

AH822-S

**IN THE MATTER OF AN ARBITRATION UNDER THE *Canada Labour Code, RSC*
1985, c L-2.**

BETWEEN:

**International Brotherhood of Electrical Workers System Council No. 11
(IBEW)**

-and-

**Canadian Pacific Kansas City Railway
(CPKC)**

Dispute regarding compensation and production of medical documents

Arbitrator: Graham J. Clarke
Date: October 16, 2023

Appearances:

IBEW:

D. Ellickson: Legal Counsel
S. Martin: IBEW International Representative
J. Sommer: IBEW Senior General Chairman
Mr. X: Grievor

CPKC:

F. Billings: Assistant Director, Labour Relations
L. McGinley: Director, Labour Relations
S. Scott: Manager, Labour Relations

Arbitration held via videoconference on October 4, 2023.

Award

BACKGROUND

1. On February 24, 2023, the arbitrator issued AH822¹ which resolved certain disputes regarding Mr. X's reinstatement. AH822's introductory paragraphs provided an executive summary of the decision²:

4. For the reasons which follow, the arbitrator concludes that, while the original reinstatement order remains in place, the jurisdiction under the Original Decision does not extend to new matters which had never formed part of the original arbitration. For the current grievance, the arbitrator has concluded that CP failed to accommodate Mr. X. The contradictory medical evidence did not justify placing Mr. X in a different position with a lower rate of pay. Similarly, CP did not engage with the IBEW and the grievor to confirm his restrictions, if any, and then consider how to accommodate him.

5. The arbitrator orders CP to reinstate Mr. X to his original position. CP must also fully compensate Mr. X for any losses occasioned by not reinstating him into his original position. However, before Mr. X returns to active duty, the arbitrator will allow the parties to revisit the accommodation process including the clearly contradictory medical evidence regarding Mr. X's ability to perform his S&C Maintainer duties.

2. The parties resolved all reinstatement issues except for two which they jointly described as follows³:

1. The issue of compensation owing Mr. X from February 2, 2022 to present and, in particular, his entitlement to compensation to overtime and to standby pay; and

2. The issue of Mr. X's return to performing the duties of his S & C Maintainer position. The parties are in disagreement over what medical information the Company is entitled to demand from the Grievor.

3. For the following reasons, the arbitrator has concluded that the medical information CPKC requested remained relevant to its epilepsy concerns and a possible impact on Mr.

¹ [International Brotherhood of Electrical Workers System Council No. 11 v Canadian Pacific Railway Company, 2023 CanLII 13643](#)

² AH822 at paragraph 72 ordered Mr. X's reinstatement "on paper", *infra*.

³ IBEW Brief, paragraph 7.

X's safety sensitive position. In the absence of that medical evidence, the arbitrator has decided to defer deciding the questions involving overtime and standby pay.

CHRONOLOGY

4. For proper context, this Chronology will include certain events both before and after the issuing of AH822.

5. **December 12, 2022:** CPKC's Occupational Health Services (OHS) sent Mr. X a letter with the Re line: Epileptic Seizures – Medical Monitoring as defined by Canadian Railway Medical Rules. CPKC explained its request to Mr. X⁴:

Canadian Pacific employees working in Safety Sensitive Positions have a direct role in safe railway operations. Impaired performance due to a medical condition could result in a significant incident affecting the health and safety of employees, the public, property or the environment.

Specific railway medical rules for Safety Sensitive Positions are Federally mandated under the Railway Safety Act and are contained in the Railway Association of Canada Canadian Medical Rules Handbook and the Company's Fitness To Work Medical Policy.

In order to clarify your medical condition and determine your fitness to work in your position the following information is required as soon as possible but no later than February 28, 2023.

- A completed Epileptic Seizures Medical Report (by a Neurologist)
- Copies of all Antiepileptic Drug blood level reports performed during the last year
- Any additional information your Neurologist thinks may be useful in assessing your fitness to work in your position.

Please take this letter to your Neurologist so that they are aware of what is required.

6. **February 14, 2023:** Three days before the arbitration hearing which led to the award in AH822⁵, OHS, after reviewing medical information submitted by Mr. X on February 12⁶, requested medical documentation from Mr. X going back 4 years⁷.

⁴ See AH822 at paragraphs 20-23 which indicate that CPKC/OHS only became aware of Mr. X's possible epileptic condition during the reinstatement process.

