CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4493

Heard in Edmonton, September 14, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the Company closing the employment record/wrongful termination of Conductor Steven Stacey.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

February 22, 2016 Mr. Stacey receives a second letter stating; "In the letter dated January 8, 2016, you were advised of CP's intent to close your employment record. Please be advised that your employment file has been closed effective February 22, 2016. An additional 2 weeks was granted to allow for medical to be submitted; however, to date no new medical was received."

The Union's position is that the Company has wrongfully terminated/closed the file of a Steven Stacey. In doing so they have violated not only the Collective Agreement but as well as the *Canadian Human Rights Act*. The company in its letter of January 8, 2016 states; "The most recent medical information received deems that you continue to be medically restricted…..the company has concluded you will not be returning to active service." In the Company's Step 2 grievance response they state; "Mr. Stacey is not an active employee nor will he be returning to employment of CP". The fact is, Mr. Stacey is entitled to a duty of reasonable accommodation, to the point of undue hardship. Termination can therefore not occur unless it can be demonstrated at the point of termination that reasonable accommodation to the point of undue hardship is still not possible, and that there is no reasonable basis to believe that the employee will be able to return to meaningful service in the future. Mr. Stacey, to the Unions' knowledge, has never even had a meeting with all parties to move forward on the accommodation process. The Company is violating the Collective Agreement, the RTW policy as well as Mr. Stacey's Human Rights. Rather than follow the proper RTW process the Company has taken it upon themselves to close Mr. Stacey's file. Mr. Stacey's career should not be discarded because in the opinion of the Company, that he is unfit and that he had to submit a medical within a 2-week period. An arbitrary timeline imposed to serve the Company is unjust and unfair.

The Union requests that Mr. Steven Stacey's employment file be left open and the Company find suitable accommodation for him.

The Company disagrees and denies the Union's request.

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

There appeared on behalf of the Company:

B. Medd	– Labour Relations Manager, Calgary

There appeared on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairman, Smiths Falls

AWARD OF THE ARBITRATOR

Mr. Steven Stacey worked as a trainman with CP Rail. He was hired on in 2011 as a trainee at about thirty-five years of age. On May 22, 2014 the grievor was injured and developed significant back injuries. The grievor applied for and was found eligible for short term disability (weekly indemnity) benefits.

Mr. Stacey's family doctor completed a CP Functional Abilities Form as of June 11, 2014 confirming that the grievor was fit for modified or alternative duties showing significant limitations, the need for a graduated return to work schedule of four hours per day for four weeks, and an unknown prognosis for complete recovery.

On December 23, 2014, the grievor again attended at his family physicians and again obtained a completed Functional Abilities Form. The doctor's reply on this form indicated the grievor was immediately fit for modified or alternative duties, without a graduated return to work, but still subject to some, although less onerous, limitations. Significantly, at this point the physician reported that the grievor did not suffer from any

condition that could cause sudden impairment and was capable of performing the duties of a Safety Critical Position.

The Employer's brief says that after receiving the December 23, 2014 FAF report, "a return to work meeting was requested the next day for December 30, 2014; however after seven phone call attempts, the Company was unable to reach the grievor." No records were produced to back up these assertions, no logs, no confirmatory or follow up emails and no correspondence with the Union. I note that the phone calls are said to have been made (or at least begun) on Christmas Eve, for a proposed meeting the day before New Year's Eve.

In June 15, 2015 Mr. Stacey's physician completed another CP Functional Abilities Form with similar replies to the one completed the prior December.

Nothing in the materials placed before this arbitrator shows any effort by the grievor or the Employer to ascertain whether there was alternative work the grievor might be able to perform within his medical limitations, or whether any alterations might be made to his job duties to accommodate his remaining restrictions. Nothing shows the Union was in any way advised of the situation or asked to become involved.

