IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE
RAIL CANADA TRAFFIC CONTROLLERS
(the "Union")

- and -

CANADIAN PACIFIC RAILWAY COMPANY

(the "Company")

Re: GRIEVANCE OF SHAWN CHUTE (#2)

Date/Place of Hearing: March 27, 2023, Calgary, Alberta

Arbitrator: Cheryl Yingst Bartel

DISPUTE:

Accommodation of Rail Traffic Controller (RTC) Shawn Chute.

JOINT STATEMENT OF ISSUE:

On March 27, 2017, RTC Chute was reinstated by Arbitrator Moreau through an arbitration award wherein he stated:

> The grievance is allowed in part. The grievor's file shall be reopened and he shall be reinstated to his RTC position without loss of seniority. There shall be no further compensation order for lost pay or benefits given the grievor's demonstrated refusal to cooperate with the accommodation process.

On May 10, 2017, the Company deemed RTC Chute permanently restricted from Safety Critical duties, Safety Sensitive duties, driving Company vehicles, and working nights as well as other cognitive and physical restrictions.

Thereafter the Company asserts that it continued to look for appropriate modified work for RTC Chute. The Union disagreed and filed a grievance on September 20, 2017.11

From May 28, 2018 through to January 27, 2019 RTC Chute performed temporary modified duties assisting the PTC Wayside department and on January 28, 2019 he was offered the permanent position of Analyst PTC Wayside which he accepted.

UNION POSITION

The Union submits that the Company failed both its procedural and substantive duty to accommodate Mr. Chute, including, but not limited to, by limiting the accommodation process to permanent positions and failing to consider whether various job functions could be bundled together to create a sufficiently productive accommodated position.

By virtue of its breach of the duty to accommodate Mr. Chute, the Union submits that the Company is in violation of, but not limited to, the Company's accommodation policy, the *Canadian Human Rights Act* and the Collective Agreement, including, but not limited to, Article 33.1 (Article 36.1 2015-2020 CBA).

For the reasons above the Union requests that Mr. Chute be made whole for all losses with interest due to the Company's failure to accommodate him.

COMPANY POSITION

The Company disagrees and denies the Union's request.

Following the Grievor's reinstatement via arbitration award, the Company initiated a reinstatement medical as per Policy. After thorough review of the Grievor's medical he was appropriately restricted from the Safety Critical position of RTC, Safety Sensitive duties, driving Company vehicles, etc.

The Company maintains that it fulfilled its duty to accommodate as it continued to look for both temporary modified work and permanent positions for the Grievor during the time in question. Unfortunately due to the Grievor's restrictions, qualifications, and many of the positions/duties at the Company being Safety Critical/Sensitive, opportunities were limited.

The Company maintains it complied with the Human Rights Act, its own Disability Management Policy, as well as 36.1 of the Collective Agreement.

For the above reasons, the Company requests that the Arbitrator be drawn to the same conclusion and dismiss the Union's grievance in its entirety.

FOR THE UNION:

Jason Bailey
General Chairman, TCRC RCTC

FOR THE COMPANY:

Francine Billings
Asst Director, Labour Relations, CP Railway

Appearing For the Company: Francine Billings, Asst. Director, Labour Relations
Chris Clark, Manager, Labour Relations
Emily Difriscia, Disability Management (observer)

Appearing for the Union: Robert Church, Counsel, CaleyWray
Jason Bailey, General Chairman
Veronica Linkletter, Vice General Chairperson
Dan Bertram, Local President

AWARD OF THE ARBITRATOR

1. The Grievor began his employment with the Company as a Rail Traffic Controller in March of 2007. Four years later he suffered an off-duty injury, leaving him with significant permanent work restrictions.

2. This circumstance began what has become a complicated and lengthy journey to return the Grievor to productive work. The Grievor was ultimately accommodated in the Positive Train Control (PTC) Wayside department in the Spring of 2018, first through temporary modified duties and then with a permanent position. This Grievance concerns whether the Grievor was appropriately accommodated between the Spring of 2017 and the Spring of 2018.

