and Prince George and a retroactive payment of all medical and other expenses incurred by the grievor since he ceased to be contractually entitled to the CN benefit plans in March 2001. Nor do I consider the Brotherhood's request for the retroactive payment of all income lost by the grievor since January of 2001 to be appropriate, given Mr. Smith's apparent refusal to consider work outside of Terrace, and the Brotherhood's failure bring forward any constructive proposals for alternative employment within the Company's operations generally. While such compensation might be appropriate if it could be shown that the grievor lost income by a failure of the Company to accommodate his disability, that is not established on the evidence in the case at hand.

The record confirms that when it became evident to the Company that the grievor was willing to consider employment at a location other than Terrace as part of his accommodation, it proceeded to identify the yard coordinator's position at Prince George as a possible alternative. I am satisfied that its actions in that regard, as well as its previous efforts to bring the grievor back to service as a locomotive engineer in Terrace, did constitute reasonable accommodation of Mr. Smith's disability. In the Arbitrator's opinion there has been no violation of the Company's obligation to Mr. Smith in respect of the duty of accommodation under the collective agreement or the **Canadian Human Rights Act**.

This Office well appreciates the hardship suffered by Mr. Smith and his family. It is understandable that he would not wish to move from Terrace, British Columbia. He must appreciate, however, that the duty of accommodation is not a perfect instrument of make whole protection. For the reasons related above, the Arbitrator is satisfied that accommodation of Mr. Smith's disability cannot, short of undue hardship, be achieved by his being employed at Terrace, British Columbia in the service of the Company. The evidence before me confirms that the Company has made all reasonable efforts to accommodate the grievor at Terrace, albeit unsuccessfully, and that it is only upon his indication of a willingness to consider working elsewhere that a suitable alternative position was found in Prince George. In these circumstances I am satisfied that there has been no violation of the grievor's rights in respect of the duty of accommodation.

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

July 14, 2003

(signed) MICHEL G. PICHER
ARBITRATOR