CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5082

Heard in Calgary, September 12, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the April 27th, 2023 Employment File closure of Conductor I. Gill of Calgary, AB.

JOINT STATEMENT OF ISSUE:

On March 27, 2023, by means of a letter the Company notified Mr. Gill of the intent to close his employment file effective April 27, 2023. On April 27, 2023, Mr. Gill received a letter with the explanation:

"In the letter sent to you dated March 27, 2023, you were advised of the Company's intent to close your employment record. You were invited to provide any new information which may cause us to reconsider our decision by April 27, 2023. Copies of the letter were sent to you by email and Canada Post, along with a copy sent to your union.

We received your updated FAF's dated April 05, 2023 and April 23, 2023. They were reviewed by our occupational health nurse and no new fitness message was sent because there is no change in your restrictions. The last fitness message was sent February 14, 2023 and indicated you would be permanently restricted. These two updated FAF's does not change that status. I also inquired with WCB if there had been any changes to your work restrictions. WCB confirmed on April 27, 2023 that permanent work restrictions have not changed and you remain at a sedentary position that were outlined by your surgeon.

To date, CP has unable to successfully accommodate your restrictions. As a result, we are proceeding with file closure.

Please be advised that your employment record has been closed effective April 27th, 2023.

Union Position:

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the following outlines our position.

Throughout the Company's responses the position is taken by the Company that Mr. Gill is unemployable due to extensive restrictions that are permanent. This is contrary to the medical information submitted by Mr. Gill to the Company as requested in the March 27, 2023, letter. The most recent two FAF provided by Mr. Gill, at request of the Company, indicate he is fit for modified duties and a complete recovery is expected. Furthermore, the Company has vastly expanded its position on why Mr. Gill's file was closed. Nowhere within the initial close letter or Step one response does the Company take the position that Mr. Gill turned down accommodation offers.

Furthermore, the Company has made a new allegation that "The grievor is also involved with a WCB/WIB overpayment situation" These expansions of argument prejudice the Union's ability to properly respond.

The Company's actions are in violation of the Canadian Human Rights Act, Canada Labour Code, Duty to Accommodate, recent jurisprudence, the legal obligation to accommodate an employee, and Article 36 of the Collective Agreement. The employer has a legal obligation to accommodate disabled workers to the point of undue hardship. In that respect, the onus falls upon the Company to demonstrate that the burden has been met. The Company has failed in its duty to accommodate Mr. Gill and has otherwise not been reasonable in the handling of this employee and has not demonstrated any undue hardship by not properly accommodating him. The Company has failed to comply with its own policy 1501 Workplace Accommodation, and previous incarnations of this policy.

Closing Mr. Gill's file in this manner is a further violation of Collective Agreement Articles 87.23, 92.01, 93.01, and 93.20.

The Union seeks an order that the Company has violated the above-cited Collective Agreement articles, policies, and legislation.

The Union requests that the Company reinstate Mr. Gill without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. Furthermore, the Company provide a suitable accommodation until Mr. Gill can return to his Conductor position. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees with the Union's positions and requested remedy, including all alleged violations of Articles 26, 87.23, 92.01, 93.01, and 93.20, the Canadian Human Rights Act, Canada Labour Code, and the Duty to Accommodate.

The Grievor was hired on May 24, 2022. On June 2, approximately one week into training to become a qualified Conductor, while still on probationary status pursuant to the collective agreement, he suffered an on duty injury. Following this injury, the Grievor's fitness to work assessments confirmed his fitness for modified duties only. The Company accommodated him with full time hours in a temporary accommodation until April 27, 2023. The Company has not failed to accommodate the Grievor as alleged nor has the Grievor suffered any lost wages during this time. The Grievor was also on an approved WCB claim for his on-duty injury.

Pursuant to the WCB Act, the Company's obligation is to attempt to provide temporary accommodation to the Grievor as he recovered. There is no obligation to re-employ the Grievor in a full-time, permanent accommodation as he was just one week into his Conductor qualifications training when his injury occurred.

