AH822

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 RAILWAY COMPANY

(CP)

Reinstatement and Accommodation Dispute

Arbitrator: Graham J. Clarke
Date: February 24, 2023

Appearances:

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

CP:
D. Zurbuchen: Manager Labour Relations
F. Billings: Asst. Director Labour Relations
A. Birdsell: Manager Health Services
S. Moloughney: Specialist Disability Management

Arbitration held via videoconference on February 16, 2023 about a previous reinstatement order and the duty to accommodate.

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Award

BACKGROUND

1. This arbitration examines CP's decision not to reinstate the grievor in his original position despite a previous order to do so[1]:

> 71. The arbitrator orders CP to reinstate Mr. X in his position with full compensation, other than for the 60-day suspension. The arbitrator remains seized for any issues arising from this award.

2. CP alleged that new medical information, which only came to light during the reinstatement process, justified placing Mr. X in a lower paying non-safety sensitive position outside the bargaining unit. CP alleged that those new facts fell outside the arbitrator's reserve of jurisdiction in the previous award (Original Decision). However, CP did not dispute that the arbitrator had jurisdiction to resolve the IBEW's subsequent grievance about the lack of reinstatement.

3. The IBEW argued that the arbitrator had jurisdiction under the Original Decision to remedy CP's failure to reinstate Mr. X to "his position". In any event, its later grievance also provided that authority. In the IBEW's view, CP failed to do any personal assessment of Mr. X's situation. Additionally, CP failed to assess properly the contradictory medical evidence.

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

[1] The parties agreed with the arbitrator to anonymize this award given its focus on the grievor's medical information.

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.

CHRONOLOGY OF FACTS

6. The arbitrator has considered the entire Record and merely highlights some of the key facts below for ease of reference. Some facts predate those examined in the Original Decision.

7. **April, 2019**: As described in the IBEW's Brief[2], Mr. X, while on an unrelated medical leave, experienced an "episode" of light headedness without loss of awareness or consciousness. The hospital determined he had suffered a focal seizure. This pre–Original Decision event later became relevant to his ordered reinstatement.

8. **March 2020**: After an unrelated medical leave, Mr. X's family physician provided CP with a Functional Abilities Form (FAF) allowing him to return to full duties following a 4-week period of graduated increase in hours[3].

9. **August 4, 2021**: The arbitrator issued the Original Decision which substituted a 60-day suspension for Mr. X's terminations and ordered CP to reinstate him "in his position with full compensation".

10. **September 3, 2021**: CP filed an application for judicial review[4] in Ontario Superior Court.

11. **October 19, 2021**: Rather than proceed with the judicial review, the parties negotiated a Return to Work Agreement[5] (RTWA) which included these extracts:

> **As discussed, the Parties agree to the following, on a without prejudice and precedent basis:**
>
> **i. Mr. X will return to work in his former position of S&C Maintainer**.
>
> ii. Mr. X will be compensated pursuant to [the Original Decision].

[2] IBEW Brief; Paragraph 13
[3] IBEW Exhibits; Tab 4
[4] IBEW Exhibits; Tab 2
[5] CP Exhibits; Tab 2

iii. The Company will withdraw Its pending application to the Federal Court for judicial review of [the Original Decision].

iv. Mr. X will be subject to 6 months unannounced D&A testing.

Pursuant to [Original Decision] and the award from the Arbitrator, the following terms and conditions will apply.

1. Before returning to service, Mr. X must be determined to be medically fit for his regular position by the office of the Chief Medical Officer or his designate.

2. Mr. X shall be reinstated with full compensation and no loss of seniority.

3. Mr. X will be subject to mandatory unannounced substance testing for a period of not less than six (6) months. This six (6) month period will commence upon the return to service of Mr. X and will be extended by an amount equal to any period in which he is not in active service with the Company. Any positive substance test during the term of this clause will be considered a violation of this Agreement.

…

4. There shall be no grievance advanced in respect of this Agreement. This agreement shall act as full and final resolve to any outstanding grievance relating to the dismissal of Mr. X.

(Emphasis added)

12. **October 26, 2021**: The Alcohol and Drug Program Administrator advised[6] CP that "Mr. X has tested "Negative" on his return to duty test completed on October 22, 2021. Please proceed with scheduling a medical assessment on this employee".

13. **November 4, 2021**: Mr. X's doctor provided CP with an Employment Medical Assessment[7]. Other than the need for a sleep apnea test, Mr. X had no restrictions. CP did not require Mr. X to have a sleep apnea test for his position.

14. **November 12, 2021**: CP's Occupational Health Services (OHS) asked for follow up information regarding a Substance Abuse Program (SAP) assessment and a seizures report. The OHS nurse noted the following regarding the 2019 seizure[8]:

[6] IBEW Exhibits; Page 158/249
[7] IBEW Exhibits; Tab 5
[8] IBEW Exhibits; Page 157/249

> 2. History of seizure in 2019 - reports as "mild epilepsy" with only the one seizure. EE takes lacosamide, sees his neurologist every 6 months (last seen in August 2021).

