CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4376

Heard in Calgary, March 10, 2015

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the failure to accommodate and layoff of Scott Martin

UNION'S EXPARTE STATEMENT OF ISSUE:

Mr. Martin is a colour blind employee who was hired on with the Company in 1984. Following the introduction of colour-coded signals in 1995, Mr. Martin was accommodated within his restrictions in various capacities with the Company. Commencing January 2007, Mr. Martin was laid off on seven separate occasions, between March 2007 and May 2009, but was recalled. The Union filed grievances in 2007 and 2009 pertaining to these improper layoffs, challenging the decision to lay Mr. Martin off while junior (spareboard) employees continued working Mr. Martin's pre-layoff duties. The Company contends that it was unable to accommodate Mr. Martin during each layoff period, while the Union disagrees.

On October 8, 2012, Mr. Martin's yard assignment was again cancelled, in spite of junior (spareboard) employees being called to perform the assignment.

The Union contends that the Company has a duty to accommodate Mr. Martin to the point of undue hardship. The Union contends that the Company has failed to discharge this duty and has failed to demonstrate that to do so would constitute undue hardship. The Union contends that the Company's actions are contrary to the Collective Agreement and the Canadian Human Rights Act.

The Union seeks a finding that the Company has breached the Collective Agreement, and the Canadian Human Rights Act, and a direction that the Company cease and desist from said breaches. The Union further seeks an order that Mr. Martin be made whole for his losses due to the Company's breaches, without loss of seniority, in addition to such other relief as the Arbitrator sees fit in the circumstances.

The Company disagrees with the Union's position.

FOR THE UNION: **FOR THE COMPANY:**

(SGD.) J. Robbins **(SGD.)**
General Chairperson

There appeared on behalf of the Company:

A. Daigle	– Labour Relations Manager, Montreal
D. VanCauwenbergh	– Director Labour Relations, Toronto
V. Paquet	– Labour Relations Manager, Toronto
D. Kawaler	– WCB Officer, Winnipeg

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Robbins	– General Chairperson, Sarnia
J. Lennie	– Vice General Chairperson, Port Robinson

AWARD OF THE ARBITRATOR

The grievor is a colorblind employee who has worked for the Company since 1984. He has been employed in a number of positions consistent with his restrictions. This case is about whether or not the Company was entitled to lay off the grievor, Mr. Martin, or whether it should have provided accommodated work for him for certain periods between 2007 and 2009. From 2009 to present Mr. Martin has again been accommodated and there is no continuing aspect to this grievance. In fact the Company notes that since 2010 the grievor is working as a trainer and has sufficient seniority to work on any assignment that fits his restrictions.

The Company advances two preliminary arguments as to the arbitrability of the grievances. Given my determination on the merits of this grievance, I need not address the Company's preliminary arguments.

Mr. Martin began working for the Company in 1994 and, when colour coded signals were implemented in 1995 in his work territory, he became restricted from performing certain jobs.

The Company accommodated Mr. Martin in a variety of positions. Mr. Martin has an excellent work record and has never had any discipline. From 1997 to 2004, the grievor worked night shifts at the HOT (Halifax Ocean Terminal) as a junior yard conductor. In 2005 his working restrictions were revised and he was moved to the Rockingham night shift. Mr. Martin could not perform part of that position at times because of the introduction of traffic control technology and when that occurred he worked as a utility man and another employee worked as the yard conductor.

In late 2006 one of the two intermodal trains servicing Mr. Martin's work area were cut. This resulted in the reduction in positions. Mr. Martin's position was one of the ones affected by the reduction. He took a temporary position that met his restrictions until January 2007 when that position also ended. This began a period from 2007 to 2009 when the grievor was laid off for period of time. It was not for the entire period but it is either 160 or 176 days in that period.

The Union relies on the fact that seven junior employees remained working and it further relies on the furlough board protection that it contends should have been afforded Mr. Martin. The Company responds that Mr. Martin is not protected as he

operates in an accommodated position. It says too that the seven available positions were not consistent with the grievor's restrictions

On February 26, 2007, the Company held meetings with Mr. Martin and the Union to discuss possible accommodations. The Union insisted on a utility position for Mr. Martin; the Company maintained that no utility position was available. The Company asserts that its accommodation obligations do not extend to creating a position that it does not require (see **CROA&DR 3354** and **3947**). The Company did offer Mr. Martin a transfer to the intermodal department as a heavy equipment operator. Mr. Martin and the Union refused this offer. The Union again requested a utility position be made available.

Given the material presented I am not persuaded that the Company failed to accommodate Mr. Martin in the period from 2007-2009. He was offered a position that he and the Union were not prepared to accept but which was within his restrictions. He was provided with whatever work was available within the period within his restrictions at his conductor's salary.

Accordingly, this grievance is dismissed.

March 20, 2015

MARILYN SILVERMAN
ARBITRATOR