CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4637

Heard in Calgary, May 9, 2018

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Failure to accommodate Ms. M. Kosheluk.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

In his July 15, 2013 decision in CROA Case No. 4227, Arbitrator Picher ordered Ms. Kosheluk reinstated into her employment "with both parties to meet to explore the appropriate job possibilities and accommodation that can be made" for her. Arbitrator Picher stated that "In any event, the grievor shall be reinstated to the payroll no later than sixty days from the date of this award."

Ms. Kosheluk was not provided suitable employment until October 31, 2013, when she was employed as a crew bus driver from October 31 to December 31, 2013. As of December 31, 2013, the Company advised that her accommodation had ceased. In April 2014, Ms. Kosheluk was given the position of gang labourer which did not meet her RTW criteria as the duties of this position were clearly outside of her medical limitations. As per the insistence of the Company Ms. Kosheluk attempted the position but arriving and finding out that she would be working/living on "rolling stock" triggered Ms. Kosheluk's severe anxiety. She was advised by the Foreman that on account of this the gang labourer position was not suitable. She was sent home. Since that time, the Company has not provided Ms. Kosheluk with further accommodation.

The Union contends that the Company breached the above orders of the Arbitrator. Moreover, the Union contends that the Company has a duty to accommodate Ms. Kosheluk's ongoing employment to the point of undue hardship. The Union contends that the Company has failed to discharge this duty since July 2013. The Company has failed to demonstrate that providing Ms. Kosheluk suitable accommodation 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 *Canadian Human Rights Act* as well as CROA Case No. 4227.

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 and provide Ms. Kosheluk with suitable accommodation without further delay. The Union further seeks an order that Ms. Kosheluk be made whole for her losses with interest due to the Company's breaches 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:
(SGD.) W. Apsey
General Chairman

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

C. Clark	– Assistant Director, Labour Relations, Calgary
S. Oliver	– Manager, Labour Relations, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairman, Smiths Falls
D. Edward	– Senior Vice General Chairman, Calgary
W. Zimmer	– Local Chairman, Moose Jaw

AWARD OF THE ARBITRATOR

On July 12, 2013, Arbitrator Picher, in allowing the Grievor's dismissal grievance, reinstated her and directed the parties to:

> "...meet to explore the appropriate job possibilities and accommodations that can be made for the grievor. In any event, the grievor shall be reinstated to the payroll no later than 60 days from the date of this award."

The **CROA 4427** decision should be read in conjunction with this award.

Although the Grievor was ultimately accommodated pursuant to the above order, such was not the case from the outset. There are two time periods of focus. The first being the time from July 12, 2013 (the date of the order), to October 30, 2013 (the date

the order was initially complied with). The second being the period from January 1, 2014 to June 2, 2015 when the Grievor was permanently accommodated.

1. July 12, 2013 - October 30, 2013

In **CROA 4427** Arbitrator Picher directed that the Grievor was to be: "...reinstated to the payroll no later than sixty days from the date of this award". She was not accommodated until October 30, 2013 when she began working at a temporary job as a Relief Crew Bus Driver.

The Union argues that the Company did not make the appropriate reasonable efforts to accommodate the Grievor during this 60 day period. While the Company agrees that the initial accommodation of the Grievor did not take place within the 60 day time period, it asserts that the reason for the delay rested equally with the Union/Grievor.

A delay resulted both over the issue of the Company receiving medical information and the Grievor's preference as to the location of accommodation options. I accept that the delay does not rest entirely with the conduct of the Company and that the obligation to find an accommodated position is shared with the Union.

Nevertheless, the order is clear. The Grievor was to be "reinstated to the payroll **no later than** 60 days ..." from the date of the award. "Payroll" falls exclusively within the jurisdiction of the Company. If the Company was unable to comply with the order, it was incumbent upon it to either apply for a variance to extend it or otherwise obtain the

agreement of the Union to do so. Therefore, even considering the joint responsibility of the parties that resulted in the failure to meet the deadline, the Grievor, by virtue of **CROA 4427**, is entitled, at a minimum, to be compensated by the Company for the period of October 12, 2013 to October 31, 2013.

2. January 1, 2014 - May 1, 2015

The Grievor worked as a temporary Relief Crew Bus Driver from October 30, 2013 until December 31, 2013. Thereafter, the parties set about searching for another accommodated position for her to fill. Ultimately, on May 1, 2015 she was permanently accommodated as a Crew Bus Driver in Thunder Bay, a position she holds today.

Going backwards for a moment, it is important to note that on October 7, 2013 (Company Exhibits; Tab 8), the Company asked the Grievor whether she would relocate to accept a position. She advised that although she would not relocate to Toronto, Thunder Bay or Calgary, she would consider Moose Jaw. On October 31, 2013, the company offered her an accommodated position as a Store Clerk in Moose Jaw. After some preliminary discussions surrounding relocation costs, the Grievor – in my view for acceptable reasons - declined the move.

Much of the dispute between the parties during the period between January 1st, 2014 - May 1st, 2015 can be found in missed opportunities while the Company attempted to accommodate the Grievor's specific FNF restrictions in the rail industry. These were exacerbated both by the Grievor's job and location preferences and communication

issues that arose between the Grievor/Union and the Company's return to work specialists.

I do not find any breach of the Company's bona fide duty to accommodate the Grievor, during the above period, up to the point where the Store Clerk position in Thunder Bay came available in 2014.

Despite the fact that the Union made it clear to the Company both that the position would be available and that the Grievor would take it, the Company refused to consider the Grievor for the Thunder Bay Store Clerk position principally on the grounds that she was unable to "work in proximity to moving trains" (Union Exhibits; Tab 29). This response is puzzling since, as discussed above, the Store Clerk position was the very position in Moose Jaw that was offered to the Grievor in November 2013 notwithstanding her work restrictions with respect to proximity to moving trains. Rather than provide the position to the Grievor, the Company elected, on June 2, 2014, to fill the position externally.

Given the circumstances outlined in the parties' briefs and documents, I conclude that the Company did not fulfill its duty to accommodate the Grievor, to the point of undue hardship, when it failed/refused to offer her the Thunder Bay Store Clerk position on June 2, 2014. Accordingly, the Company must make the Grievor whole between the period of June 2, 2014 and the time that she accepted the full-time position as Crew Bus Driver on May 1, 2015.

Although the Union requested damages in addition to compensation, the evidence did not convince me that the conduct of the Company, in the circumstances of this case, disclosed conduct which attracted such damages.

The grievance is allowed in part as follows:

1. The Grievor shall be compensated for all lost earnings and benefits, subject to mitigation, between the period of October 12, 2013 and October 30, 2013.

2. The Grievor shall be made whole for all lost earnings and benefits, subject to mitigation, from June 2, 2014 to May 13, 2015.

I shall retain jurisdiction with respect to the interpretation, application and implementation of this award.

May 22, 2018

RICHARD I. HORNUNG, Q.C.

ARBITRATOR