⁵ IBEW Brief, Paragraph 11.

⁶ CPKC Brief, Paragraph 18.

⁷ IBEW Brief, Tab 5.

7. **February 24, 2023:** The arbitrator issued AH822 which ordered CPKC to return Mr. X to his original position, “at least on paper” [Footnotes omitted]:

69. For CP, the medical reports may well raise some concerns. CP generally has concerns about ensuring safety in its operations. But there needs to be some explanation for CP rejecting Mr. X’s doctors’ opinions, including that of his neurologist.

70. A court would no doubt find an arbitrator’s decision arbitrary if a conclusion relied on one party’s evidence but ignored the other party’s contradictory evidence. The same conclusion by analogy applies in this case. The arbitrator could only find that CP respected its duty to accommodate by ignoring all of the IBEW’s medical evidence. There is no rational reason for doing that.

71. The arbitrator orders CP to reinstate Mr. X in his original S&C Maintainer position, at least on paper. CP will fully compensate Mr. X, less any sums he earned in his non-bargaining unit position.

72. The arbitrator orders reinstatement “at least on paper”. While Mr. X should not suffer prejudice due to the delays in this matter, the parties still need to complete a proper duty to accommodate analysis. This includes addressing the conflicts in the medical evidence about whether Mr. X can resume his full duties.

73. Should the parties not resolve the situation themselves, then they may have to prepare to have the doctors testify. Cross-examination remains the best method a tribunal has for resolving crucial evidentiary conflicts like those in the case.

CPKC returned Mr. X to his Maintainer position “on paper” and has applied that position’s hourly rate for all work performed in his current “accommodated” position⁸.

8. **March 9, 2023:** OHS reissued its medical information request letter⁹ and asked for the following information:

Health Services has reviewed your most recent Epileptic seizures report completed by the neurologist.

The following medical reports are still outstanding as indicated in the attached letter initially sent to you on Feb 14, 2023:

⁸ CPKC Brief, Paragraph 17.

⁹ IBEW Brief, Tab 7; Page 78/126: CPKC advised the IBEW that it reissued the letter to reflect the fact that Mr. X occupied a safety sensitive rather than a safety critical position.

- All Specialist consultation letters dating back to the first seizure episode in 2019 or that relate to the neurological conditions.
- All referral letters from your Primary Care Physician(s) to Specialists dating back to the first seizure episode in 2019 or that relate to the neurological conditions.
- All neurological diagnostic imaging reports.
- All electroencephalogram reports.
- All Emergency Room assessment reports that relate to the neurological conditions.
- All hospital admission reports and discharge summaries that relate to the neurological conditions.
- Any additional information your treating provider thinks may be useful in assessing your fitness to work in your position.

The reports are due as soon as possible but no later than March 14, 2023.

9. **March 13, 2023:** The IBEW objected¹⁰ to CPKC's disclosure request, including the changed grounds on which it was making the request:

I am responding on behalf of Mr. [X]. I find it very interesting that twice the company has demanded additional information while citing requirement under RAC medical rules and upon question, the Company has simply altered the letter and is now standing solely on company policy to support the demand for additional information.

The information sought by the Company is extremely and unreasonably broad, unnecessarily invasive and in many respects unrelated to the issue of whether Mr. X is capable of performing the duties of his safety sensitive position of S & C Maintainer. We suggest OHS provide us with a list of questions and requests which we will provide to Mr. X's Neurologist for answering. We believe this is the most expeditious manner of proceeding.

10. **March 13, 2023:** OHS responded to the IBEW's objection and explained its request¹¹:

Hello Steven,

¹⁰ IBEW Brief, Page 79/126.

¹¹ CPKC Documents, Tab 12, Page 99/203.

The initial letter was sent in error on Feb. 14, 2023, as the letter indicated that the employee was in a Safety Critical Position. This letter has been updated to reflect the correct information pertaining to the employee's Safety Sensitive Position.

The list of requested medical information noted in the letter was directly requested by the Chief Medical Officer. The requested information should already exist and this information can be directed to the employee's neurologist, if the employee prefers.

Please let me know if you have any further questions.

11. **March 20, 2023:** CPKC exchanged emails with the IBEW about the need for the medical information it had requested and provided a consent form¹².

