CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5001

Heard in Edmonton, February 13, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Claim requesting payment of $618.97/day to Locomotive Engineer R. Tymkin per Article 83 of the Collective Agreement.

JOINT STATEMENT OF ISSUE:

Union Position

On November 05, 2017, Locomotive Engineer R. Tymkin sustained an on-duty injury. As a result, he applied for and received Workman's Compensation Benefits (WCB). On January 20, 2018, he was cleared to return to work by his physician. The Company's Chief Medical Officer determined that Mr. Tymkin was not fit for work and refused to allow him to return to work as a locomotive engineer at that time. The Company, without solicitation, offered clerical work to Mr. Tymkin at a defined rate of pay, insisting that they were required to accommodate him.

Mr. Tymkin has submitted a time claim for modified duties in accordance with Article 83 of the 1.2 Collective Agreement.

The Company declined the claim.

Company Position

The Company takes the position that a modified duty role contemplated by Article 83 will allow an employee the opportunity to continue working in their own classification, albeit in a modified capacity. Whereas in the matter at hand, the grievor was unable to work in his classification of Locomotive Engineer and thus was accommodated as a Clerk, which had an established rate of pay. The Company maintains that the applicable rate associated with the Clerk role applies while the grievor is being accommodated.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) K.C. James	**(SGD.) J. Girard**
General Chair	Senior Vice President

There appeared on behalf of the Company:

I. Muhammed – Manager Labour Relations, Toronto

R. Singh	– Manager Labour Relations, Toronto
S. Fusco	– Senior Manager, Labour Relations, Montreal
K. MacDonell	– Senior Manager, Labour Relations, Edmonton

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, CTY-C, Smiths Falls
K. James	– General Chairperson, LE.W, Edmonton
T. Russett	– Vice General Chairperson, LE.W. Edmonton
R. Donegan	– General Chairperson, CTY West, Saskatoon
M. Anderson	– Vice General Chairperson, CTY West, Edmonton
M. Rutzki	– General Secretary Treasurer, CTY West, Melville

AWARD OF THE ARBITRATOR

Background, Issue & Summary

[1] This Grievance raises issue with the interpretation of Article 83 of Agreement 1.2. That Agreement governs the services of Locomotive Engineers employed in the Western Region.

[2] The Grievor is a former Locomotive Engineer, who was disabled by a work injury and was unable to carry out his duties as a Locomotive Engineer for a temporary period of time between January of 2018 and March of 2018.

[3] The issue raised by this Grievance is the meaning to be given to the phrase “Modified Duties” in Article 83.

[4] For the reasons which follow, the Grievance is allowed. The issue of remedy is returned to the parties given a lack of evidence to resolve what loss was suffered by the Grievor in this case.

Collective Agreement Provision At Issue

Article 83 Modified Duties

83.1 Payment for Modified Duties will be established as follows:

a) A period of 30 days immediately prior to the date of injury or illness will be identified. Any days off for miles, annual vacation, authorized leave of absence (including personal leave days) or bona fide illness will be excluded from the sampling period.

b) The earnings during the above 30-day period will be identified and will be used in calculating a daily rate.

c) To establish a daily rate, the earnings calculated in b) above, will be divided by 30 or prorated if reduced by a) above

d) The daily rate will be paid to employees based on a 7 days per week basis.

e) Employees on modified duties will protect their work on a 5 days per week basis.

Facts

[5] The facts are straightforward and not in dispute.

[6] The Grievor was employed as a Locomotive Engineer, which is a safety critical position in a highly safety sensitive industry. He is not paid on a salaried or hourly basis, but by mileage, with various other payments applicable depending on the work.

[7] On November 5, 2017, the Grievor suffered a workplace injury. As a result, he qualified for workers' compensation payments ("WSIB") and was off work for a period of time. The Grievor received what is described as "full loss of earnings" between that date and January 20, 2018.

[8] The Grievor's doctor considered he was fit to return to work as of January 21, 2018. However, a Grievor's physician does not have the final word in this industry regarding fitness to return to safety critical positions. It was not disputed the Company's Chief Medical Officer ("CMO") had to also agree the Grievor was capable of returning to work in his safety critical role. This process was a mandatory requirement of legislation and neither party argued it was not required or was exercised unreasonably.

[9] To make that determination, the CMO sought further medical information. That Officer ultimately disagreed with the Grievor's doctor, and determined a modified return to work plan was in order.

[10] While that process was ongoing, on January 22, 2018 the Grievor was offered an accommodation by the Company temporarily in a clerical position, until clearance was given by the CMO for his return to his role as a Locomotive Engineer. The parties raised issue with whether this clerical work was sought by the Grievor or offered by the Company and whether it was "modified duties" or an "accommodation".

