CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4474

Heard in Calgary, June 15, 2016

Concerning

CANADIAN PACIFIC RAILWAY

And

THE UNITED STEELWORKERS – Local 1976

DISPUTE:

The Union alleges Canadian Pacific unilaterally cancelled a valid Return to Work program of August 6, 2015 and did not make any attempt to return Mr. Murillo to work since August 6, 2015.

JOINT STATEMENT OF ISSUE:

Mr. German Murillo attended a Return to Work Meeting on August 6, 2015 with his Union representative and the following Canadian Pacific Officers: Return to Work specialist J. Goldade, Managers L. Urso and K. Marcello.

A Return to Work program was constructed and concluded that was acceptable to all parties.

Mr. Murillo agreed to the plan but requested a few days to ensure his family would be agreeable to the plan.

Return to Work specialist J. Goldade insisted that Mr. Murillo reply by the following day, August 7, 2015. Mr. Murillo agreed to comply.

Return to Work specialist J. Goldade sent an email to Mr. Murillo and the Union moments after the conclusion of the August 6, 2015 meeting detailing the "updated RTW plan as discussed during today's RTW meeting. If you have any concerns or questions please call or email to discuss. If not please sign the plan…your first day back to work 0700 Monday, August, 10, 2015."

Return to Work specialist J. Goldade sent an email on August 7, 2015 stating that the agreed on return to work plan was cancelled and under review until further notice.

As of this date, November 2, 2015, Canadian Pacific has not contacted Mr. Murillo and Mr. Murillo continues to wait for Canadian Pacific to implement the agreed on return to work plan.

TC Local 1976 USW filed a step two grievance on September 21, 2015 claiming that Canadian Pacific had unilaterally and improperly cancelled a valid return to work plan.

TC Local 1976 USW also stated that by unilaterally and improperly cancelling a valid return to work agreement Canadian Pacific has, in effect, improperly held Mr. Murillo out of service.

TC Local 1976 USW also stated that Canadian Pacific has further compounded the damage done to Mr. Murillo by not making any attempt to return Mr. Murillo to work.

TC Local 1976 USW claimed all wages and benefits for the period of the agreed upon return to work plan.

TC Local 1976 USW also claimed all wages and benefits for the period after the return to work plan period would have been completed.

TC Local 1976 USW also reserved the right to claim damages as Canadian Pacific's actions may have exacerbated Mr. Murillo's condition.

Canadian Pacific did not respond to the step two grievance.

The Company denies the Unions contentions and declines the Unions request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. Summerside	**(SGD.) D. Cote for D. Guerin**
Chairman Board of Trustees	**Senior Director, Labour Relations**

There appeared on behalf of the Company:

B. Sly	– Assistant Director Labour Relations, Calgary
B. Medd	– Manager Labour Relations, Calgary

There appeared on behalf of the Union:

R. Summerside	– Chairman Board of Trustees, Calgary
N. Lapointe	– Staff Representative, Montreal
H. Murillo	– Grievor, Calgary

AWARD OF THE ARBITRATOR

Mr. Murillo is a long service employee of Canadian Pacific, having started his career in 1996 as a Crew Dispatcher at the Crew Management Center in Montreal. In 1997, the Company moved their head office to Calgary and Mr. Murillo transferred with the Company. In April 2011, the Grievor was promoted to the management position of Locomotive Distributor. He remained at that position until the Company downsized the number of Locomotive Distributor positions and he returned as a Dispatcher.

In April 2014, the Grievor was dismissed and Arbitrator Stout resolved pending issues as follows:

> "After carefully considering the evidence and submissions in this matter, I find that in these circumstances progressive discipline ought to have been applied by the Company to correct the grievor's behaviour. In my view, a short suspension or 30 demerits and a referral to anger management to correct the grievor's behaviour would have been appropriate to address the grievor's original misconduct. In light of the grievor's uncooperativeness during the investigation, I find that a three day suspension is the appropriate penalty.
>
> Accordingly, for all the reasons stated above, the grievance is allowed and the grievor is to be reinstated in employment without any loss of seniority. The grievor's record is to be amended to reflect a three day suspension. The grievor's reinstatement shall be subject to the Company having the right to require the grievor to participate in educational training with respect to the Discrimination and Harassment Policy as well as anger management.
>
> The grievor should understand that his conduct is unacceptable and should not be repeated. The grievor should also now be aware that making false complaints might result in discipline up to and including discharge."