15. **November 25, 2021**: Shepell's SAP review[9] concluded: "Based on the client's presentation, his self-reporting and the results of the assessment, there are no impacts on work safety or performance because of substance use".

16. **November 30, 2021**: OHS' notes[10] comment on the SAP assessment and indicate: "No impacts on work safety or performance". The notes further indicate "Physician opines EE fit for full duties, no physical or cognitive restrictions noted". OHS states it is awaiting the requested seizures report.

17. **December 2, 2022**: Mr. X's neurologist, Dr. Bercovici, completed CP's form entitled "Epileptic Seizures Report"[11] and concluded the grievor could safely perform safety sensitive duties. The Form also contained this information:

> Question of Epilepsy – presumed focal aware seizures
>
> On the question asking for the "Date of first seizure", Dr. Bercovici crossed out the word "seizure", replaced it with "episode" and wrote "April 2019".
>
> Dr. Bercovici described the symptomatology as: "Episodes of euphoria feelings – no loss of awareness, can last seconds / also has episodes of light-headedness & vertigo when gets up quickly, lasting about 15 seconds.
>
> Dr. Bercovici described the "precipitating factors" as "Episodes typically associated with stress".
>
> CP's Form asked this question: Fitness to work information: In your professional opinion, is your examined patient able to safely perform his duties as defined in Part One of this form for safety critical or Safety Sensitive Duties. Dr. Bercovici ticked the box for "Yes" and added "No LOC/LOA on Meds" and "Any other non seizure related issues need to be reviewed with other doctors".

18. **December 15, 2021**: OHS' comments[12] on the seizure report include:

> Dx- query epilepsy -presumed focal aware seizures.

[9] IBEW Exhibits; Page 126/249
[10] IBEW Exhibits; Page 155/249
[11] IBEW Exhibits; Tab 7; Page 75/249
[12] IBEW Exhibits; Page 154/249

First seizure- April 2019

Pre-seizure symptoms: euphoria feeling, no loss of awareness, can last seconds - has episodes of light -head and vertigo when gets up quickly lasting about 15 seconds.

Precipitating factors- typically associated with stress.

EE also reported prolonged tremor twitching to his foot which is unrelated to episode of light headiness and vertigo.

19. **January 20, 2022**: CP's OHS nurse provided background to "corporate physicians" concerning Mr. X's reinstatement medical and included the following information[13]:

Seizure Report (dated Dec 2 2021 and completed by neurologist)

Diagnosis listed: Question of Epilepsy - presumed focal aware seizures

Prodrome/Pre-ictal/Post-ictal Symptomology and Duration: episodes of euphoria feelings, no loss of awareness, can last seconds.

Also noted that employee has episodes of light-headedness and vertigo when gets up quickly, lasting about 15 seconds.

Other neurological symptoms: prolonged tremor/twitching in foot (unrelated to light-headedness and vertigo).

Started on Lacosamide l00mb BID in February 2020.

Neurologist's FTW opinion: Fit for SCP/SSP[14] - "No LOC/LOA[15], on meds"

…

Given there was no loss of consciousness/awareness with Mr. X's April 2019 episode, I am inclined to consider it as "simple partial seizures" but I am referring this case for your review and fitness to work opinion as I do not feel I am able to make a fitness determination.

(Emphasis added)

[13] IBEW Exhibits; Page 152/249
[14] SCP/SSP: Safety Critical Position/Safety Sensitive Position.
[15] LOC/LOA: Loss of consciousness/ loss of awareness

20. **February 2, 2022**: Dr. Cutbill, a CP Corporate Physician, responded[16] to the OHS nurse's request and imposed significant restrictions on Mr. X:

> Based on the provided information (summarized below) there are several medical issues of potential concern:
>
> 1. Seizure disorder (refer to the Epileptic Seizures Report dated Dec 2, 2021 - an initial seizure in 2019 and the Treating Neurologist opinion as "Question of Epilepsy - presumed focal seizures" and episodes typically associated with stress. An EEG report (dated June 16, 2021) is noted as abnormal based on highly suspicious potentially epileptiform activity with at least one definite epileptiform discharge as well as focal nonepileptic disturbance of cerebral function in the left frontotemporal region (the region of the epileptiform discharge). He continues to take antiepileptic medication since Feb 2020.
>
> 2. Episodes of light-headedness and vertigo when getting up quickly, lasting about 15 seconds.
>
> 3. Prolonged tremor/twitching to his foot (unrelated to the first two issues).
>
> DISCUSSION
>
> The Treating Neurologist is not able to exclude a diagnosis of epilepsy and the EEG is reported as abnormal with highly suspicious potentially epileptiform activity in addition to at least one definite epileptiform discharge in an area of focal nonepileptic disturbance of cerebral function. It is notable that he continues to take antiepileptic medication. Seizure triggers include stress.
>
> **Mr. X is at risk of having a sudden and unpredictable impairing event related to a seizure and/or an episode of light-headedness and vertigo. The inherent occupational stressors, including environmental stressors, associated generally with the job demands of working in the Operations environment will increase this current threshold risk.**
>
> **Both of these medical conditions are likely to have a negative impact on safe railway operations not only in the yard but in the field where the job demands of S&C Maintainer include working at heights, climbing poles, bending, squatting and kneeling while working on low level equipment, and walking on uneven ground (refer to attached JDA for S&C Maintainer).**
>
> **We discussed this case today. I also reviewed this case with the CMO, Dr. Lambros. We agreed that based on the risk of a sudden and unpredicatable impairing event as noted above, Mr. X is considered unfit for the position of S&C Maintainer and should be restricted to non-operational NSSP duties.**