12. **April 14, 2023:** The IBEW later produced¹³ some medical information to OHS:

After much discussion with Mr. [X] I am providing the following attachments on behalf of and with permission from Mr. [X]. Except for the CMO, the attachments are not to be shared be with other individuals or departments.

OHS previously has received all applicable FAFs and seizure reports related to Mr. [X]'s fitness. With the additional information provided today we believe this should allow us to move forward to Mr. [X]'s reinstatement.

Lastly, if there are any additional specific questions related to Mr. [X]'s condition, please forward them and we will return to Mr. [X]'s specialist for response.

13. **April 18, 2023:** Dr. Lambos, the Chief Medical Officer (CMO), added a clinical file note, which the IBEW noted it only learned about for the first time at the October 4, 2023 arbitration, that Mr. X's additional medical information did not allow for "an updated and informed medical fitness for duty opinion"¹⁴:

Discussion: With respect to the assessment of this employee's medical fitness for duty the findings on the above MRI reports are both significant and concerning. However, I am unable to provide an updated and informed medical fitness for duty opinion on this employee based on the limited information that was recently submitted nor am I able to have an informed discussion with this employee's Neurologist based on the limited information that was submitted.

¹² CPKC Brief, Paragraph 23. The arbitrator could not find these emails in the Record.

¹³ IBEW Brief, Page 85/126.

¹⁴ CPKC Documents, Page 92/203

Accordingly, this employee's work limitations and / or restrictions remain unchanged.

14. **May 26, 2023:** The parties mutually agreed to arbitrate their dispute on October 4, 2023.

ISSUES

15. The arbitrator will slightly rephrase the agreed upon issues and will examine them in reverse order #1:

1. What is the scope of the medical information CPKC/OHS can request from Mr. X? and
2. From February 2, 2022 to present does CPKC owe Mr. X overtime and standby pay?

1. WHAT IS THE SCOPE OF THE MEDICAL INFORMATION CPKC/OHS CAN REQUEST FROM MR. X?

16. In its Brief, the IBEW takes issue with OHS' request for Mr. X's medical information and alleges a continuing failure by CPKC to engage in the accommodation process¹⁵:

34. The same issues exist: the Company – or, rather, OHS – refuses to consider alternatives to making demands for broad medical disclosure. This is not the necessary individual assessment mandated by the Canadian Human Rights Tribunal in *Audet v. Canadian National Railway* 2006 CHRT 25 previously relied upon by the Union and noted by the Arbitrator.

35. The Company has, without reason or explanation, ignored the Union's suggestion that OHS formulate specific questions for the Grievor's Neurologist.

36. Regarding OHS's request for medical information – in addition to being a misguided approach to the issue of accommodation – such request is, as stated by the Union, extremely and unreasonably broad, unnecessarily invasive and in many respects unrelated to the issue of whether Mr. X is capable of performing the duties of his safety sensitive position of S&C Maintainer.

37. The record continues to "remain silent on any attempts CP made to meet with the IBEW to review the medical evidence, the restrictions, if any, and possible accommodations." (Ad Hoc 822; paragraph 65)

38. Further, the Company has still not explained to the Union its reasons for "rejecting Mr. X's doctors' opinions, including that of his neurologist." (Ad Hoc

¹⁵ See also IBEW Brief, Paragraph 17.

822; paragraph 69). This is despite the fact of the Union's offer to have Mr. X's Neurologist answer any questions the Company may have.

39. The tripartite accommodation process has still not been engaged and the Union respectfully submits that the Company continues to be in violation of its obligation to engage in the accommodation process.

17. For its part, CPKC argued orally that its request for medical information focused on its concern about epileptic seizures and respected what AH822 had required:

35. In keeping with the Company's medical fitness for duty processes and the Arbitrator's award, the Company requested additional medical to ensure they could have informed discussions with the Grievor's neurologist and as suggested by Arbitrator Clarke, properly investigate any contradictions in the medical evidence.

36. Despite doing as the Arbitrator suggested, the Grievor and the Union declined to provide the requested medical information. The Company submits that for the Union to now state that this is somehow inappropriate and unnecessarily invasive, is illogical as this is precisely what they asked for in their initial submissions.

...

