CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4609

Heard in Montreal, January 11, 2018

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeals of the Company's failure to accommodate Conductor G. Ward.

THE UNIONS'S EXPARTE STATEMENT OF ISSUE:

A. October 6, 2014

The Union maintains that the Company failed to provide accommodation for Mr. Greg Ward relating to his disability as provided by the Company's Return To Work Policy, the Collective Agreement and the *Canadian Human Rights Act* and the wages associated under the *Canada Labour Code* Part III Section 132(5), for the time period of October 6, 2014 up to and including August 31, 2015.

The Union further request Mr. Ward be properly accommodated until such time he can return to his full duties and be compensated all lost earnings with interest, without loss of benefits, pensionable service or seniority from December 2015 up to and including the date that Mr. Ward has been returned to his full duties or until the Company has provided him with suitable accommodations.

The Union contends that the Company has a duty to accommodate Mr. Ward's medical disability to the point of undue hardship. The Union contends that the Company has failed to discharge this duty and has failed to demonstrate that to do so would constitute undue hardship.

The Union contends that the Company's actions are contrary to the Collective Agreement, the Company's Return to Work Policy, the Canada Labour Code and the Canadian Human Rights Act.

The Union seeks a finding that the Company has breached the Collective Agreement, the Company's Return to Work Policy, the *Canada Labour Code* and the *Canadian Human Rights Act*, and a direction that the Company cease and desist from said breaches.

The Union further seeks an order that Mr. Ward be made whole for his losses with interest due to the Company's breaches, without loss of seniority, in addition to such other relief as the Arbitrator sees fit in the circumstances.

The Company disagrees and denies the Union's request.

B. December 22, 2015

The Union maintains that the Company failed to provide accommodation for Mr. Greg Ward relating to his disability as provided by the Company's Return To Work Policy, the Collective Agreement and the *Canadian Human Rights Act* and the wages associated under the *Canada Labour Code* Part III Section 132(5). Specifically, the time period in dispute for Mr. Ward for not being accommodated is December 22, 2015 up to and including October 7, 2016. Further the Union's claims that the Company's extensive delay in providing the insurance provider, (Manulife) with the proper paper work to allow for a continuation in Mr. Ward's treatment and recovery from injury. Thus, causing Mr. Ward's recovery period to be unnecessarily extended.

The Union contends that the Company has a duty to accommodate Mr. Ward to the point of undue hardship.

The Union contends that the Company has failed to discharge this duty and has failed to demonstrate that to do so would constitute undue hardship.

The Union contends that the Company's actions are contrary to the Collective Agreement, the Company's Return to Work Policy, the *Canada Labour Code* and the *Canadian Human Rights Act*.

The Union contends that the Company has not complied with Policy 1501 by failing to provide Greg with an accommodation and failing to follow proper procedure involved in finding an accommodation, up to the point of undue hardship.

The Company has a duty to accommodate employees by canvassing existing, available positions, or bundling various duties. Mr. Ward was finally provided a RTW program on October 7, 2016. Further the Union's claims that the Company's delay in providing the insurance provider, (Manulife) with the proper paper work to allow for a continuation in Mr. Ward's treatment and recovery from injury was not done in a timely fashion. The cause for the initial delay in getting Mr. Ward's benefits paid lies in the Company not submitting the original Plan Sponsor Statement for nearly two and a half months. Putting Manulife's receipt of the statement in early March 2016. During that time, Manulife then cut off additional benefits to Mr. Ward as he allegedly was no longer in active treatment. During this time, Mr. Ward was not receiving any short-term disability pay from Manulife, because they had not received any paper work from the Company. Thus, Mr. Ward was unable to continue to purchase an expensive medication because of lack of benefits and/or wages. Because of this Manulife then deemed that Mr. Ward was "no longer in active treatment" because he couldn't afford the medication to assist his return to work.

Manulife then cut off Mr. Ward's benefits as of February 22, 2016, this falls squarely on the shoulders of the Company.

