CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4358

Heard in Montreal, January 15, 2015

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNIFOR COUNCIL 4000

DISPUTE:

The alleged constructive discharge of M.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

M was hired in 1996 as a Revenue Management Clerk in Toronto and subsequently relocated to Mississauga Ontario. As a result of an Article 8 notice affecting the relocation of the CN Revenue Management Group to Montreal, the grievor's position was abolished and she was required to find alternative employment within the Company.

The grievor advised the Company that due to her family status she could only take employment on a position that provided a day shift with weekend off and requested accommodation on the basis of her family status. The Company advises that they could not accommodate the request and unilaterally placed her on a leave of absence.

Under the date of June 23, 2014, the Company wrote the Grievor outlining five positions she might wish to consider. None of those positions fit within the accommodation request. The grievor was advised that if she failed to exercise her seniority by June 17, 2014 she would be administratively terminated.

The Union filed three grievances alleging that the Company's actions are in violation of Articles 12, 13, 15, 24, 28, and 32 and others of the Collective agreement 5.1 and the *Canadian Human Rights Act*. The Union requests reinstatement with full compensation for all losses and damages and that she be accommodated accordingly.

The Company disagrees with the Union's contentions and has declined the grievance.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

In 2013, an Article 8 notice was served to the Union stating that all Revenue Management clerical positions in Mississauga, Ontario would be abolished and centralized in the Company's headquarters in Montreal. This included the position held by the grievor.

The grievor was offered to relocate to Montreal and to undergo retraining pursuant to an agreement between the Union and the Company, both of which she declined. The grievor indicated she was only available for work on day shift, with Saturday and Sunday as rest days, on account of her parental responsibilities. The grievor exercised her seniority to the position of

Inventory Maintainer at the MacMillan Yard Mechanical Centre, but was later medically restricted from it.

Based on her seniority, the grievor was eligible to hold various positions in Toronto. However, she declined to exercise her seniority accordingly on the basis that she would only work a position with a day-time schedule with weekends off. The grievor requested to be accommodated by being provided a position on day-shift with weekends off, notwithstanding that her seniority did not allow her to hold such a position. While the Company reviewed her request, the grievor was offered a temporary position as a Gate Clerk at the Mississauga Intermodal Yard, with a daytime schedule with weekends off. The grievor declined this offer and maintained her refusal to exercise her seniority to any available position. Upon review, the Company declined the grievor's request on the basis that it was not warranted under her circumstances.

Despite being provided with a list of positions available to her based on her seniority, the grievor has maintained her refusal to exercise her seniority onto any such position. At this time, the grievor is on an unauthorized and unpaid leave of absence.

The Union requests that the grievor be reinstated immediately and accommodated into a day-shift position with weekends off, pursuant to the *Canadian Human Rights Act* and the Collective Agreement. The Company disagrees that the grievor has been discharged, that it has failed to accommodate her or that it has otherwise breached the Collective Agreement or the *Canadian Human Rights Act*, and has declined the Union's grievance.

FOR THE UNION:
(SGD.) R.J. Fitzgerald
National Representative

FOR THE COMPANY:
(SGD.) J. Darby
Labour Relations Associate

There appeared on behalf of the Company:

S. P. Paquette	– Counsel, Montreal
R. Bateman	– Director Labour Relations, Toronto
S. Blackmore	– Senior Manager, Labour Relations, Edmonton
J. Darby	– Labour Relations Associate, Toronto
S. Fusco	– Senior Manager, Human Resources, Toronto
I. Meunier	– Manager, Human Resources, Montreal
K. Webster	– Retired, Senior Manager, Revenue Management, Toronto
N. Champagne	– Assistant Superintendent, Mechanical, Toronto
R. Gilchrist	– Assistant Superintendent, Mechanical, Toronto
L. Waller	– Officer, Workers Compensation Claims, Toronto

There appeared on behalf of the Union:

R. Fitzgerald	– National Representative, Toronto
M. Robinson	– Local Chairman, Toronto
F.K. Consiglio	– President Local 4003, Toronto
M.	– Grievor, Toronto

AWARD OF THE ARBITRATOR

The Factual Background

The Grievor claims discrimination on the basis of family status and seeks an order that the Company provide her with accommodation. The Grievor was hired in 1996 and as of the date of the hearing had eighteen years of service with the Company. Until the events leading up to this grievance, the grievor was employed in various clerical positions in the Company's Revenue Management Department. The last position held was as an account representative in the CN facility in Toronto. She always worked weekdays on the day shift.

