CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4848

Heard in Montreal, July 13, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

Anonymization

The parties have agreed, due to the sensitive personal medical information contained in the file, that the grievor's name should be anonymized. He will therefore be referred to as "A" or the grievor.

DISPUTE:

The issue in dispute is the declination of weekly indemnity benefits ("WIB") to Mr. A of Toronto, Ontario between the period of January 26 to June 26, 2016 and the Union's request for the Company to explore alternative work.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Mr. A was absent from work since approximately September 12, 2015. During the period between September 2015 and January 2016, there have been numerous assessments and re-assessments to determine his fitness to work in a Safety Critical capacity.

On or about January 26, 2016, CP provided Manulife with a job description for a Locomotive Engineer. Based on this description, A was cut off benefits as they deemed him able to perform the duties of a Locomotive Engineer, which is sedentary compared to a Conductor's position. A however did not have the seniority to hold a Locomotive Engineers position at the time as he was set back. The job description ought to have been for a Conductor's position.

Union Position:

The Union contends that A is owed top up of his short term disability and, more importantly, the Company has a duty to accommodate as per the Collective Agreement return to work policy and the Canadian Human Rights act.

The Union further contends that at the time of the denial of benefits, the Company ought to have immediately met with A and investigated the possibility of finding other work for him.

The Union requests Mr. A be made whole for the financial top up and subsequent weeks which ought to have been paid, further, that the Company explore alternative work with the

assistance of the return to work committee until he is cleared to return to his normal employment.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

Mr. A was absent from work due to an off duty injury from September 12, 2015 to June 21, 2017. A was approved for WIB payments starting September 15, 2015. By letter dated April 1, 2016, Mr. A's WIB claim was approved to January 25, 2016 and terminated thereafter. Mr. A was made aware of the option to appeal Manulife's determination, however chose not to file an appeal.

Mr. A's fitness to work was as follows:

- Jan. 26, 2016 - Fit with restrictions
- Sept. 30, 2016 - Fit with restrictions
- Nov. 11, 2016 - Unfit all work
- Dec. 9, 2016 - Fit with restrictions
- Jun. 22, 2017 – Returned to Work

Mr. A retained legal counsel, Diamond and Diamond Personal Injury Lawyers for the purposes of a lawsuit, the details or outcome of which are not known to the Company.

The Union filed a grievance on Mr. A's behalf on November 25, 2016.

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

Union Position:

The Union takes the position that Mr. A's restrictions were assessed against the job description of Locomotive Engineer and on that basis, his WIB was cut off. The Union contends that Mr. A is owed WIB payments from January 26, 2016 to June 26, 2016. The Union further contends that at the time of the denial of benefits, the Company ought to have immediately met with Mr. A and investigated the possibility of finding other work for him.

The Union requests Mr. A be paid WIB from January 26, 2016 to June 26, 2016. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company Position:

Manulife, the Company's third party benefits administrator, adjudicates WIB claims based on the evaluation of pertinent policy provisions and relevant medical documentation. The Company's Health Services department is required to evaluate medical information supplied in the form of Functional Abilities Forms in making Fitness to Work determinations.

Contrary to the Union's positon, Mr. A's claim was reviewed against the job description of Conductor. The Company maintains that the Grievor's WIB claim was appropriately denied because the Grievor's claim did not meet the requirements to be eligible for WIB.

Mr. A was made aware of the option to appeal Manulife's determination, however chose not to file an appeal.

Throughout the time period in question, Mr. A had significant restrictions or was deemed unfit. It should also be noted that Mr. A did not provide the required information to Health Services, which limited the Company's ability to determine or locate a suitable accommodation. CP was unable to provide any accommodation based on Mr. A's restrictions.

The Company maintains there was no violation of the Collective Agreement, the Company's Return to Work Accommodation Policy and guidelines, the CHRA nor the Canada Labour Code. Critically, the grievance does not explicitly allege the Company violated any of the foregoing, merely that the Company has a duty to accommodate.

The Company reserves the right to object to any new allegations or requests that the Union might attempt to progress that were not done so via the grievance procedure.

Accordingly, the Company cannot agree to the Union's request and requests the arbitrator be drawn to the same conclusion.

