CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3432

Heard in Montreal, Wednesday, 9 June 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Appeal on behalf of Catherine Hoyt concerning the alleged failure to accommodate her pregnancy in 2002.

COMPANY'S STATEMENT OF ISSUE:

On February 18, 2002 Ms. Hoyt provided the Company with a doctor's note advising that she required modified working conditions due to pregnancy. On February 25 and 26, 2002 respectively, the Company contacted Ms. Hoyt and the Union to offer modified duties. The Union advised the Company, on April 29, 2002, by way of a policy grievance, that they would not agree with the Company's proposed accommodation.

Subsequently, Ms. Hoyt returned to work on alternate modified duties effective May 28, 2002.

The Union alleges that the Company discriminated against Ms. Hoyt and failed to provide an alternate position for Ms. Hoyt from February 19, 2002 to May 27, 2002.

The Company does not agree with the Union's position.

UNION'S STATEMENT OF ISSUE:

On February 18, 2002, Catherine Hoyt provided the Company with a doctor's certificate describing medical restrictions resulting from her pregnancy and requested that she be suitably accommodated.

The Company, on February 25, responded that a position working as a hump foreman was available. This position required the use of "belt pack" or "LCS" equipment.

Ms. Hoyt reviewed this matter with her doctor, who determined that LCS use may pose a risk to her pregnancy. The Company advised that no non-LCS work was available.

A grievance was filed by the local on February 27, 2002. The Company refused to accept this grievance. The matter was then progressed to the General Chairperson's office.

Following an exchange of telephone conversation and correspondence it became evident that the Company was only willing to allow Ms. Hoyt to work an LCS position, but not require her to wear or use the LCS control unit.

The Union would not agree to this as the nature of the work in question required the use of two LCS control units and requiring Ms. Hoyt to work without one would compromise her safety as well as that of her co-workers.

The Company disagrees.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. A. HACKL	**(SGD.) S. M. BLACKMORE**
FOR: GENERAL CHAIRPERSON	**FOR: VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

S. Blackmore	– Manager, Labour Relations, Edmonton
Wm. G. McMurray	– Counsel, Montreal

And on behalf of the Union:

M. A. Church	– Counsel, Toronto
R. A. Hackl	– Vice-General Chairperson, Edmonton
J. W. Armstrong	– Vice-President, Edmonton
R. A. Beatty	– General Chairperson, Sault Ste. Marie
J. Kuzyk	– Local Chairperson, Saskatoon
F. Boutilier	– Local Chairperson, Halifax

AWARD OF THE ARBITRATOR

Upon a review of the materials the Arbitrator is satisfied that the Company was, as the Union alleges, under an obligation to reasonably accommodate the grievor by reason of her condition of pregnancy. It is not disputed that eventually an accommodated position was found for the grievor when she was relieved of yard work and placed on a position as a utility van driver commencing May 28, 2002. At issue,

therefore, is the alleged failure to accommodate Ms. Hoyt in the period of March 5 to May 27, 2002.

The material establishes that there were no other positions within the grievor's craft at Edmonton which would have suited her restrictions, as described in a note from her personal physician dated February 18, 2002. In the circumstances, seeking to keep the grievor within her craft, the Company proposed to the grievor and to the Union that she be placed in a regular flat yard switching assignment then held by a senior employee. It does not appear disputed that that assignment would have occasioned the displacement of senior employees, in all likelihood resulting in another employee being placed on the spareboard and possibly facing reduced assignments and reduced income, although that was not established as a certainty.

The Union declined to agree to the proposal made by the Company on two grounds. Firstly it maintains that the proposed accommodation would not be appropriate from a safety standpoint. Secondly, it indicated that it would not accept the proposal of the Company on the basis that the employer did not indicate that it would cover any loss of income occasioned by an employee who might be displaced by reason of the accommodation.

The Arbitrator addresses the first issue at the outset. What the Company proposed was to have Ms. Hoyt perform yard switching without wearing a belt pack. In

essence, she would work in LCS operations on a two person crew. Her mate would wear a belt pack and she would be assigned to work out of a yard locomotive. While in the locomotive she could utilized a belt pack that would not be attached to her body. When working outside of the locomotive, on the ground, she would communicate by radio with her workmate who would control the movement of the locomotive in accordance with her instructions. The Union submits that that arrangement would be less than optimal from a safety standpoint, as the grievor would be dependent upon the remote operation of the locomotive by another employee, and would not have as immediate control over the locomotive as she might if she was herself wearing a belt pack. Secondly, it submits that the use of two belt packs in a two person LCS crew is specifically contemplated by the parties' own belt pack agreement, and that what the Company proposed would be outside the terms of that understanding.

