

IN THE MATTER OF AN ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

(The Union)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

(The Company)

Dispute:

Grievance regarding the Company's alleged failure to accommodate and return X.Y. to work from December 20, 2021 to February 16, 2022.

Joint Statement of Issue

X.Y. was off work between December 8, 2021 and February 15, 2022. During that time, X.Y. received full WIB benefits. He was cleared for modified duties on December 20, 2021 and Safety Critical duties on January 13, 2022. X.Y. was returned to full service on February 16, 2022.

The parties agree that CROA rules apply including item 14 of the Memorandum of Agreement Establishing the CROA&DR.

Union Position:

The Union contends the Company has violated Article 36 and 37 of the Collective Agreement, Sunlife Benefits at a Glance, the RTW Accommodation Policy and process, and the Canadian Human Rights Act and the wages associated under the Canada Labour Code Part III Section 132(5).

The Company made no attempts to accommodate X.Y. between December 20, 2022 and January 13, 2022. nor place him back to full SCP service between January 13 and February 15, 2022.

The Union requests X.Y. be compensated all lost wages, as Locomotive Engineer for the time period of December 20, 2021 to February 15, 2022 and that X.Y.'s Pension/Benefits/EDO/GH/AV be adjusted positively.

Company Position:

The Company disagrees and denies the Union's request.

The Company maintains it fulfilled its obligations under the Collective Agreement, Sunlife Benefits at a

Glance, Canadian Human Rights legislation, Canada Labour Code statutes, and RTW Accommodation Policy and process.

Company maintains that X.Y. was fit for non-safety sensitive work only. Provided the Covid-19 situation and mandates that were present in Ontario at the time, any non-safety sensitive work that could have been performed was deemed non-essential by provincial Covid mandates, and thus would not permit X.Y. to come to work. Additionally, X.Y. was not cleared by the Chief Medical Officer to drive Company Vehicles. This restriction prevented X.Y. from being able to serve as a crew bus driver.

The Company can see no violation of the Collective Agreement, Sunlife Benefits at a Glance, Canadian Human Rights legislation, Canada Labour Code statutes, and RTW Accommodation Policy and process. The Company maintains that it met its duty to accommodate, and accordingly denies the Union allegations and requested remedy.

For the foregoing reasons and those provided during the grievance procedure, the Company request that the Arbitrator be drawn to the same conclusion and dismiss the Union's grievance in its entirety.

FOR THE UNION:



Ed Mogus
General Chairperson LE East
TCRC

FOR THE COMPANY:



Chris Clark
Manager Labour Relations
Canadian Pacific Railway

February 12, 2023

Hearing: February 22, 2023 - By video conference

Appearances:

For the Union

Ken Stuebing:	Legal Counsel
Ed Mogus:	General Chairperson LE East
Joe Bishop:	Vice General Chairperson LE East,
Sean Orr:	Vice General Chairperson CTY East,
Brad Marquette:	Local Chairperson, Toronto
X.Y.	Grievor

For the Company

Chris Clark:	Manager Labour Relations, Calgary
Lauren McGinley:	Assistant Director Labour Relations, Calgary
Nancy Biltek:	Director Health Services & Disability Management, Calgary
Emily Difruscia:	Specialist, Disability Management, Calgary
Sean Moloughney:	Specialist, Disability Management, Toronto

AWARD OF THE ARBITRATOR

JURISDICTION

1. This is an Ad Hoc Expedited Arbitration pursuant to the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument. The parties have agreed that I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

2. Both parties submitted objections regarding additional particulars put forward in submissions which were not originally framed in the grievance or the grievance responses during the process. After reviewing the objections, I am satisfied that the evidence provided by the parties can be properly examined and construed to ensure that the grievance is dealt with and an appropriate decision provided. I also find that in these facts and circumstances both parties reasonably should have understood the grievance after engaging in the grievance process and before making their written submissions.

3. Given the extensive personal medical information contained in this award the Grievor's name has been anonymized as X.Y.

