CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4648

Heard in Montreal, July 12, 2018

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The failure to accommodate Mr. J. Rubino.

JOINT STATEMENT OF ISSUE:

Following an agreement that Mr. Rubino would be reinstated with full compensation without loss of seniority and benefits upon withdrawing a CHRC complaint, Mr. Rubino was unable to be accommodated. On March 15, 2016 the local management and Union team engaged in a discussion on a suitable accommodation for Mr. Rubino without success. On January 23, 2017 Mr. Rubino's Doctor provided additional medical information to the Company's Health Services Department as previously requested. Mr. Rubino was subsequently found to be fit to return to full duties by the Health Services Department on January 23, 2017. On March 10, 2017 the Grievor resigned from Company service.

The Union's Position:

The Union contends that the Company has a duty to accommodate Mr. Rubino 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 is acting in bad faith and has made Mr. Rubino suffer relentlessly since November 2015. It is self-serving on the Company's part to withdraw from an undertaking, not once but twice, in returning an employee to active service in order to promote a healthy, viable, and meaningful working environment for all parties. The Union and its member have participated in good faith with no resolution as the Company has impeded each step in the RTW process.

The Company stated in its responses that the accommodation was determined to be unsuitable due to Mr. Rubino's restrictions and that is the reason for ending the RTW process. However, the Union is of the opinion that the option was appropriate and within the restrictions placed on him and it was only stopped for the Company's interest alone. The Company has not proven or discharged its duty until the point of undue hardship. It is the grievor that has suffered the hardship due to this failure.

For the above mentioned reasons, the Company is in violation of the Collective Agreement, its own Return to Work Policy, the *Canada Labour Code*, the *Canadian Charter of Rights and Freedoms*, and the *Canadian Human Rights Act*.

The Union requests that Mr. Rubino be compensated all lost wages with interest including missed WIB/WSIB benefits with interest between November 6, 2015 up to and including his RTW. The Union further requests that he be accommodated by the Company until return to full duties. The Union contends that he be awarded damages in connection with all violations pertaining to his Human Rights entitlement due to the Company's mishandling of his disability and their failure in the accommodation process. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company's Position:

No suitable accommodation was identified during the March 15, 2016 return to work meeting. The allegations of the Union with respect to the alleged accommodation found during the March 15, 2016 meeting are overstated and not supported by fact.

The Grievor's restrictions were prohibitive to finding a suitable accommodation. However, the Company remained committed to working with the Grievor and Union, up until his resignation, to find a suitable accommodation.

The Union failed to articulate how the Company allegedly violated the "Collective Agreement, the Company's Return to Work Policy, the *Canada Labour Code*, and the *Canadian Human Rights Act*".

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey	**(SGD.) D. Pezzaniti**
General Chairperson	

There appeared on behalf of the Company:

C. Clark	– Assistant Director, Labour Relations, Calgary
M. Pilon	– WCB Specialist, Montreal

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairman, Smiths Falls
D. Psichogios	– Vice General Chairman, Montreal
D. Fulton	– General Chairman, Calgary
J. Rubino	– Grievor, Montreal

AWARD OF THE ARBITRATOR

Nature of case

1. The TCRC alleged that CP failed to accommodate Conductor J. Rubino to the point of undue hardship during the period starting November 2015 to the date of his resignation in March 2017 (the "Period"). During the Period, Conductor Rubino initially

had some significant restrictions, including being unable to work in safety sensitive positions. Towards the end of the Period, Mr. Rubino had virtually no restrictions, including for safety sensitive positions, other than the need to work daytime shifts.

2. For the reasons which follow, the arbitrator concludes that CP did not meet its burden of proving that undue hardship existed for the entire Period. This finding entitles Mr. Rubino to a partial remedy.

The Duty to Accommodate

3. This Office has previously summarized the principles which may apply to an accommodation case: CROA&DR 4503. The application of the principles remains far more challenging than creating them, as noted in CROA&DR 4609:

> 13. The duty to accommodate continues to be one of the more challenging labour relations areas. The principles are relatively straight forward: CROA&DR 4503. But even the Supreme Court of Canada, on a seemingly annual basis, keeps revisiting those principles and often has differences of opinion on their practical application.

