# ARBITRATION

between

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**COUNCIL NO. 11 OF THE CANADIAN SIGNALS AND COMMUNICATIONS NETWORK, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS**

**GRIEVANCES CONCERNING: XUAN VINH NGUYEN**

**ARBITRATOR:** **CHRISTINE SCHMIDT**

**There appeared on behalf of the Company:**

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| D. Laurendeau | – Manager, Labour Relations |
| S. Grou | – Senior Manager, Labour Relations |
| Y. Langis | – Manager, S&C |
| S. De Roy | – Worker's Compensation—Claims Adjuster |

**There appeared on behalf of the Union:**

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| S. Beauchamp | – Counsel |
| L. Couture | – International Representative, IBEW Council No. 11 |
| C. Ménard | – Representative, IBEW Council No. 11 |
| X. Vinh Nguyen | – Grievor |

Heard in Montreal on October 27, 2016. Written responses submitted on November 29, 2016.

# ARBITRATION AWARD

## Introduction

1. This award concerns three grievances submitted by the Union on behalf of Xuan Vinh Nguyen (the "Grievor"). The Union maintains that the Company failed in its obligation to provide reasonable accommodation to the Grievor. Among other things, it requests that the Grievor be reimbursed for lost salary and benefits incurred for the periods during which the Grievor was absent from work—more specifically, between November 18, 2013, and March 30, 2014, and since May 2, 2014.

2. The Company admits, and the Union agrees, that the Company must continue to provide reasonable accommodation to the Grievor in keeping with his functional limitations.

3. This award establishes certain facts and provides guidance to the Company regarding its obligation to provide reasonable accommodation to the Grievor.

4. The parties were unable to agree on a joint statement of issue. The nature of the dispute is summarized in the statement of issue submitted by the Union, which reads as follows:

**DISPUTE:**

Veiled dismissal, failure to accommodate Mr. Xuan Vinh Nguyen, and compensation for lost salary and benefits.

**STATEMENT OF ISSUE:**

Mr. Nguyen has been a Company employee since 1990. Mr. Nguyen sustained a work accident on May 12, 1999, that left him with functional limitations in his left leg. On January 30, 2003, the Company declared Mr. Nguyen fit for duty with certain functional limitations.

Not under dispute is the fact that Mr. Nguyen is still employed by the Company and fit for duty with the following permanent functional limitations prescribed by a Company physician:

- May not walk on uneven ground;
- May not walk for more than 30 minutes;
- May not climb stairs.

Further to these functional limitations, Mr. Nguyen continued to work as a S&C mechanic at Taschereau Yard until 2008, at which time he began working at Company headquarters.

In June 2013, the Company told Mr. Nguyen that he would be transferred to the Jules-Poitras establishment. Following several discussions about the nature of the work, Mr. Nguyen submitted an accommodation request to human resources regarding his functional limitations. This request was declined by the Company, which left Mr. Nguyen without pay from November 15, 2013, to March 31, 2014. This situation is dealt with in grievance 2014-0028 and the Union believes that the Company proceeded with a veiled dismissal of Mr. Nguyen on this date and has failed in its obligation to provide reasonable accommodation.

Mr. Nguyen returned to work on March 31, 2014, but the Company asked him to stop reporting for duty as of May 2, 2014. Mr. Nguyen no longer worked after this date, and received no further compensation from the Company. Certain undertakings were subsequently made, but the Union believes that the Company did not respect its obligation to provide reasonable accommodation to Mr. Nguyen and should compensate him for lost income. Two other grievances were submitted to this effect: 2015-0080 and 2015-0098.

For all of these disputes, the Union respectfully asks the arbitrator to:

- note that the Company failed to respect its obligation to provide reasonable accommodation to Mr. Nguyen;
- note that Mr. Nguyen was the victim of a veiled dismissal on November 15, 2013;
- uphold the grievances;

- order the Company to reinstate Mr. Nguyen as of this date, with no loss of seniority or benefits;
- order the Company to fully compensate Mr. Nguyen for lost pay and other losses incurred between November 15, 2013, and the present time;
- order the Company to adequately discharge its obligation to provide reasonable accommodation to Mr. Nguyen in the future;
- render any other order deemed appropriate by the tribunal.