BACKGROUND

4. The Grievor, Locomotive Engineer, X.Y., is 53 years old. He entered service with Canadian Pacific Railway in August 1990. In February 2015, X.Y. developed a heart condition that was monitored by CP's OHS department thereafter. X.Y. was diagnosed with atrial fibrillation with mitral valve regurgitation and possible mitral valve prolapse. He was under the care of a cardiologist in connection with this condition from 2015.

5. On September 9, 2021, X.Y.'s treating Cardiologist Dr. Carling-Chambers submitted an FAF to OHS which provided no restrictions for safety critical positions. OHS took no issue with this FAF at the time, and confirmed X.Y.'s fitness to work.

6. On December 8, 2021, X.Y. was held out of service. X.Y. commenced the process of claiming WIB from LifeWorks, CP's disability insurance provider. On December 15, 2021, Lifework's commenced an initial assessment with X.Y..

7. On December 20, 2021, X.Y.'s physician, Dr. Arshat provided a functional abilities form that provided no physical or cognitive restrictions. In the forms, Dr. Arshat indicated that the Grievor may be at risk for sudden incapacitation or sudden impairment.

8. When the Grievor's Family Physician was asked if his patient was totally unfit to perform any work, including sedentary, non-safety sensitive modified work, he responded with "N/A". Dr. Arshat had also confirmed X.Y.'s fitness for modified duties immediately. X.Y. was specifically cleared to drive all personal and Company vehicles. The only restriction provided by Dr. Arshat was to avoid driving a train until final treatment is accomplished.

9. What followed the December 20, 2021 documentation by the Grievor's physician was a series of interactions and communications regarding the actions required for the Grievor to return to full service. On January 3, 2022, X.Y. was required to undergo diagnostic imaging and stress test assessment.

10. On Tuesday, January 18, 2022 2:40 PM, Mandy Jegou, CP's Occupational Health Nurse,

emailed CP corporate physicians regarding the Grievor's CV Report of January 13, 2022, regarding her review and recommendation. She advised that the Grievor was now fit for Safety Critical positions and asked if corporate physicians agree stating:

EE is now fit for SCP as he meets RAC criteria for A-fib.
Repeat CV report and 24-hr Holter to be done in 1 years time.
Please let me know if you concur with this recommendation.

11. On January 21, 2022, X.Y. was advised that an assessment had been completed regarding his ongoing absence from work.

12. On February 10, 2022, Dr. Lambros, CP's Chief Medical Officer declared X.Y. fit for Safety Critical Duties. On February 16, 2022, X.Y. returned to active service.

13. TCRC submits that, as of January 13, the Grievor's functional abilities otherwise unrestricted, there was no process by which CP could have concluded that it was unable to accommodate his restrictions and limitations as outlined by his physician.

14. The Union argues that accommodating X.Y. to return to gainful work cannot have been beyond the threshold of undue hardship at this time, in the circumstances. The Union argues that CP's dogmatic message to LifeWorks is fundamentally inconsistent with its duty to undertake a searching review for modified duties.

15. The Union argues that the February 10, 2022 determination of X.Y.'s fitness to work the usual duties of the Safety Critical Position of Locomotive Engineer was based entirely on evidence that CP's OHS had since January 13, 2022. There were no other requests for additional documents, clarifications, further reporting or assessments. The Union maintains that CP's delays beyond January 13, 2022 were entirely beyond the Union and Grievor's control. Without any new clinical evidence having been supplied, CP's OHS took in excess of one full month to determine whether the evidence already on file confirmed fitness to return to work as a Locomotive Engineer. It eventually confirmed that it did.

16. CP submits that for the period of time X.Y. was off work between December 8, 2021 and February 15, 2022, a total of 58 days, he received full weekly indemnity benefits. The Company maintains that for this period of 58 days, there was no opportunity to accommodate the Grievor in another position based primarily on his medical restrictions. Additionally, the pandemic directives that were present in Ontario at the time, made accommodating the Grievor even more difficult. Simply put, the Ontario COVID-19 mandates would not permit the Grievor to come to work unless the nature of the work required him to be on-site.