4. Both the TCRC and CP have evidentiary obligations in a duty to accommodate case[1]:

> [23] To make a claim for discrimination under the Act, the employee must establish a *prima facie* case of discrimination. If this is established, the onus then shifts to the employer to show that it accommodated the employee to the point of undue hardship.

[1] Stewart v. Elk Valley Coal Corp., [2017] 1 SCR 591, 2017 SCC 30

5. The TCRC initially needs to prove "*prima facie* discrimination". This is often conceded in many accommodation cases depending on the circumstances, but CP did not do so in this case (E-1; Company Brief; Paragraphs 4 and 32):

> 32. The Company maintains that the onus lies with the Union to establish a *prima facie* case of discrimination. The Union failed to meet this onus, as the grievor could not be accommodated.

6. The onus to prove *prima facie* discrimination differs from the burden regarding undue hardship. The Supreme Court of Canada in *Elk Valley, supra*, recently reconfirmed its test for "*prima facie* discrimination":

> [24] To make a case of *prima facie* discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the [Human Rights Code, R.S.B.C. 1996, c. 210]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact": Moore, at para. 33. Discrimination can take many forms, including "'indirect' discrimination", where otherwise neutral policies may have an adverse effect on certain groups: Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), 2015 SCC 39 (CanLII), [2015] 2 S.C.R. 789, at para. 32. Discriminatory intent on behalf of an employer is not required to demonstrate *prima facie* discrimination: Bombardier, at para. 40.

7. If the TCRC demonstrates *prima facie* discrimination, then CP has the evidentiary onus to show that it could not accommodate Mr. Rubino without undue hardship. In CROA&DR 4503, *supra*, this Office described in general terms an arbitrator's task when evaluating an undue hardship argument:

> 7. 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 if an employer has been sufficiently diligent in pursuing accommodation opportunities.

8. Evidently, accommodation cases present significant challenges in an expedited arbitration environment: CROA&DR 4630P.

Analysis and Decision

A. *Prima facie* discrimination

9. To the extent it was necessary, the TCRC has met its evidentiary burden to prove *prima facie* discrimination. Mr. Rubino had a protected characteristic (disability); he experienced an adverse impact in his employment; and there was a connection between his disability and that adverse effect.

B. Evidence regarding undue hardship

10. The finding of *prima facie* discrimination means that CP must then demonstrate that it could not accommodate Mr. Rubino without undue hardship. Meeting this burden requires evidence to explain why accommodation could not take place. This Office noted previously in CROA&DR 4588 the importance of evidence in the accommodation process:

> 17. No one disputed when negotiating the original agreement that Mr. Windsor required accommodation. What remained unexplained in this case is why CP terminated that accommodation, when Mr. Windsor's personal circumstances seemingly had not changed.
>
> 18. CP did not argue, beyond the comment at the hearing that the agreement was "not working", that it had reached the point of undue hardship. Neither did the facts show that CP had cancelled the existing accommodation due to an alleged failure on Mr. Windsor's part to provide relevant and essential information about his situation.

> 19. Instead, the accommodation was cancelled first and then Mr. Windsor was asked for information.

11. The arbitrator has attempted to discern from the parties' briefs and the written record the reasons why CP could not accommodate Conductor Rubino throughout the entire Period.

12. CP satisfied the arbitrator that Conductor Rubino's restrictions, including being unable to occupy any safety sensitive position, prevented it from immediately finding accommodated work. In December 2015, CP had requested up to date medical information from Mr. Rubino to allow it to evaluate its obligations (U-2; Union Exhibits; Tabs 7 and 8).

13. The medical information Mr. Rubino provided to CP's Occupational Health and Safety (OHS) nurse in December and January 2016 indicated in part that he could not occupy any safety sensitive position. However, Mr. Rubino's physician's note dated January 23, 2016 did indicate that he could work in a modified position, with a controlled environment and with a regular shift (U-2; Union Exhibits; Tab 12).

