CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4433

Heard in Toronto, January 12, 2016

Concerning

VIA RAIL CANADA

And

UNIFOR COUNCIL 4000

UNION'S DISPUTE:

There are two issues in this case. Firstly, the alleged failure by the Corporation in its duty to properly accommodate Mr. Ragot in accordance with the collective agreement and the *Canadian Human Rights Act* and in bad faith in altering the time slip he submitted in order to deprive him of potential benefits. The second issue is that the Corporation improperly discharged the Grievor contrary to the collective agreement and the Canadian Human Rights Act.

COMPANY'S DISPUTE:

The accommodation and administrative dismissal of Mr. G. Ragot from Via Rail Canada on October 8, 2014.

UNION'S EXPARTE STATEMENT OF ISSUE:

The grievor was an accommodated position off train in December 2013. He sustained a workplace injury and was off duty until April 2014. The grievor was authorized to return to work with the same restrictions he had in December 2013. The corporation refused to place him back on the accommodated position off train or seek any other meaningful alternative accommodated positions. He was placed out of service without wages, benefits or other means, and subsequently discharged stating the following: Corporation has exhausted all its obligations to reasonably accommodate you, you are hereby advised that your employment has been terminated as of October 8, 2014.

It is the Union's position that the grievor should have been allowed to return to the former accommodated position or alternatively he should have been found other accommodations within his medical restrictions. The Union also argued that the altering of the time slip was improper and set the Grievor back in terms of the benefits eligibility. Furthermore, the discharge is in violation of the collective agreement and the Canadian Human Rights Act.

The Union requested reinstatement with compensation for all losses including damages as outlined in the grievance procedure.

The corporation disagrees with the Union and declined the requested settlement.

COMPANY'S EXPARTE STATEMENT OF ISSUE:

Mr. Ragot, a Winnipeg on-board employee, was absent from work in due to a workplace accident from July 26, 2009 to July 2, 2013. On July 2, 2013 he returned to work at the Winnipeg station on light duties to accommodate his temporary restrictions.

On December 17, 2013, the Corporation wrote to Mr. Ragot, advising him that the Workers' Compensation Board of Manitoba (WCB) informed VIA that Mr. Ragot could resume his pre-injury duties on board the train. Via advised Mr. Ragot that his former position was available to him and did not contravene his permanent restrictions. Mr. Ragot declined to return to work.

In May 2014, Mr. Ragot requested workplace accommodation, based on new medical information supplied by his physician. Consequently, the Corporation began a review of the accommodation request with the Union to effect a suitable accommodation agreement for all parties. Mr. Ragot did not participate in the accommodation process and declined the offers of accommodation. Consequently, on October 8, 2014, Mr. Ragot's employment was administratively terminated from Via Rail Canada.

Mr. Ragot continued the appeal process regarding the WCB decision of December 2013 regarding his status with the WCB. His appeals to the Workers' Compensation Appeal Tribunal of Manitoba were ultimately and finally denied in a decision dated July 2, 21015.

It is the Union's position that the grievor should have been allowed to return to light duties or alternatively he should have been found other accommodations within his medical restrictions.

The Corporation maintains it made suitable accommodation job offers taking into account Mr. Ragot's personal functional limitations related to his work place injury and medical condition. The Corporation submits it exhausted all its obligations to reasonably accommodate Mr. Ragot. The Corporation submits the remedies requested by the Union are beyond the purview of the collective agreement.

It is the Corporation's position that it discharged its obligations, the administrative dismissal of Mr. Ragot was justified, and there has been neither a violation of the collective agreement nor any relevant laws in the termination of employment.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) R. J. Fitzgerald	**(SGD.) B. A. Blair**
National Representative	**Senior Advisor, Employee Relations**

There appeared on behalf of the Company:

B. A. Blair	– Senior Advisor Employee Relations, Montreal
L. Mayes	– Senior Manager CE West, Vancouver
E. Houlihan	– Director Employee Relations, Montreal

There appeared on behalf of the Union:

R. Fitzgerald	– National Staff Representative, Toronto
D. Kissack	– Unifor Regional Representative, Winnipeg
G. Ragot	– Grievor, Winnipeg

AWARD OF THE ARBITRATOR

This matter is about whether Via Rail Canada Inc. ('the Company") met its duty to accommodate Mr. Ragot ("the grievor") having regard to his permanent medical restrictions; and whether the Company was ultimately justified in terminating the grievor

because he was unwilling to accept what the Company submits were two offers of reasonable accommodation consistent with those restrictions.

Initially, the Union alleged that the Company had acted in bad faith by altering some of the grievor's time slips in December 2013. At the hearing, the Union made no submissions about the time slips at issue, nor did it raise any allegation of bad faith in respect of them. Since the Company explained how the time slips came to be changed as a result of a miscommunication, and the Union did not take issue with the Company's explanation, the Union's allegation of bad faith cannot be sustained.