Again, the Union believes that Mr. Ward's right to a reasonable accommodation has been overlooked during the period of December 22, 2015 until October 7, 2016 and further delays caused directly by the Company not providing Manulife with the needed information for almost 2 ½ months causing undue hardship to Mr. Ward.

The Union seeks a finding that the Company has breached the Collective Agreement, the Company's Return to Work Policy, the Canada Labour Code and the Canadian Human Rights Act, and a direction that the Company cease and desist from said breaches.

The Union further seeks an order that Mr. Ward be made whole for his losses with interest due to the Company's breaches, without loss of seniority, in addition to such other relief as the Arbitrator sees fit in the circumstances.

The Company disagrees and denies the Union's request.

C. March 1, 2017

After Mr. Ward was initially provided accommodation the Company then arbitrarily terminated this accommodation effective March 1, 2017.

Mr. Ward continues to not be accommodated causing him to lose wages/compensation benefits.

On March 1, 2017 Mr. Ward was involved in a return to work meeting, through conference call with the Company. During the meeting, Mr. Ward was informed by the Company that his workplace accommodation had been terminated, and that a letter had been written to Mr. Ward's doctor requesting further clarification. The Union requested that Mr. Ward stay on in his current accommodation while this clarification was being sought, but the Company terminated his accommodation.

It is the position of the Union that the Company stopped Mr. Ward's accommodation solely for the purpose to financially hurt the employee. The Company is well aware of the Collective Agreement provisions, the RTW Accommodation Policy and process, and the *Canadian Human Rights Act* and the wages associated under the *Canada Labour Code* Part III Section 132(5). The Company by choice abruptly ended Mr. Ward's current accommodation and wait for any medical information. It goes without saying that it was inconceivable why they would ever end an active accommodation when it could have continued while any further information was being looked into. Common sense at every level tells us that keeping Mr. Ward actively working in his present accommodation at the time would have been the right thing to do, not send him home to save a buck. If ever there was a clear example of Management rights and abuse of, it is this example. The Company further stated during the conference call; "the company indicated that they had not received any feedback from Mr. Ward's crew members on his progression."

Mr. Ward's crew members are not medical professionals, they are not Return to Work Specialists, and they are not privy to Mr. Ward's personal and private medical information. Nor are they privy to Mr. Ward's work return to work arrangement.

The Company states in their decline; "CP is unable to determine what positions are suitable due to various inconsistencies. CP is seeking further clarification with regards to: restrictions indicating, "alternate days", lack of progression and lack of objective medical information."

Again, there would be no undue hardship to the Company to have kept Mr. Ward in his current accommodation. The Company has directly and knowingly caused harm to this employee for no other reason than as a form of punishment.

The Union requests that the Company comply with the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, and the Company's own Return to Work Policy. The Company continues to ignore any request for Mr. Ward's accommodation.

The Union seeks a finding that the Company has breached the Collective Agreement, the Company's Return to Work Policy, the *Canada Labour Code* and the *Canadian Human Rights Act*, and a direction that the Company cease and desist from said breaches.

The Union further seeks an order that Mr. Ward be made whole for his losses with interest due to the Company's breaches, without loss of seniority, in addition to such other relief as the Arbitrator sees fit in the circumstances.

The Company disagrees and denies the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Apsey	**(SGD.)**
General Chairman	

There appeared on behalf of the Company:

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

And on behalf of the Union:

A. Stevens	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairman, Smiths Falls
R. Moffat	– Legislative Representative, Toronto
G. Ward	– Grievor, Toronto

AWARD OF THE ARBITRATOR

Nature of the Case

1. This award deals with three separate, but related, grievances alleging that CP failed to accommodate Conductor Greg Ward.

2. CP argued that Mr. Ward's first grievance had been filed out of time. Moreover, it alleged that its continuous efforts to accommodate Mr. Ward satisfied its duty.

3. The arbitrator dismisses CP's preliminary objection, since its position contradicted the legal representation it made during an investigation by the Canadian Human Rights Commission (CHRC).

4. On the merits, the arbitrator finds that CP made numerous attempts to accommodate Mr. Ward. But the TCRC did demonstrate that CP inexplicably removed Mr. Ward from his accommodated position in March 2017. Mr. Ward is entitled to compensation for this failure to accommodate.