[16] IBEW Exhibits; Pages 149-150/249

(Emphasis added)

21. **February 3, 2022**: OHS advised[17] CP Labour Relations (CPLR) that Mr. X could only perform "non-safety sensitive modified/alternate duties with restrictions":

> Hello,
>
> Health Services has reviewed the Reinstatement Medical for Mr. X and effective February 3, 2022 he is fit for:
>
> Non-Safety Sensitive modified/alternate duties with Restrictions:
>
> Restricted from any Safety Critical Position, work or duties.
>
> Restricted from any Safety Sensitive Position work or duties.
>
> Restricted from driving Company Vehicles.
>
> Restricted from Operating Moving Equipment/Machinery.
>
> Restricted from working at heights.
>
> Restricted from working alone.
>
> Restricted to working a regular shift only.
>
> Restricted to working in a non-operational NSSP office type environment
>
> Health Services review and clearance via an updated FTWA is required prior to Mr. X returning to any Safety Critical or Safety Sensitive duties
>
> Further medical information is to be completed and submitted by: February 3, 2023 (A Functional Abilities Form is NOT required)

22. **February 3, 2022**: CPLR asked[18] OHS whether they had known about Mr. X's condition before the Original Decision:

> Can you confirm in this instance whether these restrictions would have come up during the time he was dismissed or from a prior condition? Any dates you can provide would be helpful as this may affect his compensation calculation.

[17] IBEW exhibits; Page 148/249; CP Exhibits; Tab 4
[18] IBEW Exhibits; Page 147/249

23. **February 4, 2022**: OHS confirmed[19] to CPLR it had not previously known about the condition:

> This condition is new to HealthServices and was disclosed on his recent reinstatement medical where he said he was diagnosed in 2019. According to SAP he was dismissed in Aug 2020 so he was likely still employed with the company at the time of his diagnosis. Because he is SS, HS was not involved in his file prior to the reinstatement so we were not aware of the condition. These restrictions are in effect starting February 2nd 2022 when the corporate physician provided his fitness opinion.

24. **February 8, 2022**: CP's Disability Management (CPDM) team began a search for an accommodation[20].

25. **February 15, 2022**: When CP advised Mr. X of the restrictions, the IBEW expressed its concerns[21], given the contradictory opinions between Mr. X's specialist and CP's medical staff:

> **I do not understand the extreme difference of medical opinions in this matter. Mr. X's specialist has not changed any treatment recommendations or placed any higher level of concern with his safety. I would point out that the opinion suggested below is contradictory to the specialist in this matter**. I would also note that any medical condition as severe as suggested below would likely involve the ministry of transportation to revoke his motor licence. This has not happened as there is no elevated concern for Mr. X to safely operate a motor vehicle or work a safety sensitive position in the medical opinion of the specialist.
>
> I would ask what is the Company's view as to the next step in addressing Mr. X's return? I must also note that Mr. X resigned from his job in preparation to return to CP as per the Arbitration ruling, as such he again has been without an income due to the company's actions.
>
> (Emphasis added)

26. **February 15, 2022**: OHS provided further information[22] to CPLR about the Corporate Physician's medical opinion for Mr. X:

[19] IBEW Exhibits; Page 147/249
[20] CP Exhibits; Tab 5
[21] IBEW Exhibits; Page 144/249
[22] CP Exhibits; Tab 6

> I've had a look through Mr. X's file and hope this can provide some insight for the Union.
>
> Although Mr. X seemingly had the medical condition in 2019 when he was last returned to full active duty, Health Services has received additional medical information from 2021 which suggests a potentially more severe diagnosis.
>
> With all of the medical information, the Corporate Physician has concluded the following:
>
> "Mr. X is at risk of having a sudden and unpredictable impairing event related to (redacted).
>
> The inherent occupational stressors, including environmental stressors, associated generally with the job demands of working in the Operations environment will increase this current threshold risk.
>
> Both of these medical conditions are likely to have a negative impact on safe railway operations not only in the yard but in the field where the job demands of S&C Maintainer include working at heights, climbing poles, bending, squatting and kneeling while working on low level equipment, and walking on uneven ground (refer to attached JDA for S&C Maintainer)."
>
> Please advise if this is sufficient information.