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

| **FOR THE UNION:** | **FOR THE COMPANY:** |
|---|---|
| International Representative | |
| (SGD.) L. Couture | |

## Chronology of events

5. The Company and the Union have presented observations and numerous documents and precedents in support of their respective positions. The Arbitrator intends to review only the chronology of events and facts related to the matter before her.

6. The Grievor began working for the Company on June 11, 1990, as a S&C (signals and communications) mechanic.

7. The Grievor sustained an injury to his left leg in 1999, which left him with the following permanent functional limitations:

- avoid walking on uneven ground;
- avoid climbing vertical ladders;
- avoid walking over long distances for extended periods.

8. As a result of these functional limitations, the Grievor—who had a position related to the construction, installation or updating of equipment, or the performance of electrical or other work—was no longer able to perform the tasks normally associated with the position of the S&C mechanic position for which he was originally hired.

9. Until 2008, the Grievor was accommodated through the assignment to a light-duty position at the S&C shop at Taschereau Yard (the "Taschereau shop") in Saint-Laurent. His work essentially consisted of making "relays."

10. In 2008, the Grievor was transferred to a position at the Company's headquarters in downtown Montreal. In this accommodated position, the Grievor was assigned to entering information and plans using software, updating the layouts of communication equipment (telephone lines) on the various floors of the headquarters building and entering relay barcodes using the Excel system. The Grievor had a flexible schedule for this position.

11. Following the implementation of system changes at the Company in 2013, the work previously done by the Grievor was no longer required. In June 2013, his supervisor ("supervisor Langis") informed him that he would be transferred to the S&C shop at 1280 Jules-Poitras Blvd. in Saint-Laurent ("Jules-Poitras shop"). The Company planned to assign the Grievor to relay repairs at this new work location.

12. The Grievor was faced with substantial personal problems at the time of the planned transfer and during the months that followed. According to his file, he dreaded

going back to working regular hours. He believed that the Company should have provided him with transportation to his new work place because he was uncomfortable with the idea of going up and down the stairs in the metro.[1]

13. The Grievor informed the Company in October 2013 that the few minutes' walk from the metro to his work place would be "very dangerous for me"; he was afraid of falling. The Grievor let it be known that the fact the Company expected him to get to work by his own means did not respect the limitation prohibiting from walking on uneven surfaces.[2] In his opinion, the possibility of having to climb stairs was incompatible with the fact that he was supposed to avoid going up vertical ladders.

14. The Grievor was becoming increasingly assured in his communications with the Company. An examination of the documentation in its entirety indicates a certain intransigence regarding his transfer to his new work place. The Grievor clearly wanted to return to Taschereau Yard, where he had worked until 2008.

15. Communications between the Grievor and the Company led to a request presented by the Company, through supervisor Langis, ordering him to report for duty at the Jules-Poitras shop on Monday, November 18, 2013. The Company informed the Grievor that he was required to wear his safety boots, hard hat, safety glasses and vest.

[1] At the time, the Grievor had to climb around ten steps to get to his apartment.
[2] According to the files, the Company had already provided the Grievor with transportation in the past.

16. On or around November 14, 2013, the Grievor asked supervisor Langis if he could work at headquarters for another week and whether the Company could assign him work that could be performed sitting down. The Grievor also stated that he would obtain safety boots, but that he would not be able to tie the left boot “so that I can rub my leg right away if it swells up.” Several hours later, the Grievor stated in another email that he would wear his boots untied and would hold the Company liable if he had an accident because of the change in his workplace. The Grievor wrote to the Company again several hours later to say that he was refusing to wear his work boots.

17. In his last communication of the day, the Grievor presented to the Company a medical certificate from Dr. Van Phuc Nguyen (“Dr. Nguyen”) indicating that it would be preferable for the Grievor to work sitting down and that he could wear safety boots, but without firmly tying them.