Preliminary Objection

5. CP argued that the TCRC filed Mr. Ward's first grievance almost a year after the events had taken place. In its view, article 71.04 of the collective agreement rendered the grievance invalid (E-1; CP Submissions; Paragraphs 10-12).

6. The TCRC argued CP had taken a contradictory position as set out in the CHRC's report into Mr. Ward's complaint (U-6; File Exhibit). That report, which recommended not dealing with Mr. Ward's complaint because he had access to a grievance procedure, summarized CP's position:

> 13. The respondent states that the grievance process, per the collective agreement, has time limits associated with it, and indicates that these times limits may not restrict the complainant as this complaint is ongoing. The respondent states in its position statement that the complainant continues to have full and reasonable access to a grievance process as outlined in his collective agreement.
>
> 14. **In a telephone discussion on March 22, 2016, the respondent confirmed that it will waive the timeline and will accept a grievance from the complainant, without prejudice or precedence**.
>
> (Emphasis added)

7. The report recommended that the CHRC not deal with Mr. Ward's complaint at that time, since he should first exhaust the grievance procedure:

> 29. The respondent has agreed to accept and the TCRC has agreed to file a grievance with respect to the complainant's concerns. Given this, the complainant ought to exhaust the grievance process available to him; and the Commission should not deal with the complaint at this time.

8. The TCRC filed Mr. Ward's grievance shortly after receipt of this report. CP did not deny the position attributed to it in the report.

9. The arbitrator summarily dismisses CP's preliminary objection.

10. Given that CP advised the CHRC that it would accept Mr. Ward's grievance and waive any timelines, it is now estopped from going back on its word.

11. In addition, and if needed, the Canada labour Code (Code) at article 60(1.1) grants an arbitrator the power to extend time limits:

> Power to extend time
>
> 60(1.1) The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.

12. It would be hard to imagine a clearer situation than the current one for the exercise of the power the Legislator granted to arbitrators to extend time limits on "reasonable grounds". This award will decide all three of Mr. Ward's grievances.

Analytical Framework

13. The duty to accommodate continues to be one of the more challenging labour relations areas. The principles are relatively straight forward: CROA&DR 4503. But even the Supreme Court of Canada, on a seemingly annual basis, keeps revisiting those principles and often has differences of opinion on their practical application[1].

14. This Office has mentioned in the past the importance of the tripartite process when an employee requires accommodation. The parties have in the past shown their ability to work together, though not without occasional difficulties, to help accommodate

[1] See, for example, Quebec (Commission des normes, de l'équité, de la santé et de la sécurité du travail) v. Caron, 2018 SCC 3; Stewart v. Elk Valley Coal Corp., 2017 SCC 30 and Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center), [2015] 2 SCR 789, 2015 SCC 39.

an employee: CROA&DR 4588. The tripartite process also provides essential evidence to this Office about the parties' collective accommodation efforts.

15. Arbitrator Picher aptly described the accommodation process in CROA&DR 3429, a decision which unfortunately is only available in French:

> L'Arbitre n'est pas d'accord. En l'espèce, il s'agit de l'exécution de l'obligation statutaire de la compagnie de chercher, dans la mesure du possible, une façon d'accommodé l'incapacité physique de l'employé, tel que l'exige la Loi canadienne sur les droits de la personne, et à la lumière de la jurisprudence qui s'y rattache.
>
> Sous cette Loi, la compagnie n'est pas en devoir de créer de toutes pièces un nouveau poste qui convient aux contraintes physiques de l'employé, ni d'embauché un autre employé, soit à plein temps ou sur une base partielle, dans le seul but de contribuer aux tâches que le plaignant est incapable d'accomplir à cause de ses restrictions physiques. L'obligation de la compagnie est de chercher à placer M. Rioux dans une affectation qu'il peut accomplir raisonnablement, compte tenu de son incapacité, sans pour autant s'imposer de contrainte excessive. (Voir CROA 3354.) De plus, il est bien établit que l'obligation de trouver un emploi approprié s'étend au delà du poste que l'employé a occupé, et peut même comprendre l'affectation de la personne en question à un poste vacant en dehors de son métier et de son unité de négociation.
>
> Il est aussi à souligner que le syndicat et l'employé ont également un rôle à jouer dans l'identification d'un poste convenable. Dans cet exercice, ils ne peuvent refuser une offre raisonnable de l'employeur, par exemple en exigeant que l'employeur accorde à l'employé seulement sa position préférée (voir CROA 3173).

