CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4713

Heard in Montreal, December 18, 2019

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal, alleging the Company failed to provide accommodation to Conductor M. Straka between the dates of September 5, 2018 until October 22, 2018 and November 9, 2018 to November 12, 2018.

JOINT STATEMENT OF ISSUE:

On September 5, 2018, Mr. Straka provided an updated Functional Abilities Form to Health Services. On September 11, 2018, a Fitness to Work Assessment (FTWA) was completed with the determination that Mr. Straka was Fit with Restrictions which included: Restrictions –for use of Medium Strength; Frequent use of Upper Limb, Frequent/Occasional use of Lower Body; All functionalities requiring rest breaks, and Occasional/Frequent ability for Walking/Climbing.

An updated FAF was requested of Mr. Straka by September 25, 2018 as a further update and clarification was required. Mr. Straka received confirmation that he was Fit for duty with Restrictions and these restrictions were not expected to change within 12 months. A return to work plan was created with input by both Union and Management; Mr. Straka began modified duties on October 22, 2018.

Union's Position:

The Union maintains that the Company failed to provide accommodation for Mr. Mike Straka 935108 relating to his disability as provided by the Company's Return To Work Policy, the Collective Agreement and the Canadian Human Rights Act and the wages associated under the Canada Labour Code Part III Section 132(5) between September 5, 2018 until October 22, 2018, and November 9, 2018 to November 12, 2018.

It is the position of the Union that the Company has acted in bad faith and in a discriminatory fashion in the handling of Mr. Straka. The Union contends that the Company has failed to accommodate Mr. Straka 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 Company has violated the Collective Agreement provisions, the RTW Accommodation Policy and process, the Canadian Human Rights Act and the wages associated under the Canada Labour Code Part III Section 132(5).

The Union's grievance is about the Company's failure to provide Mr. Straka a suitable RTW Accommodation. The Company did not from the September 5th date look for any accommodation/modified duties in order that Mr. Straka could earn a living and work towards a future of full employment.

Mr. Straka was available and ready for RTW Accommodation from September 5th, which the Company failed to accommodate him. He was also physically able for modified duties as per his Doctors information provided in FAF and additional questioning by OHS.
It is an obligation of the Company to provide accommodations to their employees up to the point of undue hardship as outlined in Canadian Pacific Railways Return to Work Policy.

The Union requests that the Company comply with the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act, and the Company's own Return to Work Policy and Collective Agreement.

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. Straka be made whole for his losses with interest due to the Company's breaches, during the period of times that the Company failed to provide any RTW Accommodations, and in addition to such other relief as the Arbitrator sees fit in the circumstances. Mr. Straka should not be penalized account CP's conduct.

<u>Company's Position:</u>

The Company maintains it has not acted in bad faith nor acted in a discriminatory manner. The Company has continued to work with the Grievor in ensuring that a proper return to work plan and accommodation was implemented in order to minimize any health or safety risk to the Grievor himself and his colleagues.

The Company cannot agree with the Union's argument that Mr. Straka should have been returned to active service based solely on his Doctor's findings. Further information was required for clarification, which was later provided to the Company from Mr. Straka's Physiotherapist. The Company has a requirement and a duty to ensure employees are fit and able to perform their safety critical duties.

The Company committed to creating a Return to Work Plan with the Union and Mr. Straka was able to return to work on modified duties on October 22, 2018.

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
<u>(SGD.) W. Apsey</u>	**<u>(SGD.) D. Zurbuchen</u>**
General Chairperson	Manager, Labour Relations

There appeared on behalf of the Company:

S. Shaw	– Senior Director, Labour Relations, Calgary
D. Pezzaniti	– Assistant Director, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, Smtihs Falls
J. Bishop	– Legislative Representative, Mactier

AWARD OF THE ARBITRATOR

1. In **CROA 4503**, Arbitrator Clarke outlines the kind of inquiry that needs to be undertaken when determining whether an Employer has fulfilled its duty to accommodate. He notes, *inter alia*:

> "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.
>
> *It is to be noted that the duty to accommodate does not include an absolute obligation to find a position. It does, however, require the Employer to demonstrate that it has made reasonable efforts to accommodate the employee up to the point of undue hardship (CROA and DR4609)."*