14. On January 29, 2016, CP's OHS nurse passed this recommendation along (U-2; Union Exhibits; Tab 13).

15. The TCRC repeatedly asked CP about its efforts to accommodate Mr. Rubino. Once *prima facie* discrimination exists, CP has the duty to accommodate the employee

up to the point of undue hardship. It is not up to the TCRC to lead that process, though its assistance is obviously helpful (E-1; Company Brief; Paragraphs 10-11).

16. It appears some individuals working for CP may not have fully grasped the medical restrictions which noted that, while Mr. Rubino was unfit for safety sensitive positions, he could work in an accommodated non-safety sensitive position (U-2; Union Exhibits; Tab 14).

17. CP and the TCRC held a return to work meeting for Mr. Rubino on March 15, 2016. The minutes of the meeting set out his restrictions and noted various scenarios which might assist Mr. Rubino in returning to accommodated work (U-2; Union Exhibits; Tab 18). CP and the TCRC later disputed whether they had come to a verbal agreement to allow Mr. Rubino to work in an office position in the Montreal terminal (E-1; Employer Brief; Paragraph 13).

18. In an accommodation case, the issue is not whether the employer and the trade union reach an agreement. The issue is whether CP's evidence demonstrates that it could not have accommodated Mr. Rubino without undue hardship.

19. Mr. Rubino had restrictions impacting safety sensitive positions, as well as others which could present challenges, including "Not always fully alert" and "Requires frequent supervision". The TCRC suggested this latter restriction related to the Conductor job description which had been attached to the return to work papers.

20. Benefits Specialist Mr. Pilon raised possible accommodation opportunities with CP managers. One involved work covered by the USW bargaining unit, but the evidence did not disclose whether anyone followed up on the need for a cross-union agreement (E-1; Company Brief; Tab 4(e)).

21. Another possibility concerned the Montreal office position which an accommodated employee had recently left to return to his full-time position (E-1; Company Brief; Tab 4(f)). A CP manager refused Mr. Pilon's suggestion:

> Look at the restrictions, Manon cannot monitor this guy, she has her own duties. At this time we cannot accommodate until his restrictions are much less and he can help. Wayne Sheppard was able to go outside and help out.

22. CP argued at paragraph 14 of its Brief there were two reasons why it could not accommodate Mr. Rubino in the Montreal office position:

> 1. The Grievor required frequent supervision which made the potential accommodation impossible given the Admin Assistant position is not designed to have direct reports due to the required workload and associated tasks.
>
> 2. The previous employee who was partially accommodated by providing assistance to the Admin Assistant was performing bundled duties by also working in the yard. The duties available to the grievor were not sufficient to constitute meaningful work and would have actually required additional resources to supervise the Grievor on a frequent basis as required by his restrictions placed on him by his Doctor and supported by the FAF.

23. CP concluded on April 6, 2016 that it could not accommodate Mr. Rubino in the Montreal office position (U-2; Union Exhibits; Tab 20). The TCRC grieved at Step 2 alleging a failure to accommodate. CP did not respond to the Step 2 grievance.

24. On April 25, 2016, CP sent a request to OHS to update Mr. Rubino's medical information, since the "frequent supervision" restriction may have referred to his safety sensitive conductor position (E-1; Company Brief; Tab 4(g)). On May 12, 2016, Mr. Rubino provided an updated Functional Abilities Form (FAF) (U-2; Union Exhibits; Tab 23). That FAF noted in part that Mr. Rubino could "tolerate infrequent supervision". CP's OHS nurse confirmed that "Mr. Rubino is fit to work in a non-safety sensitive position only" (E-1; Company Brief; Tab 4(i)).

25. On May 25, 2016 at 5:40 pm, Mr. Pilon wrote to a CP manager to inquire again about accommodating Mr. Rubino in the Montreal office position. The manager responded approximately 4 minutes later and indicated "We have nothing to accommodate these restrictions": (E-1; Company Brief; Tab 4(j)).

26. The TCRC advanced its grievance at Step 3 on July 28, 2016. CP replied to it on September 26, 2016 and denied there was ever an agreement to provide Mr. Rubino with the Montreal office position. CP further explained that it could not accommodate Mr. Rubino in that position since some of his restrictions prevented him from doing some of the duties the previously accommodated employee had performed (U-2; Union Exhibits; Tab 27):

> …The employee previously assigned to assist in that department had different restrictions that allowed him to perform other tasks in and around the yard and did not require frequent supervision. Grievor was not able to perform the same tasks.