27. **February 16, 2022**: OHS provided further information to CPLR[23] regarding the Corporate Physician's opinion and referred other issues to CPDM:

> Health Services has communicated to the business the fitness to work determination as per CP Corporate Physician's assessment, and will follow-up on the status of his medical condition in one year as per Health Services process.
>
> In regards to addressing the Union's question about the company's next steps in returning Mr. X to work, I will defer back to LR to determine if Mr. X has met the terms and conditions outlined in Arbitration Award and if the company will accept returning him to work with the outlined restrictions and limitations. Please engage with CP Disability Management to address appropriate accommodations as necessary.

28. **February 25, 2022**: CP provided Mr. X with a Return to Work Plan[24] (RTWP) which gave him a temporary position supporting "Trucking Services in a sedentary, office type

[23] IBEW exhibits; Page 143/249
[24] IBEW Exhibits; Tab 9; Page 168/249

setting working with the current restrictions". The position fell outside the bargaining unit and did not pay Mr. X at his regular S&C Maintainer rate.

29. **March 22, 2022**: The IBEW grieved[25] Mr. X's situation:

> On behalf of S&C Maintainer Mr. X this grievance is being filed on a without prejudice basis and specifically without prejudice to the Union's position that the issue of Mr. X's reinstatement is within the jurisdiction of Arbitrator Graham Clarke. This grievance is filed the Company's violation of Article 12.7 and the unjust treatment Mr. X has been subjected to at the hand of the Company.
>
> On February 21 2022 the Company posted Mr. X's permanent Maintainer position for bulletin account "incumbent requires an accommodation". Although LR advised they would look into the matter the frustration from the 7 months of delays the Union chose to advance the matter back to the Arbitrator via legal counsel on February 22 2022. Arbitrator Clarke held a conference call with the Parties on March 2 2022 . It was during this call on March 2nd that CP advised that the Company initiated permanent workplace accommodation was outside the scope of the Arbitrator's jurisdiction as it relates to Mr. X's reinstatement. In accordance with the provisions of Article 12 of Wage Agreement No.1 this grievance is properly submitted.
>
> **In [Original Decision], an Award dated August 4, 2021, Arbitrator Clarke ordered the reinstatement of Mr. X into his position as S & C Maintainer. The Company has failed or refused to reinstate Mr. X into his position contending that he is medically unfit to perform the duties associated with a safety critical or safety sensitive position.**
>
> **The Union disputes the Company's position. The Union contends that the Company's position is unreasonable, arbitrary and discriminatory and in violation of the Collective Agreement, the Canadian Human Rights Act and the Arbitrator's Award in [Original Decision]. The Union is seeking a declaration to this effect.**
>
> …
>
> **The Union has requested numerous times that the Company provide medical reason as to why they have placed several work restrictions on Mr. X. To date Labour Relations and Disability Management have failed to provide any reason for restrictions other than to say it was CP's Corporate Physician's decision. The Union contends that without a valid explanation, the decision to place significant work restrictions on Mr. X is arbitrary and discriminatory.**

[25] IBEW Exhibits; Tab 10; Page 171/249

The Union further contends that Mr. X has complied with return to work processes which includes but not limited to submitting to a Drug and Alcohol screening and providing a clear CP Medical Report dated November 24 2021 and a clear CP Epileptic Seizures Report dated December 2 2021 with zero physical or cognitive restrictions that would require any workplace accommodation. Mr. X has complied with all Company processes and has submitted to all additional hurdles the Company has thrown in the way all seemingly to block Mr. X's arbitrated return to work.

(Emphasis added)

30. **May 4, 2022**: CP responded to the IBEW's grievance and highlighted these points about its accommodation for Mr. X:

> This letter is in response to the Union's grievance filed at Step 1 on March 22, 2022 regarding Mr. X's reinstatement and accommodation since his [Original Decision] reinstatement arbitration award.
>
> …
>
> **The Union's allegation that the Company has failed or refused to reinstate the Grievor to his former position is without merit. The Union, the Grievor and the Company entered into a Return to Work Agreement dated October 19, 2021 which stated, in part:**
>
> > **"Pursuant to [Original Decision] and the award from the Arbitrator, the following terms and conditions will apply,**
> >
> > **1. Before returning to service, Mr. X must be determined to be medically fit for his regular position by the office of the Chief Medical Officer or his designate."**
>
> Upon the signing of this Agreement, the Company's Health Services (HS) department proceeded with its standard Safety Sensitive Position medical review of Mr. X. Given his medical history, the Company requested additional medical information in order to determine his fitness to work on November 12, 2021. Once this was received in January, some further concerns were noted and the file was escalated to the Company's Corporate Physician, Dr. John W. Cutbill.
>
> **On February 2, 2022, Dr. Cutbill determined that based on the medical information received, there were several medical issues of potential concern, including the Grievor's seizure disorder, his episodes of light-headedness and vertigo, and a prolonged tremor/twitching to his foot. Given this and the fact the Grievor's Treating Neurologist is not able to exclude a diagnosis of epilepsy and the EEG reported as abnormal "with highly suspicious potentially epileptiform activity in addition to at least**