FOR THE UNION:
(SGD.) E. Mogus
General Chair LE-E

FOR THE COMPANY:
(SGD.) L. McGinley
Director Labour Relations

There appeared on behalf of the Company:

L. McGinley	– Director, Labour Relations, Calgary
J. Bairaktaris	– Director, Labour Relations, Calgary

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
E. Mogus	– General Chairperson, LE-E, Oakville
J. Bishop	– Senior Vice General Chairperson, LE-E, MacTier
P. Boucher	– President, TCRC, Ottawa

AWARD OF THE ARBITRATOR

Background

1. The grievor is a Locomotive Engineer and Conductor, with some twenty-four years of seniority with the Company at the time of the Hearing. He was off work from September 2015 to June 2017.

Issues

1) Was A entitled to Weekly Indemnity Benefits from January 26, 2016 to June 26, 2016?
2) Was he entitled to and did he get reasonable accommodation towards a Return to Work?
3) If not, is he entitled to damages?

Entitlement to Weekly Indemnity Benefits

2. Section 3.1 of the Manulife Policy sets out when employees are entitled to disability benefits:

> On receipt by the Service Organization of proof as herein required that an Eligible Employee has become wholly and continuously disabled from bodily injury or from sickness or disease so as to be prevented from performing the duties of his occupation or employment, a benefit will be paid to such Eligible Employee….

Totally disabled employees are eligible for benefits for a maximum of 26 weeks.

3. Mr. A seeks a top up of EI benefits until June 26, 2016,

Submissions of Parties

4. The Company takes the position that a third party adjudicator, Manulife, made the decision that the grievor was no longer eligible for WIB payments from January 26, 2016 to June 26, 2016. It notes that, while an appeal of the Manulife decision was possible, the grievor failed to do so. It argues, based on multiple CROA decisions, that this decision cannot be overturned unless the Union shows that the decision was motivated by a purpose that is arbitrary, discriminatory or in bad faith (see **CROA 4679**, **4270** and **2849**). It states that the Union has not met this burden of proof and the decision must stand.

5. The Union argues that the Manulife decision was based on a Locomotive Engineer job description, rather than the Conductor/Train Switchman position he was performing prior to his claim. It argues that Manulife is an Administrative Service Organization ("ASO"), but that the Company remains legally and financially liable for the payment of the benefits. It further argues that the decision was made in bad faith and was arbitrary and discriminatory.

Challenging the decision of Manulife

6. The Company notes that Mr. A did not appeal the decision of Manulife that he was no longer totally disabled from his own occupation or employment. That is correct, although he did engage outside counsel to challenge the decision. It does not appear, based on the documentation provided, that this counsel was successful in having Manulife change their decision.

7. The remaining issue is whether the decision of Manulife can be challenged as part of the grievance process.

8. Previous cases have dealt with the incorporation by reference of the provision of benefits into the Collective Agreement (see **CROA 4834**). Arbitrator Yingst Bartel found as follows:

> 21. Article 27 of the Collective Agreement outlines the obligation on the Company to provide benefits to Union members "in accordance with the terms of the Disability and Life Insurance Plan Agreement dated November 27, 1988 … as amended" (the "Plan"). It is not disputed that the terms of the Plan would provide benefits to the Grievor when he is totally unfit to work in his own occupation. I am satisfied the Plan has been incorporated by reference into the Collective Agreement, as was the plan in CROA 4679 and 2849. I am also satisfied the obligation ultimately falls on the Company to ensure that it does not breach Article 37 of the Collective Agreement regarding the provision benefits: CROA 2945.

9. As part of the collective agreement, breaches of the benefits agreement can be challenged by grievance. The CROA jurisprudence is consistent that a decision of the insurer can be challenged, but only if the decision has been made in bad faith, is arbitrary or discriminatory (see **CROA 2849**, **4270** and **4679**).

10. It is not enough that the arbitrator might have decided the issue differently than the insurer. The decision must be so flawed that it cannot stand, having been made, as set out above, in bad faith, or is arbitrary or discriminatory.

11. For the reasons which follow, I find that the decision was arbitrary and cannot stand.

The Manulife termination of benefits letter

12. Mr. A received a letter on April 1, 2016 from Manulife notifying him that his benefits would be terminated effective January 26, 2016 (see Tab 3 Company documents, page 108-110).