16. The reasons in CROA&DR 4503 described an arbitrator's focus when deciding an accommodation case:

> 7. An arbitrator must examine the entire process, including the assistance provided by the trade union and the accommodated employee, plus the specific factual context, when deciding if an employer has been sufficiently diligent in pursuing accommodation opportunities.

17. Accordingly, in deciding the three grievances, the arbitrator analyzed the parties' oral and written submissions as well as the full written record they provided.

The Three Grievances

18. CP hired Mr. Ward on July 17, 2000 as a yard helper. He is a qualified conductor. There is no dispute that Mr. Ward suffered an injury in August 2013. The injury required surgery in March 2014. Manulife paid Mr. Ward short term disability benefits from August 15, 2013 to May 26, 2014.

19. The TCRC argued that CP not only failed to accommodate Mr. Ward, but also engaged in obstructionist behaviour and took negligent, bad faith actions which required a make-whole remedy (U-1; TCRC Submissions; Paragraph 5).

20. The overall record suggests, however, that CP made numerous efforts to accommodate Mr. Ward. The evidence did not persuade the arbitrator that CP "has acted in bad faith or has sought to shirk its obligation to accommodate the grievor in suitable employment": CROA&DR 3398. In addition to the written record each party filed, the TCRC filed as an exhibit a CP document on which CP had listed 20 attempts to accommodate Mr. Ward (U-5; File Exhibit). Mr. Ward added his helpful handwritten comments to the document for each attempt.

A. October 6, 2014 to August 31, 2015

21. Mr. Ward's family physician, Dr. Dobson, indicated in an August 5, 2014 Functional Abilities Form (FAF) that Mr. Ward could perform modified duties. CP

satisfied the arbitrator that it made bona fide efforts to try to accommodate Mr. Ward during this first period.

22. CP described the various efforts it made to assist Mr. Ward (E-2; CP Exhibits; Tab 2). Mr. Ward had family responsibilities which limited his ability to work elsewhere than in the Greater Toronto Area (GTA). He did not lose his entitlement to be accommodated due to this limitation, though that can have an impact on finding an accommodated position: CROA&DR 4503:

> 32. The desire not to relocate is understandable, especially when someone is under the care of a specialist. But those decisions remain relevant in examining an employer's diligence when trying to accommodate an employee with significant restrictions and preferences.

23. CP's efforts to accommodate Mr. Ward included an initial temporary accommodation assisting the Return to Work Specialist (RWS) while the search continued for an accommodation. CP accepted the TCRC's suggestion to allow Mr. Ward to perform these tasks at a specific location. CP asked Mr. Ward to sign the Return to Work Plan (U-2; TCRC Exhibits; Tab 6) on several occasions, though he failed to return a signed copy. This was not fatal to Mr. Ward right to be accommodated. In any event, this accommodation with the RWS was never intended to continue long term.

24. CP further tried to accommodate Mr. Ward in the Intermodal Representative training program. Mr. Ward, who did not own a computer and had extremely limited

computer skills, did not pass the test for the position's requirements. That position later disappeared.

25. CP considered Mr. Ward's suggestions of possible accommodation positions and also provided Mr. Ward with access to its "Soft Skills Program". Mr. Ward did not complete the program, though the arbitrator notes that he took the initiative to borrow a computer to try to do it, but he found the courses were not designed with computer beginners in mind (U-2; TCRC Exhibits; Tab 9).

26. Similarly, CP offered a position with a different bargaining unit in Thunder Bay along with a $10,000 relocation allowance. Mr. Ward was unable to accept it due to his family responsibilities.