[11] With respect, this is a distinction without a difference. I am satisfied that under the jurisprudence relating to accommodation, performance of “modified duties” are what occurs when an accommodation is put in place.

[12] Accommodation of a Grievor who is unable to work in his own classification due to disability is a multi-party process. There are roles for the Grievor, his Union and the Company. Whether the Grievor initially sought the modified duties or the Company offered those modified duties makes no difference to the issues in this case and does not change the nature of the Company’s obligation. I am satisfied the Grievor was unable to return to his safety critical position due to disability while the CMO was determining that issue, but that he was capable of performing clerical duties, which he ultimately did for a period of time.

[13] The Company’s obligation was to accommodate the Grievor’s disability, if it was capable of doing so without undue hardship, which in this case it was. The Company obviously felt the Grievor was capable of being accommodated in a clerical position during the time period when the CMO was reviewing the Grievor’s medical information, because that was the modified duties which I am satisfied the Grievor performed while that review was ongoing. The clerical role was a sedentary role, which was a modification from the Grievor’s regular duties as a Locomotive Engineer, which is not a sedentary position.

[14] As noted in the accommodation offer made to the Grievor for this modified position, the Company noted that “WSIB will provide a top-up for any lost wages as a result of this accommodation”.

[15] I am satisfied this would have been the “top up” of the difference between the pay of the clerical work he performed as of that date and his regular wages as a Locomotive Engineer. By the Company paying the Grievor the clerical rate of pay, this created a “spread” that WSIB then “topped up”.

[16] The Grievor worked in that role between January 21, 2018 and March 8, 2018. The Company paid the Grievor the rate of pay applicable to the clerical position, which was considerably less than he received as a Locomotive Engineer under the formula noted in Article 83.

[17] This left an amount to be "topped up" by WSIB.

[18] Between January 21 and February 25, 2018, the Grievor was paid "less than 100%" from workers' compensation, according to the Company's records. That made sense, if he received some of his wages from the Company for performing his clerical role, leaving less need for a "top up" than when he was off work completely.

[19] Payment to February 25, 2018 is the last entry in the evidence filed by the Company and there was no evidence filed as to why the top-up was not paid by the WSIB after that date. It was not clear in the evidence why the Grievor did not receive a WSIB top-up between February 25, 2018 and March 8, 2018, and whether this "top up" amount to be paid by the WSIB was determined under the formula in Article 83.

[20] I am further satisfied from the evidence filed that there are historical surrounding circumstances which are relevant between the parties and appropriately considered as an aid to interpreting Article 83.

[21] On June 9, 1994, the Company sent a letter to the various Vice-Presidents and General Chairmen of the predecessor union, cross the country.[1] That letter noted the Company had developed a "Modified/Alternate Work Standard" and "Guidelines on Reasonable Accommodation.

[22] This "Modified/Alternate Work Standard" was described by the Company in this letter as a "tool by which both the provisions of the collective agreement and the *Guidelines* may be given concrete action".

[23] The "Modified/Alternate Work Standard" that was attached to that correspondence stated:

> **INTRODUCTION**
>
> Modified/alternate work refers to any job task, function, or combination of tasks or functions that workers who have temporary partial disabilities may perform safely for remuneration without risk of re-injury, aggravation of disability, or risk to others.
>
> This work may incorporate, but is not limited to, regular work that has been changed, redesigned, or physically modified. This work may include reductions

[1] Including in Nova Scotia, Newfoundland, New Brunswick, Ontario, Quebec, Alberta, Saskatchewan, Manitoba and British Columbia

> in time or volume, as well as work that is normally performed by others or that has been specifically designed or designated for workers participating in a modified/alternate program. The work must be productive and must be performed at the work place.
>
> Modified/alternate work generally refers to work performed for fifteen working days or less. However, recuperating employees may remain in modified/alternative work assignments for up to one year, provided the injured employee's physician and CN's Occupational Health Service Department agree that the recuperation will take that long, and the recuperation period is consistent with applicable statutes and meaningful modified/alternate work is available.
>
> **STANDARD**
>
> The Company where available and practical, will attempt to provide productive work for all employees who are temporarily restricted by an injury and/or illness, incurred either on or off-the-job, unless being at work would be detrimental to their recovery.
>
> Returning an injured employee to productive work as soon as possible following an injury or illness is in the best interest of the recuperating employee – both physically and psychologically. Returning an injured employee to productive work promptly is also in the best interest of the Company.
>
> An injured employee is expected to perform productive work, if available and practical, consistent with statutory provisions and work limitations specified by the injured employee's physician and Canadian National's [O[ccupational Health Services Department. The injured employee's physician, the Occupational Health Services Department, General Claim Department, and management will communicate closely to ensure that the work assigned is compatible with the injured employee's physical limitations.
>
> …