17. The Company submits that the period in question, January 13, 2022 to February 10, 2022, is only nineteen business days. It argues that just because the Grievor's doctor sent in new medical information, a return to his safety critical duties is not automatically triggered. A proper evaluation of all medical information is required. In his role, the CP Chief Medical Officer, may require additional assessments or clarification in order to make a final determination. It points out that is precisely what occurred in this case. Health Services emailed the Grievor's specialist with clarification questions and clarification regarding his test results. CP's Health Services department wrote to the Grievor explaining why the additional information was required. As it turned out, the Grievor's specialist had only returned an interpretation of the test results and not the actual test results.

18. The Company maintains that Union's claim that there were two crew bus driver positions

and one office position open that could have been used as an accommodation is not correct. The Grievor's medical assessments clearly indicate that he could not drive Company vehicles, with or without passengers, could not operate equipment or machinery and was restricted from all safety critical and safety sensitive positions. Accordingly, working as a crew bus driver was not a possible accommodation. It argues that the Union provided no evidence in their grievance other than allegedly "hearing" about it. There is simply no evidence to support such an assertion.

19. CP maintained that between the period of January 13, 2022 and February 10, 2022, CP was still in communication with the Grievor's health professionals. On January 11, 2022, CP wrote to the Grievor requesting additional information. The Union argues that CP does not address any of X.Y.'s treating physicians ever stated he was unfit to drive Company vehicles or personal vehicles.

ANALYSIS AND DECISION

20. It is not in dispute that Railway Medical Rules are formulated under the Railway Safety Act and specified in the Railway Medical Rules for Positions Critical to Safe Railway Operations. Safety Critical Positions are railway positions directly engaged in the operation of trains. It is also not disputed that these positions have a direct role in railway operations where impaired performance could result in a significant incident.

21. Physicians and Ophthalmologists/Optometrists assessing employees who work in Safety Critical Positions are required by law to disclose to CP's Chief Medical Officer (CMO) any medical condition that may affect the employee's ability to work safely.

22. On December 20, 2021, in a Fitness to Work Assessment, the Grievor's Family Physician provided his opinion and addressed the risk for sudden incapacitation or sudden impairment of the Grievor in his report. The report provided:

In your opinion, is your patient at risk for a sudden incapacitation or sudden impairment?

NO Yes, please explain: If a bradycardia complicates atrial fibrillation

23. The Grievor is a Locomotive Engineer with over 32 years of service with the Company and works out of the Toronto Terminal. The position of Locomotive Engineer is classified as a Safety Critical Position.

24. The Union submitted that commencing in February 2015, X.Y. developed a heart condition that was monitored by CP's OHS department thereafter. It maintains X.Y. was diagnosed with atrial fibrillation with mild mitral valve regurgitation and possible mild mitral valve prolapse. He was under the care of his cardiologist in connection with this condition from 2015 ongoing. However, in his December 20, 2021, Fitness to Work Assessment, the Grievor's Family Physician referred to the condition as persistent atrial fibrillation.

25. CP submits that CP Health Services has the following responsibilities in this matter:

- a) Determine the medical fitness to work assessments for candidates and employees of CP (Canada) and individuals who may perform Safety Critical, Safety Critical Aviation and Safety Sensitive Position duties.
- b) Assist employees in a safe and timely return to work after injury or illness, in accordance with the provisions of the Disability Management Policy & Procedures.
- c) Assist in the individualized accommodation for employees with job-

specific limitations and/or restrictions as required under the Disability Management Policy & Procedures.

26. The Union argues that while such restrictions were asserted by OHS in its Fitness to Work Assessment on January 10, 2022, they were not based in any clinical records. The Union submits that they were indeed “invented” by the Chief Medical Officer.