The Grievor has been on prolonged restrictions, with no anticipated date of improved prognosis from his Safety Critical duties. CPKC Health Services also confirmed that the Grievor has permanent restrictions with no foreseeable prognosis of improving. The Grievor's restrictions ultimately deemed him restricted from performing the full duties of any Safety Critical work, which was what he was hired on to do in the role of a Conductor.

The Company maintains it has not been unreasonable in closing the Grievor's employment record, given the circumstances. Due to the nature of his prognosis, the lack of available permanent positions that fit his requirements, as well as already exceeding the Company's accommodation obligations under the WCB Act, the Company rightfully initiated the employment record closure on April 28, 2023. The medical information provided by the Grievor was reviewed, and it was determined that there was no change in his restrictions.

For these reasons, the Company maintains that it has reached the point of undue hardship and that the Grievor's employment record was appropriately closed.

The Company requests that the Arbitrator be drawn to the same conclusion and dismiss the Union's grievance in its entirety.

For the Union:	**For the Company:**
(SGD.) D. Fulton	**(SGD.) F. Billings**
General Chairperson, CTY-W	Director, Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen	– Manager, Labour Relations, Calgary
F. Billings	– Director, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, CTY-C, Calgary
J. Hnatiuk	– Vice General Chairperson, CTY-W, Vancouver
M. Nilsson	– Local Chairperson, via Zoom
I. Gill	– Grievor, via Zoom

AWARD OF THE ARBITRATOR

Introduction & Issue

[1] The Grievor was hired on May 24, 2022 as a Conductor trainee. On June 2, 2022, one week into his training, he suffered an on-duty injury of a severe leg cramp alighting from a train.

[2] It was eventually determined the Grievor had suffered full-thickness tendon tears in both of his quadricep muscles.

[3] The Company temporarily accommodated the Grievor with sedentary work, between July of 2022 until February 2023, increasing eventually to full-time hours. The Grievor performed clerical and administrative duties.

[4] In February of 2023, the Grievor's injuries and restrictions were assessed to be permanent. That assessment was made by the Grievor's treating orthopedic surgeon.

Those restrictions included a standing/walking tolerance of 30 minutes and a driving restriction against operating company vehicles. He was approved for sedentary work only.

[5] On March 27, 2023, one month after that determination was made, the Company advised the Grievor via a letter that it would be closing his file as of April 27, 2023. In that letter, the Company invited the Grievor to submit updated medical information, which is a required step in this industry, prior to proceeding with a file closure.

[6] That Letter also outlined the four positions that had been considered in an attempt to accommodate the Grievor's restrictions, between September of 2022 and February of 2023, *before* his restrictions were stated to be permanent. It also stated:

> **Based on the permanent nature of your restrictions, it has been determined that you have not and will not be able to attain the required level of proficiency required to fulfill the duties to qualify as a Conductor** with Canadian Pacific Railway (emphasis added).

[7] It was noted the Grievor had not finished his probationary period, and that his name would not be placed on the seniority lists and he would be "removed from the Conductor Training Program and your employment with Canadian Pacific Railway shall cease".

[8] The Grievor provided two further FAF's in April of 2023 from his family physician, in response to the letter of March 2023. The first of which indicated he could perform "normal sedentary work as required"; and was restricted for three months. He had no restriction for sitting tolerance; and 30 minutes for standing. He could also not crouch or kneel or forward bend, or do any overhead work or lifting floor to waist. It was also noted he should not operate any moving equipment, due to "physical impairment" and that while he was fit to drive his personal vehicle and company vehicles – with and without passengers – he was to take microbreaks. The question of "complete recovery expected" (yes or no boxes) was left blank.

[9] The second FAF was completed on April 23, 2023. The same "normal sedentary work as required" was given regarding the Grievor's ability to perform work, with the same restrictions. This time, the Grievor's family physician checked "yes" for the question "complete recovery expected". It was still noted he could drive company vehicles "with

microbreaks" but that he should not operate moving equipment due to physical impairment.

[10] The Company provided a letter to the Grievor dated April 27, 2023 in response to this information. In that letter, it was stated the Company's occupational health nurse had considered the new information from the Grievor and determined "no new fitness message was sent because there is no change in your restrictions" noting that the Grievor's restrictions had been stated to be "permanent" on February 14, 2023.

