

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4360

Heard in Montreal, February 10, 2015

Concerning

CANADIAN PACIFIC RAILWAY

And

UNITED STEELWORKERS - TC LOCAL 1976

DISPUTE:

The violation of article 23.7 (3) when placing M.M. on a permanent position and the refusal of the company to accommodate M.M.'s medical restriction.

JOINT STATEMENT OF ISSUE:

M.M. is an employee who has been requiring an accommodation for many years and has been accommodated on a suitable position. In December 2013, the Company did a rundown in the Crew Management Center. M.M. signified her preference in accordance with her seniority.

The Company refused to award her the position in accordance with her seniority and improperly placed her on an unassigned position, and refused a reasonable accommodation. M.M. has not been able to work since that time. The Union filed a grievance claiming that not only had the Company violated the *Canadian Human Rights Charter* regarding disabilities, and its Duty to Accommodate, the Company may have gone out of its way to punish M.M. for reasons that are unknown to the Union.

The Union contends that if the Company had not violated Article 23.7, had respected M.M. seniority, had placed her on her proper position, had conducted a proper accommodation process, then M.M. would not have been forced to seek medical care. It is also the Union's contention that the Company created and prolonged this issue without any possible justification.

The Union is requesting that M.M. be paid for all shifts that she has been forced to miss due to the Company's actions. The Union further requests that, if Manulife benefits are being paid to her, that the Company makes up the difference in wages as this situation is clearly the result of the Company's wilful violation. The Union further claims all benefits, seniority, wages, pension be paid or credited to her from the date of the violation until her return to work on her proper seniority based position. The Union further claims that she be paid interest as this was not an error but a deliberate action by the Company. The Union also claims that she be paid all out of

pocket costs and medical costs incurred as a result of time off work. The Union further claimed that the grievor be paid damages for her suffering during this period.

The Company did not reply to the grievance.

FOR THE UNION:

(SGD.)R. Summerside

Chairman Board of Trustee

FOR THE COMPANY:

(SGD.)

There appeared on behalf of the Company:

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| P. Ainslie | – Legal Counsel, Calgary |
| G. Parmar | – Senior Director Crew Management, Calgary |
| B. Medd | – Labour Relations Officer, Calgary |

And on behalf of the Union:

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| R. Summerside | – Chairman Board of Trustees, Calgary |
| N. Lapointe | – District Vice President, Quebec |
| M.M. | – Grievor, Calgary |

AWARD OF THE ARBITRATOR

1. I address first a jurisdictional matter the Company raises. It suggests Article 23.7(e) of the collective agreement provides an exhaustive resolution process for any alleged violation of Article 23.7. It says the process was followed and completed, therefore any allegation of such violation is not properly within my jurisdiction. Article 23.7 reads:

- (a) A position that requires a change in location, rate of pay, regular assigned rest days or hours of services involving change of more than one hour will not be bulletined. Such change will not become effective until the position has been filled; except that in case of emergency the change will be made and position be made available as soon as possible thereafter.
- (b) A position that requires a change per this clause 23.7 will not be bulletined as outlined in clause 32.1 but will rather be made available to permanent employees in the affected group in the office, center, department where the change occurs. The positions will be made available through a verbal rundown by local union and management or the LAC.
- (c) The Purpose of 23.7 is to ensure that all permanent employees remain with a permanent position within their affected group once the rundown is complete. All employees who are displaced must displace a permanent employee within the affected group.
- (d) As a result spare and unassigned employees will not be able to attain a permanent position as a result of the application of Article 23.7
- (e) Any disputes arising from the application of Article 23.7 shall be referred to the President of the Union and the Manager, Labour Relations for review.

2. The meeting described must occur to try to resolve any difference between the Union and the Company. But that meeting between the Union President and the Manager, Labour Relations is not exhaustive of the Union's entitlements under the collective agreement if those representatives of the parties do not come to a resolution. Their review is a necessary step, but failing agreement between them, the Union (and the individual employee affected by the change) would be entitled to grieve.

Background facts

3. The Grievor has not been well for some time. She is 53 years old, a long serving employee with almost 35 years service. She should be entitled to an unreduced pension on early retirement in August 2016. She is a Crew Dispatcher and has been since at least 1994.

4. In 1994 the Grievor was diagnosed to suffer from depression and a severe panic and anxiety disorder. She went off work sick. Working in Montreal at the time, she submitted a claim for workers' compensation, which was ultimately successful. She was on workers' compensation for some time. She returned to work for the Company in a timekeeping position in 1998, at the Company's head office in Calgary. This position was later abolished and she returned to crew dispatching, in Calgary. In 2005, following a reorganization, the Grievor was given a permanent Manitoba / Ontario crew dispatching position.

5. For several years the Grievor was able to cope with the normal stresses of her position, but she later required a medical accommodation to work 36 hours per week, working days only. The Company facilitated this.

