CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4605

Heard in Montreal, December 14, 2017

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the Company's failure to accommodate Conductor G. Robinson.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

In December, 2012, Conductor Glen suffered a disabling lumbar injury. On February 5, 2013, Mr. Robinson commenced a graduated return to work as a Supervisor Crew Reporting with the Rail Department. He was accommodated in that capacity until April 15, 2013. Commencing May 13, 2013, Mr. Robinson was offered work at the ancillary building in Toronto yard. On May 29, 2013, the Company advised that his accommodation had been discontinued. Since that time, the Company failed to provide Mr. Robinson with any further accommodation. As a result, Mr. Robinson lost time from work between May 29 and August 5, 2013.

The Union contends that the Company has a duty to accommodate Mr. Robinson's medical restrictions 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 Union contends that the Company's actions are contrary to the Collective Agreement, the Company's Return to Work Policy, the *Canada Labour Code* and the *Canadian Human Rights Act*.

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*, and a direction that the Company cease and desist from said breaches. The Union further seeks an order that Mr. Robinson be made whole for his losses with interest due to the Company's breaches, without loss of seniority, in addition to such other relief as the Arbitrator sees fit in the circumstances.

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey	**(SGD.)**
GENERAL CHAIRMAN	

There appeared on behalf of the Company:

C. Clark – Assistant Director, Labour Relations, Cal gary

And on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairman, Smiths Falls
R. Moffat	– Legislative Representative, Toronto
G. Robinson	– Grievor, Toronto

AWARD OF THE ARBITRATOR

Nature of the Case

1. The TCRC alleged that CP failed to accommodate Yard Trainperson Glen Robinson between May 30 and August 5, 2013. CP justified its decision not to allow Mr. Robinson to work during this period because he allegedly failed, *inter alia*, to respect his obligation to provide relevant medical information.

2. The arbitrator concludes that, while Mr. Robinson may not have provided everything in the precise manner CP required, he nonetheless ensured that a significant amount of medical information was sent to CP regarding his recovery from a workplace injury. Mr. Robinson is entitled to compensation.

Facts

3. Mr. Robinson suffered an on duty lumbar injury on December 19, 2012 which resulted in considerable restrictions. CP accommodated Mr. Robinson's injury until late May 2013.

4. Between January and May 2013, Mr. Robinson provided CP with a significant amount of medical information about his limitations including:

i. A January 7, 2013 WSIB Functional Abilities Form (FAF);
ii. A January 10, 2013 Form 26 from his family physician;
iii. A January 29, 2013 assessment from the Regional Evaluation Center (REC) assessment at Humber River Regional Hospital;
iv. Further FAFs dated February 4, February 20 and March 6, 2013;
v. A second REC assessment in March 2013;
vi. A March 27, 2013 WSIB decision continuing benefits until June 4, 2013;
vii. An April 18, 2013 FAF;
viii. An updated FAF dated May 6, 2013 which was sent several times after CP said it had not received it; and
ix. A May 8, 2013 FAF which recommended a gradual return to full duties.

5. CP was of the view that the WSIB's decision had indicated that Mr. Robinson could return to full duties as of June 4, 2013. CP requested further medical information from Mr. Robinson's physician who advised on May 27, 2013 that a return to yard duties should occur at 2 hours per day for the first week, increasing by 2 hours each week until he could work the full 8 hours.

6. In a May 29, 2013 letter, CP took that position that Mr. Robinson was in non-compliance with the return to work process. CP made 4 allegations: i) non-compliance with requests for medical updates; ii) non-compliance with log book documentation; iii)

barriers related to seating; and iv) non-compliance with attempting Graduated Return to Work to regular duties.

7. Mr. Robinson disputed CP's allegations in his June 5, 2013 letter. He further provided an updated June 3, 2013 FAF from his physician which recommended a graduated work schedule of 4 hours a day for 2 weeks, 6 hours a day for 2 weeks, then full duties 8 hours/day in 4 weeks.