18. The Grievor did not report for duty on November 18, 2013. He did, however, write to the Company asking whether he could wear other safety boots. The Company agreed to this request the following day. On November 18, 2013, the Grievor also made known his intention to submit an application for short-term disability insurance for personal reasons.

19. On December 19, 2013, supervisor Langis arranged a meeting with the Grievor and the Union so that the Grievor could see what type of environment he would be working in. Supervisor Langis explained to the Grievor that part of his job would be to

inventory materials on the shop's three levels. The Grievor would have to use mobile steps to reach the higher shelves. The Grievor was reluctant to use these steps.

20. The Grievor sent the Company a new medical certificate at the beginning of the new year—more precisely, on January 3, 2014. It is not known whether the doctor's note was sent to all recipients that day. What is clear, however, is that it was not until April 3, 2014, that the Company became aware of the note dated January 3, 2014. In this note, Dr. Nguyen indicated that the weakness of the Grievor's left leg could affect his balance at heights, that the Grievor could not work on a mobile ladder or staircase, that he could not fully bend his left leg as this would result in numbness and could result in an occupational accident, but he could wear a safety boot up to his ankle.

21. The Grievor submitted a harassment complaint against supervisor Langis on January 5, 2014, which had no result.

22. The Company received medical information from Service Canada on February 11, 2014, indicating that the Grievor could not work at heights and would be receiving a maximum of 15 weeks of Employment Insurance benefits.

23. The Company never disputed the supplementary medical information reflected in Dr. Nguyen's notes dated November 14, 2013, and January 3, 2014.[3] Neither did the

[3] The company requested clarification regarding certain aspects of the functional limitations in Dr. Nguyen's notes with the Grievor's consent. The supplementary information ultimately provided by the Grievor's physician is difficult to decipher due to his writing. This information does not appear to shed any additional light on the Grievor's limitations.

Company ask the Grievor to submit to an assessment of his functional capacities or a medical exam to precisely determine his incapacity.

24. The Grievor started working at the Jules-Poitras shop on March 31, 2014, and used public transit to get there. The Grievor replaced relay covers and inventoried material on the ground level. He performed these tasks until the replacement of relays and ground-level inventory were completed on May 2, 2014. As the Grievor was unable to perform the tasks required of his assigned position on the upper levels, he was sent home at the end of the day.[4]

25. On April 3, 2014, the Union submitted a grievance requesting the provision of appropriate accommodation to the Grievor along with the replacement of lost salary for the period from November 15, 2013, to March 31, 2014.

26. When the Grievor had completed the work he was able to do at the Jules-Poitras shop, the Company informed him that it would continue to look for an accommodated position for him that took his functional limitations into account. The Company also proposed that the Grievor attempt to submit another claim for disability benefits to the insurance company—which the Grievor did, but to no avail.[5]

27. The Grievor has been without work and without pay since May 2, 2014.

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[4] On May 2, 2014, the Grievor filed invoices in order of vendors. This work was neither productive nor necessary.

[5] Throughout the claims process, the Company always filled out forms as required without delay.

28. In June 2014, the Grievor was invited to report to a certain location to undergo a verbal and written test to evaluate his language skills. He reported for this evaluation on July 23: he passed the French test but failed the English test. At that time, the Grievor filled out a questionnaire regarding his request for accommodation, which indicated that he did not have a driving permit, that he had very little computer experience, but did have training in drafting (provided by the Company). The Grievor also wrote that he was unable to work in English. In anticipation of the Grievor's linguistic skills evaluation, the Company had asked him to bring an up-to-date résumé. The Grievor failed to do so.

29. By its own admission, the Company did not schedule a meeting with the Grievor before November 2014 to evaluate what it said were all of the accommodation opportunities for the Grievor. It was unable to find a vacant position outside the bargaining unit. Given the circumstances, the Company met the Grievor and his union representative and offered the services of an outside resource to update the Grievor's résumé. It did so to enable the Grievor to apply for vacant positions outside the S&C department. The Company also invited the Grievor to regularly check the careers section on the Company web site to find positions that matched his profile.