13. The letter notes:

Policy Overview

a. In order to be eligible for disability benefits, you must satisfy the policy definition of total disability, which under your contract is defined as follows:

-An eligible employee has become wholly and continuously disabled from bodily injury or from sickness or disease so as to be prevented from performing the essential duties of his regular occupation or regular employment.

14. The letter reviews his diagnosis of Axonal Polyneuropathy with symptoms of pain and tingling in both feet. The wearing of work boots causes foot pain, as does standing for long hours and operating vehicles.

15. The letter notes that the "employer supplied a fitness to work assessment. The assessment stated that were fit for work in a safety critical position as of January 26, 2016."

16. The letter concludes: "As we did not receive evidence of ongoing restrictions and limitations or a severity of condition that would prevent you from working beyond January 26, 2016, we are …terminating benefit payment on your claim after that date".

Was the Manulife decision arbitrary?

Which Job Description was Used?

17. There is a dispute between the parties as to the job against which the grievor was being assessed. The Union argues that the comparator job used by Manulife was that of Locomotive Engineer. The Company disagrees, and notes that Manulife had both job descriptions.

18. I agree with the position of the Company. The Functional Abilities Form signed by Dr. Etchell, on which Manulife relies, refers to the grievor's occupation as "Conductor/ Eng.". The OHS Fitness to Work Form refers to the grievor's occupation as "Conductor**".** I find that the Conductor job description was used to assess Mr. A.

Generic Job Requirements

19. The generic Job Demands Analysis Conductor/Trainperson-Road Service sent to Manulife by the Company (see Tab 3, page 164-166 of Company documents) contains a headnote in red:

> Note: The duties outlined in this JDA are for a generic Conductor/Trainperson-Road Service position. Actual job demands will vary depending on the individual position, shift, work assignment or work location. For more specific job demands, please contact your local RTW Specialist.

20. The JDA notes multiple requirements, including:

> Walking the railroad tracks to connect/disconnect rail cars, bleed brakes, switch tracks, clean the rail tracks of debris, etc.-Rarely/Occasionally.
> Uneven Surfaces-Walking across coarse gravel on rail bed when connecting/disconnecting rail cars, switching tracks, and when guiding the Engineer with the movement of the train-Rarely/Occasionally.
> Work at Height-Climbing ladders to get on/off locomotives and rail cars-Rarely.
> Rarely is defined as up to 1-5% of shift and Occasionally as 6-33% of shift.

21. Even is an activity is only done “Rarely” or “Occasionally”, ranging from 1-33% of a shift, it still represents a significant amount of time over the course of an entire shift.

22. The essence of a Conductor position is to move large, heavy and dangerous equipment around. To do so, a Conductor must move on and around such equipment, climb ladders and walk on uneven track surfaces in all weather conditions.

23. The setting, particularly in a large yard, is a dangerous one, with many cars and engines moving in close proximity. Employees working in such a setting would require a high degree of attention to safety and an awareness of and an ability to avoid potential and actual dangers.

Physical condition of Mr. A and ability to meet job requirements

24. Mr. A had on-going problems with numbness in his feet. The severity of the problem changed over time, but over the January-June 2016 period, the problem never went away.

25. Following a Fitness to Work Assessment, the Grievor was cleared to return to a Safety Critical position with restrictions as of January 26, 2016 (see Company Tab 5). These restrictions, based on a Functional Abilities Form prepared by Dr. Etchell included standing, walking/climbing, driving of company vehicles and operating moving equipment, based on his physical impairment only[1].

26. Dr. Etchell notes that Mr. A had a tolerance for standing "Limited Due to Pain and Weakness" and a "Limited" walking tolerance. He restricted Mr. A from driving a Company vehicle with passengers and found that he "Should not operate moving equipment due to Physical Impairment".

27. Mr. A was assessed against a generic Job Demands Analysis for a Conductor/Trainsperson-Road Service. It does not appear that either Manulife or the Company ever assessed him against his actual position, which the Union alleges was considerably more demanding. The fact of possible variation to the job requirements is set out in red, at the start of the document. Denise Perri of Manulife writes to the Company requesting a job description, noting that: "I need to understand how much this person is required to stand and walk for his position" (see Tab 3 Company documents at p. 163). Despite the red-lined note in the generic description and the request of Ms. Perri, no information was obtained about the actual demands of Mr. A's job.