6. In June 2013 another reorganization occurred. At the time the Grievor's medical restrictions were such that she could work 17 shifts (of the regular 20) in six weeks, or 85% of a full schedule. The Union proposed, on her behalf, that she be given what her seniority entitled her to, with the shifts she could not do being filled by unassigned employees. The Company initially rejected this suggestion. It proposed giving her an unassigned position. Although the Grievor had previously had some experience working the Saskatchewan desk, the unassigned position would have been onerous for her because it might have required her to do crew dispatch for territories other than Manitoba / Ontario, with much learning and familiarization, and her shift schedule would have been subject to sudden change. The Union anticipated that such an unpredictable position would exacerbate the Grievor's anxiety. The Union and the Company held further discussions. As a result, the Company agreed to maintain the Grievor's accommodation, with her working 85% of a regular day shift as a dispatcher for Manitoba / Ontario.

7. That continued until December 2013 when the Company initiated another operational change. Prior to the rundown, employees worked 20 shifts in a 42-day rotation (with the Grievor working 17 shifts). In the reorganization employees were to work a different shift arrangement. Pursuant to Article 23.7, above, all the jobs available were vacated and they were to be allocated on the basis of the senior qualified person choosing the position they wanted. The Grievor was amongst the most senior employees, and she was the most senior qualified for the positions she bid for. Her first choice was for MB2, her second choice MB1 – both crew dispatching for Manitoba / Ontario. These are permanent assignments (PAs) covering a particular desk or territory. The Company refused to let her take either position. The Company takes the view that the Grievor could not work a full schedule and, to accommodate her on a partial schedule, was an undue hardship for it because it would have meant that arrangements would have had to be made to replace her regularly, whenever her medical restrictions prevented her from working.

Employees junior to the Grievor were appointed to the MB2 and MB1 positions she was entitled to, but for her disability.

8. The Company placed the Grievor in a permanent unassigned (PU) crew dispatch position, PU4. The Company did so in the belief that her accommodation would be best served by her performing this position. However, as the Union had previously anticipated, the uncertainty inherent in a PU position caused the Grievor very severe anxiety. This is because the Grievor anticipated the following: a PU might be required to learn and work five additional dispatcher positions (for territories other than Manitoba / Ontario or Saskatchewan, with which the Grievor was familiar); although the Company has endeavoured to standardize the rules for the different desks, there are still different rules for the different territories and the Grievor would have had to learn the local calling rules for the new territories she might have had to cover. She would have had to learn and become familiar with new employee rosters and field managers, new seniority rosters, yard starts and yard extras, and with different train directions. She might also have had to work with many different rail traffic controllers, operations managers, and corridor managers. There would have been no guarantee of what work would be required on any given day, nor any guarantee of what days the Grievor would be called in to work. In contrast, the positions the Grievor bid on (and should, by rights, have got under Article 23.7) have a specific desk (in her case, Manitoba / Ontario), and she would have known her work schedule for a year ahead, subject only to another Company-initiated reorganization.

9. On December 26, 2013 the Union filed the grievances that are the subject of this award. They concern the Company's refusal to appoint the Grievor to the her preferred choices of MB2 and MB1, and the Company's failure to accommodate her disability.

10. The Grievor's treating physician provided a Functional Abilities Form (FAF) in January 2014. He recommended a specific accommodation, rather than describing the nature of the Grievor's restrictions and limitations. On January 22, 2014, a RTW meeting was held, and a draft RTWP (return to work protocol) was presented to the Grievor and the Union. She was offered accommodation as a PU employee, with shifts to be assigned in accordance with her doctor's recommended work schedule. The Grievor and the Union did not agree to the proposed protocol. Their reasons for not agreeing were those described above: the uncertainties inherent in the PU position were not addressed in the proposed accommodation and the Union and the Grievor anticipated the PU position would likely cause her considerable stress.

11. After the unsuccessful return to work meeting, the Grievor applied unsuccessfully for workers' compensation benefits in Alberta and, in March 2014, she was denied sickness benefits by Manulife, the benefits insurer. Manulife advised that "the medical and non-medical evidence received does not support a medical condition of such severe and ongoing nature as to prevent you from performing demands of modified duties provided by your employer."

12. The Grievor continued to see her treating physician and she remained away from work. She has not returned to work since January 27, 2014. The Company made efforts to meet with the Grievor during the period from January to August 2014 to investigate her absence, but she did not attend the scheduled meetings. Consequently, on August 22, 2014, the Company advised the Grievor that she was being removed from service pending an investigation into her absence from work. On August 24, 2014, likely in response to this advice, the Grievor's doctor informed the Company that she was unfit for any work, for an indefinite period. On September 16, 2014 the Grievor's doctor diagnosed her as suffering from a major depression. She continued to be totally unfit for work. On January 5, 2015 the Grievor's doctor gave a more optimistic report, indicating that the Grievor could return to work on suitably modified duties.