27. The TCRC submits that, as of January 13, there was no process by which CP could have concluded that it was unable to accommodate his restrictions and limitations as outlined by his physician. I disagree. On January 18, Mandy Jegou, CP’s Occupational Health Nurse emailed CP Physicians indicating that she had received the January 13 report and made recommendation that the Grievor was now fit to return to work in his Safety Critical position. I do not find evidence of anything being invented by CP’s Chief Medical Officer. I find no evidence that the CMO received the report and recommendation for review until late January 18. There is no evidence as to when he opened the email or reviewed the file.

28. Most people with health issues impacting their employment would like emails regarding them to be opened immediately after being sent. They would also hope that the information contained in them is placed at the top of those to be reviewed. Unfortunately, today, that is not always the case. There is no evidence to conclude that the significant delay was unnecessary.

29. Under the rules the Chief Medical Officer of the railway company is required to maintain records of all persons' medical assessments required as well as any restrictions required. The Railway Medical Rules for Positions Critical to Safe Railway Operations applying to the railway companies are under the oversight of the Director General, Rail Safety for Minister of Transport.

30. The Union argued that restrictions placed on the Grievor were not based on any clinical records. It says they were indeed “invented” by the Chief Medical Officer. I cannot gauge which clinical records the Union was referring to determine that the restrictions were invented. The Union did not make any requests for information considered by the Chief Medical Officer or call him as a witness.

31. The evidence did establish that on December 20, 2021, the Grievor’s Family Physician provided his opinion and addressed the risk for sudden incapacitation or sudden impairment of the Grievor in his report. After a review, Dr. Lambros, CP’s Chief Medical Officer declared X.Y. fit for Safety Critical Duties on February 10, 2022. On February 16, 2022, X.Y. returned to active service. I find that after December 20, 2021, medical information was required by the Chief Medical Officer in order to ensure that the Grievor was fit to return to SCP service.

32. The Union argues that the Company had an obligation to accommodate the Grievor between December 20, 2021, and February 16, 2022. The Union argues that it has demonstrated that several other RTW plans existed during this time, all of which would have been appropriate for X.Y.. Accommodation of X.Y. was readily feasible. His physician provided only one restriction (driving trains), he remained fit for all other duties. As such, other accommodations were present and ought to have been availed. Not only was the accommodation process flawed, but his return to work was not facilitated until more than a month after he was cleared to return to SCP. I find that the Grievor’s physician does not establish restrictions. That responsibility is for the CP CMO.

33. The Union submits that X.Y. could easily have been put on a train as a familiarizing employee with full wages. X.Y. certainly could have pulled train documents for crews and perform safety meetings. These duties would have been within his limitation (no driving trains) and, as they

fall within his job category, would therefore attract Locomotive Engineer rates. If office staff were working from home, there is no evidence of any impediment whatsoever to X.Y. being set up to work from home to perform clerical duties in a meaningful capacity in this period.

34. I find the Grievor and Union were primarily focused on his return to his safety critical position, not accommodation in other duties. Union's repeated position that the Grievor's personal doctors determined his restrictions is flawed. In this case, it is the Chief Medical Officer who determines restrictions and fitness for Safety Critical duty based on all the information he receives. In this case, that includes the test results which he requested after the Grievor's doctor expressed his opinion regarding risk for sudden incapacitation or sudden impairment in his report.

35. The Company maintains the time period in question continued to be extraordinary times of COVID and to have the Grievor or other employees in the office would have been contrary to the direction of the Ontario Government. The Company says it had a duty to ensure that all Federal and Provincial mandates were followed in an effort to keep employees safe. The Company maintains that based on the Grievor's restrictions there were no suitable accommodation opportunities during the 58-day period he was off work and unfit for the duties he was hired for.

36. The Union argues that the evidence is not reflective of any searching probe for accommodation to the point of undue hardship, in breach of the Company's obligations to X.Y.. It says CP's delays beyond January 13, 2022 were entirely beyond the Union and Grievor's control. Without any new clinical evidence having been supplied, CP's OHS took in excess of one full month to determine whether the evidence already on file confirmed fitness to return to work as a Locomotive Engineer. It eventually confirmed that it did.