[11] It was also stated that WCB had also noted no changes to the Grievor's restrictions as outlined by his surgeon.

[12] The Company stated it was proceeding to close the Grievor's employment file.

[13] The Union grieved that action.

[14] The issue between the parties is:

a. What is the Grievor's fitness to work? and
b. Has the Company has accommodated the Grievor to the point of undue hardship?

[15] For the reasons which follow, the Grievance is upheld.

[16] While I agree with the Company that the Grievor's updated and contradictory medical information from his family physician received in April of 2023 was not compelling, the Company has failed to meet its burden that it reasonably accommodated those permanent restrictions to the point of undue hardship.

Facts

[17] Several Functional Abilities Forms ("FAF") were provided by the Grievor. It is useful to summarize that information to provide context to the Grievor's "post-file closure" medical information.

[18] Initially, the Grievor was expected to recover and he had less significant walking and standing restrictions than developed later. For example, on June 6, 2022, a complete recovery was expected. On June 20, 2022, the Grievor's restriction for sitting was 4 hours; for standing was one hour; and for walking was 30 minutes. He was to avoid uneven

ground and vertical and step ladders and was only fit to drive his personal vehicle and not operate moving equipment, however a complete recovery was still expected. July 10, 2022 had similar restrictions, with sitting tolerance of 4 hours and standing tolerance of 1 hour; and walking tolerance of 30 minutes, and fitness to only drive his personal vehicle. A complete recovery was still expected.

[19] By August of 2022 the Grievor provided a report from his orthopedic surgeon which diagnosed he had suffered from a severe muscle/tendon sprain in his right and left legs and that he continued to be able to perform sedentary duties on a full-time basis, with restrictions in the amount of walking or standing. The Grievor had a sitting tolerance of 8 hours; a standing tolerance of 10 minutes and a walking tolerance of less than 10 minutes, with no driving of any vehicle. He was expected to recover to the point he would be able to return to his work as a Conductor Trainee. By November of 2022, while sitting tolerance was still 8 hours; standing tolerance was 15 minutes; walking tolerance was 15 minutes and restrictions against driving of any vehicle continued. It was still expected the Grievor would recover to return to his pre-accident employment.

[20] By February 13, 2023, the Grievor was noted by his specialist to be “permanently restricted” with no restrictions for sitting, but 30 minute restrictions for both standing and walking. The orthopedic surgeon determined the Grievor required “permanent sedentary work due to knee problems”. “Long-term [greater than six months] or permanent work restrictions” was noted by the surgeon, on the WCB form.

[21] With the permanent restrictions, the Company considered the Grievor’s recovery had plateaued. One month after the Grievor’s restrictions were noted to be permanent, the Company moved to close his file.

[22] As noted above, after the Grievor was informed his file was being closed, the Grievor provided two updated Functional Abilities Forms (“FAF”) from his family physician. Those FAF’s were dated April 5, 2023 and April 23, 2023. That medical information conflicted with that of his specialist given two months earlier, both in the restrictions and the Grievor’s prospects for recovery.

[23] The April 5, 2023 FAF noted the same restrictions for sitting, standing and walking, but stated that he was now fit to drive his personal vehicle and fit to drive a company

vehicle with or without passengers, which he had not been fit to do just two months previously. In the April 23, 2023, the GP filled in the box regarding expected recovery, which had been left blank in the April 5, 2023 FAF. In contrast to the assessment of the surgeon that the Grievor's limitations were permanent, that FAF indicated that a full recovery was expected, with the same sitting, standing and walking restrictions listed and the same fitness to drive notations. The box next to "fit for modified duties immediately" was checked with "full hours" also checked. Those boxes had been left blank on the previous FAF.

[24] The Company disclosed OHS notes in its Reply Brief. The Union took issue with the late disclosure, as noted below. It is unnecessary to determine this issue. Those notes do not disclose details of a job search for the Grievor. There is a note from Ms. Brace that "CPKC unable to locate a permanent position" on March 21, 2022 and a reference to telling the Grievor CPKC had been "unable to find a perm accommodation", but no evidence of what those efforts were, or of how that conclusion was arrived at.

