

IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

- and -

CANADIAN PACIFIC RAILWAY COMPANY

(the "Company")

JOINT STATEMENT OF ISSUE

DISPUTE:

Grievance regarding the Company's alleged failure to accommodate Conductor Jim Laszlo of Revelstoke, BC.

JOINT STATEMENT OF ISSUE:

Mr. Laszlo suffered an off-duty injury which caused him to cease active service as a Conductor on February 12, 2014. Both Mr. Laszlo and the Union were proactive in seeking an accommodation beginning in March 2015. On August 27, 2015 and March 14, 2016 the Union was notified by the Company that no suitable accommodations were available.

Mr. Laszlo remained unable to occupy his previous position of Conductor but continued to seek accommodation, including being temporarily accommodated as a crew bus driver between July and October 2016. Mr. Laszlo retired effective September 1, 2017.

UNION POSITION

The Union contends that the Company failed to fulfill its duty to accommodate Mr. Laszlo's condition contrary to the terms of the Collective Agreement, the Company's Workplace Accommodation Policy, Return to Work Policy and the Canadian Human Rights Act. The Union further contends that the Company has failed to demonstrate that to do so would constitute undue hardship, which has resulted in discriminatory treatment in addition to undue hardship.

The Union contends Mr. Laszlo was forced to retire out of financial necessity, which is an extension of discrimination, and equivalent to the Company's termination of Mr. Laszlo's employment.

The Union seeks an order that the Company has violated the above-cited Collective Agreement, policies and legislation. The Union further seeks an order that the Company cease and desist from these violations and that it be directed to comply with the same.

The Union seeks an order that the Company failed to accommodate Mr. Laszlo, and failed to establish undue hardship. The Union seeks a further order that Mr. Laszlo be made whole for all losses incurred, as outlined in the Union's recent October 30, 2017 grievance which includes but not limited to:

- An order that the Grievor be reinstated immediately;
- An order for payment of any and all lost wages, with interest, to be accrued to the date of payment;
- Payment for any lost benefits including expenses incurred, payable forthwith, all plus interest, to be accrued to the date of payment;
- Payment for any shortfall in pension earnings, plus interest, to be accrued to the date of payment;
- Repayment of pension arrears plus interest, to be accrued to the date of payment;
- Damages for pain and suffering in an amount to be determined, plus interest, to be accrued to the date of payment;
- Any other remedy the Arbitrator deems just.

COMPANY POSITION

Following the Grievor's medical leave of absence on March 1, 2014, the Company regularly reviewed the Grievor's Functional Abilities Forms, and consistently searched for accommodation opportunities at its Revelstoke location. However, no suitable accommodations existed for the Grievor.

Between July 12, 2016 and October 20, 2016, the Grievor was temporarily accommodated as a crew cab driver.

On August 18, 2017 the Grievor commenced his pre-retirement Annual Vacation, and retired on September 1, 2017.

The Company maintains that throughout 2014 until the Grievor's retirement on September 1, 2017, consistent efforts were made to identify accommodation opportunities for the Grievor. The Company maintains that it met its duty to accommodate, and accordingly denies this grievance.

FOR THE UNION:

FOR THE COMPANY:

Dave Fulton
General Chairperson
TCRC CTY West

Andrew Jansen
Manager, Labour Relations
CP

August 14, 2019

There appeared on behalf of the Company:

Sharney Oliver	-Manager, Labour Relations, Calgary
Lauren McGinley	-Assistant Director, Labour Relations, Calgary
David Moore	-Manager, Disability Management West, Calgary

There appeared on behalf of the Union:

K. Stuebing	-Counsel, Caley Wray, Toronto
D. Fulton	-General Chairman, Calgary
D. Edward	-Senior Vice-Chairman, Calgary
J. Kiengersky	-Vice General Chairman, Revelstoke
W. Pitts	-Vice General Chairman, Moose Jaw
K. Plug	-Observer
J. Laszlo	-Grievor

AWARD

The grievor was hired in 1984 and spent his entire career in Revelstoke until he retired on September 1, 2017. It is important to note at the outset that Revelstoke is a “run-through” terminal with trains headed either west to Kamloops or east to Field/Golden.