[24] In 1997, the Company sent a letter to the General Chairperson from Edmonton and that from Saskatoon, regarding how the Company's formalized process would determine the appropriate compensation for an individual on "modified duties". It was noted that for an individual in "road service"

> A period of 28 days immediately prior to the date of injury or illness will be captured respecting the establishment of the daily rate. Earnings during such period will be divided by 28 to determine daily rate.
>
> Days off, for miles, annual vacation, authorized leave of absence or bona fide illness will be excluded from the sample period. Non productive time claims will also be excluded from the calculation of daily rates (i.e. run arounds).

> The rate will be paid to employees based on a seven (7) day per week basis.
>
> Note: The submission of late time claims will not be used to readjust the established rate.

[25] On January 2, 1999, an email was sent from the Assistant Superintendent Disability Management Program, regarding “Modified Duty Pay-Running Trades” to several individuals at the Company. That letter noted the existence of Bill C-99, which implemented the Workplace Safety & Insurance Board, and the onus placed on the Company to “provide injured employees with modified duties in an effort to hasten their return to full duties”. It also noted that there had been a “hit and miss” issue regarding compensation. It stated a pay scale to be implemented for employees in the Great Lakes Region, which is the same as that noted in the paragraph above, from the 1997 letter. The Assistant Superintendent requested the information to be disseminated to the Local Chairperson. For Road service, the 28 day method as noted above was set out.

[26] On June 7, 1999, the Vice-Presidents of the Eastern Canada Division, the Prairie Division and the Pacific Division of the Union were provided a further letter from the Senior Vice-President Operations of the Company, containing a “Modified/Alternate Duties” package, “prepared for E.H. Harrison based on guidelines and deliverables he wanted to see in the program”. A PowerPoint presentation was attached. Those slides. That “Guideline” noted that work must have a “meaningful value” and that “Employees on modify or alternate duties do contribute to the corporation and generally recover quicker from their disabling injury.

[27] Certain of the stipulations sought by Mr. Harrison, would not likely be in compliance with current arbitral and judicial jurisprudence relating to the law of accommodation as it has developed, such as that “[e]mployee must be on property daily for a minimum of six hour per shift; and that a “maximum of 100 days” and that there would be “no modified duty for off property injuries and illness”. As is well-established, a Company must provide accommodation to the point of “undue hardship” for both on-duty – and off-duty – injuries; and there is no “time limit” for that to occur.

[28] A similar email to that sent in January 2, 1999 was sent out in August of 2000, setting out the same pay scale.

[29] I am satisfied the definition of "modified duties" as being duties to ensure productive work was not modified by any of this documentation.

Analysis and Decision

[30] The Company argued the phrase "Modified Duties" as used in Article 83 was only limited to the pay owing to individuals who were performing duties, in their *own* occupation. If an employee cannot work in their own occupation, it argued they are not performing "modified duties" and are not subject to the Article 83 formula.

[31] The Union argued this led to an absurd result, as the duties of Locomotive Engineers can only rarely be modified within their own classification. The Union also argued that to reach that interpretation would "read down" that provision and imply a limitation that does not exist and was not negotiated. The Union also filed evidence of the Company's historical position, as noted above. The Union argued the Grievor should have been paid as if he was still a Locomotive Engineer, given the wording of Article 83.

[32] Both parties argued there were significant financial implications flowing from the result of this Grievance.

[33] Considering first the factual issues, this is not a case where the Grievor suffered an off duty injury. In this case, this was a workplace accident and the wages of the Grievor were therefore subject to a "top up" by WSIB to "100% of earnings" according to the evidence filed.

[34] The difference between what the Grievor would have earned under Article 83 and his clerical position appears to have been "topped up" by workers' compensation benefits, at least for all but 10 days of the time the Grievor worked.

[35] However, the evidence was not clear if the "top up" was made *to the formula in Article 83* or maxed out at some other level.

[36] While the Union argued the Grievor is entitled to an extra $618.97 per day under Article 83, this Arbitrator is at a loss to determine how that is calculated or how many

days it is argued were not fully paid, other than for the period between February 25, 2018 and March 8, 2018, which is the period on modified duties that were not "topped up" by WSIB.

[37] It may well be that WSIB should have paid this last "top up" and did not for some reason, but that reason was not clear.