On January 8, 2016 the grievor received the following letter from CP:

> A review of company records has determined that you have been off work for medical leave since May 11, 2014. The most recent medical information received deems that you continue to be medically restricted. Based on the current medical prognosis and length of absence, the company has concluded you will not be returning to active

> service. Please accept this letter as notice of the company's intent to close your employment record; your CP employment record will be closed effective February 8, 2016.
>
> If you have any new information about your current work restrictions please forward it before February 7, 2016. Should you choose to provide updated medical information, a Return to Work (RTW) package/Functional Abilities Form (FAF) has been included with this letter.
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> You will be entitled to severance in the amount of $1,103.34. This amount was calculated based on years of service and rate of pay per mile.
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> Should you have any questions, please contact Silvia Afonso at 416.297.3127.

The letter shows a cc to TCRC, although the Union's assertion is that it was never received. The Employer's brief says the Return to Work Manager also contacted the Union and provided them with the letter. Whether this was simply by mailing a copy of the letter or something more direct is not disclosed. Again, no records from the Return to Work Manager were put into evidence. Nonetheless, the Employer's brief recounts the following chronology:

> Grievor contacted the return to Work Manager on January 10th, 2016. On January 12, 2016 the Return to Work Manager advised Grievor that the Company's Occupational Health Services (OHS) has asked for updated medical information on more than one occasion. The Return to Work Manager stated that she would find out exactly what information he needed to provide to OHS and would call grievor back.
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> The Return to Work Manager called Grievor back, with no reply. After leaving three (3) voicemails for Grievor, she advised that she wouldn't be calling him anymore if he refused to respond.
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> Two (2) days later, Grievor finally phoned the Return to Work Manager back. Grievor was advised that he would need to submit a Functional Abilities Form (FAF) prior to the February 7th deadline. He was also advised that any other medical information (case notes, tests, etc.) since the June 2015 FAF needed to be submitted to OHS as soon as possible. Grievor agreed to provide the information and that he would do so immediately.

> The February 7, 2016 deadline passed and Grievor did not submit any information as instructed. The Return to Work Manager tried calling Grievor with no response.
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> The February 7, 2015 deadline to provide the updated medical information was extended until February 22, 2016.

Again, all this is by way of assertions in the Employer's brief without any supporting documentation from the Return to Work Manager or the OHS Department said to have been involved. There is nothing to indicate any further contact with the Union.

On February 22, 2016 the grievor received a further letter saying, in part:

> In the letter to you dated January 8, 2016, you were advised of Canadian Pacific's (CP) intent to close your employment record. Please be advised that your employment file has been closed effective February 22, 2016. An additional 2 weeks was granted to allow for medical to be submitted; however, to date no new medical was received.

The January 8th letter is devoid of any explanation for the Company's position. It does not say what medical restrictions present problems and why accommodation would be inappropriate or unduly burdensome. It says nothing about what it views the current medical prognosis to be, whether or how it considered the grievor's ability to return to work in the future, and on what basis it concluded the grievor would not be returning to active service. It makes no reference whatsoever to the (much) earlier request for a return to work meeting, nor did it suggest that such a meeting be held prior to the decision to "close the grievor's employment record" meaning terminate the grievor's employment.

An Employer can, in appropriate circumstances, dismiss an employee for innocent, non-culpable absenteeism. Arbitrator Paul Weiler has said:

> The first basic principle is that innocent absenteeism cannot he grounds for discipline, in the sense of punishment, for blame-worthy conduct. It is obviously unfair to punish someone for conduct which is beyond his control and thus not his fault. However, arbitrators have agreed that, in certain very serious situations, extremely excessive absenteeism may warrant termination of the employment relationship, thus discharge in a non-punitive sense. Because the relationship is contractual, and the employer should have the right, to the performance he is paying for, the employer should have the power to replace an employee on a job, notwithstanding the blamelessness of the latter. If an employee cannot report to work for reasons which are not his fault, he imposes losses on an employer who is also not at fault. To a certain extent, these kinds of losses due to innocent absenteeism must be borne by the employer. However, after a certain stage is reached, the accommodation of the legitimate interests of both employer and employee requires a power of justifiable termination in the former.
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> *Re U.A.W. and Massey-Ferguson Ltd*. (1969) 20 L.A.C. 370