I turn to a brief and undisputed chronology of the facts giving rise to the offers of accommodation and the grievor's participation in the accommodation process.

The grievor is a very long service on-board Company employee who suffered a workplace injury in 2009. At the time of his injury, the grievor held the position of Assistant Service Coordinator ("ASC"). As a result of his injury the grievor remained off work and in receipt of Worker's Compensation Board ("WCB") benefits through December 18, 2013. Prior to that, between July 2, 2013 and December 13, 2013 the Company provided the grievor with temporary modified work at the Winnipeg station to facilitate his return to work from Worker's Compensation.

On October 4, 2013, the grievor settled a complaint against the Company at the Canadian Human Rights Commission ("CHRC").

By letter dated December 10, 2013, the WCB informed the Company that the grievor was able to resume his pre-injury duties on board the train as an ASC. The grievor claimed that he had re-injured himself at the medical examination where that determination had been made.

Prior to the termination of the grievor's WCB benefits on December 18, 2013, the grievor informed the Company that he would be claiming short-term disability benefits. He received these benefits from December 16, 2013 through March 30, 2014 (and then applied for Employment Insurance and was topped up with short term disability benefits through July 19, 2014) based on the fact that the grievor's family physician had restricted him to sedentary duties on December 16, 2013.

On or about March 29, 2014, the grievor sought to return to work. The accommodation process was initiated, and the Company considered the issue of suitable accommodation for the grievor. Just prior to that, the grievor filed another CHRC complaint against the Company. On April 1, 2014, the grievor filed a grievance and sought to return to the temporary modified duties made available to him between July and December 2013.

In or about May 22, 2014 the grievor's family physician provided the grievor's chronic and permanent restrictions to the Company as follows:

- No bending or twisting of back and waist
- No exposure to vibration
- No repetitive movement or bending
- No pushing or pulling
- Request of being able to rest lay supine when pain exacerbation
- Walking for short distance only

- Standing less than 30 minute
- Sitting less than 30 minutes
- Lifting floor to waist less than 10 KG
- Stair climbing limited to 2 to 3 steps
- No ladder climbing

The Union agreed with the Company's assessment that, having regarded to the grievor's restrictions, an accommodation in the grievor's pre-injury bargaining unit would not be suitable. The Company offered the grievor training to become a Counter Sales Agent ("CSA"), a position outside the bargaining unit. The grievor said he would attend the training for the CSA position scheduled for June 17, 2014 but he did not attend.

On July 4, 2014, the grievor wrote to the Company. His view was that the Company's offer did not "encompass his abilities" nor had the Company "reached a place of undue hardship" considering his experience and education.

The Company arranged another opportunity for the training in respect of the CSA position on July 29, 2014, and a meeting was scheduled for July 22, 2014 for the grievor to meet with the Company to finalize an accommodation agreement in respect of the position. If the grievor's medical restrictions had changed he was to advise the Company. The grievor did not attend the meeting or inform the Company that he would not be coming.

On August 6, 2014, the Company wrote to the grievor, explaining that, while it appreciated that the CSA position identified (and which the Union had deemed a reasonable accommodation) was not in the grievor's view ideal, it was suitable considering his very limiting restrictions. The Company sought to set up a further

meeting on August 21 or 22, 2013, in an attempt to move the grievor's request for accommodation forward.

The following day, August 7, 2014, an unanticipated retirement of a full-time accounts payable/payroll clerk ("APC") created an opportunity for the grievor to consider. The Company immediately informed the grievor that the vacant position would be held for him and discussed at the August 21 or 22, 2014 meeting. The grievor did not respond to the Company's communication. The Union made itself available for attendance on either day. The offered meeting dates came and went.

On September 4, 2014 the Company contacted the grievor again. A meeting was set for September 23, 2014, and the Company reiterated its most recent offer of accommodation – the APC position. The Company reminded the grievor of the importance of his attendance, as well as his obligation to provide updated medical information if there was any. The Company explained that communication was crucial for the grievor to maintain his employment relationship with the Company.

Prior to the scheduled meeting, the Company contacted the grievor again, and reiterated the importance of his attendance at the meeting and his consideration of the two offers of accommodation for the positions that fit within his medical restrictions. Once again, the grievor did not attend the scheduled meeting or communicate with the Company about the positions that were being offered to him.

In the circumstances the Company wrote to the grievor on September 25, 2014, set out the undisputed chronology of events as described above, and confirmed that the grievor had been advised of the potential consequence of his failure to attend the meeting. The Company then informed the grievor of its intention to terminate his employment because in its view it had exhausted its obligations to reasonably accommodate the grievor.