8. CP advised it would rely on the March 12, 2013 REC assessment which suggested a date of June 6, 2013 for a return to full duties, unless Mr. Robinson provided contrary medical information. Mr. Robinson provide another FAF dated June 13, 2013 from his physician containing the same medical opinion on a graduated work schedule as had been provided on June 3.

9. From May 30 to August 6, 2013, Mr. Robinson was off work.

Analysis and Decision

10. This Office has frequently noted that the duty to accommodate is not a one-way street. Both an employer and an employee have important obligations in the accommodation process, as may a trade union. A failure by an employee to provide relevant medical information may end the duty to accommodate: see, for example, CROA&DR 4585 and CROA&DR 4504.

11. Mr. Robinson's case differs, however, from those where an employee failed to provide relevant medical information or to stay in contact when off work. In Mr. Robinson's case, the TCRC reviewed the extensive medical information which had been sent to CP's Occupational Health Services (OHS).

12. The facts demonstrate that Mr. Robinson provided medical information which would allow CP to accommodate his temporary situation. At the hearing, CP suggested that Mr. Robinson had failed to provide CP with a CP FAF. The arbitrator cannot find this specific problem in CP's documentation. Moreover, the May 8, 2013 FAF appears to be on CP's form (Company Exhibits, E-2; Tab 8). If CP had an issue with the form of Mr. Robinson's physician's medical reports, then it could have raised it explicitly.

13. Similarly, if performance issues existed in Mr. Robinson's temporary accommodated position, then these needed to be managed (Company Exhibits, E-2; Tab 7). They did not justify ending an accommodation, though they might justify a different accommodation depending on the facts.

14. While CP relied on the March 12, 2013 REC assessment which suggested a return to full duties by June 4, 2017, that document itself clearly indicated that the target date was a hope rather than a certainty. That assessment stated: "It is hoped that he will be able to resume normal activity in about 12 weeks' time" (Union Exhibits, U-2; Tab 15). It

was unclear at the hearing why CP placed greater importance on the REC than on the later medical evidence Mr. Robinson supplied.

15. The arbitrator does accept that Mr. Robinson did not fill out the logbook CP had requested. Mr. Robinson's failure to complete the logbook, on the basis that he was doing it orally, was not overly convincing as an excuse. The issue of the chair for sitting was ultimately a request by Mr. Robinson; nothing turned on it. There was also medical evidence about when Mr. Robinson should perform outside duties. The evidence did not suggest an outright refusal to do these duties; the issue was when he could do them i.e.: in the morning when he was fresher.

16. The arbitrator concludes that Mr. Robinson essentially complied with his obligations to provide appropriate information to CP so that it could accommodate him. The medical information appears uniform that Mr. Robinson's injury needed time to heal and that he continued to make improvement throughout 2013.

17. Based on the medical information provided to CP, it is unclear why they concluded that they could no longer continue to accommodate Mr. Robinson during the graduated period suggested by his physician. While there may have been an earlier issue in 2012 which potentially influenced CP's analysis, that cannot justify disregarding the significant medical information Mr. Robinson provided.

18. CP violated its duty to accommodate; Mr. Robinson is entitled to a remedy.

19. The TCRC also asked for damages under the *Canadian Human Rights Act (CHRA)*. This Office can award such damages, as noted in various awards including CROA&DR 4588. Parties should know that damages are a potential remedy for *CHRA* violations.

20. But the burden remains on a party claiming such damages to provide argument and case law supporting its remedial request. A neutral arbitrator is not in a position to develop a party's legal arguments: CROA&DR 4587. On that basis, the arbitrator has not been convinced that this case merits an additional award of damages, beyond the compensation already ordered.

21. The arbitrator orders that Mr. Robinson be compensated for his lost remuneration for the period in question, without loss of seniority. The arbitrator retains jurisdiction to deal with any questions arising from this award.

December 20, 2017

GRAHAM J. CLARKE
ARBITRATOR