CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4504

Heard in Montreal, October 13, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Grievance regarding the Company's failure to accommodate, and file closure of Conductor John Lunnin of Saskatoon, SK.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Mr. Lunnin became absent from work due to a verified medical condition on February 7, 2013. On July 8, 2015 the Company sent Mr. Lunnin a letter informing that his employment record had been closed, due to an alleged inability to rectify his situation under company policy and procedure. The Company did not fully engage in action concerning Mr. Lunnin's return to work or accommodation prior to the termination.

The Union contends the Company has failed to properly recognize the medical evidence supplied, and improperly terminated Mr. Lunnin's employment file as a result thereof.

The Union contends that the Company failed to fulfill its' duty to accommodate Mr. Lunnin's disability contrary to the terms of Article 85 of the Collective Agreement, the Company's Workplace Accommodation Policy, Return to Work Policy and the Canadian Human Rights Act. The Union further contends that the Company has failed to demonstrate that to do so would constitute undue hardship, which has resulted in discriminatory treatment in the instant matter.

The Union also contends the Company has dismissed Mr. Lunnin as a result of his medical condition, contrary to the Canada Labour Code.

The Union seeks an order that the Company has violated the above-cited Collective Agreement, policies and legislation. The Union further seeks an order that the Company cease and desist from these violations and that it be directed to comply with these provisions as described.

The Union seeks a determination that the Company has not, to this point, demonstrated that the employer cannot accommodate the grievor's disability to the point of undue hardship. The Union further seeks an order that Mr. Lunnin be reinstated to Company service, provided with suitable accommodation and made whole for all loss incurred, including wages and benefits.

The Company disagrees and denies the Union's request.

FOR THE UNION: **FOR THE COMPANY:**
(SGD.) D. Fulton **(SGD.)**
General Chairman

There appeared on behalf of the Company:
C. Clark – Assistant Director, Labour Relations, Calgary
J. Schmuacher – Manager Health Programs, Calgary
L. Page – Manager Disability Management, Calgary

And on behalf of the Union:
K. Stuebing – Counsel, Caley Wray, Toronto
D. Fulton – General Chairman, Calgary
D. McCulloch – Local Representative, Saskatoon
J. Lunnin – Grievor, Saskatoon

AWARD OF THE ARBITRATOR

Nature of the Case

1. This decision concerns the obligation of an employee being accommodated to provide updates about his/her medical condition. The parties differed somewhat whether this case concerned a file closure or a disciplinary termination.

2. The arbitrator has concluded that Mr. Lunnin did not respect his obligations to provide CP with medical information in support of his continued absence. Accordingly, CP was justified, given its multiple attempts to obtain that information, to end its accommodation process and close Mr. Lunnin's employment file.

3. These are the reasons for that conclusion.

The Duty to Accommodate

4. Duty to Accommodate cases require an examination of both the employer's duty to accommodate and the employee's duty to do his or her work. Part of an absent employee's duty includes providing proper medical evidence to an employer to justify the maintaining of an employment relationship, despite no services being provided.

5. The Supreme Court of Canada (SCC) has established a framework for duty to accommodate situations. The SCC's framework includes these guiding principles:

- the standard at issue in innocent absenteeism cases is one which requires an employee to perform services for his/her employer on a regular basis[1];
- to show that the attendance standard is reasonably necessary, the employer must show that the employee cannot be accommodated without undue hardship[2];
- Undue hardship does not require proving that further accommodation would be impossible[3];
- the duty to accommodate does not "completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration"[4];
- the employer's duty does not require changing the workplace in a fundamental way, but does include arranging "the employee's workplace or duties to enable the employee to do his or her work"[5];
- the employee and his/her trade union have an important role to play in the search for accommodation[6];

[1] British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 SCR 3, 1999 CanLII 652 (Meiorin)
[2] Meiorin at paragraph 54
[3] Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ), [2008] 2 SCR 561, 2008 SCC 43 at paragraph12
[4] Hydro-Québec at paragraphs 14-15
[5] Hydro-Québec, at paragraph 12
[6] Meiorin, at paragraph 65

- the employer's duty is discharged if an employee turns down a reasonable accommodation proposal[7];
- undue hardship is contextual and includes factors like cost, interchangeability of the workforce and facilities and interference with other employees' rights[8];
- the arbitrator's analysis must examine the entire period of the accommodation[9]; and
- the employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future[10].

6. The duty to accommodate places obligations on both the employer and the employee. CROA&DR 4273 provides a helpful description of an employer's obligations. In a unionized environment, the trade union also has a duty to be proactive and assist in the accommodation process. This may include modifying collective agreement rights, including those arising from seniority, in the search to accommodate an employee.