42. The Company has a legitimate interest and obligation in ensuring its employees working in a safety sensitive capacity have certification of fitness to perform the core functions of their job. Given the core function of an S&C Maintainer is to drive a Company vehicle across an expansive geographical area that comprises of their bid territory, working largely on their own, the Company must follow the similar guidelines from the Canadian Medical Association's recommendation for commercial drivers to have a seizure-free interval of 5 years. The Company respectfully maintains it has the responsibility, obligation and entitlement to verify the fitness of its employees working in a Safety Sensitive Position.

...

44. As such, the Company maintains that it is well within its right in accordance with the Medical Fitness Guidelines and AH 822 to request additional medical from the Grievor in order to determine his medical fitness for safety sensitive duties.

18. The arbitrator reminds the parties that the duty to accommodate is an ongoing obligation. Multiple cases have described it as a tripartite process, including the original award in AH822. The confidentiality of the medical information and reliance on OHS does

not necessarily provide CPKC with a shield against the important statutory consequences if a failure to accommodate occurs¹⁶. It is unclear, for example, why CPKC would not have advised the IBEW until the day of the arbitration on October 4, 2023 about Dr. Lambos' April 18, 2023 comments regarding the need for the medical evidence.

19. However, the IBEW did not persuade the arbitrator that CPKC's request for the disputed medical information can be described as "extremely and unreasonably broad, unnecessarily invasive and in many respects unrelated to the issue of whether Mr. [X] is capable of performing the duties of his safety sensitive position of S&C Maintainer"¹⁷.

20. The medical information requested focused on the possibility of epilepsy, a situation CPKC only learned about after the arbitrator's original reinstatement order. CPKC's request repeatedly used the term "neurological" to narrow its scope. The IBEW did not demonstrate how such evidence had no relevance to CPKC's epilepsy concerns.

21. CPKC's medical information request appears consistent with the need for an individual assessment as discussed in AH822 which referenced *Audet*¹⁸:

6. Individual assessment

Individuals with epilepsy or other epileptic seizures must be assessed with regard to their suitability for a particular position. The nature of the duties and responsibilities associated with their specific Safety Critical Position must be closely evaluated before any final determination of their fitness for duty.

[53] What efforts did CN make to individually assess Mr. Audet regarding his suitability to work as a brakeman or conductor? There was no evidence of any attempt by CN to make any such assessment until December 10, 2003, almost four months after Mr. Audet had filed his human rights complaint with the Commission, and precisely 15 months after experiencing his seizure. On that date, Dr. Claude Lapierre, CN's Chief Medical Officer, wrote a letter to Dr. Guy Rémillard, a neurologist in Montreal, asking his professional opinion on the nature of the seizure disorder that [Mr. Audet] is suffering from and [Dr. Rémillard's] recommendation on his fitness for duty in a safety critical position.

[54] Dr. Rémillard did not meet or examine Mr. Audet personally, nor was he asked to do so. Jackie Anderson, a nurse on CN's Medisys team, testified that

¹⁶ See, for example, [AH835 - International Brotherhood of Electrical Workers \(System Council No. 11\) v Canadian Pacific Kansas City Railway, 2023 CanLII 73603](#) at paragraphs 90-98.

¹⁷ IBEW Brief, Paragraph 36.

¹⁸ [Audet v. Canadian National Railway, 2006 CHRT 25](#). *Audet* dealt with a safety critical position while Mr. X occupies a safety sensitive position. In AH822 at paragraphs 52-53, the arbitrator noted that the Medical Guidelines in *Audet* applied to safety *critical* positions.

the standard protocol is to conduct a paper review of the medical condition of an employee with epilepsy. The assessment is made based on information from the employee's treating physicians and specialists. Ms. Anderson added that the assessment is usually made in consultation with CN's Chief Medical Officer. In some complex cases such as Mr. Audet's, the advice of a specialist on the medical condition is sought, in order to determine if Medisys' assessment is correct.

22. While the parties could have agreed to follow the IBEW's suggested approach of providing further questions to Mr. X's neurologist, that is not the only possible avenue. A full understanding of the relevant medical facts appears helpful prior to OHS having a discussion with Mr. X's neurologist.

23. During the arbitration, the parties did raise the possibility of an independent medical examination, something which AH822 had originally referenced¹⁹. That process may be a way, once the medical evidence has been produced, for the parties to resolve their current impasse themselves²⁰.