[38] On these facts, the Grievor was *already* paid for some loss of wage by a combination of the Company's wages and the WSIB "top up" he was receiving after January 21, 2018, at least until February 25, 2018, which was the majority of time he spent in those temporary duties. It cannot therefore be the case that the Union is claiming for payment under Article 83 *in addition* to what the Grievor already received from the Company and from WSIB, as that would result in a "double recovery" over and above his wage loss, which result would lead to an absurdity. Such an interpretation is to be avoided.

[39] Turning to the interpretation of the provision itself, the principles of contract interpretation were well canvassed by this Arbitrator in **CROA 4884** and are adopted – but not repeated – here. The modern principle requires that words be given their "plain and ordinary meaning", within the appropriate factual and agreement context.

[40] One of the canons of construction to contract interpretation is that where a particular word or phrase is used, it must be determined whether that word or phrase has a specialized meaning in this particular industry, in labour relations more generally; or as between the parties themselves.

[41] A further important principle is that evidence of 'surrounding circumstances' – which include uncontroversial background facts in existence when the contract was negotiated – are always to be considered.

[42] A further underlying key and important principle is that an arbitrator must "take the agreement as she finds it". It is not up to an arbitrator to change or modify the deal which the parties agreed to, or impose her own view of contractual fairness or reasonableness[2].

[2] As also expressed in the CROA Agreement between these parties, Article 14.

[43] Collective bargaining and not arbitration is the forum for that discussion and for negotiation of any changes to the wording of a collective agreement.

[44] While the Union argued for a broad interpretation of human rights issues, the jurisprudence on which it relied was based on the interpretation process for interpreting human rights legislation itself, which in this country enjoy a quasi-constitutional status. While I agree parties cannot *contract out* of the protections offered by human rights statutes, the law of accommodation has risen up to address these issues in the employment context and it is *that* jurisprudence – both arbitral and judicial – which is applicable to this dispute.

[45] Article 83.1 sets out how "payment for modified duties" will be calculated. Upon close review of all of the relevant evidence filed, I am satisfied this phrase *does* have a specialized meaning. That meaning must not be inconsistent with the law of accommodation.

[46] The surrounding circumstances are set out in some detail, above.

[47] The Company's own document from 1994 states, in part:

> Modified/alternate work refers to **any** job task, function, **or combination of tasks or functions** that workers who have temporary partial disabilities **may perform safely for remuneration without risk of re-injury, aggravation of disability, or risk to others.**
>
> This work **may incorporate, but is not limited to, regular work that has been changed, redesigned, or physically modified. This work may include reductions in time or volume, as well as work that is normally performed by others or that has been specifically designed or designated for workers participating in a modified/alternate program.** The work must be productive and must be performed at the work place.[3]

[48] I am satisfied that "modified duties" as used in Article 83 was objectively intended to encompass the Modified/Alternate Work Standard, which pre-existed the negotiation of Article 83. The Company did not provide any evidence that Standard had been modified or was not otherwise in existence when Article 83 was negotiated.

[3] Emphasis Added.

[49] From a review of this program, I am further satisfied that phrase is used in Article 83 to describe a period of time when an employee is being accommodated on a *temporary* basis, *while pursuing recovery*. I am satisfied from a review of both the "Introduction" and "Standard" sections of the Modified/Alternate Work Standard, that this definition is broad enough to encompass work in an employee's "own" occupation, and work in another occupation.

[50] The term "Modified Duties" is one that is also well-recognized and used in arbitral and judicial jurisprudence to describe duties which are performed by an employee who is unable to perform their own duties due to disability and so are accommodated with performing 'changed' or 'different' duties. Those roles are regularly referred to in the jurisprudence as "modified duties", without any distinction between whether those duties are ones that are performed in a grievor's own occupation or not.

[51] A meaning of "modified duties" broad enough to encompass these types of duties – both within and without an employee's own classification – is consistent with that law which remains applicable to the Company's workplace. Under the law of accommodation, it is well-established that an employer is obliged to consider the existence of "modified duties" *not just in an employee's own occupation,* but also in other occupations as well.[4]

[52] While this was recently recognized by this Arbitrator in **AH834**, it is not a new concept. As noted by Arbitrator Picher in **CROA 4273**, the obligations around accommodation "extends beyond the bargaining unit and can encompass managerial responsibilities or work in relation to another bargaining unit."

[53] The Supreme Court of Canada's decision in *Hydro-Quebec v. Syndicat des employees de techniques professionnelles et de bureau d'Hydro-Quebec, section local 2000* (2008) and in *British Columbia (Public Service Employee Relations Commission* v. *BCGSEU (Meiorin)* [1999] 3 S.C.R. 7868 and the principles noted in **CROA 4503** also support that finding.

