

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

CASE NO. 4588

Heard in Montreal, October 11, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The dismissal assessed to Locomotive Engineer M. Windsor of Toronto, Ontario.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following a formal investigation, Mr. Windsor received a form 104 stating "...Please be advised that you are dismissed from Company service as you have breached the bond of trust necessary for continued employment based on your prior discipline history and the culminating incidents between January 1, 2016 and March 13, 2016, a violation of Bulletin No. SO-011 Attendance Management."

The Union contends that the discipline assessed Mr. Windsor is excessive, unwarranted and is in violation of the Canadian Human Rights act and Canadian Pacific's own policies regarding Discrimination and Harassment (Policy 1300) and workplace accommodation (Policy 1501).

Mr. Windsor is a long service employee of approximately 27 years. He is and has been a single parent for approximately 7 years. During these past several years, Mr. Windsor had been accommodated as a single parent with the ability to book off to tend to the needs of his son and to comply with court ordered familial obligations. Mr. Windsor continues to attend court almost monthly to continue with challenges brought against him as it relates to custodial agreements and such. The Company for its part, had been accommodating to Mr. Windsor with an agreement that saw him able to book personal provided he wrote to a designated list of Company officers informing them of his needs.

This process worked well and Mr. Windsor was able to tend to the needs of his child while also being able to earn a living at the Railway.

In the spring of 2015, Mr. Windsor was off on Doctor's orders and was absent from work for approximately two months. When authorized to return through OHS, a return to work meeting was convened at the Company's request. It was at this meeting that the Company informed Mr. Windsor that the accommodation he had no longer existed as of that point forward. Mr. Windsor was instructed to reapply for an accommodation if he felt he needed to be accommodated. He did so prior to leaving that meeting and has yet to be granted an accommodation or been denied an accommodation.

The Union contends that in order for Mr. Windsor to breach the bond of trust, there had to be trust. The Company had not shown Mr. Windsor trust since unilaterally and arbitrarily revoking his accommodation. To do this to a single parent is in contravention of the Canadian Human Rights Act as well as CP has been discriminatory in its treatment of Mr. Windsor.

The Union seeks to have Mr. Windsor re-instated into his employment. That he be made whole for all wages and benefits lost and, that Mr. Windsor be accommodated in order that he comply with his court ordered familial obligations and that the Company cease and desist from knowingly discriminating against Mr. Windsor, a single parent. In the alternative, the Union requests that the discipline be substituted for such lesser penalty as the Arbitrator sees fit.

The Company considers the discipline assessed as appropriate and that it met its burden of proof.

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

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

D. Guerin	– Senior Director, Labour Relations, Calgary
K. Giddings	– Manager Diversity and Inclusion, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Campbell	– General Chairman, Peterborough
W. Apsey	– General Chairman, Smiths' Falls
M. Windsor	– Grievor, Peterborough

AWARD OF THE ARBITRATOR

Nature of the Case

1. On April 7, 2016, CP terminated Locomotive Engineer Michael Windsor, an employee with 27 full years of service, for attendance reasons. TCRC alleged CP failed to accommodate Mr. Windsor on the ground of family status.

2. The parties did not dispute that Mr. Windsor had been accommodated in the past. His need for accommodation arose because of various special challenges related to his having sole custody of his child.

3. For the following reasons, the arbitrator has concluded that what should have been an ongoing issue of accommodation, with a limit only at the point of undue hardship, inexplicably morphed into a disciplinary attendance matter. Mr. Windsor will be reinstated into his employment with full compensation.

Facts

4. At the hearing, the arbitrator allowed the TCRC to introduce significant context explaining Mr. Windsor's situation. But the current decision is limited to those issues which were raised in the TCRC's ex parte statement, as cited above.

5. CP had accommodated Mr. Windsor based on family status in the past. CP, TCRC and Mr. Windsor had negotiated an agreement in 2011 setting out the parameters of the accommodation. Mr. Windsor could use personal days when he needed accommodation. However, the agreement also required Mr. Windsor to meet certain attendance standards. The agreement accommodated Mr. Windsor's family needs, while also making it clear he had a continuing duty to attend and perform work for CP.

6. In or about 2014, CP required that Mr. Windsor reapply for accommodation. CP commented at the hearing that the agreement had been cancelled because it was not working, but that was the extent of the analysis provided.

7. On February 22, 2014, Mr. Windsor reapplied for accommodation. Mr. Windsor then provided some background information to CP, a lot of which CP had already received in the past, such as court orders. CP also requested information on Mr. Windsor's attempts to self-accommodate.
8. CP and Mr. Windsor exchanged correspondence several times, though the amount and sufficiency of the information provided remained in dispute.
9. From January 1 to March 13, 2016, Mr. Windsor worked only 2 round trips for CP over 72 days. During this time, Mr. Windsor booked sick or unfit, even though he did not always meet the collective agreement's requirements for these specific leaves.
10. Mr. Windsor did advise CP staff that the reasons for these leaves arose from his parental responsibilities. He had previously used personal days for these matters under the earlier accommodation agreement, but no longer had access to that regime.
11. On March 14, 2016, CP investigated Mr. Windsor's attendance and his use of both sick days and unfit for duty leave inappropriately. On April 7, 2016, CP terminated Mr. Windsor based on his attendance and prior record.