The Company underlined that the unionized positions in Revelstoke are all safety sensitive in nature. The Company generally maintains that these positions all require functional abilities which exceeded the grievor's physical restrictions after March 1, 2014.

The grievor's physical restrictions, followed by medical leave after March 1, 2014, were the result of an off-duty torn rotator cuff injury to his right shoulder on October 30, 2011. The grievor, despite his injury, was able to exercise his seniority and maintain a yard utility position through to March 22, 2013, at which time that position was abolished. He then worked as a freight conductor but his injury caused him to book off sick on February 12, 2014. The grievor then consulted with his physician, Dr. Molder, who sent the grievor for x-rays on February 17, 2014. Dr. Molder determined that the grievor was not fit for safety critical duties due to his shoulder injury. From March 2014 to the end of October 2014, the grievor attended a number of rehabilitation specialists and underwent diagnostic tests including an MRI on October 20, 2014.

Throughout the grievor's absence from work, he regularly submitted Functional Ability Forms ("FAF") completed by his attending physician, as requested by the Company. The first of those forms was submitted by Dr. Molder on December 19, 2014. Dr. Molder noted that the grievor was only fit for modified duties. The FAF also identified

several physical limitations which generally included: walking (limited uneven ground); climbing and balance (stairs only); strength (sedentary); upper limb (no above shoulder right arm reaching). It was also indicated that the grievor should not operate moving equipment but could drive company vehicles. The grievor's medical benefits through Manulife expired in December 2014.

The grievor continued to visit his physician and submit FAF's to the Company over the ensuing months. The FAF's documented the same physical restrictions and that the grievor was capable of performing modified duties. The only exception is the FAF dated December 8, 2015, the day before the grievor's rotator cuff surgery, which indicates that the grievor would be totally unfit for any work until January 1, 2016 and that his estimated time for full return-to-work was 3 to 4 months. On March 9, 2016, the FAF from the grievor's physician indicates that he was again able to work a full shift of modified duties.

A further FAF on July 6, 2016 indicates that the grievor's walking restriction, including walking on uneven ground, was lifted. The September 20, 2016 FAF states that the grievor could perform modified duties as did the December 20, 2016 FAF. The July 11, 2017 FAF again confirmed that the grievor was only able to perform modified duties

and that the expected duration of the modified duties was 12 months. The grievor applied for his pension on April 12, 2017 and officially retired effective September 1, 2017.

The Union, starting in March 2015, pressed the Company to try and find light duties for the grievor as they had for several other individual employees who had been accommodated with light duties assisting train crews in January, February and March 2015. A formal letter requesting light duties for the grievor was sent to the Company on June 14, 2015. The Company responded on August 27, 2015 indicating that there was no light duty work available for the grievor at that time.

The Union's grievance filed on October 20, 2015 alleged that the Company had failed in its duty to accommodate the grievor and set out the efforts it had made over several months to meet with the Company in order to find suitable work for the grievor. The Union went on to suggest that some light duties that the grievor was able to perform included, but were not limited to, the following:

Clean gas masks; repair gas masks; scan documents for upload for Health and Safety; job brief crews on any changes to rules/safety flashes; assist new hire Conductors with switch lists and job briefings; drive crews; track checks; assist with trainees; ensure reports are properly handled; any other tasks the Company feels would be beneficial. What he cannot do is lifting, handbrakes, and any tasks that would place strain on his shoulder.

The Company replied on November 4, 2015 indicating that of the 16 employees that were off on medical leave, only 2 were accommodated. The Company emphasized that Revelstoke was a run-through terminal with little work available because the "...crews change off at the front door of the station." The Superintendent concluded his response as follows:

"Now, should any meaningful work come up in the future, Mr. Laszlo along with ALL the other employees that are off right now will be considered".