[25] As noted in its letter of March 27, 2023, the Company considered the Grievor had no prospect of improving to the point he could resume his safety critical duties *as a Conductor Trainee*[1], when it decided to close his file.

[26] The letter of March 27, 2023 is self-explanatory for the Company's position, communicated to the Grievor.

Arguments

[27] The Union argued the Company had not met its obligation to accommodate the Grievor's disability to the point of "undue hardship". It argued it ignored the updated medical information from the Grievor, including that the Grievor was expected to make a full recovery. It argued there was no evidence the Company considered what other modified work would be available to the Grievor. It argued this was especially true, as his restrictions had been "modified" by his family physician, and he was now able to drive Company vehicles. The Union argued the Company's conclusions could not be maintained, and pointed out that the Grievor was able to be accommodated by the

[1] Emphasis added.

Company for clerical duties from July of 2022 to February of 2023, gathering and assembling trainee packages and other assigned administrative duties (return to work plan; beginning July 2022) and questioned why that could not have continued. The Union also argued the Grievor was an educated individual, with post-graduate training in energy system engineering. It questioned the Company's assertion the Grievor did not have any transferable skills. It also questioned why the Grievor could not have been accommodated in a crew dispatcher role. It argued the Company failed to give a "searching look" for accommodation for the Grievor, as was required. It requested he be reinstated with full seniority; and accommodated into a suitable position "once able" and be made whole for all lost wages.

[28] In its written submissions, the Company relied on section 88.1 of the *Workers' Compensation Act.* However, that section only applied to accidents between certain dates (2018 to 2021) and did not apply to the Grievor's accident. It was repealed at the time of this incident, so does not provide a basis for the Company's position. It is not reproduced or considered in this Award.

[29] The Company argued that – given the Grievor's probationary status, the requirements under the *Workers' Compensation Act* [repealed) and the permanent nature of his restrictions, it had reached the point of undue hardship. It noted the Grievor was not able to meet the criteria of employment as a Conductor and that WCB had noted he was not cleared to drive a company vehicle with passengers. It also pointed out his FAF of April 5, 2023 had not indicated whether he was fit for "regular duties" "modified duties" nor "unfit for any work" and that the physician also omitted to identify if a complete recovery was expected, only indicating he was restricted to sedentary duties for three months, after which he would be reassessed.

[30] At this hearing, the Company took the position it was bound by unique medical guidelines in this industry. It noted the Grievor was accommodated with temporary positions and bundled duties while his injuries were healing, but that the Company did not have any permanent positions for the Grievor.

[31] While the Company representative noted issues with a crew dispatch role and that discussions were occurring, there was no evidence filed as to any positions considered for the Grievor after February of 2023.

[32] The Company noted there was no foreseeable improvement in the Grievor's significant restrictions; that he was permanently restricted to sedentary work and that it considered him to be "unemployable". The Company considered the Grievor had "no other railroad experience" and no skills or abilities that would transfer to railroad work. The Company noted the limited number of positions in its organization which could accommodate the Grievor's permanent restrictions. The Company relied on **CROA 3346** and *Hydro-Quebec v. Sundicat des employ-Quebec*[2]*.*

Analysis & Decision

[33] The Company provided certain OHS case notes from March of 2023 in its Reply. The Union took issue with that late disclosure, given it requested full disclosure at an early stage. Given the result in this case, it is not necessary to address whether those case notes should have been provided earlier. Given my conclusions, it is unnecessary to resolve the Union's objection. Even considering those notes, the Company has not demonstrated it has reached the point of undue hardship.

[34] It is not disputed the Grievor qualified for WCB assistance; that the Grievor was a probationary employee and at a very early stage in his employment with the Company when this injury occurred; that the Grievor was training to become a Conductor; or that the Grievor filed a WCB claim, since this was an injury which occurred at the workplace.

[35] The principles of accommodation have been outlined in **AH834** and will be relied upon – although not be repeated – here. In summary, once the Union has met its burden to establish a *prima facie* case of discrimination on the basis of disability – which it has done here given the evidence of the Grievor's medical restrictions – the burden then shifts to the Company to establish it has accommodated the Grievor to the point of undue hardship.