With respect, the Arbitrator cannot sustain either of the objections of the Union. The issue in the case at hand is not whether what is proposed by the Company is the optimal or best possible accommodation for the grievor. The obligation of the employer under the **Canadian Human Rights Act** is to propose what is a reasonable form of accommodation, short of the point of undue hardship. In the Arbitrator's view, the arrangement proposed by the Company is no more or less dangerous than the traditional form of switching performed by a yard foreman or yard helper who is located on the ground at a position remote from a locomotive under the control a locomotive engineer, the movement of which are directed by the instructions of the yard helper by the use of a radio. In fact, what is proposed by the Company is closely analogous to

operations which take place on a daily basis within the industry, save that in the circumstances the locomotive being directed by the grievor via radio is not in the control of a locomotive engineer but under the remote control of her mate in yard service utilizing a belt pack. While it is true that that method of operating would require very close communication between the grievor and her work mate, for example when she might get on or off of the locomotive, that would be no less so than the degree of care that would have to be used by any yard foreman or yard helper communicating with a locomotive engineer from the point of a movement which is not visible to the locomotive engineer at the time of the getting on or off of the consist of cars to be moved. Bearing in mind that yard switching is an inherently safety sensitive undertaking, the Arbitrator cannot find that the work assignment proposed by the Company as a means of accommodating the grievor's inability to wear a belt pack unit was unreasonable.

Nor am I persuaded that it was sufficient for the Union to simply assert that the collective agreement contemplates the use of two belt packs in flat yard LCS switching operations. While that may be so, the Union, like the grievor, is itself under an obligation to make all reasonable efforts to achieve an accommodation, such efforts to include appropriate relief against collective agreement provisions where appropriate. It may therefore be within the obligation of the Union to fully and properly consider amending or waiving work rules, bidding procedures, and seniority rights in fashioning an appropriate accommodation, within the limits of undue hardship.

It is in that context that the Arbitrator is not satisfied that it was sufficient for the Union to flatly decline the Company's proposal , without making any further creative exploration which might have led to a solution. For example, rather than simply register its objection to the fact that the employer did not propose to compensate any senior employee who might be displaced, the Union might have proposed a formula whereby the Company would be put to no additional cost, perhaps through an arrangement whereby the displaced employee would be guaranteed a full five days of work per week, even if that might mean that the grievor's accommodated days of work might be reduced.

What the record before the Arbitrator discloses can only be described as a shared breakdown in the reasonable effort to find a solution, in which both sides are equally responsible. While it was reasonable for the Company to make the assignment proposal which it did, it could not simply ignore the issue of the compensation which might be lost to a senior employee, a factor which would arguably constitute undue hardship and go beyond the mutual obligation of the parties. By the same token, the Union cannot simply fold its arms and declare that the Company has failed in its obligation if the Union does not itself propose solutions, including creative solutions, which might involve adjustments in scheduling and perhaps easing the rules of the collective agreement.

On the foregoing basis the Arbitrator is satisfied that the grievance must be allowed, but only in part. I am satisfied that both parties could and should have gone

further in the creative exploration of alternatives relating to the proposal made by Company to maintain the grievor is a work assignment within her own craft. The Arbitrator does not agree that the Company was under an obligation to first explore and exhaust the possibility of work for the grievor in other bargaining units or elsewhere within the Company, when a reasonable assignment within her own craft was feasible. For the reasons noted above, I am also satisfied that the Union was not sufficiently forthcoming in its own right with respect to suggesting a formula which would avoid undue expense to the Company or hardship to a senior employee.

The grievance is therefore allowed, in part. The Arbitrator directs that the Company compensate the grievor for one-half the wages and benefits lost for the period between March 5 and May 27, 2002, on the basis that the parties were equally at fault in the failure to conclude an appropriate accommodation in the work assignment of Ms. Hoyt for that period.

June 14, 2004

(signed) MICHEL G. PICHER
ARBITRATOR