The Company's September 25, 2014 letter prompted an e-mail response from the grievor. In it, he expressed dismay with the accommodation process since his injury in 2009. The grievor expressed the view that the offers of accommodation made by the Company were not appropriate positions for someone of his experience and someone who had demonstrated the passion he had for the Company.

On September 29, 2014 the grievor inquired as to why he had not been accommodated into a vacant supervisory position as an equipment maintenance foreman. The Company responded to the grievor's communication and explained that the supervisory position was neither administrative nor sedentary but was a very active position requiring physical work on and around trains that did not fit with the grievor's functional limitations. The grievor does not have any qualifications to perform, or experience in, equipment maintenance in any event.

On October 7, 2014, the grievor attended work unannounced and sought to resume his pre-injury position of ASC. He was not permitted to do so, because in the

Company's view, the grievor's pre-injury ASC position was inconsistent with the restrictions outlined above.

The following day the Company terminated the grievor.

Decision

At the hearing the Union suggested that there had only been one offer of employment based on a technical argument that the accommodation agreement for the APS position had not been formally written up and sent to the Union. That position cannot be sustained. A review of the material before me makes it clear that the grievor and his Union representative were well aware of the two offers of accommodation made to the grievor. The chronology of events as outlined above demonstrates that the grievor and his Union had in fact accepted the initial offer of the CSA as a suitable one and that the grievor had initially agreed to attend training in respect of that offer of accommodation.

Having regard to the grievor's restrictions, I accept, and it was not seriously challenged by the Union, that in offering to bring the grievor back to work in either the CSA position, or the APC position, the Company made reasonable offers of accommodation of the grievor's disability. Further, the grievor failed to cooperate with the Company's accommodation efforts. The grievor failed to understand that the Company was not obligated to offer him work that necessarily "validates his experience and passion." Nor did the grievor appreciate that in fulfilling its duty of accommodation,

the Company was not obligated to select an accommodation option that most closely brought it to the brink of undue hardship.

As the **CROA&DR** and general jurisprudence on the subject makes abundantly clear, it is incumbent on an employee seeking accommodation to contribute positively to the accommodation process and to accept an offer of reasonable accommodation. That is the case even though the accommodation fails to satisfy all of the employee's career aspirations and ambitions. As for "reaching a place of undue hardship" if the accommodation is reasonable, the issue of undue hardship does not arise. Finally, as the jurisprudence demonstrates, the Company's obligation to accommodate an employee does not necessarily require it to limit its exploration of alternative positions to the grievor's own bargaining unit (see **CROA&DR 4313**).

Having regard to all of the above, I am satisfied on the record before me that the grievor made it clear, by his actions, that he was unwilling to accept the Company's reasonable offers of employment.

The Company refers to its termination of the grievor as an "administrative" one. The Union disagrees with that characterization. The Union submits that his termination was disciplinary and that this issue is the crux of the dispute between the parties. The Union says that administrative terminations are exclusively restricted for cases when, by no fault of their own, an employee can no longer work due to medical reasons and is unlikely to be able to return to work.

In this case the Union says that since the grievor was not summoned to attend at an investigative interview to determine whether he was at fault or could explain what the Union refers to as the “behavioural irregularities” of missing two meetings and allegedly refusing an accommodation, the grievor’s discharge is a nullity. The Union relies on article 24 of the collective agreement between them and in particular article 24.6. The reference to “hearing” in this collective agreement refers to a disciplinary investigation.

Article 24 reads in part:

> 24.1 Discipline will be administered under the merit and demerit system. Merit marks issued will reduce proportionately the number of demerit marks in an employee’s record at the time of issuance.
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> 24.2 Employees will not be held out of service for minor offenses. Minor offenses are defined as offenses not involving suspension or dismissal.
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> 24.3 Reports submitted by employees will be used for the assistance of corporate officers in determining and evaluating the facts of the particular situation.
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> 24.4 Employees required to submit a written report will be advised of the reasons for the request and they will be allowed up to 48 hours to submit each report.
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> 24.5 Employees charged with allegedly having committed a major offense will be granted a fair and impartial hearing by the proper officer of the Corporation.
>
> 24.6 Employees, other than probationary employees, will not be suspended or discharged without a hearing.
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> 24.7 Hearings in connection with major offenses will be held as quickly as possible. The purpose of such hearings will be to establish and determine the actual facts upon which action may be taken as considered necessary by the Corporation.
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> 24.8 Employees may be held of service up to five days or one cycle of operation, whichever is greater, pending a hearing. Employees held out of service pending a hearing will be given at least 48 hours written notice of the charges against them (Saturdays, Sundays and general Holidays excluded).