30. Although a follow-up meeting had been scheduled for December 15, 2014, the Company had to reschedule it for the new year.

31. The Grievor never followed up the Company's request to update his résumé.

32. The Grievor did not attend any meetings with the Company. Instead, he filed a complaint with the Canadian Human Rights Commission ("CHRC") in early January 2015, alleging that the Company had failed to respect the *Canadian Human Rights Act*. The CHRC decided to postpone the complaint pending arbitration or the settlement of grievances submitted by the Union on behalf of the Grievor.[6]

33. On January 15, 2015, the Company wrote to the Grievor to schedule the follow-up meeting originally set to take place in December to January 22. On that same date, the Grievor sent an email to the attention of around ten recipients, including the Company's CEO, accusing management of making misleading statements about his situation. The following day, the Grievor sent another email to the same people in which he made similar statements.

34. The Grievor's Union representative attended the meeting that had been rescheduled from January 22 to January 28, 2015. The Union felt it was not necessary for the Grievor to prepare an updated résumé and that it was up to the Company to find him a S&C position and continue to pay him the mechanic's rate. The Union proposed assigning the Grievor to perform "as installed" inspections, which consisted of checking the compatibility of electrical installations in mechanical shops with the original plans and drawings. The Union was aware that there was a pressing need for this and that the Grievor had already done this type of work several years before his injury.[7]

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[6] The CHRC's decision was rendered in July 2016.

[7] After the responses were received, a dispute arose between the parties concerning the specific nature of the "as installed" inspection work done by the Grievor. This dispute is not relevant for the purposes of this arbitration award.

35. The Company looked into the possibility of having the Grievor doing this type of work and a meeting took place a few months later to discuss it. The Company deemed the Grievor unable to do this type of work because he is not an engineer.

36. In the summer of 2015, the Union made several work suggestions that, in its opinion, took into account the Grievor's functional limitations. The Union reiterated that the Grievor's assignment to a project to an "as installed" inspection project would be an appropriate accommodation for him. The Union also suggested that the Company make use of the Grievor's drafting skills for the fibre optic department or that it assign relay-related work to the Grievor and that he could also help with ordering equipment. The Union ultimately felt that the Grievor would return to work at the Taschereau shop to do various work that would be compatible with his limitations.

37. Regarding the relay work, the Union submitted uncontested evidence that the Company had asked another employee (Mr. Ricci) to work on relays at the Taschereau shop in 2015.

38. No meeting took place between the Company and the Union after the summer of 2015.

39. The Union submitted two other grievances on behalf of the Grievor on September 8 and October 8, 2015, respectively.

40. On January 29, 2016, the Company invited the Grievor to contact someone at Information Technology (IT) to set up an interview for a position at headquarters. Even though the Company tried to follow up with the Grievor, he never responded or applied for this position.

41. Several weeks later, the Company identified potential positions (that were unavailable) that required a valid driving permit. Although the Grievor had told the Company in an accommodation questionnaire completed on July 23, 2014, referred to previously, that he did not have one, the Company asked him whether he had obtained a driving permit since then, or whether it would be possible to "reactivate" his permit within a reasonable time. The Grievor did not respond.

42. In early April 2016, the parties agreed to refer this matter to arbitration on September 12, 2016. The hearing was rescheduled for October 27 and the parties submitted their written responses on November 29, 2016.

43. Before the hearing on this matter—more precisely in May 2016—the Company wrote to the Union to ask whether it would be possible to consider loosening the restriction on wearing safety boots and to confirm whether the Grievor had a valid driving permit, and if he did not, whether he was prepared to take the steps necessary to obtain one. The Company asked the Grievor once again to provide an updated résumé and reiterated its willingness to provide professional help in order to prepare one.[8]

[8] During the hearing, the Grievor explained that he had a psychological barrier that rendered him unable to obtain a driving permit.