Nature of the Case

3. Some history is required to provide context for this Grievance.

4. While various efforts were taken to accommodate the Grievor's restrictions after he suffered his injury in 2011, the Company considered its accommodation obligations were at an end in the Fall of 2016, when the Grievor refused a short-term accommodation. The Company terminated his employment and the Union grieved that decision. Arbitrator Moreau issued an Award to resolve that dispute on March 17, 2017. While he agreed the Company's obligations to accommodate the Grievor were satisfied at the point where the Grievor refused a short-term offer of accommodation, he ordered the Grievor reinstated on the basis his dismissal was discriminatory. The Grievor was reinstated and the accommodation process began again in the Spring of 2017.

5. Updated medical information was requested from the Grievor after his reinstatement and his limitations were assessed and accepted by the Company on May 10, 2017. The Union filed this Grievance on September 20, 2017, alleging failure to accommodate.

6. The Union included in its Brief and materials extensive details regarding the Grievor's medical condition prior to March of 2017. I do not find it necessary to consider the details of the Grievor's restrictions during 2015 to 2017 or the impact on him of the accommodation efforts taken – or not taken - during that time period. That time period was the subject of the previous grievance before Arbitrator Moreau and subject to his decision.

The Parties' Positions

7. The parties' positions are summarized in the JSI. At the arbitration hearing, the main thrust of the Union's argument was that the Company required the Grievor to apply to job positions "as is", with no modifications or discussion of modifications of those jobs, or consideration of the "bundling" of duties. It argued this violated the Company's obligation to conduct an individualized assessment and placed too great an obligation on the Grievor. The Company maintained it complied with its obligations to accommodate the Grievor. It urged this was a very difficult accommodation as the railway industry is a safety-sensitive industry and the Grievor's restrictions were significant, preventing him from working in either safety-sensitive or safety-critical roles. It noted the restrictions of the Grievor included both physical and cognitive restrictions, as well as restrictions against driving Company vehicles. It argued it took all reasonable steps to fulfill both its procedural and substantive obligations. The Union argued the issue in this Grievance is the accommodation measures between the Spring of 2017 after the Grievor was reinstated, and the Spring of 2018, when he was accommodated into the PTC Wayside department. The Company did not take issue with this time period.

Analysis and Decision

1. Requirements of the Accommodation Process

8. The accommodation process is recognized as a tripartite process, which involves the Union, the Company and the Grievor. It imposes shifting burdens of proof: The Union bears the initial burden of establishing a grievor suffers from a disability, has experienced an adverse impact as a result and requires accommodation. The burden then shifts to the employer to establish it has accommodated the grievor to the point of "undue hardship".

9. As described by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 S.C.R. 7868 ("*Meiorin")*, there are two components to an employer's obligations once *prima facie* discrimination is established by the employee and its duty to accommodate is triggered. These are both procedural and substantive. Those procedural components are twofold and are set out in *Lagana v. Saputo Dairy Products* 2012 HRTO 1455 at para. 52. An employer is required to:

   a) take steps to understand the disability needs of an employee; and

   b) "undertake an individualized investigation of potential accommodation measures to address those needs"

10. The substantive component considers the "reasonableness of the accommodation offered or the respondent's reasons for not providing accommodation" (at para. 52). The Tribunal in *Saputo Dairy Products* noted that it was the employer who bears the onus "of demonstrating what considerations, assessments and steps were undertaken to accommodate the employee to the point of undue hardship…" (at para. 52), consistent with the shifted burden of proof at that stage.

11. **CROA 4503** contains a useful summary of the Supreme Court of Canada's framework for assessing the duty to accommodate. It outlines several "guiding" principles. Among these principles are that an employer remains entitled to expect the employee to "perform work in exchange for remuneration"; that the employer need not change

the workplace in a "fundamental way"; that when "undue hardship is reached is "contextual" and depends on several factors; that an employer's "duty is discharged if an employee turns down a reasonable accommodation proposal"; and that in assessing accommodation issues, an arbitrator must examine "the entire period" of the accommodation (at para. 5). It should be emphasized that undertaking a contextual inquiry to determine when the point of "undue hardship" is reached means no two fact patterns will ever be the same. As a result, precedents are of limited value and each case falls to be determined on its own facts.

12. As noted in *Meiorin,* the application of the duty to accommodate requires that all parties - and all decision-makers – maintain an innovative perspective:

> Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated…the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases…*Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances* (at para. 64, emphasis added).