Chronology of Events

7. CP had been accommodating Mr. Lunnin since October, 2013 due to the latter's medical restrictions. When requested, Mr. Lunnin had been providing CP with Functional Abilities Forms (FAF) to support his continued absence.

[7] Central Okanagan School District No. 23 v. Renaud, [1992] 2 SCR 970, 1992 CanLII 81
[8] Meiorin, at paragraph 63
[9] McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal, [2007] 1 SCR 161, 2007 SCC 4 at paragraph 33
[10] Hydro-Québec, at paragraph 19

8. On May 12, 2014, CP wrote to Mr. Lunnin asking him to complete the FAF that its Occupational Health Services (OHS) had requested. CP noted that his employment record might be closed if he did not provide the FAF. CP copied TCRC's Local Chairperson on the letter. Mr. Lunnin complied with this request.

9. In October, 2014, OHS left two voicemails with Mr. Lunnin asking for an updated FAF. When Mr. Lunnin did not respond, OHS followed up with a registered letter dated October 28, 2014. OHS advised Mr. Lunnin of the possibility that his file might be closed if he did not provide an updated FAF.

10. Mr. Lunnin signed for the registered letter on November 15, 2014, but did not contact OHS. OHS spoke with TCRC's Local Chairperson who had not heard from Mr. Lunnin either, but thought he might be taking some schooling.

11. On May 19, 2015, CP initiated a process under article 70.01(1) of the collective agreement asking Mr. Lunnin to attend an investigation regarding his continued absence. When Mr. Lunnin did not attend, CP sent a second investigation letter on June 3, 2015. On June 25, 2015, CP sent another letter to Mr. Lunnin, this time by registered mail. CP forwarded a copy of this third letter to TCRC's Local Chairperson and General Chairperson.

12. On July 8, 2015, after Mr. Lunnin did not respond, CP sent a letter advising him that his employment record with CP had been closed. CP forwarded a copy of this letter to the TCRC.

13. The TCRC contested certain points about CP's process. First, while they had initially thought this was a file closure case, the TCRC suggested the use of article 70.01(1) in the collective agreement turned it into a disciplinary termination. Moreover, they indicated they had not been copied on all the correspondence CP had sent to Mr. Lunnin. The TCRC also raised the differences between the letters Mr. Lunnin received and those sent to other employees about whom CP had concluded that it had reached the point of undue hardship.

14. After the file closure, the TCRC in 2015 and 2016 provided CP with updated medical information about Mr. Lunnin.

Analysis and Decision

15. The arbitrator agrees with the TCRC that the file is not totally clear how CP approached this case. Was it an accommodation case or a disciplinary matter? The documentation could support both scenarios.

16. Despite that possible ambiguity, the arbitrator is satisfied that this situation remained an accommodation case throughout. For example, the language CP used in its

correspondence always referred to the closing of Mr. Lunnin's file. While CP relied on article 70.01(1) to obtain some explanation from Mr. Lunnin why he had continuously failed to provide any medical information, the arbitrator has not been satisfied that this changed the case into a disciplinary matter.

17. While copying the TCRC on all correspondence might have been an option available to CP, the record shows that TCRC representatives were aware of the issue of Mr. Lunnin ignoring CP's requests for information as far back as November, 2014. They similarly received notice on June 25, 2015, a couple of weeks in advance of the July 8, 2015 file closure.

18. This case focused, unlike other contemporaneous matters which examined whether accommodation had ended due to undue hardship, on Mr. Lunnin's failure to keep CP apprised of his medical situation. CP concluded that it could end its accommodation efforts and close Mr. Lunnin's file after its repeated attempts to obtain updated medical information had all failed.

19. The information which existed prior to July, 2015 that the TCRC raised in its spirited defence of Mr. Lunnin could all have been provided during CP's attempts to obtain further information. The explanations, including the fact Mr. Lunnin felt frustrated and was undergoing an employment insurance retraining program starting in September 2014, did not justify his complete failure to respond to CP's multiple requests for information.

20. The duty to accommodate does not apply only to the employer. The employee has significant obligations as well. For example, an employee may lose an entitlement to any further accommodation if he/she turns down a reasonable accommodation offer. Similarly, an employee loses the right to maintain an employment relationship, despite providing no services, by failing to provide the important medical information and updates an employer requires when managing an accommodated work scenario.

21. While the parties submitted numerous authorities in support of their positions, the arbitrator is satisfied that this situation of an employee not keeping an employer advised of his medical situation is comparable to the situation in CROA&DR 4276. That decision similarly upheld the closing of an employee's file for a failure to provide medical information to justify a continued absence from work.

22. For these reasons, the grievance is dismissed.

November 4, 2016

GRAHAM J. CLARKE
ARBITRATOR