2. As noted in **CROA 4648,** duty to accommodate cases are about the evidence. The evidence, as it relates to the Company's attempt to accommodate Mr. Straka (the "Grievor") are as follows:

- On September 5, 2018 (Union Tab 5), the Grievor's physician completed a Functional Abilities Form ("FAF");
- Notwithstanding that FAF, on September 7, 2018, the Company's Occupational Health Nurse wrote to the doctor (Union Tab 6) and asked the redundant question: "Is Mr. Straka fit for modified duties involving only modified duties (as per page 6, page 3 of the FAF)?" The doctor responded: "Yes".
- The second question posed was with regard to the doctor's 6-week timeframe for the graduated return to work plan for the Grievor: "Does this mean he is fit for Regular Hours and Duties after 6 weeks?" The doctor responded: "Not sure – reassess 2 weeks to see if modifications

> can be increased as he returns to work”. The second question was also self-evident in that Doctor Zeindler noted in the FAF sent to the Company under part 7 that he would “reassess 2 weeks”.

3. In all events, the doctor provided his response by September 11, 2018. It was not until September 19, that Mr. Moloughney advised that a Return to Work (RTW) was not approved and that there was no accommodation available for the Grievor. The evidence reflects that the Company had, by that date, not canvassed any work outside of the Grievor’s field in an effort to accommodate him. On that same date, September 21, 2018, the Company Nurse advised the Grievor that a further FAF would have to be completed to ensure that there was no change in his condition.

4. Considering the delays, the Grievor sought the help of the Division Legislative Representative which led to Mr. Moloughney calling the Grievor and advising that he was to get another FAF from his physiotherapist which focused on the narrow question concerning his physical restrictions. On October 1, 2018 the physiotherapist completed the FAF and outlined precisely the same accommodations that were necessary as those set out by Dr. Zeindler approximately a month earlier.

5. After further delay, which I attribute to the Company, Doctor Zeindler provided further documentation (Union Ex. 10) confirming that he did not:

> “…anticipate further investigation or a change in treatment. While there may still be some improvement in functional abilities, there will likely be residual permanent restrictions”.

6. Even with that new information, it took the Company a further 10 days to prepare an RTW for the Grievor on October 19, 2018 which called for the commencement of his duties on October 22, 2018.

7. This accommodation only lasted until November 8, 2018 when the Grievor received a message from the Company sending him home and telling him that he could not return to work until he had an updated FAF. However, a review of Union Tab 13 reflects that the updated FAF was sent to the Union on October 30, 2018. On November 8, 2018, the Union met with the Company and the updated October 30th FAF was reviewed and the Company who then accepted the same. The Grievor was allowed to return to work on November 13, 2018, performing the same work he had been previously performing. He missed four further days of work as a result of the Company's uninformed decision to send him home on November 8, 2018.

8. The Employer argued that the Union had not proven discrimination in the present case. I disagree. I am satisfied that he was discriminated against on the basis of medical disability in being held out of work. As indicated in **CROA 3036:**

> "…it falls to the Company to establish, on the basis of balance of probabilities facts to demonstrate that it made every reasonable attempt to accommodate his disability short of undue hardship."

9. The absence of an RTW in place even after all of the necessary medical evidence was available to the Company represents an unacceptable delay. The repetition of questions and information that they required from the Grievor's medical sources are similar.

10. In this respect, I accept the comment of Arbitrator Picher in **CROA 4273** wherein he states:

> 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.

11. In the circumstances, I conclude that:

    i. The Union's grievance relative to the period of November 9 - 12 is allowed and the Grievor made whole;

    ii. The grievance relative to the period of September 5 to October 22, 2018 is allowed in part. Taking into consideration the Company's efforts to accommodate but also considering its unnecessary delay, the Grievor shall be made whole for his losses from September 19, 2018 to October 22, 2018.

12. I shall remain seized with respect to the application, interpretation and implementation of this award.

February 28, 2020

RICHARD I. HORNUNG, Q.C.

ARBITRATOR