CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4506

Heard in Montreal, October 13, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal of the termination of employment/file closure of Locomotive Engineer R. Kosteniuk, of Calgary, Alberta.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

On August 24, 2015 the Company terminated Engineer Kosteniuk's employment. The Company had advanced an extension for the receipt of additional medical information but did not adhere to the extension granted.

Medical information was provided to the Company which cleared Engineer Kosteniuk for full duties. Under threat of dismissal, Engineer Kosteniuk requested a time limit extension to obtain updated medical information due to his physician's absence, which extension was granted by the Company. The Company proceeded to terminate Engineer Kosteniuk's employment. A grievance was filed and the Company's response dated December 4, 2015 did not acknowledge the updated medical of September 2015 and restated: "the company has concluded that you are unable to substantially perform any job within the Company for the foreseeable future."

The Union contends the Company's conclusion is without foundation, cannot be maintained, and is reckless, given that supporting medical documentation establishes Engineer Kosteniuk is cleared for full duties without restrictions three months prior to the Company's Step 1 Response. The Company's actions are discriminatory.

The Union further contends the Company failed in its duty to accommodate Engineer Kosteniuk to the point of undue hardship when Engineer Kosteniuk had submitted medical information that he was cleared for modified duties immediately.

The Union contends the Company's actions in failing to fulfill its duty to accommodate Engineer Kosteniuk to the point of undue hardship and in terminating the Grievor's employment are discriminatory and violate the terms of the collective agreement, the *Canada Labour Code*, the *Canadian Human Rights Act* and company policies.

The Union requests Engineer Kosteniuk be immediately reinstated without loss of seniority and that he be made whole, including:

- Payment of lost wages with interest from the date a reasonable accommodation was available to the date of dismissal;
- Payment of lost wages with interest from the date of dismissal to the date of reinstatement;
- Payment of any benefits expenses incurred;
- Damages for loss of dignity in an amount to be determined for persisting in terminating Engineer Kosteniuk's employment in this circumstance;
- Payment of interest on all amounts.

The Company disagrees with the Union's request.

FOR THE UNION:
(SGD.) G. Edwards
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.)

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
G. Edwards	– General Chairman, LE, Calgary
B. Weber	– Local Chairman, Moose Jaw
R. Kosteniuk	– Grievor, Moose Jaw

AWARD OF THE ARBITRATOR

Nature of the Case

1. The Canadian Pacific Railway Company (CP) took the position that it had accommodated Locomotive Engineer Robert Kosteniuk to the point of undue hardship. Mr. Kosteniuk had been off work during the 2013-2015 period due to an injury. The TCRC commented on Mr. Kosteniuk's medical issues commencing in 2010.

2. In August, 2015, CP terminated its employment relationship with Mr. Kosteniuk on the basis that further accommodation would constitute undue hardship.

3. For the reasons which follow, CP did not convince the arbitrator that undue hardship existed on the facts of this case.

Undue Hardship and Innocent Absenteeism

4. Innocent absenteeism cases require an examination of both the employer's duty to accommodate and the employee's duty to do his or her work. The Supreme Court of Canada (SCC) has established a framework for these types of cases.

5. 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];

[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

- 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];
- 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. In CROA&DR 4273, Arbitrator Picher described the importance of the process in duty to accommodate cases:

> I agree with counsel for the Union that it was not sufficient for the Company to determine whether there were vacant positions into which the grievor could be placed. The duty of accommodation goes further, requiring the employer to consider whether various job functions can be bundled together to create a sufficiently productive accommodated position. Additionally, the obligation of scrutiny on the part of the employer, and for that matter on the part of the Union, extends beyond the bargaining unit and can encompass managerial responsibilities or work in relation to another bargaining unit, subject only to the limitation of undue hardship.

[5] Hydro-Québec, at paragraph 12
[6] Meiorin, at paragraph 65
[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

7. An arbitrator must examine the entire process, including the assistance provided by the trade union and the accommodated employee, plus the specific factual context, when deciding whether undue hardship exists.

Analysis and Decision

8. CP argued initially that the TCRC had not raised a *prima facie* case of discrimination.

9. CP's attendance standard impacts injured employees differently than other employees. The SCC examined accommodation in a comparable situation in *Hydro-Québec*. Similarly, the physical performance standard at issue in *Meiorin* had the effect of excluding most women from being firefighters.

