CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5173

Heard in Montreal, May 13, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Policy grievance on behalf of Conductor Ron Loyer of Edmonton, AB, regarding the Company's alleged failure to accommodate the Grievor's medical condition as required by the Canadian Human Rights Act.

JOINT STATEMENT OF ISSUE:

The Grievor's last day of work as a Conductor was September 14, 2018. Company records indicate that he subsequently was off work for various reasons, including missed call for service, held out of service due to expired medical clearance, annual vacation, and sick leave. As the result of a disciplinary investigation, he served a 19-day suspension from January 1 to 19, 2019. He did not return to work at the end of the suspension. On May 29, 2019, he provided the Company with medical documentation which would allow him to return to work with restrictions.

The Union's position is that the Company has failed to accommodate the Grievor to the point of undue hardship. Over a period of more than two years the Company forced the Grievor to apply for open positions that were posted and available for application to all employees, never accepting him into those positions and continually failing to provide him with meaningful work. As the Grievor has a medical condition that renders him permanently unable to work as a Conductor or in any safety sensitive/critical position, the Company has the responsibility to accommodate the Grievor, ultimately failing to accommodate the Grievor for the period cited, discriminating against him, violating Article 151 and 152 of Agreement 4.3, and the Canadian Human Rights Act. The Union requests that the Grievor be made whole for all wages that he ought to have been earning from May 29, 2019 up to when he was accommodated and worked from January 5, 2021, to November 10, 2021, as well as relief in the form of damages of $25,000.00 or as determined by the Arbitrator.

The Company's position is that it acted within its duty to accommodate following *CN's Accommodation Guidelines* and explored numerous positions as per the Grievor's medical restrictions, including Rail Traffic Controller, On-the-Job Trainer (OJT), Yard Master, and Crew Dispatcher. In December 2019, the Company accepted the Grievor as a Crew Dispatcher and arranged for the Grievor to attend English Crew Dispatcher training course in March 2020 in Edmonton.

The Company maintains that it acted appropriately, without discrimination, and in a timely and responsible manner following its duty to accommodate and CN's Accommodation Guidelines. As such, the Company denied the grievance and maintains that no compensation is owed.

For the Union:
(SGD.) R. Donegan
General Chairperson

For the Company:
(SGD.) J. Girard
Senior Vice-President, Human Resources

There appeared on behalf of the Company:

C. Baron	– Manager Labour Relations, Edmonton
F. Daignault	– Director Labour Relations, Montreal
J-F. Migneault	– Manager Labour Relations, Montreal
I. Ahmed	– Assistant Superintendent, Edmonton
S. Wright	– Manager Workers Compensation Office, Edmonton
A-H. Chouman	– Associate Labour Relation, Montreal
R. Singh	– Senior Manager Labour Relations, Edmonton

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
J. Thorbjornsen	– Vice General Chairperson, CTY-W, Saskatoon
M. Anderson	– Vice General Chairperson, Edmonton

AWARD OF THE ARBITRATOR

Context

1. The Grievor is a senior employee, having been hired as a Conductor in 1990.
2. Due to a medical condition, the Grievor was off work from December 18, 2018 until January 4, 2021, when he returned to alternate employment.
3. The Union is claiming a failure to properly accommodate the Grievor from May 29,2019 to January 4, 2021, a period of some 19 months, and seeks both wages and damages. The Company denies that it failed to accommodate the Grievor and denies that either wages or damages are owing.

Issues

A. Has the Union established a prima facie case of discrimination?

B. If so, has the Company met its burden to show reasonable accommodation up to the point of undue hardship?

C. What is the proper remedy in the circumstances?

A. Has the Union established a prima facie case of discrimination?

Position of Parties

4. The Union submits that it has clearly established a prima facie case of discrimination. The Grievor was injured but able to return to work, subject to restrictions. He sought to do so, but did not receive alternative employment until some 19 months after he was first medically cleared to return to work to the knowledge of the Company.
5. The Company did not strenuously argue this point, basing most of its submissions on its efforts to accommodate the Grievor.

Analysis and Decision

6. The Canadian Human Rights Act at section 7 provides that there may not be discriminatory practices in relation to employment:

> 7. It is a discriminatory practice, directly or indirectly,
> (a) to refuse to employ or continue to employ any individual, or
> (b) in the course of employment, to differentiate adversely in relation to an employee,
> on a prohibited ground of discrimination.