[2] [2008] 2 S.C.R. 561

[36] In this expedited process – which depends on documentary evidence – an assessment must be made when evidence is contradictory, even when that evidence is medical. As has been noted by other arbitrators, this is not an easy task. This is one such case.

The Grievor's Fitness to Work

[37] The first issue between the parties is the Grievor's level of fitness to work.

[38] In February of 2023, the Grievor's treating specialist felt the Grievor's restrictions were permanent. In April of 2023 his family physician noted a "full recovery was expected.

[39] Both assessments cannot be correct.

[40] In resolving this contradiction, I am satisfied that between February 14, 2023 and April 5, 2023, the Grievor did not suggest to the Company that his symptoms were improving, or seek any further FAF's on his own initiative that he was now able to do drive and do more activities and could perform further duties; or suggest that a "full recovery" was now expected. That information did not float to the surface until the Company chose to close the Grievor's file. This new medical information stated that the Grievor was making improvements; and that he could now drive company vehicles with or without passengers. The second document noted he was fit for "full time" hours (modified duties) immediately and that a "complete recovery" was expected.

[41] To resolve the first issue of the Grievor's fitness, I prefer the evidence of the Grievor's treating specialist over the conflicting evidence of the Grievor's family physician. I do not accept that a "full recovery" was reasonable given the specialist's assessment, or that it was now safe for the Grievor to drive the Company's motor vehicles. There was no explanation given by the family physician – such as successful treatment or successful surgery recovery. The only difference was that the Grievor's file was about to be closed.

[42] It was not unreasonable for the Company to prefer the opinion of a treating specialist over the opinion of a family physician. I am satisfied the Grievor's disability was permanent as assessed in February of 2023 by his treating specialist and that he was therefore left with significant restrictions.

[43] The Company's assessment of the Grievor's condition was therefore reasonable to that point.

Has the Company Accommodated the Grievor to "Undue Hardship"?

[44] The next issue is whether the Company accommodated these permanent restrictions, to the point of "undue hardship". I am satisfied it has not.

[45] To resolve this question requires an examination of the efforts taken by the Company *after* February of 2023, when the Grievor's restrictions became permanent.

[46] As noted in **AH834**, it is the Company who bears the burden of demonstrating the steps it took to accommodate a disabled employee, to the threshold of "undue hardship". Those obligations are not just to accommodate temporary restrictions while healing occurs, but extend to permanent restrictions.

[47] While the Company noted the Grievor was on a probationary status, and argued that the duty to accommodate does not arise for a probationary employee one week into his employment, it is unclear the source of that incorrect information. Section 88.1 of the *Workers' Compensation Act* was in force for a short time between September 1, 2018 and April 1, 2021. It was subsequently repealed, but applies to claims within that time period.

[48] The Grievor's accident did not take place within that time period, however. That legislation provides no basis to the Company to argue its accommodation obligations were different, because the Grievor had been employed less than twelve months at the time of this accident.

[49] What becomes obvious quickly in an assessment of the evidence is that the Company did not make any efforts taken to accommodate the Grievor, once it determined his injuries were permanent. While the Company provided evidence of the steps it *took between 2022 and February of 2023*, to temporarily accommodate the Grievor, the same information was not provided for the time period after permanence was determined.

[50] Upon reviewing the course of events, I am satisfied the Company did not consider it even *had* an ongoing obligation to accommodate the Grievor's sedentary restrictions, to the point of undue hardship, when those restrictions became *permanent*. It erroneously believed section 88.1 applied.

[51] The Company appears to have concluded that since the Grievor was injured during his probation and was unable to return to his probationary position, it no longer had a responsibility to accommodate him and could close his employment file. This is demonstrated in its letter of March 27, 2023.

[52] While the Company focused on the Grievor's inability to return to his position as a Conductor, in supporting its file closure in that correspondence, the Grievor's ability to return to his position in his former position as a Conductor is not the standard by which the Company's actions are judged in an accommodation dispute. While I agree the Company was not obliged to reinstate the Grievor into his *pre-accident* position, given his permanent restrictions, the Company still had an obligation to accommodate the Grievor, to the point of "undue hardship", even after his restrictions were judged to be permanent. The standard is whether the Company would suffer "undue hardship" in accommodating the Grievor with productive work; not necessarily whether the Grievor would ever be able to return to the training program for which he was hired.