one definite epileptiform discharge", the Grievor's continued use to take medication and the fact his seizure triggers include stress, the Corporate Physician determined that the Grievor is "at risk of having a sudden and unpredictable impairing event related to a seizure and/or an episode of light-headedness and vertigo".

Medical documentation also supported the determination that Mr. X "is at risk of having a sudden and unpredictable impairing event related to a seizure and/or an episode of light-headedness and vertigo ." **Given this and the inherent occupational stressors generally associated with the job demands of working in the Operations environment, it was determined by both physicians (Dr. Cutbill and Dr. Lambros, Chief Medical Officer) that based on the risk of a sudden and unpredictable impairing event, Mr. X is considered unfit for the position of S&C Maintainer and should be restricted to non-operational NSSP (Non-Safety Sensitive Position) duties.**

…

Based on this and notwithstanding the fact Mr. X was unable to fulfill the required terms of the Return to Work agreement by not being able to medically clear for Safety Sensitive Position duties, the Company maintains it acted in good faith and went above and beyond the required terms of the October 19, 2021 Return to Work Agreement when it sought a suitable accommodation for the Grievor. The Company was successful in finding a temporary position within the CP Intermodal Trucking Services department on February 18 and Mr. X began his accommodation position on March 23.

…

The Union states in its grievance that the Company violated the Return to Work Agreement by not returning Mr. X to his former position of S&C Maintainer. A review of the Agreement is clear that as a condition of the terms and before returning to active service, Mr. X must be determined to be medically fit for his regular position by the office of the Chief Medical Officer or his designate. **The Agreement clearly states the condition that the Chief Medical Officer or his designate is to make this determination. The Company maintains it adhered to the requirements of this Agreement when the CMO and his designate both made the determination that Mr. X is not fit for Safety Sensitive work.**

(Emphasis added)

31. **June 7, 2022**: The parties cancelled a scheduled arbitration for this date and agreed to appoint the arbitrator to hear the IBEW's March 22, 2022 grievance:

> 1. The parties have agreed to your appointment to hear the grievance dated March 22, 2022 filed on behalf of Mr. X and will canvass dates for a hearing in October, 2022.
>
> 2. Prior to that hearing the parties agree to resolve as expeditiously as possible any remaining compensation issues arising from [Original Decision]. Failing resolution, the parties will return to you for resolution prior to any hearing on the March 22, 2022 grievance; and
>
> 3. The Grievor will be assessed by OHS on September 1, 2022 to determine his fitness to return to work in a safety critical or safety sensitive position.

32. **February 16, 2023**: The parties filed their Briefs and, in accordance with their expedited arbitration model, pleaded this matter in a few hours.

ANALYSIS

Introduction

33. The parties worked diligently together to ensure a full Record existed for this arbitration. When they had any challenges, they contacted the arbitrator for case management conferences. This cooperation allowed the parties to plead this matter efficiently and without any evidentiary surprises.

34. This case illustrates the challenges for CPLR when its decisions rely on conclusions provided to it by others. The medical and accommodation decisions are processed elsewhere than in CPLR. This makes it difficult for CPLR to assess, from a legal perspective, the case it may end up having to plead at arbitration. Nonetheless, there are ways around this and, ultimately, CP as an entity remains bound by the actions taken.

35. The chronology of facts highlighted the significant differences between the parties. For its part, the IBEW's Brief contested its lack of involvement, and that of Mr. X's doctors, in CP's medical analysis as well as in the development of restrictions and alternative work:

> 27. In the OHS notes of January 20, 2022[26] Dr. Cutbill concludes that "Mr. X is at risk of having a sudden and unpredictable impairing event related to a seizure and/or episode of light-headedness and vertigo." On this basis, Dr. Cutbill determined that the Grievor was not fit for a safety sensitive position and that the Grievor would be reviewed again "in one year as per current HS protocols."

[26] Dr. Cutbill issued his medical conclusion on February 2, 2022.

> 28. This conclusion was reached without any input from the Union, the Grievor or the Grievor's physicians, including and especially Dr. Bercovici.(Tab 8)
>
> 29. To be clear, Dr. Cutbill did not assess, interview, or examine the Grievor, nor did Dr. Cutbill perform any tests or communicate with the Grievor's family physician or Neurologist.
>
> 30. Nor did the Company consult with the Union or the Grievor.