[1] Functional Abilities Form prepared by Dr. Etchell. (Note the form is ambiguous, as it is not clear when the physician is being asked to respond to abilities or restrictions. For example, under "Driving vehicles-Fit and Able to drive", the doctor checked "company vehicle with passengers". The parties appear to have understood this to be a limitation, rather than as an ability. Their assumption appears reasonable as "personal vehicle" was not checked, implying an ability to drive a personal vehicle but not a company vehicle with passengers).

28. Even on the basis of the generic job description, Mr. A had such serious physical restrictions that his doctor would not permit him to drive a small crew bus or to operate moving equipment. Mr. A had such serious restrictions that he could not and did not go back to his Conductor position at any time during the benefit period. Indeed, he did not go back to his original position until these and other restrictions were removed in May/June 2017, more than a year after his benefits were refused by Manulife.

29. Despite these very significant restrictions which prevented Mr. A from returning to his "own occupation", Manulife fails to even mention the restrictions in its letter declining benefits. Instead, it asserts incorrectly that "we did not receive evidence of ongoing restrictions and limitations or a severity of condition that would prevent you from working beyond January 26, 2016".

30. The failure to inquire into the actual work of Mr. A and the failure to address the limitations which kept him from returning to his work as a Conductor/Trainperson-Road Service makes the decision an arbitrary one which cannot stand.

31. Mr. A was entitled to his top up benefits under the Manulife plan from January 26 until June 26, 2016.

Return To Work and Duty To Accommodate

32. The return to work, as quickly as possible, of employees who were sick or injured, is of obvious critical importance to both the company and the employee. The company loses production and may face increased costs, while the employee may well lose both pay and the validation that productive work provides.

33. The process by which the employee is returned to work often requires adjustments on all sides. Arbitrator Yingst Bartel provides a helpful summary of the accommodation requirements in Shawn Chute #2 (AH-834) at paragraphs 8-16:

> **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.
>
> *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.

34. The Company has recognized these requirements and has created a Return To Work Policy (see Tab 7, Union documents). The Policy sets out a detailed road map of the return to work process. I set out some of the key provisions, to which I will refer later:

> 2.0 Purpose
> CP, (The Company) is committed to protecting the health and wellbeing of our employees. The objective of the Return To Work RTW program is to provide a caring and consistent process through which CP will support all employees who incur a disabling injury or illness in a successful timely reintegration to their regular positions in conjunction with their recovery to optimal functioning.
> CP recognizes the value of each employee and the important contribution work is in an individual's life. Remaining involved in work and using current capabilities is important in an individual's recovery. The RTW program therefore provides for the timely provision of modified duties and work assignments where feasible. Modified duties and plans for reintegration into full duties are to be based on functional abilities information provided by treating health care professional.
> This policy is intended to achieve an effective return to work by:
> - Assisting employees in maintain their dignity and self-respect subsequent to being adversely affected by injury or illness.
> - Ensuring the well-being of affected employees and by so, reducing stresses associated with: adjusting to a disability, reintegration to the workplace, financial complications and other factors that adversely affect the employee.
> - Early intervention, resulting in timely and safe return to work of employees, thereby minimizing the economic and emotional impact on employees and their families.
> - Establishing and promoting good communication between all parties, respecting the need to protect confidential information.
> - Reducing direct and indirect costs associated with occupational and non-occupational injuries and illnesses.
> - Complying with current statutory requirement, (Canadian Human Rights Act, Canada Labour Code, Provincial Workers Compensation Acts and current rulings).
>
> **3.0 Definitions:**
> Accommodation: accommodation is the process of facilitating the return to productive work of an employee with medical limitations and/or restrictions that may be physical or psychological in nature, through various means with productive, meaningful employment. These might include

reassignment or adjusting the work environment (e.g. workstation, equipment, process, duties and hours).

Graduated Work Program: A work-hardening program that initially results in a minimal amount of activity or time at work with a schedule to increase participation up to and including normal duties within a specified time period. Such programs must be structured and may be performed under the guidance of a rehabilitation specialist and/or a health care provider.