[53] To establish that standard, the Company must file evidence of what efforts it took to accommodate the Grievor. It cannot rely on the Grievor's probationary status or his inability to return to his position *as a Conductor* to make its case, or on its interpretation of a repealed section of the *Workers' Compensation* legislation in relation to employees who have worked less than twelve months. The Grievor's probationary status does not impact the Company's obligation to accommodate the Grievor, to the point of undue hardship, if he has established he suffered from a disability. The Company has the same obligation for an employee who has worked one day as for an employee who has worked for 30 years.

[54] No jurisprudence was offered by either party to indicate that is not the case.

[55] While the Company noted at the hearing the limited permanent positions available in its organization, and made representations regarding the difficulties of accommodating the Grievor into a crew dispatch role, no actual evidence was filed into this proceeding to support that broad statement, or to demonstrate what actions the Company took to meet this standard in 2023.

[56] There was a lack of evidence filed post February of 2023 regarding *any* efforts to accommodate the Grievor, such as what jobs were considered; could they be modified; if not suitable, why not?

[57] While there were some OHS notes disclosed by the Company in its Reply Brief relating to the Grievor, those notes do not assist the Company. While Ms. Brace, the WCB Specialist for the Company, was asked by WCB "[i]s there a position you are looking to move Inderpal into permanently", the "efforts" made reduce to one sentence of Ms. Brace in response: "CPKC unable to locate a permanent suitable position". The other entries provided do not refer to job searches. The last entry is in August of 2024, indicating the Grievor was employed elsewhere.

[58] There were no records or notes as to *what* positions were in fact considered at that point – if any; *why* they were deemed unsuitable or *whether* they could have been modified. Without that type of searching undertaking, it is unclear how the Company determined the Grievor would not be able to return to meaningful service in the future, or determined it was reasonable to close his employment file.

[59] I have no difficulty in determining the Company has not met its burden to accommodate the Grievor to the point of undue hardship, for the period of time *after* the Grievor's restrictions were determined to be permanent (post February 2023).

Remedy

[60] In terms of appropriate remedy, it is not disputed the Company was able to accommodate the Grievor with full-time administrative and clerical duties when he was temporarily being accommodated, between mid 2022 to February 2023, before his restrictions became permanent.

[61] The Company offered no evidence why those tasks could not have continued while it conducted a search for a permanent accommodation, once his restrictions were assessed to have reached that point.

Conclusion

[62] The Grievance is upheld.

[63] I find and declare that the Company failed to reasonably accommodate the Grievor to the point of undue hardship.

[64] I further find and declare that the closure of the Grievor's employment file was an unreasonable step and the Company is directed to re-open that file.

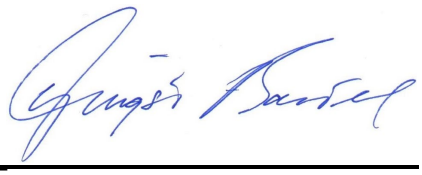
[65] As in **CROA 3036**, I will remit the matter to the parties "for the identification of a position for which the grievor is suited and which he can perform with reasonable accommodation"…consistent with its obligations to reasonably accommodate his disabilities" (at p. 6).

[66] Should there be any dispute between the parties as to whether the Grievor is capable of being reasonably accommodated or whether all reasonable efforts were undertaken, either party can apply to this Office to have the matter set down at a CROA session over which I preside, as a stand-alone issue and I retain jurisdiction to resolve that issue.

[67] If that request occurs, the Office is directed to schedule that dispute on an expedited basis.

[68] The Grievor is also to be compensated for any lost wages and benefits and not to suffer any loss of seniority.

I retain jurisdiction regarding the remedy directions, noted above. I also retain jurisdiction to correct any errors; and address any omissions, to give this Award its intended effect.



December 5, 2024

CHERYL YINGST BARTEL
ARBITRATOR