CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5077

Heard in Calgary, September 11, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY

And

UNITED STEELWORKERS LOCAL 1976

DISPUTE:

The Denial of accommodation to Mr. D. Palmer.

JOINT STATEMENT OF ISSUE:

As result of the Covid-19 pandemic the Company relocated the Crew Dispatchers to Building 10 at Company Headquarters. The Crew Dispatchers were located on the second floor of building 10, where access was only available by the way of stairs.

Mr. Palmer submitted a completed FAF form (Functional Ability Form) on December 10th, 2021 that list his Restrictions as follows: "Where it states, Mr. Palmer is unable to climb constant stairs and requires the use of a knee brace".

The Company did not accommodate Mr. Palmer as per the FAF provided.

The Grievor returned to work on May 27, 2022.

The Union filed a grievance. The Company declined the Union's grievance.

The Union's Position:

The Union takes the following position:

The Company has an obligation to accommodate to the point of undue hardship.

The Company had the ability to accommodate Mr. Palmer with a working location on the main floor of the building or to place Mr. Palmer in another building that was accessible to those with disabilities.

The Company's rationale in the view of the Union did not demonstrate that undue hardship would occur as a result.

As a full and final resolve, the Union requests Mr. Palmer be compensated for all lost wages for the time period until his return.

Company Position:

The Company cannot agree with the Union's contentions nor the requested remedy. As a direct response to the Covid-19 Pandemic, Crew Dispatchers were temporarily relocated to Building 10, to limit the operational risk of potential exposure within the Operations Centre. The Company maintains that it could not accommodate Mr. Palmer by placing a desk on the first floor in the temporary building the crew management was using, nor could he be accommodated with remote work. The position of Crew Dispatcher is one where active supervisor is required by

managers in a centralized location. As such, neither of those options was feasible. The Company maintains that it did search for an accommodated position for the Grievor, however none could meet his restrictions.

Accordingly, the Company respectfully requests the Arbitrator dismiss the Union's grievance in its entirety.

For the Union:	**For the Company:**
(SGD.) N. Lapointe	**(SGD.) L. McGinley**
Area Coordinator	Director, Labour Relations

There appeared on behalf of the Company:

S. Scott	- Manager, Labour Relations, Calgary
A. Harrison	- Manager, Labour Relations, Calgary
S. Arriaga	- Labour Relations, Representative, Calgary
K. Marcelo	- Director, Crew Management, Calgary

And on behalf of the Union:

N. Lapointe	- Area Coordinator
N. Lapointe	- President, USW-1976
J. White	- OC Local Representative
J. Howell	- President Board of Trustees

AWARD OF THE ARBITRATOR

Background Facts & Issue

[1] The Grievor is a Crew Dispatcher. He was originally hired on February 20, 2012 as an Apprentice Rail Car Mechanic until February 28, 2014, when he was permanently accommodated as a Crew Dispatcher. He continued to work as a Crew Dispatcher until his resignation on February 6, 2024.

[2] The issue in this Grievance is the alleged failure of the Company to accommodate the Grievor between the period December 10, 2021 and May 27, 2022; a period of approximately five months. The parties had a return-to-work meeting on May 20, 2022 and the Grievor returned to work May 27, 2022. The Union noted he subsequently resigned to care for a very ill partner.

[3] The facts are straightforward: Following the COVID19 pandemic, Crew Dispatchers were located on the first floor of Building 1, inside the secured "Operations Centre" at the Company's head office in Calgary, Alberta. Rail Traffic Controllers (RTC's) were also located in the same building.

[4] To limit the possible spread of COVID19, the Company relocated Crew Dispatchers, ultimately ending up on the second floor of Building 10 in March 2020. It was not disputed this second floor area of Building 10 was only accessible via a set of stairs.

[5] The Grievor had been off work due to physical issues since June of 2020. On July 24, 2020, he was fit for safety-sensitive duties, with a less than 10% use of stairs. On July 24, 2020, that was amended to "no stairs", with cognitive and driving restrictions. There was no change to those restrictions until August 15, 2021, more than one year later. At that time, the Grievor was fit with "no stairs". On December 13, 2021, he was also assessed as fit for safety sensitive work, with "no stairs". Several FAF Forms were filed by the Grievor to support these limitations.

[6] In the JSI, the parties have noted that as of December 13, 2021, the Grievor was fit to return to work, with modified duties, which were that he was "*unable to climb constant stairs and requires the use of a knee brace*". There was a FAF filled out by the Grievor's doctor on December 10, 2021. That was the only FAF filed into these proceedings.