Findings

13. I have carefully considered the parties' submissions. I conclude from all the facts that, as of January 2014, the Grievor was capable of performing modified duties if she, the Union and the Company could have come to a suitable arrangement on what she could do as a crew dispatcher.

14. I do not find that the Company intended to punish the Grievor, or that it acted other than in a genuine effort to accommodate the Grievor. Consequently, there is no foundation for any claim for damages arising from the Company's failure to accommodate her.

15. Nonetheless, the Company's decision to offer the PU accommodated position to the Grievor was not, in my view, a reasonable accommodation. It met her need for her shift hours, and her need to work only days, but it failed to address her concerns regarding the predictability of her shift work schedule and the scope of the work. As a consequence, the proposal made by the Company in January 2014 created far greater uncertainty and instability for the Grievor, necessarily and predictably causing her great anxiety. She needed an accommodation that required the opposite: stability, certainty, predictability in her work, within the demands she was capable of performing. The Company's failure to make these additional accommodations, which would not have caused it undue hardship, violated its statutory and contractual duties to reasonably accommodate her.

16. Further, I find that the Company's current intended investigation of the Grievor's absences from work since December 2013 is detrimental to her health and to her recovery, and I

direct that the investigation cease. The reasons for her absence are manifestly from the Company's failure to properly accommodate her. No further investigation is required.

17. The Grievor was in attendance at the hearing. What became clear at the hearing, from my direct inquiries of the parties, is that the parties – the Company, the Union and the Grievor – are capable of determining suitable accommodation for the Grievor that can meet her medical needs and the Company's operational needs.

18. The Grievor needs to be better accommodated by the Company than has been the case since December 2013. She requires a stable, predictable work schedule, on days, so that she may know a long time ahead what work is expected of her. Stable work, known to her, and a regular shift schedule within her restrictions will facilitate her medical recovery.

19. The Grievor is now again fit to perform the work of a crew dispatcher. She is most familiar with doing so for Manitoba / Ontario, but she has experience also of doing it for Saskatchewan. I understand that the Company is able to ensure that her assignment as a crew dispatcher be restricted to these dispatch areas. If it is necessary for the Grievor to work beyond those areas, that is a matter for further consideration in consultation between the Company, the Union and the Grievor. She is capable of working a modified shift, subject to her doctor's recommendations, and her health will be best served by her knowing well in advance what shift schedule she will be working. I understand that the Company can provide her, as she would prefer, with a year-ahead schedule so that she can know what work will be expected of her. She needs to work straight days, which the Company is able to accommodate. The above requirements are within the Company's capacity, and they meet the Grievor's accommodation needs. It does not much matter whether her crew dispatcher designation is MB2 or MB1 or PU, so long as these conditions are met.

20. Accordingly, the Grievor is to return to work on the terms set out below and what has occurred since December 2013 is to be addressed as follows.

21. The Grievor has suffered financial loss as a result of her being out of work during the period since the grievances were filed in December 2013. I find, on all the evidence, that the Company could have accommodated the Grievor on a schedule similar to what she worked prior to the Company's reorganization then. To the extent to which she has not had other compensation, she is to be compensated (without loss of benefits, seniority, wages, pension) for the period when she was not at work on the basis of the work schedule she had previously performed, from the time of the filing of the grievances until August 23, 2014, when she became totally disabled.

22. The structure for the Grievor's accommodation is to be the following:

- a. the Company will ensure that the Grievor will act as a crew dispatcher for Manitoba / Ontario, with which she is very familiar and, if necessary, as a crew dispatcher for Saskatchewan, which the Grievor has done previously, provided, for Saskatchewan crew dispatching, she is given a reasonable opportunity for suitable re-familiarization;
- b. the Company will ensure that the Grievor works only days;
- c. the Company will provide the Grievor with a schedule that meets her medical needs (i.e. the number of shifts that she is able to work);
- d. if the Grievor's medical circumstances change, such that she can work more or less shifts, the Company, in consultation and agreement with the Union and the Grievor, will make the necessary adjustments to her shift schedule;
- e. the Grievor's shift schedule will be provided for a year in advance, so that she can confidently know what work will be expected of her, and when, subject only to changes in the Grievor's medical condition and bona fide organizational changes;
- f. it does not matter how the Grievor's position is characterized (whether as a PU crew dispatcher or a PA Manitoba / Ontario crew dispatcher) so long as the above conditions are satisfied.

23. The Company, the Union and the Grievor are directed to meet to determine an appropriate schedule for the Grievor, on the above basis. The Grievor is to have an updated medical report available for that meeting, with details of the medical restrictions under which she can work, so that the shift schedule she is to work can be structured around that report. Upon resolution of the schedule, the Grievor is to be returned to work forthwith.

24. I remain seized of the implementation of this award.

February 27, 2015



**CHRISTOPHER ALBERTYN
ARBITRATOR**