[4] See the discussion of the history of accommodation jurisprudence in **AH834**, paras. 9 to 16; see also **CROA 4503** and **CROA 4273**

[54] Article 83 must be interpreted in a manner which is consistent with the law of accommodation – which has developed from human rights legislation – and which is applicable to all workplaces and is not subject to contractual limitation.

[55] I accept that Article 83 refers to payment for as *temporary* accommodation, as was also noted in the Standard and which is also consistent with the law of accommodation. If a grievor is *permanently* accommodated into a lower paying role due to injury, the Company is not required to pay them at their former rate until they retire. Rather, the Company is entitled to pay that employee on the basis of the salary for the lower position.

[56] As was noted by this Arbitrator in **AH834**[5], it is a fundamental principle of arbitral jurisprudence – accepted by the Supreme Court of Canada – that an "employer remains entitled to expect the employee to "perform work in exchange for remuneration". A permanent accommodation for an employee who can no longer perform that work is consistent with a level of pay that recognizes that service.

[57] I am satisfied this is also recognized in the Modified/Alternate Work Standard, which refers to a "temporary" accommodation. In this case, it is not necessary to determine if the time limitation – whether one year of 100 days – would be off-side the law of accommodation, as the Grievor only performed his modified duties for a shorter period of time.

[58] This interpretation of Article 83 is consistent with the jurisprudence and with the parties' historical context. To reach the Company's conclusion, it would be necessary to imply limiting words into the Agreement that do not exist. Such an interpretation is not supported by the historical context which gives meaning to the phrase "modified duties".

[59] While the Company argued that certain historical information provided as surrounding circumstances by the Union did not apply across the country and was limited to the Great Lakes Region, there are two answers to this position.

[5] Quoting **CROA 4503** at para. 11

[60] First, the Modified/Alternate Work Standard which was filed from 1994 was in fact sent out by the Company to the various union divisions across the country and not just to the Great Lakes Region. While clarifications *were* given to the Great Lakes Region, there is also a clarification email which appears to have been disseminated more broadly with the same information, in August of 2000.

[61] Second, the Company did not provide any evidence to support that they had a *different* policy for accommodating disabled employees in one region of the Company versus another regarding that program, as argued, or that the program had been discontinued, which would not have been appropriate given the legal requirements to accommodate disabled employees which existed in the 1990's – and exist now. As one Company, it would unusual – and potentially discriminating – to treat disabled employees differently in one region of the country than another region.

[62] To resist the Union's evidence there was such a program, I am satisfied the Company was required to make more than a bare statement the program did not apply across the country.

[63] The Company also argued there is significant financial implications to it from this Award. That may be, however the financial implications cannot carry weight for an arbitrator appointed to interpret an Agreement. It is up to the parties to address that issue through bargaining.

Remedy

[64] In this case, it is not clear from the evidence what financial loss was suffered by the Grievor.

[65] In particular, the Arbitrator was not provided with sufficient evidence to determine how the Union had determined the Grievor lost more than $600 per day when the Grievor had received a "top up" from WSIB for his loss of wages.

[66] That "top up" was noted to be to "100% of earnings" on the Company's documentation, at least until February 28, 2018.

[67] There is also question whether the formula from Article 83 was used to determine the “top up” of the Grievor’s wages by WSIB.

[68] It is also not clear whether the claim was for $618.97 per day for just that 10 day time period that WSIB did not pay, between February 28, 2018 and March 8, 2018.

[69] In view of these evidentiary insufficiencies, the issue of the remedy required to restore to the Grievor to the point he would have been had the Article 83 formula been used to determine his compensation for the time spent in his temporary accommodation, is remitted to the parties for their discussion and resolution.

[70] I retain jurisdiction should the parties not be able to reach resolution.

Conclusion

[71] The Article 83 formula is appropriately used to determine wage loss for *temporary* accommodation in “modified duties” whether within or without an employee’s occupation, while an employee is pursuing recovery.

[72] The Grievance is allowed, with remedy for the Grievor’s financial loss remitted to the parties. Should the parties be unable to agree on that amount, either or both can approach the CROA Office for the hearing of that issue on a stand-alone basis, to be scheduled within 90 days of that request, at the next CROA Session over which I preside.

I retain jurisdiction as noted regarding the issue of remedy, and for any issues involving the application or implementation of this Award. I also retain jurisdiction to correct any errors or omissions, to give this Award the intended effect.

March 20, 2024

CHERYL YINGST BARTEL
ARBITRATOR