The Grievor is a single mother of three school age children, ages 5, 7, and 12. Her husband passed away in January 2012. In the period February 28, 2011 to September 15, 2013 the Grievor was off work on approved leaves of absence or in receipt of benefits. She returned to work on September 16, 2013.

During the period leading to the Grievor's return to work, the Company reorganized its Revenue Management Department, which resulted in the centralization of Revenue Management Department and the relocation of that work to Montreal. Pursuant to various agreements with the Union, employees were offered options, including voluntary separation, relocation should they wish to transfer to Montreal, or retraining for those opting to remain in Toronto.

The Grievor did not accept voluntary separation or relocation to Montreal. She was advised, upon her return to work in September 2013, that her position would be abolished on February 28, 2014 and that she could exercise her seniority to displace another employee within the bargaining unit. The Grievor does not have sufficient seniority for a weekday day-shift position. From the period September 2013 to June 2014, the Grievor, the Union and the Company, were actively engaged in a variety of discussions regarding work that the Grievor could do.

The positions that the Grievor can access in her bargaining unit, based on her seniority, are positions with a day-time schedule with two weekdays off or positions with an afternoon schedule and weekends off. As noted the Grievor seeks weekday day shifts only and claims entitlement to such because of her child care responsibilities. The Grievor says that, given her status as a single parent, she required an accommodation of a day shift with weekends off.

The Grievor’s children attend school or camp during the day. The oldest child takes care of the others until the Grievor returns from work; a neighbor is available in the event of emergency. There was no evidence that the children are in specialized, daily care either at school, summer camp or morning daycare.

I review next what occurred between the Grievor’s return to work in September 2013 up until June 2014 when she went off work and remains on leave, although the Union claims she has been constructively dismissed.

Upon her first return to work in the fall of 2013, the Grievor was asked to participate in a training course which she declined because part of the training would require her attendance at various shifts. It was the Grievor's view that she did not have to work shifts and could not, in any event, because she was a single mother.

Numerous meetings occurred between the Grievor, the Union and various Company officials, where the Grievor made it clear she could only work a weekday day shift schedule. I summarize the reasons advanced by the Grievor in support of her request for accommodation: a) financial hardship; b) the non-availability of childcare she requires on the shifts offered by the Company; c) the requirement that she be home for her children in the evenings and on weekends, d) the requirement that her childcare provider have specialized medical knowledge (which arose in April 2014). The Grievor said she would require the accommodation for a ten year period. The following is what is recorded in the material presented as to what occurred in the discussions between the Company and the Grievor.

The Grievor told the Company that that there were no childcare services that would allow her to hold a schedule other than a weekday day shift schedule, and that she had inquired of day care services and nannies, but none was available or suitable.

In February 2014, the Grievor applied for two management positions, but was unsuccessful. One such position was awarded to a junior internal candidate whom the

Company deemed a better candidate. The Union asserts that other non-union positions were open for hiring, but other individuals were hired into them.

At a meeting held on February 25, 2014, the Grievor advised the Company of her efforts at finding childcare on the shifts that would be available to her. She called ten day care services and number of nannies, but she did not keep a list. She advised that to her belief nannies and live-in nannies would not work nights or weekends.

In the spring of 2014, the Grievor attempted a day job as an Inventory Maintainer, which had some physical demands which she did attempt, but was unable to perform it because of permanent lifting restrictions.

In April 2014 the Grievor raised the issue that her children needed specialized medical knowledge from their caregiver. She said that her requirement for a nanny was both medical training and command of the English language.

The Grievor provided two medical notes, one dated May 8, 2014 and one dated January 6, 2015, which essentially advise that the Grievor's children require childcare from a caregiver with certain child counselling skills. The medical notes also indicate that it is important that the Grievor be available as much as possible to her children. At the hearing I allowed the Company additional time to respond to the January 6 medical note. It seeks to obtain additional medical evidence upon which the note is based. At this point, I decline that request.

In June 2014 the Grievor provided a list of her efforts to find childcare. It contains first names and with no contact information.

The Company offered the Grievor the position of gate clerk at the intermodal yard, a temporary four week-day shift, weekday position which the Grievor rejected, as it was temporary.

The Company advised the Grievor by letter dated June 13, 2014 that her request for a week-day day only shift on the basis of family status obligations was denied. It advised that it would accommodate occasional child care issues that arose, assist her in scheduling vacation days, allow her to arrange shift changes with others when needed and, with the Union's consent, have her seniority ranking changed to allow her access to weekday day shifts.