7. The Company's Accommodation Guidelines clearly recognize its duty not to discriminate on the basis of disability:

> 1. Objective
>
> It is the policy of CN not to discriminate in the context of employment, including as part of its hiring process, based on the prohibited grounds of discrimination set out in the Canadian Human Rights Act.
>
> It is CN's policy to ensure that working conditions are not a barrier to employment regarding prohibited grounds of discrimination. As such, the accommodation of individuals' needs under the Canadian Human Rights Act, to the point of undue hardship, forms an integral part of CN's policies and practices in order to ensure respect for people and their differences.
>
> 2. Scope
>
> This policy applies to all employees of CN while working in Canada.
>
> 3. CN's Duty to Accommodate
>
> <u>The purpose of accommodation is to ensure that a person who is able to work at CN can do so, without being excluded due to</u>

considerations related to the following prohibited grounds of discrimination:

- Race
- National or ethnic origin
- Color Religion
- Age Sex
- Sexual orientation
- Marital status Family status
- Genetic characteristics Gender identity or expression
- Disability
- Conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered

The duty to accommodate applies to current employees and to applicants for employment at CN.

Accommodation is a matter of flexibility, and means making efforts to meet the reasonable needs of employees. Those seeking accommodation should also be flexible in accepting solutions that address their needs. CN is not required to provide "perfect" accommodation; CN may proceed with an option that is least costly or easiest to provide, if it also addresses the accommodation request of the employee.

Examples of Accommodation

Undue hardship means the limit of CN's obligation to accommodate a person under the law. Undue hardship is reached when factors such as safety, health or cost make CN's burden in providing accommodation too high.

1. In any accommodation, an employee must be able to perform the essential job duties of the existing, re-structured or newly assigned position.

2. Health and safety are critical factors in considering an accommodation request. If the safety of the public or employees would be jeopardized, the request may be excessive. However, the mere existence of a hypothetical safety risk does not, in itself, justify a refusal to accommodate.

3. The costs incurred in providing accommodation must be significant to justify a refusal to accommodate. Renovations or special equipment can be expensive but financial aid may sometimes be obtained from various organizations. Each request for accommodation must be addressed on a case-by-case basis. (underlining added)

8. Arbitrator Clarke in **CROA 4503** reviewed the guiding principles from the Supreme Court of Canada with respect to accommodation:

> 4. Duty to accommodate cases require an examination of both the employer's duty to accommodate and the employee's duty to do his or her work. The Supreme Court of Canada (SCC) has established a framework for these types of cases.
>
> 5. The SCC's framework includes these guiding principles:
>
> -the standard at issue in innocent absenteeism cases is one which requires an employee to perform services for his/her employer on a regular basis;
>
> -to show that the attendance standard is reasonably necessary, the employer must show that the employee cannot be accommodated without undue hardship;
>
> -Undue hardship does not require proving that further accommodation would be impossible;
>
> -the duty to accommodate does not "completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration";
>
> -the employer's duty does not require changing the workplace in a fundamental way, but does include arranging "the employee's workplace or duties to enable the employee to do his or her work";
>
> -the employee and his/her trade union have an important role to play in the search for accommodation;
>
> -the employer's duty is discharged if an employee turns down a reasonable accommodation proposal;
>
> -undue hardship is contextual and includes factors like cost, interchangeability of the workforce and facilities and interference with other employees' rights;
>
> -the arbitrator's analysis must examine the entire period of the accommodation; and
>
> -the employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.

5. More recently, Arbitrator Yingst-Bartel in **CROA 4861** provided the following summary:

> [27] <u>The Union must first establish the existence of the need for accommodation and an adverse impact from an employer's requirement. This is referred to as establishing prima facie discrimination. Once that is established, the burden shifts to the Company to establish – on a balance of probabilities – that it took reasonable measures to accommodate the Grievor to the point of "undue hardship"</u>. The law relating to that obligation was

> recently canvassed by this Arbitrator in **AH843**. As was noted in that decision, while an employee must continue to "perform work in exchange for remuneration", and the workplace need not be changed in a "fundamental way" to accommodate an employee, the determination of whether "undue hardship" has been reached is a contextual question. (underlining added)

6. Arbitrator Clarke in **CROA 4648** dealt directly with the Union onus to establish a prima facie case of discrimination:

