

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

CASE NO. 4382

Heard in Calgary, March 12, 2015

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Failure to accommodate Conductor D. C.

JOINT STATEMENT OF ISSUE:

D.C. was diagnosed with a brain tumor and booked off October 25, 2013 for surgery to remove the tumor. D.C. was cleared to return to modified duties. The Company did not provide D. C with any accommodation. D.C. was then cleared to return to full duties. The Company allowed D.C. one familiarization run as a Conductor and then pulled him from work. The Company stated it has no work for D.C. has not been allowed to return to work.

The Union contends that the Company has a duty to accommodate D.C. 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 acted in a discriminatory and arbitrary fashion in denying D.C. his return to work. 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 damages, an order that D.C. be accommodated and 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:

(SGD.) B. Hiller
General Chairperson

FOR THE COMPANY:

(SGD.)

There appeared on behalf of the Company:

P. Ainslie – Legal Counsel, Calgary
B. Medd – Labour Relations Officer, Calgary
S. Lang – Legal Counsel, Calgary

And on behalf of the Union:

K. Stuebing – Counsel, Caley Wray, Toronto
B. Hiller – General Chairman, Toronto
G. Edwards – General Chairman, Calgary

AWARD OF THE ARBITRATOR

The case is about the Company's duty of accommodation owed to the grievor after his return to work following surgery for a brain tumour.

The period of accommodation is limited from January to September 2014, as in September 2014 the grievor retired.

The grievor was a conductor who had worked for over 35 years in many positions including office and training jobs. The grievor worked out of Smiths Falls.

The grievor underwent surgery in October 2013. He was cleared for light/modified duties by his treating physician on January 15, 2014.

The grievor provided the Company Occupational Health Services (OHS) with his restrictions which included restriction from safety sensitive or safety critical work, driving or operating moving equipment or machinery.

Immediately, the Union followed up on the accommodation with various Company representatives, highlighting administrative positions that the grievor could do and no work was found.

In March 2014 OHS confirmed the grievor fit for safety critical duties and he worked as a conductor on a test run. He was quickly removed from service and advised that he could no longer perform safety critical duties and could not work alone; the latter restriction was not one that the grievor's doctors had applied but one that the OHS doctor determined was warranted.

The first search for accommodation was required in January 2014 and when asked by the Union, the Company responded that nothing was available. In March 2014 the Union indicated that the grievor was willing to work in Montreal or Toronto. The Company said it had no work available. The Company indicated that they had employees working in both locations in job bundled and administrative positions and others who were not being accommodated. The job of Field Plant Co-ordinator was identified but the Company indicated it had fallen through. The Union informed the Company in April 2014 that a required return to work meeting had not been conducted. In July 2014 the Company made its sole offer of accommodation for an intensive labour position as an Extra Gang Labourer which the grievor did not think appropriate and was concerned he would injure himself performing. In August 2014 when the Union became aware of a position in Toronto for a "line up improvement project", the Company responded that Toronto had approved someone for that job on a "temporary basis as a

study” and the position had been filled. It is not sufficient that a potential position was not investigated for the grievor and no explanation provided as to why it was given to someone else.

The Company was entitled to satisfy itself that the grievor could perform safety critical work. For the purpose of this determination, I need not decide whether the Company was entitled to insist on its restriction that the grievor not work alone. In any event, there is no dispute that the grievor was entitled to accommodation under the Canadian Human Rights Act. Having regard to the material presented, the Company has not persuaded me that it met its obligation to accommodate the grievor. It has not shown ongoing review and investigation of work opportunities or sufficient responses to the Union as to why certain opportunities presented were not further explored. Accordingly, the grievance is allowed.

The grievor is entitled to compensation for losses from the period January 15, 2014 to September 1, 2014. The Union asks that the calculation be remitted to the parties for determination. I remain seized in the event they are unable to resolve that matter.

Marilyn Silverman

March 20, 2015

MARILYN SILVERMAN
ARBITRATOR