13. This comment serves to add flesh to the obligation imposed on employers to undertake an "individualized investigation of potential accommodation measures" to accommodate the employee.

14. A creative mind-set is a key aspect of this obligation, especially when the accommodation task is proving difficult. It has been recognized that is not sufficient to consider the grievor's restrictions, consider the position, and determine the two do not coordinate. The duty to accommodate goes further than this type of "review and slot" process, which was noted by Arbitrator Picher in **CROA 4273**:

> I agree with counsel for the Union that it was not sufficient for the Company to determine whether there were vacant positions into which the grievor could be placed. The duty of accommodation goes further, requiring the employer to consider whether various job functions can be bundled together to create a sufficiently productive accommodated position. Additionally, the obligation of scrutiny on the part of the employer, and for that matter on the part of the Union, extends beyond the bargaining unit and can encompass managerial responsibilities or work in relation to another bargaining unit, subject only to the limitation of undue hardship (at p. 5).

15. The Supreme Court of Canada has recognized that the purpose of the duty to accommodate is to

> [E]nsure that an employee who is able to work can do so. In practice, this means that the employer must accommodate the employee in a way that, while not causing the employer undue hardship, will ensure that the employee can work. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded *where working conditions can be adjusted without undue hardship*.
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> *Hydro-Québec v. Syndicat des employe-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section local 2000* [2008] 2 SCR 561 at para. 14, (emphasis added)

16. While Arbitrator Picher noted the possibility of "bundling" of functions as one option, that is not the only option in applying a creative mind-set. I am prepared to accept that the Company's obligations under the duty to accommodate requires consideration of whether a grievor's *own* job could be modified to meet his or her restrictions, as well as whether there were other positions within its organization that could suit the grievor "as is" or that could be modified to address the grievor's restrictions, as a potential "accommodation measure", as those measures must be taken to the point of undue hardship.

2. Has the Company Met its Obligations?

17. The Grievor established he suffers from permanent disabilities. That is not in dispute. The issue in this case is whether the Company has met its burden to demonstrate it took all reasonable steps to accommodate the Grievor, to the point of undue hardship.

18. As a first issue, the Union argued that the Grievor's accommodation efforts should have begun prior to May 10, 2017, since he was a returning employee with a complex restriction history of which the Company was aware. It argued he should not have ben treated a "new hire", which unnecessarily and unreasonably delayed the accommodation process.

19. I accept it was reasonable for the Company to seek updated medical information upon the Grievor's reinstatement, in order to satisfy itself that there had been no changes to his restrictions in the time period after his discharge and before his reinstatement. In fact, such an assessment is part of the first aspect of the procedural component, as noted in *Saputo Dairy Products.* It was not unreasonable for the Company to do so after the delay between the Grievor's original dismissal and Arbitrator Moreau's direction he be reinstated. I find there was no undue delay in the accommodation process caused by that reassessment.

20. As of May 10, 2017, the Grievor's restrictions had been reviewed and updated and the accommodation efforts of the Company began again.

21. It is recognized that accommodating the Grievor in this case created significant challenges for the Company. The railway is safety-sensitive industry and many of its positions carry that designation. As of May 10, 2017, the Grievor was restricted from any "safety critical" or "safety sensitive" positions, was restricted from working night shifts; required a break mid-shift; was restricted from driving Company vehicles with or without passengers, could not concentrate at an intense level and had limitations for walking and lifting tolerances. These are significant limitations in this industry.

22. In support of its position that it met its obligations, the Company provided the case of *Sodexo Canada Ltd. and CUPE, Local 145,* and **CROA 4313**. The facts in both of those cases are distinguishable from this case. In both cases, it was the grievors who did not carry out their obligations under the accommodation process by refusing to try an accommodation, becoming fixated on a particular accommodation that was not forthcoming, and/or layering on their own limitations on the Company's efforts. That is distinct from the facts before me. The Grievor in this case has cooperated with the Company's efforts.

23. The Union focused on the lack of documentation from the Occupational Health and Safety department of the Company between the Spring of 2017 and the Spring of 2018. I am prepared to accept that once the Occupational Health and Safety staff

had determined the disability-related limitations of the Grievor, the Disability Management department at the Company took over the efforts to accommodate the Grievor, with the occasional question back to Occupational Health where necessary. I accept that documents from both departments are relevant to resolving this dispute.