Key Stakeholders: Individuals who may provide support to the employee during their return to work process, which may include OHS, Local Return to Work Committees, Regional RTW Coordinators, WCB Specialists, treating physicians, family members, rehabilitation professionals, managers co-works, Union representatives, CRTWC and HSSE.

Local Return to Work Committee (LRTWC): A Local Return to Work Committee consisting of a local management representative and a local Union representative from the appropriate bargaining unit to assist the Company in an early and safe return to meaningful work of an employee who is absent from work due to occupational or non-occupational injuries, illnesses and bona fide requests for workplace accommodation due to a disability.

Meaningful Work: Work that will contribute to the rehabilitation of the employee and will add value to the Company.

Modified Duties: Any job, task, function or combination of tasks or functions that an employee who suffers from diminished capacity may perform safely without harm to themselves or others. This work may incorporate but is not limited to, regular work that has been changed, redesigned or physically modified. This may include reductions in hours or volume, as well as work which is normally performed by others, or which has been specifically designed or designated for an employee participating in a return to work plan. The work must be productive and the result of the work must have value.

Non Safety Sensitive Positions (NSSP) : NSSP are railway positions that are not classified as safety critical or safety sensitive. These positions may be a lesser safety impact on other employees, operations and the public, however, despite the terminology, may still include positions where there is some degree of safety risk and individuals must be safety responsible. Jobs in this category include work in certain locations or in association with a potentially hazardous environment e.g. crew bus drivers, electricians, machinists and laborers. Alternatively, other NSSP may have minimal or no safety risk such as office workers.

Undue Hardship: There is no precise legal definition of undue hardship, nor is there a standard formula for determining undue hardship. Each situation is unique and needs to be evaluated individually and the Company is required to carefully review all options before they decide that accommodation would cause undue hardship. The decision should be evidence based and not based on an assumption, opinion or on an anecdotal or impressionistic evidence of risk. Generally, some hardship can be expected in meeting the duty to accommodate and undue hardship usually occurs when the Company cannot sustain the economic or efficiency costs of the accommodation. This means the Company is not expected to provide accommodation if doing so would bring about unreasonable difficulties based on health, safety, and/or financial considerations.

4.0 Policy Statement

- The Company shall make every reasonable effort to provide suitable meaningful employment to employees who are unable to return to their regular duties as a results of an injury or illness. This will include training and/or the modification of workstations or equipment, or job duties to accommodate the employee, provided that such accommodation does not create undue hardship to the Company.
- Early intervention is considered the cornerstone of the RTW program and the Front Line Manager (FLM)/Supervisor is responsible for initiating and implementing their employee's return to work plans in a timely manner in consultation and conjunction with the Regional RTW Coordinator, the LRTWC, where applicable and in accordance with the relevant collective bargaining agreements.

Company / Union Commitment

CP and participating Unions representing employees have entered into the following Letter of Agreement:

CP and the Participating Unions recognize that an early return to productive employment in the workplace will assist in achieving speedy rehabilitation as well as allowing employees to maintain their personal dignity and financial stability. Accordingly, CP will make every reasonable effort to accommodate employees coming within the scope of the Return to Work Policy with suitable alternate, temporary or permanent employment, by reviewing, and if necessary, modifying their regular duties.

In consideration of accommodating an employee with a disability the following shall apply in the order listed below:

- First, the employee's present position shall be considered for modification,
- Second, positions within the employee's classification shall be considered,
- Third, positions within the bargaining unit shall be considered,

- Fourth, positions outside the bargaining unit shall be considered.

5.0 Roles and Responsibilities:
It is the responsibility of the Union(s) to:
- Take an active role as partners in the return to work and accommodation process.
- Provide accommodation advice and guidance.
- Support accommodation and RTW measures and plans regardless of the collective agreements unless to do so would impose an undue hardship on the Union.
- Work with the Company to address existing barriers in the collective agreement, ensuring that no new barriers are added.

6.0 Return to Work Process: Return to Work Plan
When the FLM/Supervisor receives the completed FAF it is their responsibility to develop the RTW plan as soon as possible, in a timely fashion, by matching the employee's work limitations and/or restrictions as indicated on the FAF with the available modified alternate work. The Supervisor may consult with their Regional RTW Coordinator and LRTWC to assist in the development of the RTW plan.