A more recent leading case summarized the situation as follows:

> … in appropriate circumstances, innocent absenteeism can constitute just cause for dismissal. However, to accommodate the competing interests of the employer and the employee, arbitral jurisprudence has developed a twofold test. Briefly stated, the employer must establish (1) undue absenteeism in the grievor's past record, and (2) that the grievor is incapable of regular attendance in the future.
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> *Champion Road Machinery Ltd*. (1992) 25 L.A.C. (4th) 1 (Verity)

Brown and Beatty, *Canadian Labour Arbitration* – 7:6100 – Disabled Employees – describe the Employer's situation in dealing with employees chronically unable to perform the duties of their job. Significantly, after citing the test in *Champion* (*supra*) they added the requirement not to discriminate based on disability.

> When employers are faced with employees who, as a result of some infirmity or incapacity, are unable either to report for work on a consistent and regular basis or to perform the tasks expected of them,

> arbitrators have not left them without any remedy. To the contrary, in the absence of any limitations in the collective agreement, they have recognized the employer's right to insist on the benefit of its bargain and to require the employee to render those services which the agreement anticipates she will perform in return for her remuneration. Most fundamentally, where it can be established that (i) an employee's record of past absences is excessive and (ii) that there is no reasonable expectation that it will improve in the future then, unless the employer has waive its rights, and so long as it will not deprive those who are handicapped of their rights to sickness, disability and related benefits more than others, nor of their right not to be discriminated against that is guaranteed in both the Constitution and human rights legislation, employers can terminate their services on the grounds of innocent, non-culpable absenteeism. (*emphasis added*)

None of this is remotely new to the parties, since it is well canvassed in Arbitrator Picher's decision in **CROA&DR 3346**, a case cited by the Employer in its brief. Indeed, the Employer, in paragraph 29 asserts it has met the test in that case. Arbitrator Picher was dealing with the Union's right to be notified and involved in decisions of this nature. Arbitrator Picher begins his review (in 2003) noting the parties sophisticated attention to return to work and duty to accommodate issues. He then noted the three-party aspect of the duty to accommodate saying:

> It is now well established that disabled employees are owed a duty of accommodation to the point of undue hardship, now entrenched in section 15(2) of the *Canadian Human Rights Act*. It is also well settled, through the decisions of the Supreme Court of Canada, that the duty of accommodation involves not only the employer, but also requires the active participation of the employee and his or her trade union (*Central Okanagan School District No. 23 v. Renaud* (1992), 95 D.L.R. (4th) 577, [1992] 6 W.W.R. 193, [1992] 2 S.C.R. 970). If a trade union has an obligation to be involved in the accommodation process, an obligation which may perhaps include making allowances under the provisions of its collective agreement, it must surely have a corresponding right of notice to participate in any significant decision affecting the employment status of a disabled employee who is subject to the duty of accommodation.

After reviewing other decisions, the Arbitrator continued:

