CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4861

Heard in Edmonton, September 12, 2023

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Policy Grievance on behalf of Conductor H. Migvar of Prince George, BC, who was not properly accommodated and was discriminated against by the Company.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On February 25th, 2013, Conductor Migvar (the Grievor) informed the Company that she was pregnant and required suitable accommodations within her medical restrictions. She was initially instructed to apply for short term disability; she asserted her rights under *the Code,* requesting a paid leave of absence until such accommodation could be found. The Grievor was then assigned to a Utility position. Her physician determined the assigned position did not conform to her medical restrictions and the Company was provided an update of her restrictions on March 5th, 2013.

On March 18th, 2013, the Grievor was informed by the Company that she would not be accommodated and was being placed on an unpaid leave. The Grievor continued to search for an accommodation with the Company, suggesting yardmaster training and/or locomotive engineer training, both of which fell within her medical restrictions. Instead, she was placed on an unpaid leave of absence. With the Company failing to accommodate her, she applied for short term disability.

It is the Union's position the Company has failed to accommodate the Grievor during her pregnancy in contradiction to the Canadian Human Rights Act and the *Canada Labour Code* for the period of March 5th to September 19th, 2013, causing a substantial loss of earnings. Furthermore, the Company acted in a discriminatory manner towards the Grievor; the Grievor made numerous suggestions that complied with her restrictions and that had previously been performed by other employees (male) and other employees restricted due to pregnancy. The Union requests that she be fully compensated and made whole for all wages and benefits lost.

It is the Company's position that there were no alternative assignments that fell within the Grievors restrictions, and that they have met their obligation in reviewing alternative work that fell within her medical restrictions. Accommodations are dealt with on a case-by-case basis; the Grievor was offered a utility position, but the position was refused.

FOR THE UNION:
(SGD.) R. Donegan
General Chairperson, CTY W

FOR THE COMPANY:
(SGD.) n. a.

There appeared on behalf of the Company:

R. Singh	– Manager Labour Relations, Edmonton
F. Daignault	– Director Labour Relations, Montreal
S. Miller	– Manger Workers' Compensaiton, Obeserver, Edmonton
A. Borges	– Manager, Labour Relations, Toronto

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Thorbjorsen	– Vice General Chairperson, CTY-W, Edmonton
M. Anderson	– Vice General Chair, Edmonton
M. Sinclair	– Vice General Chair, Prince George
P. Boucher	– President, TCRC, Ottawa
R. Finnson	– Vice President, TCRC, Ottawa
H. Migvar	– Grievor, via Zoom

AWARD OF THE ARBITRATOR

[1] The Grievor was employed as a Conductor. She has had two pregnancies during her employment: in 2013 and in 2015. It is not disputed the Grievor had medical restrictions for both of her pregnancies and properly advised the Company of those restrictions.

[2] The issue in this Grievance is whether the Company has met its burden to establish its attempts to accommodate the Grievor's 2013 pregnancy had reached the point of undue hardship.

[3] For the reasons which follow, the Company has not met that burden.

[4] The Grievance is upheld.

Background

[5] No Investigation was conducted as this was not a disciplinary matter.

[6] Since the Grievance was filed, there has been considerable turnover in the Company. It therefore had very little evidence to offer regarding its efforts to accommodate the Grievor. It filed a letter dated March 18, 2023 where the efforts it had taken were summarized. For its part, the Union offered into evidence a detailed summary written by the Grievor regarding what efforts were taken to accommodate her disability and what options she put forward to assist in that process.

Facts

[7] I have reviewed the evidence and make the following findings of fact.

[8] On February 25, 2013, three months into her pregnancy, the Grievor informed the Company she was pregnant and that had certain medical restrictions as a result. She was restricted from wearing a belt pack and from heavy lifting. She sought accommodation, due to these restrictions. This request was made to the Superintendent and the Assistant Superintendent. As these gentlemen were unsure of the procedure in such a case, they called in labour relations personnel to this meeting with the Grievor.

[9] A discussion then took place. The Grievor inquired about the pay she would be entitled to while an accommodated position was being considered and was told there were STD benefits and was provided paperwork for those benefits. The short-term disability benefits available to the Grievor are “own occupation” benefits; if she is disabled from performing the duties of her “own occupation”, she would qualify for those benefits. STD benefits provide some wage recovery, but not to the same level as if the Grievor was working.