27. CP's RWS had mentioned to Mr. Ward in or about September 2014 that a custom brace might assist him with his return to work as it had with other employees. In a letter dated May 5, 2015, Dr. Dobson also recommended this approach (U-2; TCRC Exhibits; Tab 12). CP agreed to lend Mr. Ward the $1700.00 he needed to purchase custom boots to reduce his pain and assist him in returning to work.

28. In August 2015, Mr. Ward completed a one-week work hardening, as recommended by his doctor. CP extended this work hardening, during which he shadowed other employees, for five more weeks. The record does not disclose many details about this "shadowing".

29. In the circumstances, while the arbitrator can fully appreciate an employee's desire to work, the record does not demonstrate that CP failed in its duty to accommodate during this specific period.

B. December 22, 2015 to October 7, 2016

30. The TCRC alleged that CP failed to file paperwork with Manulife which unnecessarily extended Mr. Ward's recovery period and caused him to suffer financial loss. During this period, Mr. Ward's boots needed repair and he started a new medication called "Neurontin" to deal with the pain resulting from Neuralgia. Mr. Ward suffered fatigue and light-headedness from that medication. Mr. Ward stopped work on December 22, 2015, seemingly without any mention of illness to CP. CP thought it might be related to his boot brace (E-6; File Exhibit). Mr. Ward submitted a claim directly to Manulife on January 7, 2016 but did not advise CP of this fact.

31. The TCRC alleged that CP over a three-month period failed to submit its Plan Sponsor Statement to Manulife. This delay precluded Manulife from considering Mr. Ward's claim until March 22, 2016. The TCRC also argued this delay prevented Mr. Ward from continuing with his medication which meant he would have to start anew to get conditioned to it. Manulife later granted Mr. Ward benefits from December 22, 2015 but only to February 22, 2016, seemingly due to him not being under active treatment (U-1; TCRC Submissions; Paragraph 49).

32. Mr. Ward remained unfit to work in May and June 2016 due to taking the Neurontin. The TCRC alleged that Mr. Ward would have returned to work by this date, had CP not delayed in submitting its required paperwork to Manulife.

33. Mr. Ward started working again in October 2016 when he began working part time on a 2-person crew. He performed these duties until March 1, 2017 when CP stopped that accommodation.

34. CP argued that Mr. Ward had been off work from December 22, 2015 to February 22, 2016, a period for which he later received Manulife benefits. CP contested the TCRC's allegations that it had delayed responding to the Manulife claim and filed an email chain between Mr. Ward and the RWS (E-3; File Exhibit). CP first learned of Mr. Ward's application when Manulife had contacted it about the claim on January 22, 2016 (E-6 and U-2; TCRC Exhibits; Tab 16).

35. On January 22, 2016, the RWS asked Mr. Ward for a FAF so that CP could complete its paperwork for Manulife.

36. The TCRC questioned why CP needed another FAF, in part since Mr. Ward had been diligently providing them throughout the accommodation process. However, the Record appears to indicate that the last FAF CP received was in May 2015 (U-2; TCRC Exhibits; Tabs 10 & 11). Mr. Ward advised CP he was meeting his doctor on February 1. CP followed up with Mr. Ward on February 8 since it had still not received a FAF.

37. On February 12, 2016, CP received a FAF indicating that effective February 1 Mr. Ward was unfit for all duties (E-3; File Exhibit). Dr. Dobson indicated he would reassess in two to three weeks. On or about February 22, 2016, CP received this follow-up FAF (U-2; TCRC Exhibits; Tab 17).

38. CP completed the Manulife forms on March 2, 2016 (U-2; TCRC Exhibits; Tab 15). Manulife provided Mr. Ward with benefits from December 22, 2015 to February 22, 2016. It concluded that Mr. Ward's medical evidence did not entitle him to benefits beyond that date (E-2; CP Exhibits; Tab 4).

