

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

CASE NO. 4611

Heard in Montreal, January 11, 2018

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Union advanced an appeal of the termination to Locomotive Engineer [X] of Cranbrook/Fort Steel, B.C.

THE UNIONS'S EXPARTE STATEMENT OF ISSUE:

Engineer [X] was on sick leave from June 13, 2016, the Company closed his file three months later. During this period, Mr. [X] was suffering from a bona fide illness which he was being treated for in the form of medication by his Physician. As a result of this treatment, Engineer [X] was unable to perform his duties while under his medical care. His Physician did provide a return date of September 1, 2016.

The Union contends that during the period of June 13, 2016 up to the point that the Company decided to close his file, Engineer [X] qualified for and received weekly indemnity benefits. The Company was well aware that that Engineer [X] was suffering from an illness that qualified him for benefits, nevertheless, the Company chose to close his file August 9, 2016 just prior to his return date of September 1, 2016.

The Union further contends there is no record of the Company engaging in any job search or return to work process prior to unilaterally closing his employment file. This omission by the Company is disingenuous, grossly unfair and a violation of Engineer [X]'s basic human rights. A thorough review of this case has revealed that the Company has failed to fulfill its' duty to accommodate Engineer [X] and has implemented an improper and unfair termination of his employment.

By dismissing Engineer [X] from employment, the Company has violated the Collective Agreement including, inter alia, Article 41, the Canada Labour Code, the Canadian Human Rights Act, and its own policies and procedures, including, but not limited to: Failure to fulfill its' duty to accommodate the Grievor's disability to the point of undue hardship; Violating the Company's Return to Work Policy by demonstrating a callous disregard for his updated return date.

The Union further contends that the sole reason that prevented him from returning to work was his medical condition. The Union contends that the Company's unprecedented conduct in the course of closing Engineer [X]'s file is unsupported by the Collective Agreement

and contrary to the reasonableness requirements on the Company's exercise of managerial rights.

The Union requests that Engineer [X] be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company has denied the Union's request.

FOR THE UNION:
(SGD.) G. Edwards
General Chairman

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

D. Pezzaniti – Manager, Labour Relations, Calgary
C. Clark – Assistant Director, Labour Relations, Calgary

And on behalf of the Union:

A. Stevens – Counsel, Caley Wray, Toronto
G. Edwards – General Chairman, Calgary
H. Makoski – Vice General Chairman, Winnipeg
D. Fulton – General Chairman, Calgary
W. Apsey – General Chairman, Smiths Falls
[X] – Grievor, Cranbrook

AWARD OF THE ARBITRATOR

Nature of the Case

1. During the January 11, 2018 hearing, the arbitrator suggested that the parties attempt to resolve this grievance. Despite their best efforts, the parties advised on February 6, 2018 that they required a written award.

2. Locomotive Engineer (LE) X had worked for CP for over 36 years. By letter dated August 9, 2016, CP closed X's employment record for being absent from work and for failing to contact CP despite multiple requests. In CP's view, X's failure to return calls and attend three (3) properly scheduled investigations concerning his unauthorized absence from the workplace justified the employment record closure.

3. The TCRC argued that CP exercised its management rights unreasonably when it closed X's file. In its view, CP had learned that X had applied for Manulife disability benefits and had in fact been approved for them prior to the August 9, 2016 employment file closure date. In the circumstances, CP therefore had a duty to accommodate X and return him to active employment once his health permitted.

4. For the reasons set out in this award, the arbitrator orders CP to reinstate X in his employment without compensation, but without loss of seniority. The arbitrator retains jurisdiction over further remedies which may include measures relating to X's entitlements as a long-term employee for pension and early retirement programs.

Facts

5. CP had earlier reinstated X because of an award of this Office. Following X's reinstatement, he began the process to requalify as an LE. That process included medical testing, as well as rules and requalification classes. After requalifying as an LE, X took vacation.

6. When X's vacation ended on June 13, 2016, and as he was about to be added to the employee pool, he called CP's Crew Management Centre (CMC) and booked himself sick. This took him off the list of available employees. CP speculated that X's desire to return to work was designed to take advantage of an early retirement opportunity (E-1; CP Submissions; Paragraph 47).

7. If an employee is off for more than 72 hours, then CP requires a Functional Abilities Form (FAF) to assist it with its return to work and accommodation processes.

8. On July 6, 2016, X applied for short term disability benefits (STD) from Manulife (U-1; TCRC Submissions; Tab 3). CP filed its portion of the application with Manulife shortly thereafter.