> 4. Both the TCRC and CP have evidentiary obligations in a duty to accommodate case:
>
> [23] To make a claim for discrimination under the Act, the employee must establish a prima facie case of discrimination. If this is established, the onus then shifts to the employer to show that it accommodated the employee to the point of undue hardship.
>
> […]
>
> 6. The onus to prove prima facie discrimination differs from the burden regarding undue hardship. The Supreme Court of Canada in **Elk Valley**, supra, recently reconfirmed its test for "prima facie discrimination":
>
> [24] <u>To make a case of prima facie discrimination, "complainants are required to show that they have a characteristic protected from discrimination under the [Human Rights Code, R.S.B.C. 1996, c. 210]; that they experienced an adverse impact with respect to the service; and that the protected characteristic was a factor in the adverse impact"</u>: Moore, at para. 33. Discrimination can take many forms, including "'indirect' discrimination", where otherwise neutral policies may have an adverse effect on certain groups: Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), 2015 SCC 39 (CanLII), [2015] 2 S.C.R. 789, at para. 32. Discriminatory intent on behalf of an employer is not required to demonstrate prima facie discrimination: Bombardier, at para. 40. (underlining added)

7. On May 29, 2019, the Grievor provided a Return to Work-Restrictions Report, which confirmed that the Grievor could return to work, subject to certain restrictions (see Tab 11, Union documents). The restrictions clearly prevented the Grievor from performing his old work as a Conductor, but did not prevent him from doing other work. The Grievor did not in fact return to work until some 19 months later, on January 4, 2021. Many of the Company exhibits deal with its efforts to place the Grievor in a different position compatible with his restrictions (see Tabs 20-32, Company documents).

8. The Union has therefore established that the Grievor had a protected characteristic (disability), he suffered an adverse impact in his employment (being held out of work for 19 months) and there was a connection between his disability and that adverse effect (see **CROA 4648**).

9. I therefore find that the Union has established a prima facie case of discrimination, and the burden then shifts to the Company to establish that it met its duty to properly accommodate the Grievor up to the point of undue hardship.

B. If so, has the Company met its burden to show reasonable accommodation up to the point of undue hardship?

Position of the Parties

10. The Company submits that its duty to accommodate must be appreciated within the context of the global Covid-19 pandemic, causing a significant lowering in customer demand, widespread disruption within the Company, and the need to lay off 20% of its workforce.

11. It notes that the Grievor had significant restrictions in terms of the kinds of work that he could do, and that these restrictions changed and grew over the period in question.

12. It submits that it looked for numerous jobs, considered bundling of tasks, but numerous possibilities were either not available or delayed due to the pandemic. It submits that it met its duty to accommodate up to the point of undue hardship

13. The Union submits that the accommodation process shows that it was the Grievor who was pushing to get back to work, and offering suggestions about possible accommodated work.

14. The Union argues that the Company initially limited itself to full time positions. It argues that the Company further limited itself by only looking at positions “as is”, without considering whether positions could be modified or combined.

15. It argues that the Company failed to seek Union involvement, which could have both helped and expedited the accommodation process.

16. Finally, it submits that the Company has failed to provide evidence of other positions considered, or how the accommodations would require undue hardship.

Analysis and Decision

17. As noted above, it is the Company which bears the burden of proof to show that there was reasonable accommodation, up to the point of undue hardship.

18. Firstly, I accept that meeting accommodation requirements will be made much more difficult in the face of a global pandemic and very substantial layoffs within the Company. These layoffs would affect not only the work that was available for the Grievor, but the employees available to look for that work on behalf of the Grievor.

19. Secondly, I accept that the Grievor had very substantial restrictions (see Tab 20, Company documents) which very substantially reduced the Grievor's ability to do physically active jobs. Later in the process, the Grievor revealed additional restrictions concerning an inability to work certain shifts and that he did not have a driver's license (see Tabs, 28-29, Company documents). Again, this would have limited possible jobs the Grievor was able to do.

20. However, the Company made certain assumptions which made the search unduly limited. It treated all conditions as permanent, if they were predicted to last 12 months or more. This was the case despite the May 29, 2019 assessment indicating a return to work without restrictions in roughly 18 months. This meant that the Company was initially looking only for permanent positions (see Tab 32, Company documents). This may be administratively convenient, but it cannot represent a complete attempt to find accommodated work.

21. Additional assumptions were made which were incorrect. The Grievor was offered and accepted a Crew Dispatcher position in December 2019, with training to take place in March. The training was postponed at least until the Fall of 2020. Unfortunately, during this time the Company was not in contact with the Grievor and did not offer any temporary positions, despite admitting that it should have done so (see paragraphs 72 and 81, Company Brief).