36. In CP's view, this arbitration raised the following issues:

> 20. The Company respectfully submits the following positions:
>
> > a) The Arbitrator does not have the jurisdiction over the new issue(s) that have arisen, namely, that the Grievor was reinstated into an accommodated position; and
> >
> > b) Notwithstanding the above, even if the Arbitrator does have jurisdiction over the matter(s), the Company did comply with the (Original Decision) when it returned the Grievor into a position that met his restrictions.
> >
> > c) The Company has acted reasonably in its duty to accommodate, including paying the Grievor appropriately for the work he is performing.

37. The arbitrator must examine two areas. First, what remaining jurisdiction did the arbitrator have under the Original Decision? Second, did CP satisfy its duty to accommodate when it placed Mr. X in a non-bargaining unit position at a lower salary?

What remaining jurisdiction does the arbitrator have under the Original Decision?

38. In the [Original Decision], the arbitrator reserved jurisdiction as follows:

> 71. The arbitrator orders CP to reinstate Mr. X in his position with full compensation, other than for the 60-day suspension. **The arbitrator remains seized for any issues arising from this award**.
>
> (Emphasis added)

39. The order for CP to reinstate Mr. X remains in force. Whether a court will enforce it given subsequent events is not an issue for the arbitrator. Ultimately, whether the arbitrator has reserved jurisdiction expressly or not, a decision maker's duty includes providing enforceable language to the parties.

40. At either parties' request, enforceable language can be put into an official Order. On the rare occasions when this is needed, the parties usually draft the Order themselves and approve it as to form and content. If they cannot agree, then the arbitrator can draft it.

41. Once an official Order exists, section 66 of the *Code*[27], which distinguishes an "Order" from "Reasons", then applies to the issue of enforcement:

> Filing of orders and decisions in Federal Court
>
> 66 (1) **Any person or organization affected by any order or decision of an arbitrator or arbitration board may, after fourteen days from the date on which the order or decision is made or given, or from the date provided in it for compliance, whichever is the later date, file in the Federal Court a copy of the order or decision, exclusive of the reasons therefor.**
>
> Idem
>
> (2) On filing an order or decision of an arbitrator or arbitration board in the Federal Court under subsection (1), the order or decision shall be registered in the Court and, when registered, has the same force and effect, and all proceedings may be taken thereon, as if the order or decision were a judgment obtained in the Court.
>
> (Emphasis added)

42. Arbitrators, especially in the railway industry, routinely advise the parties in an award if an employee will be reinstated. Generally, however, arbitrators leave to the parties the particulars of any compensation owing. For the Original Decision, if the parties could not agree on "full compensation" then they could return before the arbitrator and plead that related issue[28].

43. However, there are limits to the arbitrator's jurisdiction under the Original Decision. Subsequent events or discussions do not necessarily grant the arbitrator a new or expanded jurisdiction to resolve new disputes[29]:

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[27] Canada Labour Code, RSC 1985, c L-2

[28] See, for example, CROA 4505-S: Canadian Pacific Railway Company v Teamsters Canada Rail Conference, 2020 CanLII 48641

[29] See, for example, Riverside Health Care Facilities Inc. v. Canadian Union of Public Employees, Local 65, 2009 CanLII 84348

6. The Employer suggests that if I felt I have insufficient information to determine the implementation issue I should convene a hearing to hear the parties more fully.

7. The parties have discussed several possible implementation options. During the conference call the Employer has suggested an arrangement the substance of which would put the grievor into a cobbled together temporary full-time Food Service Aid position, which would require her to complete an orientation period and certain training courses but no trial period. She would be paid at the HCA rate, and would be automatically awarded the next available full-time non-HCA position without regard to any collective agreement job posting or other requirements in that respect. The Union (and grievor) have rejected all suggested options, including this one.

8. The Union simply responds that the June 8, 2009 final Award speaks for itself and that in the absence of agreement the grievor is entitled to be reinstated to her SCU HCA job.

II. DECISION

9. The Union's position must be sustained.

10. First, the June 8, 2009 final Award must and does speak for itself. I have no reconsideration or other jurisdiction to alter or amend that Award (except to rectify a clear typographical or other error – which does not apply in this situation).

11. No one asked for the hearing to be bifurcated – and it was not. No one asked that I leave the question of remedy to the parties and remain seized with that issue in the event that the parties were unable to do so themselves – and I did not. All issues, including remedy were on the litigation table to be addressed in evidence and argument. The hearing cannot now be re-opened to permit evidence and argument with respect to remedy.

…

16. Accordingly, in the absence of agreement, the Employer must comply with my order to "forthwith reinstate the grievor to employment without loss of seniority as a Health Care Aid /Attendant in the SCU". This is not a matter of choice, and I am functus with respect to the issue of remedy.

44. The arbitrator agrees with CP that the Original Decision does not provide the requisite jurisdiction over all the subsequent events. However, the March 22, 2022 grievance and the parties consensual appointment of the arbitrator does provide that jurisdiction.

