CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4871

Heard in Montreal, October 17, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The alleged failure to provide Mr. S.K. an accommodation following his previous accommodation which ended on July 22, 2021.

JOINT STATEMENT OF ISSUE:

The Union alleges that the Company failed to continue to provide an accommodation for Mr. S.K. relating to his disability from July 22, 2021 – May 5, 2023. The Company maintains that it met its duty to accommodate, and accordingly denies the Union allegations and requested remedy.

Union's Position:

The Union contends that the Company failed to provide Mr.K. a timely RTW accommodation.

Prior to July 22, 2021 Mr. K. was accommodated as a utility person, 3rd person on crew, and used for yard cleanup which started March 25, 2021.

On July 22, 2021 Mr. K. was advised by OHS that he would no longer be accommodated due to a medical condition. This should not stop the accommodation process. In fact, in other terminals where the employee had any issues with sleep apnea, they worked within the yard office doing tasks there.

The Union local was in constant communication with the Company in attempts to and questioning why Mr. K. was not accommodated.

The Company was given many suggestions such as assisting with clerical work at St. Luc yard, assisting the rules instructor and clerical work at Lachine, the Union was continually in communication with CP's RTW and local Management in attempts to have Mr. K. not only accommodated but put into the accommodation. There is no doubt that the Union was very proactive during this process, it is clear the Company was not. The Union further questions why Mr. K. was ever taken out of his accommodation that was working towards him returned into his full capacity.

As noted within our grievances the Union believes the Company has acted in bad faith and in a discriminatory fashion in the handling of Mr. K.. The Union contends that the Company

has failed to accommodate Mr. K. to the point of undue hardship. The Union contends that the Company has failed to discharge this duty and has failed to demonstrate that to do so would constitute undue hardship. The Company has violated the Collective Agreement provisions Article 36 and 37, the RTW Accommodation Policy and process, the Canadian Human Rights Act wherein Mr. K. has been discriminated against account of his disability and the wages associated under the Canada Labour Code Part III Section 132(5).

It is an obligation of the Company to provide accommodations to their employees up to the point of undue hardship as outlined in Canadian Pacific Railways Return to Work Policy.

The Canadian Human Rights Act states that it is unlawful to discriminate on the grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for which a pardon has been granted. Human Rights legislation requires employers to accommodate employees and applicants up to the point of undue hardship.

A request for accommodation may be denied on the basis that such accommodation could cause undue hardship. There was no undue hardship for the Company to provide meaningful accommodation for Mr. K., it has been all too often that the Company continues to not provide or cancel RTW Accommodations, the continuing grievances been filed prove such point.

Where a particular means of accommodation is requested and is considered to constitute undue hardship, every effort will be made to provide alternative accommodation up the point of undue hardship. It is the Union's position that the Company did not in fact abide by its own Return to Work Policy and violated their obligation to accommodate in accordance with the Canadian Human Rights Act, Collective Agreement.

The accommodation process is a tripartite one and in this case the employee and his Union held up their responsibility, the Company did not.

The Union strongly believes Mr. K's rights have been violated. It is clear that Mr. K was discriminated against. A violation of CPR Policy 1300, 1500, Employment Equity Act, Ontario Human Rights Code, and Canadian Human Rights Code.

The Union seeks a finding that the Company has breached the Collective Agreement, the Company's Return to Work Policy, the *Canada Labour Code* and the *Canadian Human Rights Act*.

The Union in response to the Company's preliminary objection is that it is baseless and a continued process of delay by the Company, there can be no doubt that the Company stopped the accommodation and did not provide a further accommodation as argued, the Company has not been prejudiced wherein they chose to only respond to one submitted grievance.

The Union further seeks an order that Mr. K be made whole for all loss of wages/benefits/pension/seniority/EDO/AV from July 22, 2021 – May 5, 2023 (any period of time where Mr. K was accommodated and compensated accordingly the Union would not be seeking compensation as noted within said period of time), the Union further seeks damages for the Company's conduct in this matter, and in addition to such other relief as the Arbitrator sees fit in the circumstances.

Company's Position:

The Company disagrees and denies the Union's request.