The Grievor is willing both to take a non-bargaining unit job or to leave her bargaining unit and work in another one where she will not be in a position to use her existing seniority.

The Grievor and the Union assert that the Company is required, based on its family status obligations under the *Canadian Human Rights Act*, to provide her with the shift she has been working since she began employment with the Company. The Union asserts that the Grievor has made every real and practical effort to find alternative

solutions to her childcare difficulties. The Union's position is that the Company should be required to offer the Grievor accommodation short of displacing a senior employee.

The Company responds that the Grievor has not made out a prima face case of discrimination. Further, if a *prima facie* case is found to have been established, it asserts that the Company has made appropriate efforts to accommodate her. It asks that the grievance be dismissed.

The relevant provisions of the *Canadian Human Rights Act* are as follows:

> **Prohibited grounds of discrimination**
> 3. (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.
>
> **Idem**
> (2) Where the ground of discrimination is pregnancy or child-birth, the discrimination shall be deemed to be on the ground of sex.
>
> **Multiple grounds of discrimination**
> 3.1 For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.
>
> **7. It is a discriminatory practice, directly or indirectly**,
> (*a*) to refuse to employ or continue to employ any individual, or
> (*b*) in the course of employment, to differentiate adversely in relation to an employee,
> on a prohibited ground of discrimination.
>
> …
>
> **10.** It is a discriminatory practice for an employer, employee organization or employer organization
> (*a*) to establish or pursue a policy or practice, or
> (*b*) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,

> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.
>
> ….

Family status is a prohibited ground of discrimination. Furthermore, it is well settled that family status accommodation extends to childcare obligations.

There are two recent Federal Court of Appeal cases that set out the standards for family status accommodation in respect of childcare obligations: *Attorney General of Canada v. Johnstone* 2014 FCA 110 and *Canadian National Railway Company v. Seeley* 2014 FCA 111. Both parties rely on these decisions, but characterize the application of the facts to this case differently.

The analysis engages a two part test. First, the individual claimant must establish a *prima facie* case of discrimination and, if established, the employer must show that the workplace rule or requirement complained of as discriminatory is *bona fide* and that accommodation would result in undue hardship to the employer.

In order to establish a *prima facie* case of discrimination, in respect of childcare obligations, *Johnstone* sets out a four-part test: (i) that a child is under the employee's care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for the child, as opposed to a personal choice; (iii) that the employee has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and

(iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation.

The second part of the test is that the child care obligation at issue engages the employee's legal responsibility as opposed to personal choice. The Company says that, although it does not dispute that the Grievor's intentions are to provide the best care for her children, she is intent on doing so in a preferred manner beyond fulfilling the legal obligation she has to her children. In the Company's view the legal obligation requires that the Grievor retain a reasonably qualified babysitter and does not extend to a requirement that she herself be the person to attend to the children on evenings and/or weekends.

The Union's position is that the Company must accommodate the Grievor, including, but not limited to, her being considered for non-bargaining unit positions or management positions. The Company suggests that the Union allow the Grievor to displace an employee with greater seniority. The Union rejects that proposal on behalf of senior employees who would be adversely affected.

In addressing the physician's note, the Company notes that it stops short of requiring that a caregiver requires formal medical certification, and refers to specific techniques and exercises and experience in child counselling. It also emphasizes that the children are cared for to the Grievor's satisfaction at school, camp, when alone with access to the neighbor before the Grievor comes home from work.

The Company's first position is that the Grievor has not made out a *prima facie* case for discrimination on either or both of the second or third criteria – specifically that her request engages a matter of personal choice or that her efforts to date to find child care are not sufficient to meet the requirement set out in the case law.

In addition to the Federal Court decisions relied upon by the parties, and the decisions referred to therein, the Union relies upon *Communications*, *Energy and Paperworkers Union, Local 707 v. SMS Equipment Inc*., 2013 CanLII 71716 (Kanee), upheld by the Queen's Bench of Alberta in *SMS Equipment Inc. v. Communications Energy and Paperworkers Union, Local 707, 2015 ABQB162* and the Company on *Ontario Public Service Employees Union and Ontario* [2015] O.G.S.B.A. No. 40 (Anderson) and *Flatt and Treasury Board* 2014 PSLRDEB (Richardson).