Did CP comply with its duty to accommodate?

Guiding principles

45. The parties have significant experience with the challenges arising from the duty to accommodate. CP did not raise any issue with *prima facie* discrimination. CP instead focussed on whether it reasonably accommodated Mr. X.

46. In CROA 4609[30], a decision which mainly upheld CP's accommodation of an employee with one exception, the arbitrator highlighted the importance of the accommodation process (footnotes omitted):

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

47. CROA 4609 examined some of CP's successful efforts when accommodating an employee:

> 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

[30] CROA 4609: Canadian Pacific Railway v Teamsters Canada Rail Conference, 2018 CanLII 6393

> 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.
>
> …
>
> 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.

48. Mr. X's case has two important distinguishing features compared to CROA 4609. First, the medical information is contradictory about Mr. X's restrictions, if any. Second, CP never consulted with the IBEW or Mr. X about accommodation.

How should the arbitrator deal with the contradictory medical evidence?

49. The arbitrator emphasizes first that nothing in these reasons should be taken as a criticism of the medical professionals' opinions in this case. Doctors, like lawyers, have very clear ethical obligations. The legal world has innumerable cases where doctors testify in chief and are cross-examined precisely because professionals can have different opinions.

50. CP has in the past had its medical experts testify at an arbitration[31]. Article 13.6 of the collective agreement clearly contemplates the calling of *viva voce* evidence. That form of hearing may be required if the parties are unable to resolve their impasse.

51. The ability to accommodate an employee is evidently dependent on the medical evidence and the job restrictions which flow from them. However, in this case, there is no way for the arbitrator to reconcile the contradictory medical opinions. This challenge also takes place against the backdrop of the Original Decision's reinstatement order.

[31] CROA 4668

52. Mr. X's neurologist concluded that he could return to work without any restrictions. Conversely, CP's Corporate Physician, after reviewing the matter with CP's Chief Medical Officer, concluded that Mr. X could not return to the bargaining unit. In its Brief, CP seemed to assume that Mr. X had epilepsy and referenced the "Medical Guidelines for the Employment of Individuals with Epileptic Seizures in Safety Critical Positions in the Canadian Railway Industry"[32] (Guidelines).

53. The challenge which arises from CP's epilepsy assumption is that Mr. X's neurologist never determined definitively that Mr. X had epilepsy. Moreover, section 4.4 of the Guidelines applies to employees in safety critical positions whereas Mr. X occupied a safety sensitive position.

54. The arbitrator cannot resolve this medical evidence conflict. On what possible basis can the arbitrator prefer one side's "evidence"? This medical evidence conflict also impacts the analysis of any alleged restrictions CP said Mr. X had.

55. The arbitrator disagrees with CP that Condition #1 of the RTWA somehow allows CP's medical evidence automatically to prevail:

> 1. Before returning to service, Mr. X must be determined to be medically fit for his regular position by the office of the Chief Medical Officer or his designate.

56. First, the RTWA does not relieve CP of its duty to accommodate obligations. Second, the RTWA also provides that "i. Mr. X will return to work in his former position of S&C Maintainer". The parties' RTWA may be relevant at some point, but it does not justify preferring CP's medical conclusions when they conflict with the opinions from Mr. X's doctors, including his neurologist.

57. The arbitrator agrees with the IBEW that more needed to be done to investigate the contradictions in the medical evidence. For example, why did OHS never discuss the matter with Mr. X's neurologist? Why did OHS not suggest that the parties have recourse to an independent medical examination?

[32] CP Exhibits; Section 4.4 Railway Medical Guidelines; Page 195/484.

58. In *Audet v. Canadian National Railway*[33] (*Audet*), the Tribunal noted the challenges arising from a paper review of an employee's medical information[34]:

> [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 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.

59. As mentioned above, Mr. X's situation placed CPLR in a difficult position. It acted based on OHS' conclusions. For privacy reasons, CPLR did not have access to the medical information which would have allowed it to analyze the situation from a legal perspective.

60. Nonetheless, CP remains bound to respect its legal obligations regardless of those challenges. The IBEW highlighted at its earliest opportunity its concerns about the conflicting medical evidence.