[10] It was discussed that the Grievor could potentially work as a roving utility person as an accommodated role. The Grievor voiced her concerns that such a position would be more demanding than her current position of Conductor on the spare board. Discussions were then had about sending her assistance for the demanding aspects of the utility role. The Grievor agreed to try that role. On February 26, 2013, the next day, the Company accommodated the Grievor into the Utility role. The Grievor performed the duties of that role for one day. She found those duties to be very strenuous and exhausting, as it required her to walk in foot deep snow for several hours, with only one short break.

[11] While I am satisfied the Grievor received no assistance on that tour of duty, there is also no evidence she requested that assistance. The Grievor considered she was unable to manage the physical exertions of this Utility role and refused to continue in the role after that one shift.

[12] Her evidence was she received a call the next day – February 28, 2023 from labour relations that her medical note was insufficient for “light duties” restriction and in any event, the Company did not have any “light duties” to accommodate her

[13] The Grievor wanted to be accommodated and to maintain her salary during her pregnancy. Her evidence was she “knew her rights” and that she was entitled to a “paid” leave of absence while the accommodation process was ongoing, under the *Canada Labour Code.* She voiced that opinion to the Company. The Grievor was then placed on a paid leave of absence while accommodation discussions continued.

[14] She returned to her doctor, who then provided another note which restricted her to “light duties”, agreeing with her that she should not perform the Utility role. She provided this second doctor’s note to CP on March 5, 2013. The Grievor also provided several possibilities of accommodated jobs to labour relations personnel at that time, which she felt would meet her medical restrictions and which she was aware were jobs which had been given to other pregnant conductors, or other employees who had been accommodated:

a. Utility person to drive crews (a male employee had been performing that role due to a “light duty” medical restriction and had just retired). This accommodation had also been given to another pregnant Conductor a few years previously, according to the Grievor. The Company did not offer any evidence to refute that evidence or demonstrate that role was not productive or available.

b. Assist the on-the-job trainer (OJT) with scheduling, paperwork and training of newly hired Conductor trainees. This was also a position a pregnant Conductor had been given for accommodation to the Grievor’s knowledge, several years before, and for which there had been up to four individuals providing that assistance, but for which there were only two during this time period. The Company did not offer any evidence or demonstrate that role was not productive or available.

c. Yardmaster training: To be trained and then work as a Yardmaster. The Grievor had already applied and passed the test which was a prerequisite for that training. It was her evidence she could have completed the training and worked in that position for the remainder of her pregnancy. Her evidence was she was told by the Company they would not put on a class for one person. However, she was aware that training had been put on for one person for another employee, so he could be home with his pregnant wife. The Company did not offer any evidence or demonstrate that role was not productive or available.

d. Assisting in the office; this was also something pregnant Conductors had been accommodated to do in the past. The Company did not offer any evidence or demonstrate that role was not productive or available.

e. Check tracks for the carmen/TMC. The Company did not offer any evidence or demonstrate that role was not productive or available.

[15] The Grievor's evidence was that the labour relations personnel was not interested in any of her suggestions and also did not offer any suggestions to her.

[16] The Grievor was told by the Company that there were no "light duties" available in the Prince George terminal and she was asked if she could relocate. As she was expected to have multiple doctor's appointments each month during her pregnancy, she told the Company it would be too stressful and impractical for her to relocate.

[17] I am satisfied that on March 6, 2023, the Company discussed with the Grievor modifying the Utility person role, even though this discussion is not referred to in the Grievor's summary of events. According to the Company in its subsequent letter, the Grievor told the Company she had advised her physician to include "light duties" in her restrictions, in order to avoid all Conductor work. As this discussion was not discussed in the Grievor's summary, there is no evidence from the Grievor that she did not make this comment and I am satisfied this comment was made. However, there was no evidence that the Grievor's doctor blindly accepted that information, as suggested by the Company. I am also satisfied a third medical note was received from the Grievor on March 8, 2013, which was also not referenced in the Grievor's summary. That note listed several further restrictions, including to avoid standing

or walking and prolonged weight bearing and avoid climbing ladders. From this evidence, the Company considered the Grievor was therefore able to do "sedentary" work only.

[18] The Union refutes that this is what the medical evidence established.

[19] Up to that point, the Grievor had been meeting directly with the Company. The Company next set up a meeting on March 15, 2023 through the Grievor's Union representative. At that meeting, the Grievor was told there were no positions available in Prince George, but the Company would keep looking, and she would stay on a paid leave of absence while that process was ongoing.