As Arbitrator Clarke noted in **CROA&DR 4503** the kind of inquiry that an arbitrator is to undertake when determining whether an employer has fulfilled its duty to accommodate:

[7] An arbitrator must examine the entire process, including the assistance provided by the trade union and the accommodated employee, plus the specific factual context, when deciding if an employer has been sufficiently diligent in pursuing accommodation opportunities.

He went to say in **CROA&DR 4648**:

[30] ...Duty to accommodate cases are about evidence. As CP previously demonstrated in **CROA&DR4609**, that evidence can include the efforts made to find accommodated positions and attempted accommodations, even for limited periods. There is no absolute obligation to find a position. If that obligation existed, the analysis for these cases would be quite simple.

[31] But in the absence of providing any actual accommodated work, the evidence will need to demonstrate that an employer made reasonable efforts to accommodate the employee up to the point of undue hardship.

This case, as all other accommodation cases, must be judged in its specific factual context. One of the key elements in the analysis of any undue hardship case, such as the one here, is the importance of examining the facts in light of the tripartite involvement of the employer, employee and the employee's bargaining agent.

Similar to the facts in **CROA&DR 3036**, we are dealing with a relatively small location in Revelstoke with very few sedentary positions. This a run-through terminal where, as the Company explained, crews change off at the front door of the terminal. The evidence is that of the 16 employees off on medical leave in November 2015, only 2 employees could be accommodated with meaningful work. That is not surprising given the limited extent of administrative operations in Revelstoke. As the court noted in *Carter v. Human Rights Tribunal of Ontario* (Superior Court of Justice) 2019 ONSC 142 in a similar case:

[27] Sadly, the reality was that there were more disabled individuals who needed accommodation in this workplace than there were positions for them.

The Union put considerable effort into trying to assist the grievor. It approached the Company in numerous meetings indicating the tasks the grievor could perform on light duties. According to the grievance documents, the Union suggested, as far back as 2015, specific available positions where the grievor could be accommodated, including a Field Placement Coordinator position in March 2017.

As Arbitrator Clarke noted above, there is no absolute obligation on the part of the Employer to find a position for an employee under disability. During the time the grievor

was off work due to his shoulder injury, the Company relied on the advice of the Work Specialist, Sasha Oddstad, regarding the availability of work that suited the grievor's physical restrictions. The Company, over the course of several years when the grievor was only fit to perform modified duties, was unable to find a position that fit the grievor's work restrictions or for which the grievor was otherwise suited. In that regard, there is insufficient evidence before me to determine whether, for example, the grievor had the necessary skill sets or the physical ability to perform the tasks in a position like a Field Placement Coordinator. The run-through nature of the terminal, in the end, offered little useful work to those who required accommodation like the grievor.

One area that stands out is the absence of any offer by the grievor, as part of his role in the accommodation process, to seek accommodated work elsewhere-such as in Golden, a busy centre of railroad activity 150 km from Revelstoke. That is what occurred in **CROA&DR 3354** where a Locomotive Engineer requiring accommodation for a back injury indicated that he was willing to relocate to an accommodated position as a Yard Coordinator in Prince George rather than remain in Terrace where no accommodated positions were available.

Had the grievor demonstrated that he was prepared to work in a busier centre such as Golden, for example, it would have been incumbent on the Company to embark on a search for modified duties for the grievor at that location. But the grievor, unfortunately, did not come forward with any indication that he was prepared to work elsewhere other than Revelstoke, where unfortunately there were no "meaningful" positions available.

After considering all the particular facts of this case, I find that the Company has met its duty to accommodate the grievor up to the point of undue hardship.

I would also add that I find no evidentiary basis to conclude that the grievor was constructively dismissed. The grievor voluntarily applied for his pension on April 12, 2017 and left the service of the Company on his own accord on September 1, 2017.

For all the above reasons, I must dismiss the grievance.

Dated at Calgary, this 25th day of November, 2019



**JOHN M. MOREAU, Q.C.
ARBITRATOR**