[7] That FAF stated the Grievor "*cannot manage stairs" due to a "chronic knee problem*" and that "*hopefully with rehab I can remove this restriction in a month*". That FAF also noted the Grievor was to be reassessed on January 15, 2022.

[8] There is no evidence filed by the Union from that reassessment in January of 2022, and no other medical evidence beyond that one FAF, filed on December 10, 2021.

[9] As of December 2021, the Grievor's work was still re-located to the second floor of Building #10. The Company took the position it was not able to accommodate the Grievor, whether on the first floor of Building #10 or on the first floor of a different building.

[10] The issues between the parties are:

a. Has a case of *prima facie* discrimination been established? ; and, if so

b. Did the Company fail in its obligations to accommodate the Grievor to the point of undue hardship?

[11] For the reasons which follow, the Grievance is allowed, in part.

Analysis and Decision

Arguments

[12] The Union argued that a *prima facie* case of discrimination had been established as the Grievor was unable to climb stairs to access work on the second floor due to knee issues. It argued that disabilities included temporary disabilities. It argued the Company's obligation to accommodate the Grievor to the point of undue hardship was therefore triggered; and that the Company failed in this obligation. It argued it would not have constituted undue hardship to place a workstation for the Grievor on the first floor of Building #10, or even in another building to address the Grievor's physical restrictions regarding stairs. The Union felt the Grievor could have still worked from Building 10, or from any other building accessible to him with a main floor location for a workstation, or he could have worked from home. It argued the Company did not even try to accommodate the Grievor, and pointed out that possibilities for supervision included such technologies as "Teams" and "Zoom".

[13] The Company argued that it had reached the point of undue hardship. It argued it was unable to accommodate the Grievor's request to either work from home, or be moved to a first floor, whether in Building #10 or in another building. It argued the nature of the Grievor's work did not allow a work from home option, given its equipment requirements. It also argued that Crew Dispatchers are subject to constant supervision and interaction with Supervisors, throughout the course of a 12-hour shift. It pointed out that one Supervisor has obligations to supervise a number of different individuals, and could not move up and down stairs multiple times or to a different location, during the course of a 12-hour shift, to supervise the Grievor in another location. It pointed out it contacted the Grievor as soon as operations returned to the first floor.

Decision

[14] This is an accommodation Grievance.

[15] It is well-established in the jurisprudence that the initial burden of proof rests on the Union to establish that the Grievor has suffered an adverse impact from a physical disability, in order to establish a *prima facie* case that discrimination had occurred.

[16] When a *prima facie* case is established, that triggers an obligation of the part of the Company to accommodate the Grievor to the point of undue hardship.[1] If a *prima facie* case of discrimination has *not* been established, no obligation to accommodate is triggered. If a *prima facie* case is established, the burden of proof shifts to the Company to either establish it has reasonably accommodated the Grievor, or that it would have been an "undue hardship" to do so.

[17] As noted in the jurisprudence relied on by the Union, whether a *prima facie* case of discrimination has occurred will be dependant on the facts of a given situation.

[18] In this case, there is no dispute the Grievor had been unable to perform work for a certain period of time in the Spring of 2020 and had filed multiple FAF's to support his restrictions, since June of 2020.

[19] At issue in this Grievance is accommodation for the period between December 2021 and May of 2022. There is only one FAF filed over the five-month disability period at issue in this case. This is unusual, especially given what that FAF stated.

[20] The Grievor's physician completed the only FAF on December 10, 2021. He/she stated: "Patient has a chronic knee problem and cannot manage stairs. I suggest he be accommodated ***as such and hopefully, with rehab, I can remove this restriction in a month***"*.* This is not therefore a case where an FAF stated "the [individual] will be reassessed in a one month period and we will then see how he is". To the contrary, in this case, the physician indicated in December of 2021 that the Grievor was a) receiving rehab treatment; b) he anticipated being in a position to remove the restriction in a one month period; and c) the Grievor was to be reassessed to that end on January 15, 2022.

[21] As the party with the onus of proof, It was up to the Union to establish that the treatment was not effective and the Grievor's restriction continued past January 15, 2022. That evidentiary onus has not been met.