Preliminary Objection

The Company submits that the Union has not provide sufficient information to substantiate their allegations. It is not sufficient for the Union to simply state its position without supplying details or support for the allegations. The Grievance handling and Arbitration procedure requires sufficient information to be included in the grievance in order to properly identify the issue(s) and basis for an allegation. The lack of information prejudices the Company from providing a proper response.

Without prejudice or precedent to the above objection(s), the Company provides the following response.

Company's Position:

The Company disagrees with the Union's positions and requested resolve, including all alleged violations of the Collective Agreement, the RTW Accommodation Policy and process, the Canadian Human Rights Act as well as s.132(5) of the Canada Labour Code.

All parties have roles and responsibilities pursuant to the accommodation process. Employees are responsible for providing required medical information necessary for CPKC to assess their fitness for work. The Company maintains that efforts have been made to confirm the Grievor's condition, yet he remained non-compliant with Health Services' requests rendering the Company unable to make further determinations with respect to his medical status.

The Grievor was previously accommodated as follows:

1. Mar 25, 2021 to Jul 22, 2021 (Light duty Conductor - Safety Critical)
2. Jan 8, 2020 to Jan 21 2020 (Light duty Conductor - Safety Critical)
3. Oct 23, 2018 to Dec 21, 2018 (Yard Clean-up - Safety Sensitive)

Based on the above, the Company disagrees with the Union's claims of discrimination and bad faith. There is nothing in the grievance to support such allegations.

With respect to the Union's claim for damages, the Company submits that damages are reserved for conduct which is found to be harsh, vindictive, reprehensible and malicious, as well as extreme in its nature such that by any reasonable standard it is deserving of full condemnation and punishment. There is no evidence of any such behavior in this instance, nor has the Union provided any information to support such a claim. As such, the Company maintains the request for damages is without merit.

The Company can see no violation of the Collective Agreement, the RTW Accommodation Policy and process, the Canadian Human Rights Act and the wages associated under the Canada Labour Code Part III Section 132(5). The Company maintains that it met its duty to accommodate, and accordingly denies the Union allegations and requested remedy.

Further, the Company maintains that the Grievor was not discriminated against and can see no violation of CP Policy 1300, 1500, Employment Equity Act, Ontario Human Rights Code, and Canadian Human Rights Code.

As an additional comment, failure to specifically reference any argument or to take exception to any statement presented as "fact" does not constitute acquiescence. The Company rejects the Union's arguments, maintains no violation of the agreement has occurred, and no compensation or benefits are appropriate in the circumstances.

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:
(SGD.) W. Apsey
General Chairperson, CTY-E

FOR THE COMPANY:
(SGD.) F. Billings
Assistant Director, Labour Relations

There appeared on behalf of the Company:

A. Cake	– Manager Labour Relations, Calgary
D. Zurbuchen	– Manager Labour Relations, Calgary
M. Pilon	– WCB Specialist, Montreal

And on behalf of the Union:

R. Whillans	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chair, Smiths Falls
D. Psichogios	– Vice General Chair, Montreal
S. K.	– Grievor, Montreal

AWARD OF THE ARBITRATOR

Preliminary Objection

1. The Company makes a preliminary objection, alleging that the Union grievances do not provide sufficient information to substantiate the Union's allegations.

2. The Union argues that the Company could have sought further particulars, which it failed to do. In any event, the Union argues that the claim is clear, involving an allegation of a failure to properly accommodate a partially disabled employee to the point of undue hardship.

3. In the Step 2 and 3 grievances, as well as the Union position in the JSI, it is clear that the Union objects to the grievor being held off work from July 2021 to May 2023, alleging that the grievor could have done non safety critical or safety sensitive work. It alleges that the Union made repeated efforts to suggest work alternatives, while the Company failed to accommodate the grievor to the point of undue hardship.

4. From both the briefs and the submissions of the parties, it is clear that all parties knew of the issues between them and addressed them in detail. Accordingly, the objection is dismissed.

Context

5. The grievor is a Conductor with thirteen (13) years of seniority. In 2018, he was seriously injured in a work place accident, which has required significant medical intervention, time off work and accommodations upon return to work. He worked in various accommodated positions from October 2019 to July 2021. On July 22, 2021, he was removed from work by the Company due to his medical condition and remained off work until May 5, 2023.