24. To meet its burden of proof regarding its accommodation efforts, the Company disclosed three documents from the Disability Management office, in addition to disclosure of the Occupational Health and Safety documents relating to the Grievor. The first document was a summary of accommodation efforts, created as a timeline. The second document relied on by the Company was a copy of notes taken by personnel in Disability Management during a return to work meeting with the Grievor held on June 27, 2017, roughly five weeks after his disabilities had been assessed. In that meeting, the Company explained to the Grievor that he would be sent job opportunities he could apply for, as they arose, and that he would be required to interview for these positions (which are outlined on the first page of the timeline). The third document was an email from the Disability Manager to the Union about interview feedback and coaching which had been given to the Grievor. The email was dated in February 2018, after the Grievance was filed.

25. Considering the timeline, it is eight pages long. While at first blush this appears to demonstrate substantial effort, only the first page refers to the Company's efforts, and that page also lists the Grievor's limitations. The remaining seven pages lists the 51 jobs the Grievor applied for on his own initiative, many of which he was wholly unsuited to perform (such as "Train Conductor").

26. Focusing on the first page of the timeline, five references outline various jobs for which the Grievor applied and why the Grievor was unsuccessful. One of the five entries for jobs the Grievor applied for but did not receive was dated September 20, 2017, and referred to a Crew Dispatcher position. The timeline indicated the candidate was required to work night shifts, which the Grievor was unable to do and he was therefore disqualified from that position. The Grievance was filed that same day. The remaining four entries from page one are :

a. May 12, 2017: an inquiry was sent by Disability Management to the Operations Centre (the Grievor's former department), regarding work for the Grievor in the Operations Centre. The response was "We have no work available in the OC for [the Grievor] at this time"; there was no evidence of any follow-up with this department by Disability Management;

b. June 19, 2017: considered the Grievor for a position with Facilities on June 19, 2017, (disqualified due to his physical restrictions);

c. October 24-31, 2017: arranged modified duties in the Labour Relations department; and

d. January 17, 2018: "reviewed for temporary duties within the PTC dept (which the Grievor was ultimately offered on March 28, 2018 and which became a permanent job offer on January 28, 2019); no evidence was provided for why this accommodation was not offered before March 28, 2018.

27. That is the extent of the Company's actions in attempting to accommodate the Grievor, as noted on the timeline, however there is one other reference in the Occupational Health and Safety files. This refers to Disability Management seeking confirmation from Occupational Health and Safety regarding the Grievor's restrictions. This message is dated October 19, 2017, after the Grievance was filed. That department was seeking to confirm the Grievor's night shift restrictions, as the department wanted to accommodate the Grievor into the Crew Dispatcher (non safety-sensitive) position, but that position required working night shifts. Upon finding that the Grievor still had the "no night shift" restriction, that job was not further considered.

28. The Union argued the Company has not met its burden of proof through these efforts. For the following reasons, I am drawn to the same conclusion.

29. There are two inter-related faults of the Company in this case. The first is the failure by the Company to consider whether positions could have been modified to meet the restrictions placed on the Grievor, without causing undue hardship, which is an important part of the Company's obligation in an accommodation process. Modification of an existing role to accommodate an employee's requirements does not create a new "position", but rather changes an existing position to enable an employee to return to productive work. I am satisfied this type of innovative approach

is required - not just in relation to the Grievor's own former job duties- but also in relation to the Company's efforts generally.

30. It should be emphasized there is no doubt this was a difficult accommodation. While bundling of functions or other modifications may or may not have been found to be possible in this case, the difficulty for the Company is there is no evidence these possibilities were considered, except for one brief job in the labour relations department. If a position did not meet all of the Grievor's requirements, the inquiry ended there.

31. A review of the documentation and evidence in this case demonstrated that the Grievor was disqualified from several possible positions due to his physical restrictions, but there is no evidence of any conversations where the Company considered whether the job requirements of *those* positions could modified to enable the Grievor to carry out those roles, or whether duties could have been bundled in a manner that would provide meaningful work to the Grievor. No evidence was provided that this type of approach would have led to undue hardship on the Company, in this case.