> NOTE: all evidence shall be made available to the designated local representative of the Union at the Corporation's office at least 48 hours in advance of the hearing, if he so desires. This does not preclude the Corporation from submitting, unexceptional basis, additional evidence prior to the time of the hearing. The names and addresses of complainants or other witnesses may be withheld if considered necessary by the Corporation

The Union provided me with a number of disciplinary cases in the **CROA&DR** jurisprudence. Some comment on the importance of the disciplinary investigation process in the railway industry (see **CROA&DR 290, 1255, 2958, 3985 and SHP 719**). In addition, the Union provided me with **CROA&DR 3346** to support its assertion that employers are only entitled to administratively terminate employees when it can be shown that, with proper notice to the affected employee, a return to work is not possible or likely in the future.

I have carefully reviewed all the cases upon which the Union relies. None are remotely analogous to the one before me. **CROA&DR 290** is a 1971 case where the Company informed employees who were suspected of falsely reporting sick (a disciplinary offense) that they would be considered as having resigned if they did not produce evidence of their *bona fide* illnesses. In **CROA&DR 1255** an employee was dismissed because he did not attend at a disciplinary interview relating to his unavailability for duty as a result of his incarceration for manslaughter. In **CROA&DR 2958,** the employee was discharged for allegedly feigning illnesses and deliberately under-performing on training tests to avoid being called in to work. In **CROA&DR 3985** the grievor was issued twenty demerits for allegedly not following instructions resulting in a delay of train. In **SHP 719** the grievor was terminated for a positive post incident

drug test with no evidence of impairment and no believable explanation for the positive result.

In **CROA&DR 3346**, Arbitrator Picher found that the Company had not given injured employees notice of its intention to terminate them administratively. The employees had been off work on authorized leaves for years with no prospect of their return to work. Arbitrator Picher did not find that these employees were entitled to interviews as contemplated by the discipline process. However, before being terminated they needed to be afforded an opportunity to consider a return to work, either with or without accommodation.

None of the cases have any application to the case before me.

Article 24.6 relates to disciplinary sanctions and terminations. Contrary to the Union's submission, that clause has no application to the case before me. The cases referred to by the Union do not stand for the proposition that his termination ought to be treated as disciplinary in nature, thus giving rise to a right of the grievor to an interview to explain his non-cooperation in the accommodation process during which reasonable offers of alternative work were provided to him.

As for the specifics of the "behaviour irregularities" which the Union suggests should have been investigated prior to making a decision to terminate the grievor, none were described in the course of the hearing. The only reasonable conclusion to be drawn from the chronology outlined above is that the grievor was not interested in

participating in the accommodation process in a meaningful way. That is not what I would consider a behavioural irregularity, although again, I am not certain what the Union means by that term.

The Union's submission with respect to administrative terminations is not correct. The concept is not restricted to what the jurisprudence refers to as circumstances of "innocent absenteeism." Administrative terminations cover a broader scope than that.

CROA&DR 4313, submitted by the Company, is on point. It too involved an issue of accommodation. In that case, the Union took the position that the employer's dismissal of the employee was fatally flawed as there had been no investigation of the employee prior to his termination. The Arbitrator disagreed. He found that the employee was administratively terminated. Arbitrator Picher wrote, in part:

> Having endeavoured since the fall 2012 to find the grievor an appropriate position, without success, and in light of his refusal to entertain work outside of Capreol, on November 29, 2013 the Company determined that it had little alternative but to administratively terminate the grievor's employment.
>
> It is axiomatic that in the exercise to find reasonable accommodation there is a responsibility shared by the employer, the Union and the employee himself, or herself. On a review of the evidence before me I am satisfied that the Company made every reasonable effort to find the grievor accommodated employment, and that that effort was severely constrained by the grievor's refusal to work other than in Capreol. Nor can the Arbitrator ascribe significant weight to the grievor's wish to work exclusively within his own bargaining unit, it being effectively agreed that no work suited to his limitations could be found within the bargaining unit at Capreol. In the end, for reasons he best appreciates, employee A simply refused to accept the accommodated janitorial duties offered to him by the Company. While it may be that those duties were less than full time, it does not appear disputed that he would have had the benefit of a Great West Life top up and would, in any event, be better positioned to move to any other position at Capreol which might become available.

> In the result, I cannot find that the Company violated its duty to offer the grievor reasonable accommodation to the point of undue hardship, to perform work at Capreol consistent with his physical limitations. For reasons he best appreciates, the grievor simply insisted on establishing unrealistic parameters for the work which he would accept and ultimately frustrated the accommodation process by his own actions.
>
> For all of the foregoing reasons the grievance must be dismissed.

In the case before me, as in **CROA&DR 4313**, I am satisfied that it is the grievor who ultimately frustrated the accommodation process here and that by so doing the Company was justified in administratively terminating the grievor.

For all these reasons, the grievance is dismissed.

January 22, 2016

CHRISTINE SCHMIDT
ARBITRATOR