Issues

A. Was the Company entitled or required to seek additional medical information from the grievor before permitting him to return to a safety sensitive or critical role?

B. Did the parties meet their accommodation obligations?

C. What remedy, if any, should be awarded in the circumstances?

A. Was the Company entitled or required to seek additional medical information from the grievor before permitting him to return to a safety sensitive or critical role?

Positions of Parties

6. The Union argues that there were a never-ending number of requests for medical information. It argues that the Company failed to accept uncontradicted Functional

Abilities Forms which stated that the grievor could return to work in a Safety Critical role, albeit with certain physical restrictions (see Union Tab 2, pp. 149, 278-334). It argues that the grievor had only moderate sleep apnea which had been found not to hinder his ability to work (see Union Tab 2, pp. 87-97).

7. The Company argues that a Conductor is a Safety Critical position by virtue of both Federal legislation and Company policy (see Company Tab 4). It notes that the Canadian Railway Medical Rules (see Company Tab 3) allow medical assessments to be made by the Chief Medical Officer for safety critical positions. These assessments can be made in relation to sleep disorders, including sleep apnea:

> Medical Fitness for Duty Assessment
> As part of their fitness for duty assessment, individuals with a diagnosis of symptomatic mild obstructive sleep apnea or moderate or severe obstructive sleep apnea should be assessed by a Physician, and at the discretion of the Railway's Chief Medical Officer, by a Sleep Medicine Physician or by a Physician with competence in Sleep Medicine. This assessment should include an evaluation of compliance with recommended treatment and the effectiveness of recommended treatment. A written report, which is to include an opinion on the individual's medical fitness for duty in a Safety Critical Position, should be submitted to the Railway's Chief Medical Officer.

8. The Company submits that the CMO sought this assessment, which the grievor failed to provide until February-April 2023, after which he was returned to his Safety Critical accommodated role.

Analysis and Decision

9. For the reasons which follow, I find that the Company was entitled to seek additional medical information from the grievor, prior to permitting him to return to a Safety Critical role.

10. The Canadian Railway Medical Rules (see Company Tab 3) set out the importance of healthy employees performing Safety Critical roles, the impact of sleep apnea on performance and the need to properly assess this sleep disorder:

> **4.9 – Sleep Disorders – Medical Fitness for Duty Guidelines for the Employment of Individuals with Sleep Disorders in Safety Critical Positions in the Canadian Railway Industry.**
> Canadian railway employees working in a Safety Critical Position operate or control the movement of trains. Physical and mental fitness is mandatory. Impaired performance due to a medical condition could result in a significant incident affecting the health and safety of employees, the public, property or the environment.
>
> **4.1 Risk to Safe Railway Operations**
> 4.1 Sleep Apnea Types of Sleep Apnea
> There are three types of sleep apnea: obstructive sleep apnea, central sleep apnea and a combination of both types referred to as mixed sleep apnea.
>
> **Risk to Safe Railway Operations**
> Symptoms of sleep apnea that constitute a risk to safe railway operations and directly impact fitness for duty include daytime sleepiness, fatigue, lack of concentration, cognitive deficits, mood changes, irritability, angina on awakening, and reports of a motor vehicle collision or near miss.
>
> Snoring, breathing cessation during sleep, choking or gasping during sleep, nocturia, nonrestorative sleep, frequent awakenings (fragmented sleep), nocturnal restlessness, and vivid dreams are also associated with sleep apnea. Dry mouth or sore throat on awakening, morning headaches, and decreased libido and impotence are other indicators. Sleep apnea can also be associated with diabetes, metabolic dysfunction and an increased risk of cardiovascular disease and mortality.
>
> **Medical Fitness for Duty Assessment**
> As part of their fitness for duty assessment, individuals with a diagnosis of symptomatic mild obstructive sleep apnea or moderate or severe obstructive sleep apnea should be assessed by a Physician, and at the discretion of the Railway's Chief Medical Officer, by a Sleep Medicine Physician or by a Physician with competence in Sleep Medicine. This assessment should include an evaluation of compliance with recommended treatment and the effectiveness of recommended treatment. A written report, which to

> include an opinion on the individual's medical fitness for duty in a Safety Critical Position, should be submitted to the Railway's Chief Medical Officer.