[20] However, the Company changed its position was changed a few days later. The Grievor received a voicemail on March 18, 2023 stating that the Company could not accommodate her and that she was being placed on an unpaid leave of absence.

[21] The Company followed this up with its letter dated March 18, 2023. That letter confirmed this information. It stated it was not "reasonably practicable to modify your own job of conductor, particularly as you have repeatedly emphasized that you wished to be relieved from conductor work". The Company also stated that while it had attempted to identify alternate work which conformed to the Grievor's restrictions, there were no available jobs in Prince George that met these restrictions, so the Grievor would be placed on an unpaid leave of absence effective March 18, 2023. It was also noted that during her leave, the Grievor may be eligible for STD benefits. When the Grievor was ultimately not accommodated, she did apply for – and receive – STD benefits. Those benefits fell short of what the Grievor would have made had she kept working during her pregnancy.

[22] Part of the evidence offered by the Grievor is that she was accommodated during her second pregnancy in 2015 by a "bundling of duties", whereby she assisted in the track maintenance department, wrote notes and drove a truck, and was a spotter for maintenance workers and other related duties. These types of duties were not offered to the Grievor during her first pregnancy.

Arguments

[23] The Union maintained it had met its burden to establish a case of *prima facie* discrimination due to the Grievor's medical restrictions and that the burden then shifted to the Company. It urged the Company had not met its burden to accommodate the Grievor to the point of undue hardship. The Union argued that no real efforts had been taken by the Company to accommodate the Grievor's pregnancy. It argued the Grievor had provided to the Company several options, which she was aware had been offered to other employees – including pregnant employees – as part of accommodation measures. The Union argued the Company had not established why these options could not have been offered to the Grievor. It pointed out noted the Company had been able to accommodate the Grievor's restrictions in her second pregnancy in 2015. These duties were not offered to the Grievor during her first pregnancy.

[24] It was the Company's position the Grievor had not cooperated in the accommodation process and so had "failed to do her part". It noted it had made multiple attempts to accommodate the Grievor and argued she refused alternate work on two occasions. It also argued she was unreasonably unwilling to relocate or travel outside the Prince George terminal. It noted it tried to accommodate the Utility position for the Grievor's restrictions, but that the Grievor was not interested in modified Conductor work. It also raised the issue that the Grievor appeared to be "dictating" to her doctor the restrictions which she wanted, to get the alternate work that she preferred, rather than accept what the Company was offering. It urged it met its obligations to accommodate the Grievor, to the point of undue hardship. It further noted the Grievor had access to STD benefits, which demonstrated that a third party insurer had determined she was not able to perform her role of Conductor.

[25] It argued the point of undue hardship had been reached.

Analysis and Decision

The Law Relating to Accommodation

[26] The *Canadian Human Rights Act*[1] and the *Canada Labour Code*[2] both contain an over-arching requirement that pregnancy be accommodated in the workplace. The accommodation process is recognized as a tripartite one, with obligations placed on the Grievor, the Company and the Union and with shifting burdens of proof.

[27] The Union must first establish the existence of the need for accommodation and an adverse impact from an employer's requirement. This is referred to as establishing *prima facie* discrimination. Once that is established, the burden shifts to the Company to establish – on a balance of probabilities – that it took reasonable measures to accommodate the Grievor to the point of "undue hardship". The law relating to that obligation was recently canvassed by this Arbitrator in **AH843.** As was noted in that decision, while an employee must continue to "perform work in exchange for remuneration", and the workplace need not be changed in a "fundamental way" to accommodate an employee, the determination of whether "undue hardship" has been reached is a contextual question.

[28] It was noted in **AH843** the obligation on an employer has both procedural and substantive aspects. Under its procedural obligations, an employer must first understand the disability of an employee and secondly "undertake an individualized investigation of potential accommodation measures to address those needs".[3] The substantive component considers the "reasonableness of the accommodation offered or the respondent's reasons for not providing accommodation"[4].