44. In its statement of issue, the Company noted several positions it considered assigning to the Grievor, but for one reason or another were incompatible with his functional limitations. The Company continued checking for other vacant positions from time to time. To this end, it presented a table of positions to enable it to determine which ones would be suitable for the Grievor.

**Decision**

45. This matter consists of determining whether the Company fulfilled its obligation to provide reasonable accommodation to the Grievor, a S&C employee with a permanent disability since sustaining an accident in 1999.

46. The Company states that it fulfilled its obligation to provide reasonable accommodation in view of all circumstances and it maintains that the Grievor did not cooperate with the efforts made to find him a position compatible with his functional limitations. The Union disagrees.

47. The Union believes that the Company had simply had enough of the complaints submitted by the Grievor and that it subtly tried to make it known to him that he was unwanted and should seek work elsewhere. In its statement of issue, the Union maintained that the Grievor was the subject of a veiled dismissal on May 2, 2014.

48. The Arbitrator disagrees with the allegation that this was a veiled dismissal. Firstly, the matter of dismissal—veiled or otherwise—was not raised in any of the grievances before the Arbitrator. The Union made its first allegation of veiled dismissal in

its joint statement of issue. The Company therefore did not have an opportunity to examine the question of veiled dismissal in the grievance settlement procedure.

49. Assuming, without confirming, that the notion of a veiled dismissal applies to a position covered by a collective agreement, the Arbitrator is of the opinion that the facts do not allow one to conclude that the Grievor was the subject of a veiled dismissal. If, as the Union asserts, the veiled dismissal took place on May 2, 2014, it would appear that the parties and the Grievor subsequently acted in a way that is not at all commensurate with the status of a laid-off employee.

50. Thus, the Grievor reported for an assessment of his language skills on July 23, 2014, at the Company's request. However, the Union and the Grievor met with the Company in November 2014 to examine possible accommodations for the Grievor. The Union continued to attend meetings with the Company in 2015 and looked into ways to accommodate the Grievor's disability. These actions by the Union and the Grievor are incongruent with the Grievor's hypothetical dismissal.

51. Even if the Arbitrator is wrong about the Union's assertion that this was a veiled dismissal, it would seem, in light of the conclusions arrived at in this matter, that the remedies available to the Union in an alleged veiled dismissal are essentially the same as those available in the case of a human rights or accommodations analysis. It would thus appear that this matter should be considered in terms of respect for human rights.

52. In order to determine whether the Company met its obligation to provide reasonable accommodation to the Grievor, the accommodation process must be evaluated as a whole, in the specific context of the Company's duty. The fact that the accommodation of employees with functional limitations requires the cooperative participation of the employer, the union and the employee is not in dispute.[9]

53. What happened in 2013 should be viewed in context. At the time—three and a half years ago—the Grievor had been working for the Company for more than 23 years. He had had a permanent disability since 2000 and the Company had accommodated him with a job in the S&C bargaining unit. The Grievor is now 57 years of age and the Company is essentially the only employer he has ever had.

54. In 2013, the work to which the Grievor had been assigned in the S&C bargaining unit since 2008 as an accommodation had become unproductive.

55. According to the evidence provided, in 2013, when the Company assigned the Grievor to repair relays and inventory equipment at the Jules-Poitras shop, this assignment was compatible with his functional limitations as they existed at the time. The work that the Grievor performed at the Jules-Poitras shop did not require him to walk on uneven ground, climb vertical ladders, or walk long distances for extended periods.

[9] See CROA 3354, which cites **Central Okanagan School District No. 23 v. Renaud**, [1992] 2 S.C.R. 970 ("Renaud").

56. The first period for which the Union alleges that the Company did not fulfil its obligation to provide reasonable accommodation is November 18, 2013, to March 31, 2014.