> This Office accepts that it may, in the proper circumstance, be appropriate for an employer to terminate an employee for innocent absenteeism, even though that individual may be disabled and be owed a duty of reasonable accommodation. In that circumstance, however, procedure is of the essence. As part of the continuing duty of accommodation it is essential that the employer make all reasonable efforts to verify, prior to the point of discharge, whether the person in question can be accommodated. Given the decision of the Supreme Court of Canada in Renaud, that inquiry necessitates reasonable notice to the employee and to his bargaining agent.
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> … that communication with the employee and his or her union is important not only to the extent that conditions may have changed for the employee. There may also have been changes within the workplace, whether by the introduction of new technology, different procedures, new vacancies or otherwise, such that the ability to accommodate the individual may have changed since his or her case was last considered.
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> … I am satisfied that in such a circumstance, as a matter of law, the proper course is not for the Company to discharge the employee and then make the inquiry as to whether their action was correct, but to give the appropriate notice in advance. That approach is also more in keeping with the collective bargaining regime to the extent that some individuals may be less able than others to advocate for themselves, particularly where their bargaining agent has been given no notice of their termination and no meaningful opportunity to engender the three party discussion about possible accommodation mandated by the courts.
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> The foregoing observations obviously do not stand for the proposition that a disabled employee can never be terminated for innocent absenteeism. This award merely confirms the fact that the disabled employee is, as the Brotherhood argues, entitled to a duty of reasonable accommodation, to the point of undue hardship, as long as he or she remains an employee. Termination can therefore not occur unless it can be demonstrated at the point of termination that reasonable accommodation to the point of undue hardship is still not possible, and that there is no reasonable basis to believe that the employee will be able to return to meaningful service in the future. (*emphasis added*)

The Employer here says it gave the grievor notice, although the lack of substance in that notice causes me concern. It also says it gave notice to the Union, although that fact was not established in any definitive way. What seems missing in the Company's

actions are what the notice is designed to precipitate. Arbitrator Picher described that as follows:

> The Arbitrator finds and declares that the Company was not entitled terminate the employment of any employees who were disabled within the meaning of the Canadian Human Rights Act, without first providing to the employees and to the Brotherhood reasonable notice of the Company's intention, affording both of them the opportunity to participate with the Company in a consideration, at that time, of whether a return to work, with or without accommodation, was then possible. Following proper notice, where it can be shown that such a return to work is not possible at that time or likely in the future, the employer will be entitled to close the employment file of the individual concerned. (*emphasis added*)

The underlined portions of the process were simply missing in this case. The Company's closing of the employment record is set aside. If it wishes to pursue the matter further, as it is fully entitled to do, it should arrange with the Union and the grievor such meetings as are necessary to explore the question appropriate for a non-disciplinary termination. The parties should bear in mind, based on the Supreme Court of Canada's decision in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal* [2007] 1 S.C.R. 161 that the grievor's situation must be looked at individually, even where the collective agreement or policies set certain presumptive periods of absence as sufficient.

As the Court said at para. 22:

> The importance of the individualized nature of the accommodation process cannot be minimized. The scope of the duty to accommodate varies according to the characteristics of each enterprise, the specific needs of each employee and the specific circumstances in which the decision is to be made. Throughout the employment relationship, the employer must make an effort to accommodate the employee. However, this does not mean that accommodation is necessarily a one-way street. In *O'Malley* (at p. 555) and *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 S.C.R. 970, the Court recognized that, when an employer

> makes a proposal that is reasonable, it is incumbent on the employee to facilitate its implementation. If the accommodation process fails because the employee does not co-operate, his or her complaint may be dismissed. As Sopinka J. wrote in *Central Okanagan*, "[t]he complainant cannot expect a perfect solution" (p. 995). The obligation of the employer, the union and the employee is to come to a reasonable compromise. Reasonable accommodation is thus incompatible with the mechanical application of a general standard. In this sense, the Union is correct in saying that the accommodation measure cannot be decided on by blindly applying a clause of the collective agreement.

I should say explicitly what is implicit in the comments above. Given the lack of detail given in the notice and the weak at best notice to the Union, I do not find the grievor failed to cooperate in a way that disqualified him from his rights to have accommodation explored more fully. He was not totally inactive and did respond to the contract by the MSO, although not with the speed or follow up she sought. She could have but obviously chose not to send the grievor and his Union in writing the details of what OHS needed. The grievor may well, with the assistance of his Union, moved with more alacrity to get a further Functional Abilities Form and whatever else was needed.

For these reasons, the grievance is allowed and the closure of the grievor's employment record set aside.

November 1, 2016

ANDREW C. L. SIMS
ARBITRATOR