22. For reasons which are unclear, it does not appear that the Union was involved with the accommodation process until very late in the day (see Tabs 8, 12,13 and 16, Union documents), despite having a clear role in the process, as acknowledged by the Company's Accommodation Process (see Tab 18, Company documents). It is telling that the eventual accommodated position as Utility Support was found in November 2020 "following a discussion between the Union and the Company". The Supreme Court of Canada and the Company's own Accommodation Process point out that the Union clearly has a role to play in getting injured or disabled employees back to work. The fact that the Union was not brought into the process much earlier is perplexing.

23. Evidence has been led about particular positions where the Grievor was tested but not accepted (RTC, Yard Master) or where he did not have the necessary qualifications (bilingualism for RTC). The Union has made arguments that bundling of tasks could have been done.

24. Ultimately, the question to be answered is whether the Company has established that it took all reasonable measures to find work which the Grievor could do, up to the point of undue hardship. Individual actions can be attacked or justified, but a global appreciation of the situation is required.

25. In my view, the fact that the Grievor was able to work but did not do so for 19 months is telling. The fact that the Company did not take action for 10 of the 19 months (January-October 2020), relying on Crew Dispatcher training which never occurred, is also telling. For this reason, and for the reasons given above, I find that the Company

has not met its burden to show that all reasonable measures were taken to the point of undue hardship.

B. What is the proper remedy in the circumstances?

26. The Company argues that the claim for lost wages and benefits should be limited to a 90-day period prior to the initial grievance, based on the application of article 121.7 of the Collective Agreement. This would limit the claim from December 3, 2019 to January 4, 2021.

27. The Union objects to this argument, which was never raised during the grievance process or in the JSI. Indeed, the Union position is expressly set out in the JSI in which it claims "that the Grievor be made whole for all wages that he ought to have been earning from May 29, 2019 up to when he was accommodated and worked from January 5, 2021…" (see Tab 1, Company documents). No mention is made by the Company of any argument related to article 121.7 of the Collective Agreement until the time of the hearing.

28. The Parties have expressly agreed in the CROA Rule 14 certain restrictions on the jurisdiction of the arbitrator:

> "The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions, which may be arbitrated, to such issues, conditions or questions. The Arbitrator's decision shall be rendered in writing, together with written reasons therefor, to the parties concerned within 30 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail. The decision of the arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement". (underlining added).

29. The Collective Agreement does specifically limit a claim for retroactive payments:

> "121.7 The settlement of a grievance shall not under any circumstances involve retroactive pay beyond a period of 90 calendar days prior to the date of such a grievance was submitted at the first applicable Step of the grievance procedure."

30. At issue, then, is the jurisdiction of the arbitrator to entertain arguments based on the Collective Agreement, not advanced during the grievance process or JSI. Here, the argument concerning article 121.7 of the Collective Agreement was not advanced in the Company Brief or Reply Brief, but only at the Hearing.

31. The Parties have submitted brief additional arguments following the Hearing at the request of this arbitrator.

32. The Union submits that this arbitrator decided in **CROA 4875** that the raising of issues not found in the JSI was prohibited by both CROA Rules and CROA jurisprudence:

> 15. The Company argues in paragraphs 11-16 of its Brief that the grievance is untimely under article 84.4 of the Collective Agreement, which requires a referral to arbitration within 60 days of a final decision by the Vice-President. 16. The Union argues that this issue was never raised in the JSI or at any grievance step. It submits that Article 14 of the CROA Rules limits the decision of the arbitrator to issues raised in the JSI…
>
> 17. I agree with the position of the Union. The Company is not entitled to advance arguments at the Hearing which were not raised in the JSI, as this is contrary to the Agreement between the Parties. In my view, the analysis set out by Arbitrator Hornung in **CROA 4744** and **4739** is correct and should be followed.

33. The Union argues that this approach should be followed, as otherwise unfairness is created for the Union, with no real opportunity to properly reply. It points out that **CROA 4875** also involved a collective agreement provision which arguably "defined or restricted" the issues.

34. The Company argues that article 121.7 has been part of the Collective Agreement for some time, and so the Union cannot be taken by surprise.