57. The Grievor was dealing with significant personal problems in 2013. Until November 18, 2013, the Grievor deemed these problems so debilitating that he made it known to the Company that if it allowed him to wear safety boots of his choosing in his new job, he would submit an application for short-term disability benefits to deal with his personal problems.[10]

58. With respect to the Grievor's correspondence with the Company during this period, as well as the content and the time of transmission of Dr. Nguyen's medical notes of November 14, 2013, and January 3, 2014, (of which the Company was not aware until April 2014), the Arbitrator can only conclude that the Grievor believed he was not able to work during the targeted period and that he was far from willing to help the Company in its efforts to provide him with an interesting accommodated position within the Jules-Poitras shop bargaining unit.

59. The fact that the Grievor did not report to the Jules-Poitras shop until March 31, 2014, precludes him from claiming any pay that would have been lost during this period.

[10] See the documents and precedents submitted by the Union in tab 7.

60. In accordance with what was previously described, on May 2, 2014, the Grievor completed the assigned relay and inventory work that was compatible with the additional functional limitations specified by Dr. Nguyen.

61. The Company then turned its attention to identifying vacant positions outside the bargaining unit that would take into account all of the Grievor's functional limitations—including the limitations that had been established in 2000, as well as the most recent ones. The Company never disputed the medical notes, which appeared to meet the Grievor's wishes.

62. In order to manage the accommodation process and find reasonable accommodation within a vacant position, the Company asked the Grievor to undergo language testing and to provide an updated résumé. The Company invested a great deal of effort in this regard, but it was fully aware of the extent of the Grievor's skills and language-related challenges as he had already been working for the Company for 23 years at that time.

63. By its own admission, the Company did not meet with the Grievor to discuss his situation until November 2014—around six months after he left the Jules-Poitras shop. At the November 27, 2014, meeting—the only meeting attended by the Grievor (with his Union representative)—the Company informed the Grievor that it had not found a vacant position that would be compatible with his functional limitations. The Company then

cancelled the follow-up meeting that was to take place the following month. The Grievor filed a complaint against the Company with the CHRC at the beginning of the new year.

64. The Grievor forwarded inappropriate emails indicative of a skewed perspective of what had taken place up to that time, and which also showed reluctance on his part to cooperate with the Company's efforts to find him a suitable position.

65. In light of the provided documents, it is clear that the Grievor was not backing down from his perception of the situation, which, given the overall evidence, is unrealistic. On January 29, 2016, as there had been very little progress made in this file despite the accommodation suggestions made by the Union in 2015 and referred to previously, when the Company finally found the Grievor a vacant position in IT that it deemed suited to the Grievor's skills (along with information on the time and date, and the person to contact to obtain an interview for the position), the Grievor did not respond.

66. The informed parties are aware that in searching for reasonable accommodation, they must first look for a position that takes into account the Grievor's disabilities within the bargaining unit of the Union local to which he belongs, prior to looking outside his bargaining unit.[11]

67. In the matter before us, the Company demonstrated for more than 13 years its willingness to provide accommodation to the Grievor within the bargaining unit. It did so

[11] See **CROA&DR 3429**

by assigning the Grievor to the tasks he performed from 2000 to 2008 at the Taschereau shop, then by assigning the Grievor to certain tasks at headquarters from 2008 to 2013, and lastly by assigning him certain tasks at the Jules-Poitras shop (which the Grievor performed at ground level only, in view of the additional functional limitations prescribed by Dr. Nguyen).

68. Once the work to which he had been assigned at Taschereau was finished, on May 2, 2014, the Company modified the parameters of the job search it had previously begun for the Grievor and limited its search to vacant positions outside the bargaining unit. As the Company has demonstrated through its conduct since 2000 its willingness to accommodate the Grievor within the S&C bargaining unit by assigning him various tasks, looking for a position outside the bargaining unit was premature even when taking into account the additional functional limitations imposed by Dr. Nguyen.

69. Upon careful examination of the submitted documents, including the Company's response, the Arbitrator must conclude that the Company has failed to explain why it refused in 2015 to assign the Grievor to work that the Union calls an "as installed" inspection project solely because he was not an engineer, particularly as it did not require this qualification when the Grievor had performed work of this type for several years prior to his injury.