39. CP further argued that Mr. Ward's FAFs indicated he was "totally unfit" for work from February 22, 2016 until July 10, 2016. CP provided Mr. Ward with modified duties during the Fall of 2016. In September 2016 it also raised with Mr. Ward and the TCRC two other possible Return to Work Plans involving conductor duties. CP alleged that neither TCRC nor Mr. Ward found these proposals acceptable (E-1; CP Submissions; Paragraph 7).

40. Ultimately, Mr. Ward worked within his medical restrictions as the third person on a 2-person yard crew. This accommodated work continued until March 1, 2017.

41. The record does not support the allegation that CP intentionally, negligently or in bad faith failed to complete the Manulife forms and that this then caused Mr. Ward to

lose either benefits or work to which he would otherwise have been entitled. Neither does the record support the allegation that CP delayed submitting its Plan Sponsor Statement for 3 months.

42. It appears Mr. Ward did not advise CP of why he stopped work on December 22, 2015 or of his Manulife application. In the latter case, Manulife eventually informed CP in the last week of January 2016 of Mr. Ward's application, since it needed CP to complete the employer portion of the application.

43. When CP learned of the Manulife application, it followed up with Mr. Ward about the need for a current FAF. Once CP received this updated information, it completed the Manulife forms.

44. The arbitrator can understand the TCRC's concern about CP's need for a FAF. In fact, it waited to receive two. The document CP filed as part of the Manulife process mainly provides income and tax information about the employee (U-2; TCRC Submissions; Tab 15). However, the FAFs appear to have allowed CP to inform Manulife that Mr. Ward's status had changed as of December 22, 2015 to "medical leave".

45. The arbitrator concludes that CP satisfied its duty to accommodate during this period. CP provided a shadowing position for a portion of this period and offered other

possible positions to Mr. Ward. For more than half of this period, Mr. Ward was medically unable to work (U-2; TCRC Exhibits; Tab 23).

C. March 1, 2017 to July 17, 2017

46. The TCRC noted that once Mr. Ward was able to work again, Dr. Dobson's medical opinion indicated that he could perform his regular duties for full shifts, but only on alternating days (U-2; TCRC Exhibits; Tab 24). Dr. Dobson noted that Mr. Ward required a day of rest in between shifts due to the pain in his ankle.

47. In or around February 2017 CP decided that the time for Mr. Ward's existing accommodation had run out (U-2; TCRC Exhibits; Tab 28). CP ended the accommodation on or about March 1, 2017.

48. The TCRC has satisfied the arbitrator that Mr. Ward's accommodation was succeeding and that there was no medical information suggesting the accommodation could not continue. Mr. Ward later returned to work and now works five (5) days a week.

49. There may be reasons why an accommodation cannot continue. But an accommodation cannot just be stopped for no reason. This Office commented on a similar situation in CROA&DR 4588 :

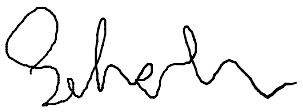
> 17. No one disputed when negotiating the original agreement that Mr. Windsor required accommodation. What remained unexplained in this case is why CP terminated that accommodation, when Mr. Windsor's personal circumstances seemingly had not changed.
>
> 18. CP did not argue, beyond the comment at the hearing that the agreement was "not working", that it had reached the point of undue

> hardship. Neither did the facts show that CP had cancelled the existing accommodation due to an alleged failure on Mr. Windsor's part to provide relevant and essential information about his situation.
>
> 19. Instead, the accommodation was cancelled first and then Mr. Windsor was asked for information.

50. There is no evidence before the arbitrator that Mr. Ward could not have continued to work in his accommodated position until he returned to work five days a week. If there were concerns that the work was not productive or that Mr. Ward required a different accommodation (E-2; CP Exhibits; Tabs 2 & 6), then the parties needed to explore those scenarios during the ongoing accommodation: CROA&DR 4605.

51. Mr. Ward is entitled to the compensation he would have earned in his accommodated position from March 1, 2017 until he returned to work full time. The fact that CP offered him other accommodated positions during that period does not impact the compensation to which he is entitled.

52. The arbitrator remains seized for any disputes regarding the calculation of the compensation owed to Mr. Ward.



February 9, 2018

GRAHAM J. CLARKE
ARBITRATOR