35. The Company submits that **CROA 5087** is applicable, where this arbitrator decided that even though the JSI was somewhat vague, the Union would be allowed to argue the language of a scope clause:

> CROA Rules and jurisprudence clearly require Parties to advance issues and facts on which they rely during the grievance process and JSI at the risk of having new issues and facts excluded at arbitration (see **CROA 3292**, **CROA 4744** and **CROA 4856**).
>
> 15. However, as Arbitrator Clarke pointed out in **AH 810**, the Rules prohibit new facts and issues from being advanced, but not necessarily new arguments:
>
> 44. Second, the JSI does not require the parties' arguments, only the facts and the issues: The joint statement of issue referred to in clause 7 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated.
>
> 46. Third, the difference between issues and arguments is not always clear. Railway arbitrators will prevent unfairness in situations where one party has expanded the issue and caused prejudice to the other. For example, an improper expansion may occur when a party raises a new issue that had not previously been candidly explored between the parties. This occurred in AH689: 31. The arbitrator agrees with the sentiments expressed by these experienced railway arbitrators. The situation may well be different in regular arbitration where the parties have not negotiated the types of procedures which exist in this expedited regime.
>
> 16. The rationale behind the Rules and jurisprudence is based both on fairness and efficiency. It would not be fair to the other Party to be able to advance brand new facts or issues at arbitration, when the opportunity to lead contrary evidence would have been lost. Providing additional time to do so, as would typically happen in a regular arbitration, would cause efficiencies to be lost in the expedited CROA process.
>
> 17. The same concerns are not necessarily present with respect to a new argument, when neither the underlying facts nor the central issue have changed. Here both Parties agree as to the underlying facts and the central issue, namely whether a CPKC manager performed work which should have been done by an available TCRC member, Mr. Lafrenière. In addition, the scope clause Collective Agreement language mirrors that of the Certification, as is set out below.

> 18. In these circumstances, while I agree with the Company that the Union position in the JSI was less than explicit, I do not think the Company is prejudiced by the Union reference to the Collective Agreement scope clause.
>
> 19. Accordingly, the preliminary objection of the Company is dismissed.

36. With due respect to the Company argument, I do not find the situation in **CROA 5087** analogous to the case at hand. In that matter, the Parties agreed with respect to the underlying facts and the central issue was not changed. The Union clearly advanced the scope argument in their materials. There was no unfairness to the Company in permitting the scope argument of the Union to be made.

37. Here, the Company was fully aware of the period for which the Union was claiming from May 2019 to January 2021. While it certainly maintained its position that it had met its accommodation obligations and owed the Grievor nothing, it never attempted to limit the damages through the use of article 121.7. Moreover, there is significant factual disagreement as to the accommodation efforts of the Company and the article 121.7 argument was never advanced at any time prior to the Hearing. I find that there would be unfairness to the Union if the argument was permitted now. For instance, had the Union had been apprised of the argument during the grievance process, the Union might have made arguments about possible exceptions to the article, or whether it contravenes Human Rights legislation to limit the period in consideration for accommodation purposes to the 45 days before a grievance is filed.

38. I make no finding on whether article 121.7 could be applicable to limit damages in a subsequent case. However, I find that permitting the Company to advance the argument in the above circumstances would be both unfair and contrary to the CROA Rules.

39. Given the findings above, the Grievor is entitled to the wages and benefits he would have earned, less mitigation and WCB payments, between May 29, 2019 and January

4, 2021, had the Company complied fully with its duty to accommodate. The precise calculation of those losses is remitted to the Parties.

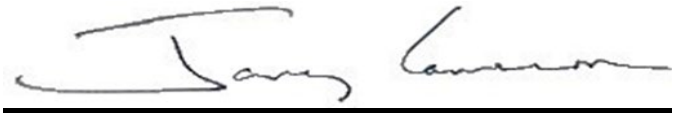
40. With respect to the Union claim for $25,000 in general damages, I do not find that the Company was acting in bad faith or with any discriminatory intent. I also find that the Company's actions and inactions were influenced by the pandemic. However, intent is not a necessary component for human rights damages and the Company could and should have done more to provide the Grievor with productive work. There can be little doubt that receiving compensation after the fact for unpaid wages is not the same as receiving income at the time. Living without a paycheque undoubtedly causes a high degree of stress, and material has been provided showing the financial consequences to the Grievor of having a sharply reduced income. The Union relies on multiple cases which have granted amounts ranging from $10,000 to $45,000 for human rights damages (see, for example, **Tearne v Windsor (City),** 2011 HRTO 2294, **Ontario and OPSEU (Ranger) Re**, 235 LAC (4th), 324).

41. In all the circumstances, I find that an amount of $**15,000** is appropriate.

Conclusion

42. The grievance is therefore granted in part.

43. I remain seized should the Parties be unable to quantify the loss of wages and benefits, as well as for any other question of interpretation or application of this Award.



August 19, 2025

JAMES CAMERON
ARBITRATOR