70. If the Arbitrator has understood properly, the work that was done by the Grievor all these years is now done by people outside the bargaining unit or this type of work is now assigned to engineers. Nevertheless, the employer's duty to provide reasonable

accommodation may require it to be somewhat flexible with its rules in order to facilitate the accommodation of an employee who has a functional limitation.

71. The Company has not, however, specified why it did not take account of the accommodation suggestions made by the Union indicated in paragraph 36 d) and described in paragraph 36 above. Lastly, with respect to the relay work that, if the Arbitrator has understood correctly, is essentially the type of work that the Grievor did for eight years between 2000 and 2008, the Union presented uncontested evidence that the Company asked another employee (Mr. Ricci) to work on the relays at Taschereau shop in 2015.

72. In the absence of a meaningful response from the Company to the accommodation suggestions made by the Union in 2015, and given the evolution of this file, the Arbitrator is convinced that the Company probably had before it several options likely to yield an accommodated position as identified by the Union, such as the job opportunities that the Company had provided the Grievor for some 13 years. The Arbitrator notes this independently of the additional functional limitations imposed by Dr. Nguyen.

73. However, the Arbitrator does not really know whether the Grievor could have productively occupied an accommodated position of any kind on a full-time basis as the Company does not appear to have given serious consideration to the Union's suggestions when they were made, and neither were they discussed in its responses.

74. In light of its observations and based on the provided evidence, the Arbitrator is not convinced that the Company has met its obligation to provide a reasonable accommodation to the Grievor. The Arbitrator is unable to verify the amount of compensation the Grievor may be entitled to, as applicable, had the Company acted on the seemingly reasonable suggestions made by the Union, in light of the evidence submitted and taking into account all circumstances.

75. This employee has not worked since May 2, 2014. The most recent medical information we have concerning the Grievor's functional limitations is not up to date. Moreover, the Grievor's apparent intransigence concerning a transfer to the position identified at the Jules-Poitras shop, his apparent frustration and his alienation from the process which, in the Arbitrator's opinion, attempted prematurely to find vacant positions outside the bargaining unit, have aggravated a situation which had become exceedingly difficult and for which the Company was partly responsible.

76. Given that a long period of time has elapsed since the Grievor worked, the Arbitrator believes it would be quite appropriate for him to undergo a new assessment of his functional capacities or a complete independent medical exam to advance an accommodation process that has so far failed. The results of this undertaking would lead to an accommodation process that must take into account how the Company has managed the Grievor's accommodation since he was permanently handicapped by his injury several years ago. In other words, the efforts made by the Company to find the Grievor a productive position must comprise not only a search of existing vacancies, but also a study of modifications that could be made to certain positions or the possibility of

combining certain tasks. It may be worthwhile for the Company to review the suggestions made by the Union in 2015.

77. It should be pointed out to the Grievor that despite his long-standing disengagement with the accommodation process, he is required to re-evaluate his willingness to participate in the accommodation exercise. If he does not engage in the process, he could compromise his opportunities for permanent employment. The Arbitrator invites the Grievor to read the aforementioned excerpt from the Renaud case, in previous awards made by this tribunal, notably in **CROA 3354**:

...

> 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.

78. As regards the appropriate corrective measure in this matter, the Arbitrator is referring this question back to the parties. The Arbitrator is simply not able to verify with certainty the losses that the Grievor may have sustained as a result of the approach adopted prematurely by the Company—i.e., limiting its search for vacancies outside the bargaining unit—and due to the Company's inadequate response to the accommodation suggestions presented by the Union in 2015. To help the parties come to a resolution as to the appropriate corrective action, the Arbitrator notes that the Grievor's manifest disengagement regarding the accommodation process should be taken into consideration in any assessment of losses he may have sustained.

79. For these reasons, the last two grievances submitted on behalf of the Grievor must be upheld, but only in part.

80. The case is thus referred to the parties, subject to the Arbitrator's jurisdiction to rule on the matter in the event of a dispute between the parties regarding the interpretation or enforcement of this award.

February 28, 2017 ARBITRATOR

**CHRISTINE SCHMIDT**