61. The tripartite accommodation process is one way an employer's labour relations experts can manage the challenges inherent in an accommodation case. There are ways for a trade union, an employer and an employee to review all the facts fully for

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[33] 2006 CHRT 25

[34] In *Audet*, there was no question the employee had epilepsy and occupied a safety **critical** position. The case focused more on the employer's obligations to consider proper accommodations.

accommodation cases, as noted in *International Union of Operating Engineers, Local 772 v University of Ottawa*[35]:

> 78. **The University did not persuade the arbitrator that Manulife was solely responsible for determining whether the employee could be safely returned to work. The University remained responsible to fulfill its duty to accommodate. That duty cannot be contracted out to Manulife.**
>
> …
>
> 82. The University did not persuade the arbitrator that the fact it did not receive an actual copy of the IME somehow insulated it from its accommodation responsibilities. While it might not have received the report, Manulife kept it apprised of the employee's situation monthly. **The IUOE noted that nothing prevented the University from obtaining a copy of the IME provided it treated it as it did all other employee medical information. Such medical information remains protected and only a few key people, like JHH, would have access to it.**
>
> 83. The IUOE further noted that even if the arrangement between Manulife and the University prevented access to the report, **nothing prevented the University from asking the employee for his consent to review the IME. An employee does have an obligation to assist the employer as it attempts to make an informed decision based on his medical evidence**.
>
> 84. **Even more fundamentally, the University remains responsible for making accommodation decisions based on all the medical evidence. As Mr. McGee noted in answer to a question during final argument, if the employee had had a 100% total recovery, but Manulife did not tell the University, this would not constitute a defence to a failure to return that employee back to work**. Any issue would instead be between the University and Manulife.
>
> (Emphasis added)

62. The arbitrator concludes that CP could not create restrictions for Mr. X without first resolving the clearly contradictory medical evidence.

What is the impact of no tripartite process on CP's position?

63. As noted above, the tripartite process could have provided CP with a full appreciation of the challenges arising from the contradictory medical evidence. If further medical investigation had taken place, there might have been some restrictions placed on Mr. X's current position which would still allow him to work. CP's medical evidence

[35] 2018 CanLII 105364

suggested that Mr. X would have had to perform every single element of his position[36]. That is not how accommodation works.

64. As noted in *Audet*, the accommodation analysis must go into more detail:

> [59] Whatever CN's motives may have been, the fact is that there is no evidence of any individual assessment of Mr. Audet having been conducted in order to determine his suitability for his specific safety critical position. It is apparent to me that once CN learned that he had experienced an epileptic seizure, it applied the criteria set out in s. 4 of the RAC Guidelines in a routine, mechanical fashion, without any consideration of his individual circumstances or condition. CN simply decided that Mr. Audet would be restricted from working in his safety critical position for a five-year period, without any further examination into his individual suitability for his position.
>
> [60] CN contends that it was not necessary to assess Mr. Audet's individual suitability. The nature of a brakeman's and conductor's duties are such that any person who experiences an epileptic seizure, like Mr. Audet, is immediately medically unfit to perform these safety critical duties.
>
> [61] I am not persuaded by this argument. To permit an employer to invoke opinions about its employees' disabilities that it views as somehow self-evident, would hand to the employer too facile a justification for conduct that may be otherwise discriminatory. As the Supreme Court noted in Grismer at paragraph 19, the reason why accommodation must be incorporated into a standard is to ensure that each person is assessed according to his or her own personal abilities, instead of being judged against presumed group characteristics, which are frequently based on bias and historical prejudice. An individual assessment of the employee is therefore an essential step in the accommodation process (see Grismer at paras. 22 and 30; Meiorin at para. 65).

65. The Record remains silent on any attempts CP made to meet with the IBEW to review the medical evidence, the restrictions, if any, and possible accommodations. Perhaps CP felt bound by the conclusions coming from OHS and CPDM. Perhaps it felt that the RTWA allowed it to discount all the medical evidence Mr. X provided as he dutifully fulfilled every single one of CP's medical requests.

66. But instead of pursuing the tripartite process to allow for an examination of all the relevant facts, CP instead unilaterally placed Mr. X into a lower paying job outside the bargaining unit. The arbitrator has already noted above that the RTWA does not exempt

[36] IBEW Exhibits; Pages 149-150/249: See Dr. Cutbill's February 2, 2022 medical opinion which referred to an S&C Maintainer's job duties.

CP from fulfilling its duty to accommodate obligations, as it has shown in the past it can do. The duty to accommodate must first resolve the contradictions in the medical evidence[37].

DISPOSITION

67. The IBEW has satisfied the arbitrator that CP did not respect its duty to accommodate obligations. The arbitrator has some sympathy with both side's positions, however.

68. For Mr. X, he did everything CP asked of him after the Original Decision ordered him reinstated in his position. He underwent multiple medical exams and understood from his doctors that no medical impediment prevented him from returning to his position as an S&C Maintainer. Despite this evidence, CP placed him in a lower-paying temporary position outside the bargaining unit. Mr. X performed these duties while awaiting the outcome of this arbitration.

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"[38]. While Mr. X should not suffer prejudice due to the delays in this matter, the parties still need to complete a proper

[37] For clarity purposes, the IBEW's position is that Mr. X's medical evidence shows he has **no** restrictions and should have been returned to "his position" long ago.

[38] See, *Audet*, paragraph 126, which provided a similar remedy, though the medical opinions were not disputed in that case.

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.

74. The arbitrator remains seized.

SIGNED at Ottawa this 24th day of February 2023

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Graham J. Clarke
Arbitrator