CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4505

Heard in Montreal, October 13, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Grievance regarding the Company's failure to accommodate, and dismissal of Conductor David Danchilla of Moose Jaw, SK.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Mr. Danchilla became absent from work due to a verified medical condition in March of 2012. On July 16 2015 the Company sent Mr. Danchilla a letter informing of his potential employment file closure unless medical information regarding a prognosis for a return to work was provided. The Company was provided the information requested on August 4 2015, which indicated Mr. Danchilla's current restrictions and that complete recovery was expected. Nevertheless the Company ultimately closed his employment file on August 24, 2015.

The Union contends the Company has failed to properly recognise the medical evidence supplied, and improperly terminated Mr. Danchilla's employment as a result thereof. The Union contends that the Company failed to fulfill its duty to accommodate Mr. Danchilla's disability contrary to the terms of Article 85 of the Collective Agreement, the Company's Workplace Accommodation Policy, Return to Work Policy and the Canadian Human Rights Act. The Union further contends that the Company has failed to demonstrate that to do so would constitute undue hardship, which has resulted in discriminatory treatment in the instant matter.

The Union also contends the Company has dismissed Mr. Danchilla as a result of his medical condition, contrary to the *Canada Labour Code*.

The Union seeks an order that the Company has violated the above-cited Collective Agreement, policies and legislation. The Union further seeks an order that the Company cease and desist from these violations and that it be directed to comply with these provisions as described.

The Union seeks a determination that the Company has not to this point demonstrated undue hardship. The Union further seeks an order that Mr. Danchilla be reinstated to Company service, provided with suitable accommodation and made whole for all loss incurred, including wages and benefits with interest.

The Company disagrees and denies the Union's request.

FOR THE UNION:
(SGD.) D. Fulton
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

C. Clark	– Assistant Director, Labour Relations, Calgary
L. Page	– Manager, Disability Management, Calgary
J. Schmuacher	– Manager, Health Programs, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairman, Calgary
B. Weber	– Local Chairman, Moose Jaw
G. Edwards	– General Chairman, LE, Calgary
D. Danchilla	– Grievor, Moose Jaw

AWARD OF THE ARBITRATOR

Nature of the Case

1. On August 24, 2015, the Canadian Pacific Railway Company (CP) closed the employment file of long-time employee Conductor David Danchilla. CP took the position that it had reached the point of undue hardship during its attempts to accommodate Mr. Danchilla over a 3.5-year period.

2. These reasons explain why CP did not meet its burden to demonstrate that its accommodation process had reached the point of undue hardship.

Undue Hardship and Innocent Absenteeism

3. Innocent absenteeism cases require an examination of both the employer's duty to accommodate and the employee's duty to do his or her work. The Supreme Court of Canada (SCC) has established a framework for these types of cases.

4. The SCC's framework includes these guiding principles:

- the standard at issue in innocent absenteeism cases is one which requires an employee to perform services for his/her employer on a regular basis[1];
- to show that the attendance standard is reasonably necessary, the employer must show that the employee cannot be accommodated without undue hardship[2];
- Undue hardship does not require proving that further accommodation would be impossible[3];
- the duty to accommodate does not "completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration"[4];
- the employer's duty does not require changing the workplace in a fundamental way, but does include arranging "the employee's workplace or duties to enable the employee to do his or her work"[5];
- the employee and his/her trade union have an important role to play in the search for accommodation[6];
- the employer's duty is discharged if an employee turns down a reasonable accommodation proposal[7];

[1] British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 SCR 3, 1999 CanLII 652 (Meiorin)
[2] Meiorin at paragraph 54
[3] Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ), [2008] 2 SCR 561, 2008 SCC 43 at paragraph12
[4] Hydro-Québec at paragraphs 14-15
[5] Hydro-Québec, at paragraph 12
[6] Meiorin, at paragraph 65
[7] Central Okanagan School District No. 23 v. Renaud, [1992] 2 SCR 970, 1992 CanLII 81

- undue hardship is contextual and includes factors like cost, interchangeability of the workforce and facilities and interference with other employees' rights[8];
- the arbitrator's analysis must examine the entire period of the accommodation[9]; and
- the employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future[10].

5. In CROA&DR 4273, Arbitrator Picher described the importance of the process in duty to accommodate cases:

> 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.

6. An arbitrator must examine the entire process, including the assistance provided by the trade union and the accommodated employee, plus the specific factual context, when deciding whether undue hardship exists.

[8] Meiorin, at paragraph 63

[9] McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal, [2007] 1 SCR 161, 2007 SCC 4 at paragraph 33

[10] Hydro-Québec, at paragraph 19

Chronology of Events

7. CP hired Mr. Danchilla in June, 1988.

8. Mr. Danchilla had been off work since March 1, 2012 for medical reasons. The record discloses that CP's Occupational Health Service (OHS) explained to Mr. Danchilla the importance of providing medical updates, though OHS frequently had to chase after him to obtain this vital information. OHS confirmed Mr. Danchilla remained available for modified work in safety sensitive positions, but with restrictions, which it was hoped that surgery would later remedy.