Upon receipt of the arbitration award, the Grievor went on Weekly Indemnity Benefits until January 2015. The Company requested in February 2015 that the Grievor complete a Functional Abilities Form (FAF) to determine his fitness to return to work. The request was reiterated in March and in April.

On April 28, 2015 Dr. Streukens, expert in psychological disability assessment and management matters recommended the following restrictions:

> "1. Work schedule of no more than 2-days per week at the outset.
>
> 2. Should a 2-day per week schedule would become onerous due to medical or psychological functioning, an immediate assessment would need to occur in order to provide stabilization treatment resources and /or to re-evaluate his current employability status.

> 3. Full medical and psychological evaluations to occur before increasing this schedule to determine current functioning and to make any treatment recommendations in the event that any issues present at the time of assessments."

On May 10, 2015, the Grievor provided the Company with a FAF outlining the grievor's restrictions:

- Restricted to working 2 days per week, day shift and Monday to Friday only
- Capable of working at a moderate pace, occasionally working under time constraints
- Ability to concentrate on details for some tasks, although not at an intense level
- Moderate ability to recall information that is harder to remember

In May 2015, the Grievor's doctor could not determine any prognosis of recovery.

In June 2015, the Company offered the Grievor a return to Work Plan within his own classification. The Grievor's doctor, Dr. Stewart did not approve the return Work Plan and reiterated his original recommendation for two days per week, no weekends, and no shift work. Dr. Stewart also stated that he expected a full recovery. The Company proposed another position that comprised of twelve (12) hour shifts. The Grievor's doctor refused it and recommended one month of eight (8) hour shifts with a reassessment at that time.

The Company states that as a result of the additional information, it suggested a third Return to Work Plan and scheduled a Return to Work meeting with the Grievor and

the Union on August 6, 2015 to discuss this plan. The Return to Work Plan included general administrative duties for two days per week in the Operation Center. The Grievor was to report to Mrs. Laurie Urso and a workstation (cubicle) located outside of the Operations Center was provided. Parties discussed the plan and at the end of the meeting, all parties approved the plan with a new location and the Grievor had until the next day to confirm and sign it. He needed to discuss the plan with his family.

After the meeting, Mrs. Goldade wrote the following email to the Grievor:

> "Hello German/Richard,
>
> Please review the updated RTW plan as discussed during today's RTW meeting. If you have any concerns or questions please call or email to discuss, if not please sign the plan in the appropriate section.
>
> I will be sending further logistical asap regarding your first day back to work – 0700 Monday, August 10th, 2015.
> Thank you."

At the end of the meeting, the Company also presented a notice of investigation for August 11, 2016 which stated in part:

> "This investigation is in connection with your failure to accept the Company's proposed suitable modified duties, which were in line with your current medical restrictions and limitations."

During that period of time, the Union was claiming that the Grievor had the right to exercise his seniority onto a position of his choosing and that the Return to Work process should be on that new position.

The next day, on August 7th 2015, the Company informed the Union and the Grievor that the Return to Work Plan was being rescinded. The Company sustains that there were significant workplace concerns, both for existing employees and the Grievor, given his behaviour (level aggression) expressed during the RTW meeting and his past records. At this point, the Grievor had not signed the plan.

On August 10th, 2015 the Union filed a step one grievance and requested that the Grievor be considered as an active employee as of August 10th, 2015 and that he be compensated for all lost wages and benefits as outlined in the Return to Work Plan of August 6th 2015. The Company replied that the Return to Work Plan was subject to review by the Grievor and the Company. In September 2015, the Union filed a step two grievance to which the Company did not reply.

The Company postponed the investigation a few hours before the investigation was scheduled on August 11th. The Union required some explanations on August 13th. The Company did not respond.

Beside the documentations filed in the course of the grievance process, there were no further communications amongst parties in regards to a Return to Work Plan between August 7th 2015 and May 24th, 2016. At that time, a disability management specialist contacted the Grievor and requested an updated Functional Abilities Form in order to assess his current fitness to work. In the meantime, a hearing was schedule in January 2016 and the hearing date was mutually agreed to be postponed.