Analysis and Decision

12. This Office has often examined the guiding principles governing the duty to accommodate: see, for example, [CROA&DR 4503](#). An employee's parental responsibilities may have to be accommodated: [Canada \(Attorney General\) v. Johnstone, 2014 FCA 110](#).

13. But accommodation is not a one-way street; an employee has an obligation to provide updated information as part of the process: [CROA&DR 4505](#).

14. In the instant case, there seems to have been a breakdown in the accommodation process, a process which at times may be tripartite in nature.

15. Mr. Windsor, CP and the TCRC had succeeded in the past in negotiating an accommodation agreement. That agreement acknowledged that there were limits to accommodation. Mr. Windsor was not entitled to a perfect accommodation and remained obligated to provide useful services to CP.

16. CP needed to accommodate Mr. Windsor, but not beyond the point of undue hardship. The TCRC, while having an obligation to assist Mr. Windsor, may also have to evaluate to what extent an accommodation impacts the legitimate interests of others in its bargaining unit.

17. No one disputed when negotiating the original agreement that Mr. Windsor required accommodation. What remained unexplained in this case is why CP terminated that accommodation, when Mr. Windsor's personal circumstances seemingly had not changed.

18. CP did not argue, beyond the comment at the hearing that the agreement was "not working", that it had reached the point of undue hardship. Neither did the facts show that CP had cancelled the existing accommodation due to an alleged failure on Mr. Windsor's part to provide relevant and essential information about his situation.

19. Instead, the accommodation was cancelled first and then Mr. Windsor was asked for information.

20. CP can evaluate an ongoing accommodation and verify whether circumstances may have changed. It may also request updated information to support an ongoing accommodation, especially if it has concerns about an employee's attendance.

21. But CP did not convince the arbitrator that a fundamental change had occurred which entitled it to end the accommodation and then require Mr. Windsor to start the process over from scratch.

22. Indeed, the essential facts remained that i) Mr. Windsor continued to be the sole custodial parent, ii) his child remained a young minor, iii) the other parent had certain

issues, including being unable to drive, which increased Mr. Windsor's responsibilities and iv) Mr. Windsor continued to have court proceedings, though the frequency of those was not clear on the evidence.

23. The arbitrator concludes that CP's unilateral decision to terminate the negotiated accommodation agreement contributed to the later issues which arose between the parties. CP had a duty to accommodate, but did not abide by it. This conclusion entitles Mr. Windsor to a remedy.

24. Mr. Windsor might have been more forthcoming in providing information to CP, or confirming that nothing had changed. His decision to claim collective agreement leaves to which he had no entitlement was certainly not helpful. But the arbitrator can understand how some of those things might have occurred due to the unilateral and unexplained cancellation of an existing accommodation arrangement.

Remedy

25. The arbitrator declares that Mr. Windsor has an ongoing need for accommodation for family status reasons. CP failed to provide proper accommodation. CP shall reinstate Mr. Windsor into his position with full compensation. Following Mr. Windsor's reinstatement, the parties shall meet to discuss his accommodation needs. Mr. Windsor will furnish CP with the appropriate and relevant information related to these accommodation needs.

26. TCRC also asked for an award of damages. CP objected that the TCRC had never asked for damages originally and that this precluded the arbitrator from awarding them.

27. The arbitrator has decided not to award damages in the specific circumstances of this case, but confirms that the remedial jurisdiction to do so exists, as has occurred in other recent cases: see, for example, [CROA&DR 4573](#) and [SHP 713](#).

28. There is a difference between raising a new issue too late in the CROA process and the range of remedies available in human rights matters. In CROA arbitrations, an arbitrator will not decide any new issues which had not been previously raised and discussed between the parties during the pre-arbitration stages: [CROA&DR 4263](#). It is simply unfair to raise novel issues at arbitration.

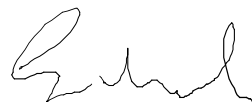
29. But an arbitrator's jurisdiction to award damages for human rights cases comes from statute, and is in addition to the terms of the parties' collective agreement and the [Memorandum of Agreement](#) setting up CROA. The TCRC clearly referred to the *Canadian Human Rights Act* in its October 13, 2016 grievance.

30. CP did not convince the arbitrator that the various remedies available under labour and human rights statutes can only be awarded if the TCRC has explicitly spelled them out in its grievance. Nothing prevents the parties, of course, from asking for particulars about the specific remedies requested.

31. While the arbitrator could award damages, the remedy in this case will not go beyond the full redress already provided. CP should not have unilaterally cancelled the accommodation arrangement. However, Mr. Windsor could have been more forthcoming in providing or updating information. For example, if he did attend court 2-3 times per month, it was not unreasonable for CP to request confirmation of the dates of those appearances. Similarly, his daycare arrangements may well be relevant to monitoring an ongoing accommodation.

32. The arbitrator allows the grievance and orders that Mr. Windsor be reinstated with full compensation. The arbitrator retains jurisdiction should any issues arise about the calculations for this compensation, including for any amounts Mr. Windsor earned while away from CP.

November 2, 2017



GRAHAM J. CLARKE
ARBITRATOR