[29] The Grievor has a part to play in this process, beyond establishing the need for accommodation. The Grievor must be willing to try roles which meet their medical restrictions, even if that role is not their "preferred" accommodation. It is well-established that an employee is not entitled to a "preferred" accommodation or a "perfect" accommodation; the measure is whether the accommodation is a

[1] R.S.C. 1985, c. H-6.
[2] R.S.C. 1985, c. L-2
[3] *Laguna v. Saputo Dairy Products* 2012 HRTO 155 at para. 52; as quoted in **AH843** at para. 9.
[4] *Ibid,* at para. 52; quoted in **AH843** at para. 10

"reasonable" one. If a Grievor refuses a reasonable accommodation, the employer's obligation is at an end.

[30] It is broadly accepted in arbitral jurisprudence that reaching "undue hardship" requires significant effort; it is not a "low bar". As noted in **AH843**, accommodation requires "all parties – and all decision-makers – to maintain an innovative perspective".[5]

[31] The duty to accommodate is not limited to whether an employee's own occupation can be performed, as that view is too narrow:

> A creative mind-set is a key aspect of this obligation, especially when the accommodation task is proving difficult. It has been recognized that it is not sufficient to consider the grievor's restrictions, consider the position, and determining 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.**[6]

In **CROA 4273**, Arbitrator Picher stated the duty to accommodate extends *beyond* the employee's own role:

> 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.[7]

[32] In **AH843** this obligation was summarized as follows:

> 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.[8]

[5] At para. 12
[6] AH843, at para. 14.
[7] Quoted at para. 14 of **AH843**; p. 5 of original authority, emphasis added
[8] At para. 16, emphasis in the original; see also **CROA 4273**

Application to These Facts

[33] I am satisfied that the Union's evidentiary burden has been established in this case. The Union has established the Grievor had a disability – being the impact of her pregnancy – which prevented her from carrying out the duties of her role as a Conductor. A *prima facie* case has been established.

[34] The burden of proof then shifted to the Company to establish – on a balance of probabilities – that it had accommodated the Grievor to the point of "undue hardship".

[35] I am not satisfied that the Company exhausted all reasonable measures for accommodating the Grievor.

[36] While I understand the Company had concerns the Grievor was 'dictating' to her doctor the limitations which she "preferred" – and while I accept the Company had hearsay evidence in its March 18, 2023 letter that the Grievor *said* this is what she had done – that comment does not result in a finding that her doctor in fact *accepted* the Grievor's direction blindly in the medical reports given, and did whatever the Grievor asked in providing that medical opinion. That would be unprofessional and inappropriate. There is no evidence that occurred. I am satisfied upon review of all of the evidence that – due to its distraction that the Grievor was "dictating" terms to her doctor – the Company unreasonably confined its thinking to whether the Grievor's *own* role as a Conductor could be modified.

[37] I find this is too narrow a view of its obligations, which cannot be sustained at law. The Company was required to look further afield into its organization to determine if the Grievor could be accommodated through a bundling of duties, or another role in its organization.

[38] I cannot agree with the Company that the Grievor failed to cooperate with its efforts. The Grievor tried the role of Utility person. She found it too strenuous and exhausting. The Company did not provide evidence that this role met her medical restrictions and should not have had that effect. I do not find it was unreasonable that the Grievor considered that moving out of Prince George while under medical

care was problematic, especially when – as here – the Company failed to consider several options *in* Prince George first. The Grievor's uncontradicted evidence was there were options provided to other pregnant employees which would have been consistent with her own medical restrictions but were not considered. The Company has not provided any evidence of its own to contradict that information. For example, the Company did not provide evidence why for example the Grievor could not have continued in the OJT role which another employee had just vacated as an accommodation measure. The Company's requirement that she move out of Prince George to be accommodated was not a reasonable one.

[39] I am not satisfied on a balance of probabilities that the Company made all reasonable efforts to accommodate the Grievor. In not doing so, the Company has breached its human rights obligations to this Grievor.

Conclusion and Remedy

[40] The Grievance is upheld. I find and declare the Company failed to accommodate the Grievor between March 5 and September 19, 2013. Turning to the question of remedy, the evidence established the Grievor only went on STD when the Company did not accommodate her. As a remedy, she is to be placed in the position she would have been in had her human rights obligations been respected. I direct that the Grievor be made "whole" for any ***net*** loss the Grievor suffered as a result of the Company's actions. I retain jurisdiction for the issue of remedy, should the parties not be able to agree on an amount, with this direction.

[41] I also retain jurisdiction for any questions relating to the implementation of this Award, and for any corrections or omissions that may be necessary to give it the intended effect.

December 21, 2023

CHERYL YINGST BARTEL
ARBITRATOR