It is well established in the jurisprudence that all parties must participate in an accommodation process. All parties including the Grievor must make efforts to find a suitable position. In **CROA&DR 3499**, arbitrator Picher stated in part:

> "With respect, the Arbitrator cannot agree. The ultimate burden of proof in this grievance lies upon the Union. At the end of the day it bears the legal burden of establishing that the Company failed in its obligation to accommodate. While it is true that as a matter of onus, it is the Company which has the best knowledge of the available jobs and has the first obligation of attempting to find a position suitable to the employee, it is not enough for the Union to simply assert that the apparent failure of any continued or successful searches by the Company necessarily resulted in prejudice to the employee. (…) As the courts have stressed, the duty of accommodation is a collaborative process which involves the good faith participation of employer, employee and trade union alike. While the Arbitrator will not dispute that it is not for the Union to be primary source of proposed assignments which might accommodate a disability, the process is plainly not well served when a Union simply falls back on the position that it is the obligation of the Company to identify opportunities and claim damages for a period during which there is no evidence, from any party, to indicate that opportunities for reasonable accommodation were in fact available.
>
> From a technical standpoint the Arbitrator agrees with the counsel that the Company remained under an affirmative obligation, after June of 2003, to remain vigilant for the identification of any position which might become open to the grievor and which could accommodate his limitations. I am not, however, prepared to convert the apparent lack of evidence with respect to what might have been done after June of 2003 into what the Union seeks, namely an award of monetary compensation to the grievor, given the Union's own failure to produce any evidence to suggest that there were any positions which in fact might have been available to accommodate Mr. Longworth in Vancouver, given his obvious refusal to consider accommodation anywhere else. Nor does the evidence before me reveal any effort on the part of the Union itself to demand any further search on the part of the Company in the period which the Union now claims involved an abandonment of the Company's obligation."

In the present matter, the evidence demonstrates that the Company and the Union engaged into an accommodation process as soon as the Grievor was found fit to return to work, sometime during the spring of 2015. The evidence also reveals that the first proposal suggested by the Company was refused by the Grievor and that his limitations were modified accordingly which made it more difficult to find opportunities for the Grievor (no weekends, 8 hours shifts only). Nevertheless, the parties agreed on August 6th 2015 on the last Return to Work Plan, but it was not final as it was clearly conditional to the Grievor's acceptance. I assumed it's acceptance from the filling of a grievance in which the Union requested its application.

On the other hand, the evidence reveals that the Grievor's medical condition was still fragile as stated by Dr. Streuken. It was also demonstrated that the Company had some concerns about the said plan that appears to some extent legitimate given the nature of the difficulties that the Company and the Grievor came across prior to the dismissal. In any case, the plan was clearly subject to re-assessment at least at the end of the first month.

The evidence also shows that while parties where discussing this last plan, other issues regarding the progressive return of the Grievor to work were not resolved. This last plan was part of the progressive process of accommodation and was therefore subject to changes depending on the resolution of all pending issues amongst parties.

Therefore, for all the foregoing reasons, I cannot presume from the evidence that this last plan would have been successful. I also cannot assume any length in time.

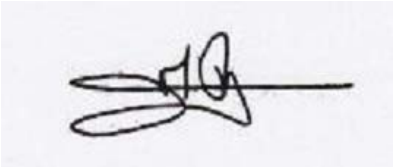
Otherwise, the cancellation of the plan does not justify afterward the absence of collaboration or communication between parties to find a solution that was suitable for all parties. The difficulties of finding an appropriate position argued by the Company at the hearing does not suffice to demonstrate that it did all the efforts to accommodate the Grievor nor did the Union provide any evidence to show that since August 7th 2015, the Grievor could have occupied a position with the Company and respect all the terms of the last plan. The Union also did not demonstrate that the Grievor tried to mitigate the loss of earnings during that period or was fit to return to work full time.

I am also not satisfied that the evidence reveals that the Company acted in bad faith. There is no evidence that establishes that the Grievor did miss some opportunities because of the Company's negligence or wrongdoing.

The success of an accommodation process relies on the collaboration of all parties involved and unfortunately in this case, after the dispute regarding the last plan proposed by the Company, both parties stopped communicating and exploring other options to accommodate the Grievor. Given the Company's role in such process and that the plan was rescinded by the Company without further notice to the Union, the Grievor should be compensated in part.

Nine months went by between the cancellation of the plan in August 7th, 2015 and the last request for an update of the Grievor's fitness to work by the Company and for all the foregoing reasons the grievance is therefore allowed in part and the Company shall pay to the Grievor thirty (30) days of work (8 hours per day) including all benefits.

I remain seized in any clarification required in the above.



June 22, 2016

MAUREEN FLYNN
ARBITRATOR