In assessing whether the Grievor has met the test for *prima facie* discrimination, the facts of this case lead to an analysis of factors two and three enunciated in *Johnstone*: whether the Grievor has demonstrated the child care need at issue is one that flows from legal obligation as opposed to resulting from personal choice and; whether the Grievor demonstrated that reasonable efforts have been expended to meet her childcare obligations but was left with no reasonable alternative solutions which were reasonably accessible.

Whether the grievor *has demonstrated the child care need at issue is one that fl*ows *from legal obligation as opposed to resulting from personal choice.*

The Grievor wishes a weekday, day shift in order to be available for her children as much as possible. Her childcare responsibilities face the additional challenge of her being a single parent. Her motivation is to spend as much time with her children as possible and to care for them personally. However, her children are cared for in school and at camp and after school in the usual manner and not by caregivers with special skills. Yet she asserts that such special skills are needed when she would not otherwise be available as a result of her changed shifts. She also resists caregivers who did not have command of the English language. These requirements are suggestive of personal choice rather than legal requirement. While it appears that the facts of this case do not demonstrate that the childcare need appears based on legal requirement rather than a person preference, the more compelling consideration is the reasonable efforts criterion which I now address.

Whether the Grievor has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible

As was stated in *Johnstone*, the application of specific facts and circumstances determine what qualifies as reasonable efforts, “This is highly fact specific, and each case will be reviewed on an individual basis in regard to all of the circumstances”. The

material submitted on behalf of the Grievor and the Company as to the information presented by the Grievor and the discussions that occurred between the parties, do not disclose meaningful efforts made by the Grievor to attempt to find childcare services to cover evenings and/or weekends. Unlike the case in *Johnstone,* the Grievor here had regular shifts available to her. She could have had a day shift schedule although that would have encompassed working weekend day shifts. Additionally, it is not clear what the afternoon shifts would have entailed, or what accommodations on hours could have been made. In *Seeley*, the grievor was faced with a required move to a small community to cover a temporary personnel shortage. No precise schedule or work location could be determined in advance. This is not the situation in this case.

In *SMS Equipment Inc*. the employer was found to have discriminated on the basis of family status against an employee, a mother with sole childcare responsibility for her two children, when it required her to work rotating shifts of days and nights. The arbitrator granted a change to straight day shifts. In the case before me the Grievor is not requires to rotate shifts and she is able to work days which include weekend shifts. Moreover in *SMS Equipment Inc*. the Union and the grievor had arranged a shift exchange with a colleague willing to change shifts with her and work exclusive nights, which the employer refused. In that regard, the employer refused a reasonable alternative that the employee had arranged.

The Grievor claimed that no appropriate or financially feasible childcare was available on weekends, yet did not have any comprehensive information to support that

assertion. While it is not easy to balance work obligations and childcare responsibilities, the Grievor is required to make the reasonable efforts referred to in *Johnstone.*

The burden of proof for establishing *prima facie* discrimination rests with the Grievor and the Union. In the instant case, the Grievor has from the outset insisted on her right to day-shift weekdays only and has advanced a number of reasons why she cannot obtain suitable childcare (finances, hours, medical care, language of caregiver). The Grievor did not engage with the Company on a consideration of the option she had of working three weekdays and obtaining childcare on the weekends when she was required to work those day shifts. The material provided does not disclose efforts to find suitable childcare in those periods or engaging with the Company on scheduling or exchanging shifts, or considering bundling of shifts or jobs to maximize day time shifts. These efforts would then have required the Company to ensure that it made further efforts as well. The Grievor has generally responded to the Company's queries in this regard indicating that various solutions would be futile given her requirements for child care and the financial burden accompanying those requirements. In the result I am not persuaded that the Grievor has made the engaged in efforts to find alternative solutions as set out in the test established in *Johnstone*. Accordingly, she has not made out a case for *prima facie* discrimination on the basis of family status.

For these reasons the grievance is dismissed.

For clarity, although the Union claims that the grievor was administratively terminated, she remains employed by the Company and is entitled, in light of this decision, to consider her current options and available positions. In an attempt to assist the Grievor consider her options, the Company is directed to provide the Grievor and the Union with a list of jobs currently available to her, both in and out of her bargaining unit and including managerial positions. It is then to meet with the Grievor and the Union to review the available positions and options for the Grievor to be returned to work.

I remain seized to deal with the implementation of this Award in the event of a dispute.

August 10, 2015

_____

MARILYN SILVERMAN
ARBITRATOR