11. Beginning on July 21, 2021, the Company sought a) a sleep apnea report completed by a medical doctor and b) a copy of a two week CPAP compliance report completed within the last month indicating that S.K. is using the machine effectively on an average of 5 hours per night.

12. I find that the Company was entitled to seek medical verification that the sleep apnea was controlled, given the risks involved, before permitting the grievor to return to a Safety Critical position. I find that the information sought by the Company was in accordance with the Canadian Railway Medical Rules set out above.

B. Did the parties meet their accommodation obligations?

13. In **AH-834** Arbitrator Yingst-Bartel set out a good review of the accommodation process and the duties of the various parties:

> 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".
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> 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
> a) is required to:
> b) take steps to understand the disability needs of an employee; and
> c) "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, (emphases 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.

14. In **CROA 4848**, I reviewed the Policy which sets out and implements an accommodated return to work (see Union Tab 9, para 34).

15. An assessment of the measures taken by the parties to meet their accommodation duties will examine firstly, the Safety Critical Position, and secondly, Non Safety Critical, Non Safety Sensitive Positions.

Safety Critical Position

16. As set out above, the Company was obliged and entitled to verify that the grievor was fit to perform his Safety Critical functions.

17. The Company repeatedly set out the information it was looking for (see paragraphs 35-64, Company Brief). The grievor provided other information in the form of FAFs, but objected to providing the information sought by the Company. He took the position that either the FAF was sufficient or that his illness was not sufficiently serious to warrant providing the information sought by the Company.

18. When he finally did provide the information, he was returned to work in an accommodated safety critical position, similar to the one he had previously held, in a matter of weeks.

19. The grievor, like the Company and the Union, has a duty to actively participate in the accommodation process. The time the grievor was off work was greatly increased by his failure to provide the requested information in a timely manner.

Non Safety Critical, Non Safety Sensitive Position

20. The Union made multiple efforts to suggest alternative work positions, such as clerical work at St Luc Yard, or assisting the rules instructor and clerical work at Lachine.

21. The Company was receptive and investigated each suggestion, unfortunately to no avail. It also asked for further suggestions from the Union.

22. The Company submits that it was much more difficult to find alternative work during Covid, and that the grievor could not work on site if in a non-essential role due to Covid regulations.

23. The Union argued that the grievor could have worked from home, as the administrative work continued to be done, even if done remotely.

24. When compared with evidence led in other cases (see **AH 834, CROA 4848**), the employer typically sets out efforts made to research other possibilities. Here, the employer appeared to be totally focussed on a return to work in a safety critical role. There is no significant evidence of efforts by the Company that it made to look for other positions, or bundling of existing tasks. There is no evidence of innovative thinking, such as clerical work from home, or other possibilities, given the Covid realities.

25. If the Company had offered other work, and the grievor had refused because he was out of the country or uninterested, the Company would have met its obligations and the grievor would not be entitled to compensation (see **CROA 4313**). However, no such alternatives were proposed.

26. In my view, the efforts of the Company to seek out alternative work were insufficient. The Company had an obligation to seek alternative work, within the established limitations of the grievor.

C. What remedy, if any, should be awarded in the circumstances?

27. The Union seeks a “make whole” remedy for all the time the grievor was off work from July 22, 2021 until May 5, 2023. In addition, they seek damages for the manner in which the grievor has been treated.

28. The Supreme Court of Canada as well as a constant stream of arbitral jurisprudence confirms that accommodation is a tripartite obligation between the Company, the Union and the grievor.

29. Here, I find that the grievor was not as diligent as he should have been with respect to providing the requested medical information concerning his sleep apnea. As such, he bears responsibility for a portion of the lost compensation.

30. I also find that the Company failed in its responsibility to actively consider alternative non safety critical, non-safety sensitive work, which the grievor was able to perform. As such, it bears responsibility for a portion of the lost compensation.

31. Accordingly, for the period between July 22, 2021 and May 5, 2023, mitigation should be deducted. For the balance, I award 50% of the lost compensation to the grievor.

32. Given that each side bears responsibility for the losses suffered, I do not consider that this is a case for an award of damages.

33. To this extent, the grievance is upheld.

34. I remain seized for all matters concerning interpretation or application of this Award.

November 21, 2023

JAMES CAMERON
ARBITRATOR