24. In sum, the arbitrator disagrees that CPKC's request for further neurological medical information was either extreme or unreasonable. That medical information appears relevant for the appropriate medical experts tasked with assessing Mr. X's situation.

25. The arbitrator accordingly dismisses this aspect of the IBEW's "motion".

2. FROM FEBRUARY 2, 2022 TO PRESENT DOES CPKC OWE MR. X OVERTIME AND STANDBY PAY?

26. The IBEW alleged that AH822 had already determined implicitly that CPKC must pay overtime and standby pay to Mr. X:

19. Recently, the Company agreed to compensate Mr. X at the correct S&C Maintainer hourly rate retroactive to the date the Company unilaterally restricted Mr. X from working a Safety Sensitive Position (February 2, 2022). The narrow issue is whether the Company is required to also compensate Mr. X the amount of overtime and standby pay he would have earned if he had been performing the duties of an S&C Maintainer.

¹⁹ See paragraph 57.

²⁰ As AH822 noted at paragraph 73, another method is for the medical professionals to testify under oath and be cross-examined. The arbitrator will then decide the human rights question in this matter.

20. In the Union's respectful submission this issue has already been determined by the Arbitrator.

21. Specifically, in Ad Hoc 822 at paragraph 5 the Arbitrator ordered the Company to reinstate Mr. X to his original position and ordered the Company to "fully compensate Mr. X for any losses occasioned by not reinstating him into his original position." Also at paragraph 71, the Arbitrator states:

71. The arbitrator orders CP to reinstate Mr. X in his original S&C Maintainer position, at least on paper. CP will fully compensate Mr. X less any sums he earned in his non-bargaining unit position.

22. The Union submits that the foregoing are "make whole" remedies ordered by the Arbitrator. A "make whole" remedy is one that sees the impacted employee placed in the identical position (or as near as possible) he or she would have been in, but for the identified breach.

27. CPKC argued conversely that Mr. X had no entitlement to overtime or standby pay given that he had only been returned to his previous position "on paper" and could not work overtime or have standby status in that position:

46. As previously mentioned, the Grievor was displaced into his previous position on paper and has been in receipt of the S&C Maintainer hourly rate. The parties have agreed on top up compensation for the period of time he was being paid his accommodated rate and the only remaining issues concerning compensation are standby and overtime.

47. The Company maintains that the Grievor is not entitled to standby or overtime while in his accommodated position unless of course he were to be on call or work hours that would entitle him to overtime.

48. As outlined in Article 7 (Tab 21) of the Collective Agreement, standby allowance is for "when employees are required by the Company to hold themselves available to protect requirements of the service outside of regular working hours and on rest days. As the Grievor is not required to nor can he protect the Safety Sensitive duties of an S&C Maintainer as he is not fit to do so, he is not entitled to compensation for standby.

49. As outlined in Article 3 (Tab 22) of the Collective Agreement, overtime is for when employees are required to work in excess of their regularly scheduled shift. As the Grievor is currently working 40 hours a week in his accommodated role he is not entitled to overtime however if he were to work in excess of his current regular scheduled shift, he would be paid in accordance with Article 3.

28. The arbitrator has decided to defer deciding this issue. The arbitrator ordered Mr. X's reinstatement "on paper" due to CPKC's failure to conduct a proper accommodation

process. This order differed from a “regular” reinstatement order for an improperly terminated employee where no subsequent fitness issue arose.

29. Since this supplemental award will promote the resumption of the parties’ accommodation process, that exercise will assist the arbitrator in determining these two remaining compensation issues at a later date.

DISPOSITION

30. For the above reasons, the arbitrator dismisses the IBEW’s motion contesting OHS’ request for further medical information. That information does not appear extreme or unreasonable. OHS has focused its request on neurological information which appears relevant to its post AH822 concerns about a possible epilepsy diagnosis.

31. It may be that such a diagnosis does not prevent CPKC accommodating Mr. X in his safety sensitive position. But the Record does not disclose how that could be done without OHS receiving the requested medical information.

32. Given the absence of the medical information CPKC requested, the arbitrator will defer deciding the issue involving overtime and standby pay for Mr. X’s S&C Maintainer position which he currently occupies “on paper”.

33. The arbitrator remains seized.

SIGNED at Ottawa this 16th day of October 2023.



Graham J. Clarke
Arbitrator