10. The TCRC has raised a *prima facie* case of discrimination. CP can overcome this *prima facie* case by demonstrating that it accommodated Mr. Kosteniuk to the point of undue hardship.

11. CP has clearly tried to accommodate Mr. Kosteniuk. This is not a case of an employer simply concluding undue hardship exists, but without offering any evidence to support that conclusion.

12. The accommodation process involves protecting the specifics of an employee's medical situation, often via an Occupational Health department, while providing enough information about restrictions to allow an employer to conduct a thorough accommodation analysis. The record demonstrates an email search occurred for both open and alternative positions, both inside and outside the bargaining unit, which Mr. Kosteniuk might be able to fill (Company Brief; Tab 5). CP representatives had also met with TCRC representatives to explore return to work options, such as in March, 2015 (Company Brief; Tab 11).

13. During argument, the TCRC produced a document which seemingly showed a significant number of employees already being accommodated in Mr. Kosteniuk's region. CP had not indicated whether that specific situation impacted its ability to accommodate Mr. Kosteniuk, other than a general comment that opportunities differ by region (Company Brief; paragraphs 12-13). That contextual information is just one of the elements the SCC identified as being highly relevant to an undue hardship analysis.

14. Despite certain *bona fide* efforts, CP's accommodation process did not meet the SCC's requirements for undue hardship. The medical evidence consistently indicated that Mr. Kosteniuk could perform modified duties. But the search for work opportunities did not seem to focus on modifying the duties of any position or bundling various duties to allow Mr. Kosteniuk to provide work of value to CP. There is no obligation to create a position which provides little or no productive value.

15. In June, 2015, the RWS offered Mr. Kosteniuk flagging work and indicated that "this position is within your restrictions and when you get cleared to return to a Locomotive Engineer, you can go back to your regular position". Mr. Kosteniuk refused the flagging opportunity, on the basis that it "would impose an undue hardship upon my family, my health and my healthcare providers".

16. The parties did not debate whether this offer relieved CP of any further accommodation obligations. The record does not contain a lot of detail about the specifics of the flagging work.

17. On July 16, 2015, CP wrote Mr. Kosteniuk indicating it would be closing his employment record, but provided him a deadline of August 15 in the event he wanted to provide new information about his current work restrictions.

18. Mr. Kosteniuk had consistently responded to CP's requests for information and had provided multiple Functional Abilities Forms (FAF) as part of the process.

19. On July 28, 2015, Mr. Kosteniuk emailed the RWS indicating he understood from his GP and specialist that he would soon be able to return to his work as a locomotive engineer. The RWS granted an extension until September 1, 2015 so that Mr. Kosteniuk could provide updated medical information.

20. Prior to the deadline, Mr. Kosteniuk provided a new FAF from his GP. The FAF contains some helpful information, such as a positive response to the question “Complete Recovery Expected?”. Paradoxically, however, the FAF also contained a check mark beside the box “Permanently Restricted” and reiterated that “Should not operate moving equipment” due to physical impairment.

21. CP closed Mr. Kosteniuk’s file on August 24, 2015, which was prior to the agreed September 1, 2015 deadline.

22. In October, 2015, Mr. Kosteniuk provided CP with another FAF from his GP. CP refused to consider this post termination information and described it as denoting a questionable “miraculous recovery”.

23. The parties can debate in a future case how this Office should treat true post discharge medical evidence given the SCC’s comments on the subject[11] and subsequent case law. Since CP’s earlier accommodation process did not support a conclusion of undue hardship, that analysis does not need to be done in this case.

24. CP is not obliged indefinitely to continue to employ individuals who are unable to fulfill their duty to provide productive services. Both CP and its employees owe each other duties arising from the “employment contract”[12]. But CP bears the burden of

[11] Cie minière Québec Cartier v. Quebec (Grievances arbitrator), [1995] 2 SCR 1095, 1995 CanLII 113

[12] The SCC in *Hydro-Québec* referred to the “employment contract” in a general sense for a Civil Law case, though the specific situation involved an employee governed by a collective agreement.

demonstrating why it could no longer accommodate a disabled employee due to undue hardship.

25. CP did not meet that burden in this case for the reasons expressed.

26. The grievance is allowed. CP shall reinstate Mr. Kosteniuk as an employee forthwith. The arbitrator reserves jurisdiction regarding any other remedies.

November 4, 2016

GRAHAM J. CLARKE
ARBITRATOR