32. The most obvious example where this could have occurred is the role of Crew Dispatcher (non safety-sensitive). The Grievor was rejected for this job in both September and October of 2017 due to his restriction from working night shifts, yet there was no evidence of whether the position of Crew Dispatcher position could have been modified to excuse the Grievor from working on night shifts, by only scheduling him on day shifts, to accommodate his restrictions. No evidence was provided this type of modification would have created an "undue hardship" for the Company. The Company bears the burden of proof to establish it made these types of inquiries. In this case, the Company has not met that burden.

33. While the Grievor had previously been accommodated unsuccessfully in a crew dispatch position (as noted by Arbitrator Moreau, at p. 3), the intention of Disability Management to offer him that role in October of 2017 – if he had not had the night shift restriction - demonstrated the confidence of the Company in the Grievor's ability

to perform those functions, with appropriate training. Rather than make that offer, the Company took the "review and slot" approach cautioned against in **CROA 4273:** When the night shift restriction was confirmed by Occupational Health & Safety, the job was no longer considered as a potential accommodation. As noted by Arbitrator Picher in that case, such an approach does not go far enough in meeting the Company's duty to accommodate.

34. The Union also argued the acceptance of the "no available jobs" comment made by the Operations Centre in May of 2017 was insufficient. A more fulsome answer may well have been that the roles in the Operations Centre are safety-sensitive/safety critical and could not be modified to remove that function, however the Union is correct that no such explanation was provided by the Company. Follow-up should have occurred by Disability Management regarding the one line answer received from the Operations Centre.

35. The second flaw with the Company's approach in this case follows from the first: The Company failed to recognize that it was not up to the Grievor to *find* a role that suited him; it was up to the Company to *accommodate* him in a role that suited him. That is a key and important distinction.

36. I have been drawn to the conclusion that the Company's approach in this case improperly placed too much initiative on the efforts of the Grievor, and not enough focus on its own obligations to be innovative and creative in finding an opportunity for the Grievor to keep working, which obligations must extend to the point of "undue hardship". An example of this flaw is demonstrated in the meeting of June 27, 2017, prior the filing of the Grievance. When the Grievor raised issues with the accommodation efforts taken in the past, he was told the Company was not required to "create work or a job position" to fulfill its duty to accommodate. While that is true, the obligation to accommodate the Grievor remained one that was to be borne by the *Company,* and not by the Grievor.

37. A further example is seen in the "recommendation" to the Grievor to "apply" for the Investigative Specialist position. It was not made clear why personnel in Disability Management did not on their own initiative consider the position of Investigative Specialist for the Grievor (including through discussions with the Union, if necessary), and make an accommodation *proposal* to the Grievor, if Disability Management felt he was qualified for the position and it met his limitations, rather than make a vague suggestion to him that he should "apply" for that role. Recommending to the Grievor that he apply for a certain position did not satisfy the Company's obligations to accommodate the Grievor to the point of undue hardship.

38. While a Company's obligation can be met when an offer of accommodation is refused by a grievor (as discussed in **CROA 4503** and as evident in Arbitrator Moreau's earlier decision in this case), before an employee can "turn down" a position, he must first be "offered" the position. In this case, no offer was made to the Grievor.

39. Further evidence that the emphasis was placed on the Grievor's own efforts to secure a job - rather than on the Company's obligations to find him an accommodation position – is also demonstrated in the third document, which outlined the Company's "coaching" feedback to the Grievor, to help him be more successful on interviews, so he could be accommodated. While feedback should always be encouraged, it is not the ability of the Grievor at the interview that ultimately determined suitability. The focus should have been on whether it was a position with duties he could perform which suited his restrictions or could be modified for his restrictions, so that he could perform productive work for the Company.

40. In summary, the Company failed to meet the procedural and substantive components of its obligations to accommodate the Grievor. This failure to accommodate took place both prior to and after the filing of the Grievance, up to when the Grievor was ultimately accommodated for a short-term in the labour relations department, and after that position until the Grievor was ultimately accommodated in the PTC Wayside department, in March of 2018.

41. The Grievance is allowed. As requested by the Union, I remain seized to resolve the issue of the appropriate remedy, should that assistance be required.

DATED AND ISSUED this 8th day of May, 2023

Cheryl Yingst Bartel
Arbitrator