9. CP's Return to Work Specialist (RWS) conducted an email search for accommodated positions, but the response back was "We have nothing to accommodate at this time".

10. In February, 2013, Mr. Danchilla had surgery and became unfit for any duties. In April, 2014, while Mr. Danchilla remained unfit for any work, his prognosis was for a complete recovery. That period of being unfit for any work continued, however.

11. In November, 2014, CP wrote to Mr. Danchilla requiring him to provide a properly completed Functional Abilities Form (FAF), since his most recent one had been significantly incomplete. The subsequent FAF confirmed Mr. Danchilla was fit to return, but with restrictions.

12. In December, 2014, Mr. Danchilla, a TCRC representative and OHS met to discuss accommodation. A further meeting took place in March, 2015. CP also conducted various computer job searches in 2015, but concluded there were no suitable positions. The record does not disclose the basis for those conclusions. OHS again sent emails asking if any accommodated positions existed for someone with Mr. Danchilla's restrictions.

13. In April, 2015, CP raised a possible supervisory position for Mr. Danchilla. For unknown reasons, and despite Mr. Danchilla's interest, CP decided not to pursue this option further. In June, 2015, CP offered Mr. Danchilla the possibility of flagging positions. He declined due to the restrictions on the number of hours in which he could work. The TCRC suggested CP did not explore modifying these work hour requirements.

14. Mr. Danchilla continued to be fit for modified duties in June, 2015, but with the same restrictions.

15. On July 16, 2015, CP wrote to Mr. Danchilla indicating that they would be closing his employment file given his absence from work since March 5, 2012. CP provided him with a chance to provide further medical information. CP's letter noted that "no suitable open positions were found during the time he had restrictions". CP also noted Mr. Danchilla could not do the offered flagging positions, due to his daily hour restrictions.

16. Mr. Danchilla did advise the RWS he could try to increase the daily hour restrictions. OHS asked for further medical information by August 15, 2015. Mr. Danchilla

provided another FAF in early August, which confirmed he remained fit for modified duties, but would need a graduated return to work. He also advised CP that he was scheduled for further surgery in September, 2015 which he hoped would allow him to recover fully and return to work.

17. On August 24, 2015, CP confirmed the closure of Mr. Danchilla's file after taking into consideration the FAF he had submitted earlier that month. OHS noted that "...there is no complete recovery expected in the foreseeable future".

Analysis and Decision

18. The TCRC argued that CP's process prevented it from demonstrating undue hardship.

19. CP has clearly tried to accommodate Mr. Danchilla. This is not a case of an employer simply concluding undue hardship exists, but without offering any evidence to support that conclusion.

20. For employees like Mr. Danchilla requesting accommodation, it is clearly in their interest to provide up to date medical information on a timely basis as part of the process. Their efforts in facilitating the accommodation process allow them to maintain their employment relationship with their employer, despite providing no services. Both sides have important obligations in this process, as does the TCRC.

21. In CROA&DR 4313, Arbitrator Picher concluded that undue hardship had been reached, in part due to the grievor's refusal of the employer's multiple attempts to provide accommodated work:

> On the whole, after an extensive review of much detailed evidence, I am compelled to the conclusion that the Company did all in its power to identify positions or reasonable accommodation for the grievor, given his physical disability, and also given the very restricting limitations which he placed upon his availability, in that he would only work within Capreol, and preferably within the same bargaining unit.
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> …
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> In the result, I cannot find that the Company violated its duty to offer the grievor reasonable accommodation to the point of undue hardship, to perform work at Capreol consistent with his physical limitations. For reasons he best appreciates, the grievor simply insisted on establishing unrealistic parameters for the work which he would accept and ultimately frustrated the accommodation process by his own actions.

22. In this case, CP has not demonstrated why it concluded it could not accommodate Mr. Danchilla. Why were other positions deemed unsuitable? What possible modifications to positions were contemplated to evaluate if Mr. Danchilla could perform them? Was any consideration given to bundling duties, which was one of the efforts made in CROA&DR 4313, in order to provide an opportunity for accommodated employment?

23. The analytical process followed when exploring accommodation is just as important as the conclusion of undue hardship.

24. While Mr. Danchilla did not assist his situation at times by being slow to provide updated medical information, it does not seem unreasonable for an employer to wait an

additional evaluation period when an employee is scheduled for surgery. While the overall length of an absence is clearly relevant, so are pending surgeries.

25. CP has not demonstrated, despite its multiple *bona fide* efforts, that it had reached the point of undue hardship. The record contains conclusions, but not enough explanation of why CP could not accommodate Mr. Danchilla.

26. The grievance is allowed. Mr. Danchilla's employment status shall be reinstated forthwith. The arbitrator retains jurisdiction for any issues related to remedy.

November 4, 2016

GRAHAM J. CLARKE
ARBITRATOR