37. The Company submits that just because the Grievor sent in new medical information, a return to his safety critical duties is not automatically triggered. A proper evaluation of all medical information is required. In his role, the CP Chief Medical Officer may require additional assessments or clarification in order to make a final determination.

38. The Union submits that X.Y. could easily have been put on a train as a familiarizing employee with full wages. It says X.Y. certainly could have pulled train documents for crews and perform safety meetings. These duties would have been within his limitation (no driving trains) and, as they fall within his job category, would therefore attract Locomotive Engineer rates. If office staff were working from home, there is no evidence of any impediment whatsoever to X.Y. being set up to work from home to perform clerical duties in a meaningful capacity in this period. However, I find there is no evidence that such positions were suggested by the Union.

39. The Union relies on a number of authorities which I find not on point with these facts. Here, the total delay is 58 days and part of that was 19 days for the CMO's final review of all the medical information. I note that in CROA 4648 relied on by the Union, the delay time was June 1, 2016 to March 2017.

40. In CROA 4503, the Grievor experienced some serious health issues in the fall of 2013. In January, 2014, he was cleared to return to work on modified duties, but not for the "usual duties" of his conductor position. He could not drive CP vehicles or operate moving equipment. CP first provided the Grievor with a temporary accommodation in August, 2014.

41. The TCRC also relies on a 2007 decision of the Canadian Human Rights Tribunal in Guy Willoughby and Canada Post 2007 CHRT 45 regarding the quality and extent of the employer's search for accommodation. The majority of factors in that case are inconsistent with this matter.

In that case, the Tribunal was addressing the complaint of a Canada Post employee who commenced his employment in April of 1977. In the fall of 1997, he was working as a letter carrier supervisor when he began to have difficulty performing his job after he suffered from an injury to his knees. After some weeks of delay, his medical requirements were accommodated. On February 14, 2003, he was advised at that meeting that there were no positions available to meet his medical restrictions.

42. In this case, while the January 13, CV Report was reviewed by OHS, there is no evidence that it was reviewed or sent to the CMO by email before January 18. He could have made a decision before it was reviewed by OHS and then his review would begin.

43. On Tuesday, January 18, 2022 at 2:40 PM, Mandy Jegou, CP's Occupational Health Nurse emailed CP corporate physicians regarding the Grievor's CV Report of January 13, 2022, regarding her review and recommendation. She stated:

EE is now fit for SCP as he meets RAC criteria for A-fib.
Repeat CV report and 24-hr Holter to be done in 1 years time.
Please let me know if you concur with this recommendation.

44. I find her review was a request for a concurrence. It was not a determination.

45. In this case, I find no evidence that the Grievor was treated differently from other SCP employees regarding medical information about his condition. I am also satisfied that the requirement to provide medical information by the CMO was warranted for ensuring safety.

46. I am not suggesting that any undue delay should be ignored or that the Grievor and his Union must be satisfied with the explanation for the delay. Clearly, they are not. However, arguing that the Chief Medical Officer invented restrictions placed on the Grievor is not supported by the evidence. Nor is the argument that he should have been placed back on his SCP on January 13 before the CMO received the OHS recommendation and completed his full review. There is no evidence that the CMO was negligent or unnecessarily tardy in his review.

47. That said, the evidence established that the Grievor is 53 years old and has over 30 years of service. He did everything requested of him in a timely fashion. While he was on Sun Life benefits, his Pension/Benefits/EDO/GH/AV may have been negatively impacted as submitted by the Union in the Joint Statement. Given the Grievor's efforts, I find that to be a potentially unjustified penalty for a long service employee approaching pensionable age.

48. In view of all of the foregoing, the grievance is allowed, in part. The parties will meet within 30 days of this award to review and rectify any potential negative impact to his Pension/Benefits/EDO/GH/AV resulting from his time held off his SCP on Sun Life Benefits.

49. I remain seized of any and all matters arising out of this decision.

Dated at Niagara-on-the-Lake, this 8th, day of May 2023.



Tom Hodges
Arbitrator