27. In the October 2016 to January 2017 time frame, Mr. Rubino provided CP with further medical information. On January 23, 2017, OHS confirmed that Mr. Rubino's medical condition had shown marked improvement. His only limitation, even for safety sensitive positions, was a requirement to work daytime hours (E-1; Company brief; Tab 4(p)).

28. Despite this improvement, CP was unable to offer Mr. Rubino any accommodated work opportunities. On February 27, 2017, Mr. Rubino passed his rules requalification exam.

29. On March 10, 2017, Mr. Rubino resigned from his employment with CP.

CP did not fully respect its duty to accommodate

30. CP's evidence, while showing it respected its duty during part of the Period, did not satisfy this burden for the entire Period. Duty to accommodate cases are about evidence. As CP previously demonstrated in CROA&DR 4609, *supra*, that evidence can include the efforts made to find accommodated positions and attempted accommodations, even for limited periods. There is no absolute obligation to find a position. If that obligation existed, the analysis for these cases would be quite simple.

31. But in the absence of providing any actual accommodated work, the evidence will need to demonstrate that an employer made reasonable efforts to accommodate the employee up to the point of undue hardship: CROA&DR 3429.

32. CP's evidence did not demonstrate that it met this threshold from June 1, 2016 until Mr. Rubino's resignation on March 10, 2017.

33. The duty to accommodate includes not only filling existing positions, but also examining whether duties exist which might be bundled to provide a position for an employee requiring accommodation: CROA&DR 4273. This does not mean that a position with no value to CP must be created, but it does mean that CP needs to show what attempts it made to allow it to conclude that it had met the undue hardship threshold.

34. The arbitrator concludes that CP did not meet its burden. The evidence regarding the USW position did not explain why CP did not pursue this option. Similarly, CP's analysis for the Montreal office position, especially the second time, seemed summary at best.

35. For example, CP noted that the previous employee had been "performing bundled duties" (E-1; Company Brief; Paragraph 14). But rather than evaluating the duties Mr. Rubino might be able to perform, including possibly new bundled ones, CP

seemingly analyzed only whether Mr. Rubino could perform the same duties as the previously accommodated employee.

36. Neither did the evidence support the conclusions in CP's brief that the duties available to Mr. Rubino would not constitute "meaningful work" or that additional supervisory resources would have been needed. This might be true, but in the absence of evidence showing an evaluation of these issues, the conclusions remain unsupported.

37. Despite Mr. Rubino's situation improving in May 2016 regarding the need for supervision, CP's undue hardship conclusion appears to have been made in 4 minutes (E-1; Company Brief; Tab 4(j)). This did not allow the arbitrator to evaluate, first, what the specific "hardships" were and, second, whether they were "undue".

38. The arbitrator notes as well that Mr. Rubino's condition had improved dramatically by January 2017, but CP did not provide evidence explaining how it considered this important change when analyzing its continuing duty to accommodate him.

39. The arbitrator concludes, for reasons similar to those of Arbitrator Hornung in CROA&DR 4637, that CP's evidence did not demonstrate that it had reached the point of undue hardship when it failed to evaluate Mr. Rubino's specific circumstances for part of the Period.

Disposition

40. CP did not demonstrate that Mr. Rubino could not have provided useful services for the Montreal office position, even if only on a part time basis. The lack of analysis about his abilities, and whether the position could have been modified as it had been for the previously accommodated employee, prevents the arbitrator from concluding that undue hardship existed throughout the entire Period.

41. The arbitrator therefore orders CP to pay Mr. Rubino the compensation which he would have earned had he been allowed to fulfill the duties of the Montreal office position from June 1, 2016 to the date of his resignation in March 2017.

42. For the reasons set out in CROA&DR 4605, the arbitrator has not been persuaded that this is an appropriate case for damages in addition to the compensation already awarded.

43. The arbitrator remains seized for any issues arising out of this award.

August 2, 2018

GRAHAM J. CLARKE
ARBITRATOR