[22] No other FAF was ever filed by the Grievor after this expected re-assessment, for the time period between January 15, 2022 to May 27, 2022, a period of approximately four additional months. It must be remembered the Union bears the evidentiary burden to

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[1] See **AH834** for a detailed discussion of these requirements.

establish a *prima facie* case of discrimination on the basis of disability has occurred and continues to occur. Whether or not this is established is assessed at an arbitration on the basis of the medical evidence.

[23] In this case, the only medical evidence offered was for the period December 10, 2021 to the Grievor's reassessment on January 15, 2022, where it was anticipated his restrictions would be lifted. No FAF was filed to establish the Grievor remained disabled after his course of treatment, which was expected to result in a lifting of his restriction against stairs.

[24] While I can agree the Grievor had established a limitation for managing stairs for that one month period with the initial FAF; I cannot agree the medical evidence offered supports a *prima facie* case of discrimination for the time period of January 16, 2022 to and including May 27, 2022. That medical evidence is lacking and the Union has not met its evidentiary burden of proof to trigger a duty to accommodate.

[25] Whether or not the Company considered the Grievor to be disabled is not the standard the Union must reach. The Union must establish a *prima facie* case of discrimination before the duty to accommodate is triggered.

[26] It cannot be the case that a Grievor can rely on one initial FAF for a five month disability period, when that FAF anticipated his recovery after the first month.

[27] The next question is therefore whether the Company accommodated the Grievor appropriately between December 15, 2021 and January 15, 2022.

[28] Given the Grievor's initial restrictions, on December 13, 2021, Ms. Brace in the Company's Disability Management department appropriately contacted Company personnel to determine if the Grievor could be placed "in Building 10 on the first floor to accommodate the stair restriction".

[29] That was an appropriate question to be asked, and a reasonable response to the FAF.

[30] On December 20, 2021, one week later, Disability Management received the following response:

> Attached is previous correspondence regarding the same request made in August. To reiterate, due to the nature of the position, CDs require 24/7 supervision and

> monitoring, including Mr. Palmer. To ensure operational fluidity, CDs need to be able to have direct contact with the on-duty Supervisor immediately in case issues arise. Additionally, there is added safety concern for the Supervisor having to continuously traverse up and down 2 flights of stairs in order to monitor an employee. Based on this, the 1st floor is not an option.

[31] I am in agreement with the Company that given the specialized equipment used by the Grievor, working from home was not an option. However, a one week period of time to provide to the Union the same response which was given several months earlier is not a reasonable time period. That response should have been provided more quickly.

[32] Further, it appears that the Company accepted the Supervisor's comments that "direct" supervision was required to accommodate the Grievor as a Crew Dispatcher, without any further discussion of *why* supervision could not be modified, given the Grievor's restrictions. No further questions were asked of the Crew Dispatch department to look behind that answer.

[33] I am satisfied Disability Management did not take the appropriate steps to follow-up this answer, such as to explore whether the Grievor could have been supervised by telephone, Zoom or Teams, if he was placed in an alternate location. The Company did note in its submissions that several positions were considered (listed between March 15, 2022 and May 9, 2022.

[34] "Undue hardship" has been recognized as a "high bar". I am prepared to accept that the Company did not appropriately canvas whether the Grievor could have been supervised via telephone or some other method than requiring the Supervisor to "travel" - whether up or down stairs, or across to another building – and that this should have been completed by December 15, 2021.

[35] To the date of his reassessment on January 15, 2022, therefore, the Union has established that a failure to properly accommodate the Grievor occurred.

[36] However, for the period between January 16, 2022 and May 20 of 2022, the Union has not met its evidentiary burden to establish that the Grievor was unable to use stairs to access the second floor for his shift, after his next medical assessment, which was to occur on January 15, 2022.

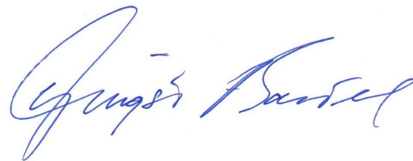
[37] No *prima facie* case of disability has been established for the time period after January 15, 2022. The duty to accommodate was therefore not triggered for that time period.

Conclusion

[38] The Grievance is allowed, in part.

[39] The Grievor is to be made whole, as if he had been appropriately accommodated, for the period December 15, 2021 to and including January 15, 2022. The matter of the amount of that compensation is remitted to the parties, who are usually able to resolve such issues. However, I retain jurisdiction over remedy, should the parties not be able to agree on that amount.

I also retain jurisdiction to correct any errors; and to address any omissions to give this Award its intended effect.



November 19, 2024

CHERYL YINGST BARTEL
ARBITRATOR