Application of the Return to Work Process

35. The Company learned in March 2016, that Manulife would cut off WIP benefits to the grievor, as he was no longer "totally disabled" according to the terms of their policy. It also had the current Occupational Health Services Fitness to Work Assessment, which noted:

> OHS has received and reviewed the Functional Abilities Form (FAF)/Medical information for the Safety Critical Position of CONDUCTOR.

36. **The current OHS Fitness to Work Assessment is as follows**:

> 1. Fit for *Safety Critical duties* of the above position, effective January 26, 2016
> **Please see the appended Functional Abilities Form. Restrictions as per the appended FAF.** (See Tab 5, Company documents).

37. At this point, the Return to Work process under the Policy should have happened. Unfortunately, it did not. The grievor was to remain off work for a further 17 months from the effective date.

38. For most of the period between January 26, 2016 and June 26, 2017, the grievor was assessed Fit to Work with restrictions. These assessments should have caused a Return to Work Plan to be generated and the Company, Union and the grievor working together under the terms of the Policy to get Mr. A back to productive work, in light of his medical restrictions, as quickly as possible.

39. It is not clear that a formal Return to Work Plan was ever created. The Union was never involved until November, 2016, when a grievance was filed. It did not receive any notification concerning possible accommodation, despite its clear role in this tripartite responsibility. It is not clear that the Local Return to Work Committee was ever involved in this matter.

40. The Company attempts to accommodate Mr. A are limited at best. Their brief at paragraph 45 sets out a helpful list of efforts at accommodation. It is noteworthy that there is nothing noted between January 26 and September 30, 2016. Between October and December 2016, there were three very brief inquiries to and from Superintendents concerning possible accommodation.

41. The Company has produced a print out of available jobs at Tab 18. This print out appears to consist of all open jobs, not jobs which were suitable for Mr. A. By way of example, the print out contains a listing for VP, Sales and Marketing and VP and Chief Risk Officer.

42. The Company is required to look for suitable jobs, or the possibility of modifying existing jobs. As found by Arbitrator Yingst Bartel in Shawn Chute #2 (AH 834):

> 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.
>
> 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.

43. As noted, it is the Company which bears the burden of proof that it has accommodated Mr. A up to the point of undue hardship. The Company has not shown that a very serious effort was made to find Mr. A work, but that no such work existed. It has not shown that there was no sedentary work which he could have performed. The fact that neither the Union, nor apparently the Local Return To Work Committee, were involved does not help the Company meet this burden of proof.

44. It is difficult to believe that no productive work could be found, if the Policy had in fact been properly applied. I find that the Company has not met its burden of proof that Mr. A. be accommodated to the point of undue hardship.

Damages

45. The Company argues that the Union has not alleged a breach of its duty to properly accommodate Mr. A, and that it has expanded its claim over the course of the grievance and arbitration process.

46. The Union argues that it has always alleged that the Company had to meet its accommodation obligations under the collective agreement and human rights legislation and it had sought a "make whole" remedy from the beginning.

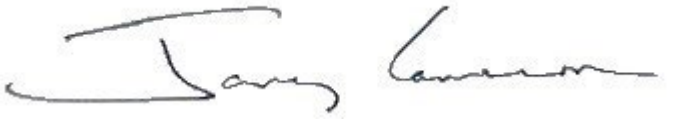
47. Here, I agree with the Union that the grievances, when read as a whole, do make clear an allegation of a breach of the collective agreement and human rights legislation

by the Company, given their actions and inactions concerning Mr. A and a “make whole” remedy is sufficiently broad to cover the losses claimed (see AH809).

49. I have found that Mr. A is entitled to his top up benefits between January 26 to June 26, 2016. He was also entitled to accommodation during those periods in which he was fit and available to work and properly participating in the accommodation process. The parties will need to consider how long it should have taken for the grievor to obtain properly accommodated work, the ramping up period towards full time work and other benefits available to him when he was not working.

50. To this extent, the grievance is allowed.

51. I remain seized of this matter with respect to any issues of implementation.



August 8, 2023

JAMES CAMERON

ARBITRATOR