9. CP managers attempted to contact X using his contact information on record. At the hearing, the TCRC played three voice mail messages that CP's managers had left on June 16, June 23 and July 18, 2016. Despite receiving the messages, X did not contact CP.

10. CP attempted to schedule an interview with X in accordance with the collective agreement (E-1; CP Submissions; Tab 10). CP sent three investigation letters to X. Apparently, the courier service CP used did not leave a notice for the recipient advising of the attempted delivery. Two of the three letters were ultimately returned to CP. However, the evidence showed that X received one of the letters convening an investigation.

11. By letter dated August 4, 2016, Manulife approved X's STD benefits (U-1; TCRC Submissions; Tab 6). CP claimed that an administrative error had occurred, and that X ought to have been ineligible for STD, since he was absent without leave. In any event, Manulife clearly considered the medical evidence and approved X's claim.

12. CP closed X's employment file on August 9, 2016 following its multiple efforts to contact him. CP was aware of the Manulife STD application and approval prior to closing X's employment file (U-1; TCRC Submissions; Tab 8).

Analysis and Decision

13. In an earlier award, a different CROA arbitrator replaced a termination with 20 demerit points for X's "conduct unbecoming". That arbitrator noted the following regarding each side's position:

Unfortunately, the conflict has been permitted to percolate through the grievance procedure and to arbitration. The Union and the grievor have failed to acknowledge the grievor's culpability, and the Company has refused to consider a less harsh response than termination, which is clearly an excessive disciplinary reaction in all the circumstances of the case. The Company appears to have appreciated this to a certain extent, albeit late in the game, when it reinstated the grievor weeks before the scheduled arbitration. The Union and the grievor have yet to demonstrate an understanding of the seriousness of the grievor's misconduct.

14. The arbitrator finds a similar sentiment applies to this case. Each party bears a certain responsibility for a situation which resulted in the end of employment for a long service employee.

15. CP argued that this is not an accommodation case, since the TCRC could not demonstrate any *prima facie* discrimination. Rather, in CP's view, X was absent without leave. His Manulife application showed he could have kept CP up to date on his

situation. Instead, he took no initiative to do so and further ignored CP's multiple attempts to communicate with him.

16. CP relied on [CROA&DR 4276](#) which upheld a decision to close an employment file after a grievor, who had been on a medically approved leave of absence, failed to communicate with the employer after that absence had ended.

17. The TCRC emphasized that CP knew of X's medical situation and of Manulife's decision to approve STD benefits prior to the employment file closure. As a result, it requested X's reinstatement with full compensation.

18. The arbitrator finds neither position fully persuasive.

19. As [CROA&DR 4276](#) showed, an employee can avoid the closure of his/her file due to abandonment by communicating with the employer. A failure to communicate, even in a situation which may involve the duty to accommodate, can result in the end of the employment relationship: [CROA&DR 4504](#).

20. For whatever reason, X decided to ignore CP. CP demonstrated that X, as a long service employee, knew and had followed in the past his reporting obligations (E-1; CP Submissions; Tab 14). Moreover, X received CP's phone messages. Similarly, despite being very hard to reach, X still received one of CP's investigation letters.

21. CP had made appropriate efforts to communicate with X and had also asked the TCRC for its assistance in contacting him (U-1; TCRC Submissions; Tab 8). Despite all of this, X made no effort to communicate with CP. CP's actions must be analyzed based on what it knew at the time it made its decision, rather than on what it might have known had X responded.

22. However, unlike in cases like [CROA&DR 4276](#) and [CROA&DR 4504](#), CP was not totally in the dark about X's situation. About a month prior to the closure of the employment file, CP knew that X had applied to Manulife for STD benefits. The arbitrator finds unconvincing the suggestion that a procedural error had resulted in CP filing the employer portion of the Manulife application. CP further knew prior to its August 9, 2016 file closure letter that Manulife had considered the medical evidence and approved X's STD benefits.

23. Given this factual situation, and despite X's conduct, the arbitrator has concluded that a 36-year employee like X should be reinstated in his employment. The arbitrator has not been convinced to award compensation to X, but he will have no loss in his seniority.

24. The TCRC asked the arbitrator to retain jurisdiction over further remedies due to certain complexities in this file, including relating to X's pension and any early retirement opportunities. The arbitrator retains jurisdiction to address these matters.

25. The arbitrator orders the parties to meet and finalize any other remedial issues. In the event they are unable to do so, they may bring this matter back on at a future CROA session or by way of an Ad Hoc process.

February 9, 2018



GRAHAM J. CLARKE
ARBITRATOR