

AH835

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)

Dennis Kirk (966754) – Workplace Accommodation

Arbitrator: Graham J. Clarke

Date: August 15, 2023

Appearances:

IBEW:

D. Ellickson: Legal Counsel

J. Sommer: Senior General Chairman

S. Martin: International Representative

N. Duncan: Regional Chairman

D. Kirk: Grievor

CPKC:

F. Billings: Assistant Director, Labour Relations

Arbitration held in Ottawa on July 26, 2023.

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Award

BACKGROUND

1. The IBEW alleged that CPKC delayed in accommodating Mr. Kirk following the latter's workplace injury. In its view, Mr. Kirk could have returned to accommodated work as of June 3, 2019, but ultimately did not return until June 21, 2021, over two years later. The IBEW asked for compensation for that time frame when Mr. Kirk could have been working, as well as damages.

2. CPKC argued that it continuously participated in the Workplace Safety and Insurance Board's (WSIB) accommodation process which ultimately resulted in Mr. Kirk's successful return to work without restrictions. It further noted that the WSIB had fully compensated Mr. Kirk during his absence, other than during a short work trial. Moreover, CPKC disputed the IBEW's claim for damages due to the lack of any conduct that could be described as harsh, vindictive, reprehensible, malicious or extreme.

3. For the following reasons, the arbitrator has determined that, starting on April 20, 2020, CPKC failed to accommodate Mr. Kirk. Because this case referenced various statutes, the arbitrator has retained jurisdiction and remitted the issue of remedy back to the parties for further discussion. Given certain unique elements in this case, the arbitrator will need the benefit of the parties' legal expertise for any remedial issues they cannot resolve.

CHRONOLOGY

4. The parties filed a significant amount of documentation concerning Mr. Kirk's situation and the lengthy accommodation process. Given the importance of the facts in a duty to accommodate case, the arbitrator will reproduce in this Chronology significant extracts from the Record.

5. **May 2010:** CPKC hired Mr. Kirk who works as an S&C Maintainer.

6. **October 31, 2018:** Mr. Kirk injured his left ankle when performing S&C testing work at a rail crossing. Despite the injury, he continued working.

7. **November 12, 2018:** Mr. Kirk's physician deemed him unfit to work¹.
8. **November 26, 2018:** Ontario's WSIB² advised CPKC that it had initially accepted Mr. Kirk's claim for loss of earnings benefits from November 9, 2018 forward³. The WSIB⁴ advised CPKC of the time limits to file an objection to the entitlement decision.
9. **December 24, 2018:** The WSIB⁵ informed CPKC about Mr. Kirk's restrictions:
- As requested, this letter is to provide you an update concerning Mr. Kirk's recovery status.
- Mr. Kirk was seen at the Advanced Rehabilitation Center (ARC) on December 13, 2018. An MRI was recommended to occur on December 22, 2018. The results are outstanding at this time.
- Mr. Kirk is fit for accommodated working duties at graduated hours. He has limitations lifting up to 5lbs, standing up to 20 minutes, walking up to 30 minutes and sitting up to 20 minutes. Frequent positional changes are required. He is to continue the use of a walking boot and cane. Mr. Kirk is fit to commence 4-hour shifts. Temporary limitations are in place for approximately 6 weeks.**
- A follow-up with the ARC will occur in 6-8 weeks pending the MRI results.**
- Treatment has been recommended to commence at the ARC.
- (Emphasis added)
10. **January 17, 2019:** The WSIB RTWS⁶, Ms. Lewis, held a RTW Meeting⁷ with Mr. Kirk, CPKC's Mr. Adams and the IBEW's Steve Martin. Mr. Kirk at that time could not return to his pre-injury position.
11. **February 13, 2019:** The WSIB advised CPKC of Mr. Kirk's situation⁸ and advised that "Mr. Kirk continues to experience an ongoing work-related impairment...".

¹ IBEW Documents; Tab 2; CPKC Functional Abilities Form.

² IBEW Documents; Tab 4; Page 18/493.

³ The WSIB later set the date at October 31, 2018 i.e., the date of the accident.

⁴ The IBEW's Documents contain other medical information. The Record does not disclose the extent to which CPKC had access to that material.

⁵ IBEW Documents; Tab 6; Page 29/493.

⁶ RTWS: Return to Work Specialist.

⁷ CPKC Documents; Tab 3b; Page 29/272.

⁸ CPKC Documents; Tab 3c; Page 33/272.

12. **May 28, 2019:** Mr. Kirk emailed⁹ CPKC's Mr. Adams updated medical information which indicated he could return to work:

Good afternoon Robert, I just wanted to update you on today's findings at my doctor appointment. I have been cleared to return to work as of June 3 2019.

Can you please notify my manager Steve Patriquin of my return date so that my truck will be ready for my return?

13. **May 29, 2019:** Mr. Adams emailed¹⁰ Mr. Kirk to advise:

The report you attached noted you have permanent restrictions. I am currently reviewing your case with your workplace. We will be in touch with you shortly in regard to your returning to work.

14. **June 10, 2019:** The WSIB provided CPKC with a status update¹¹ which described Mr. Kirk's permanent limitations for climbing extension ladders or poles:

Subject: Status Update

As requested, this letter is to provide you an update concerning Mr. Kirk's recovery status.

Mr. Kirk was seen for follow-up with the Specialty Clinic on May 28, 2019.

Mr. Kirk has been discharged from the Specialty Clinic with the following accepted permanent limitations:

- **Only capable of climbing a step ladder**
- **No climbing of extension ladders**
- **No climbing poles**

There is no indication that there are any restrictions concerning his hours of work.

(Emphasis added)

⁹ CPKC Documents; Tab 3f; Page 38/272.

¹⁰ CPKC Documents; Tab 3f; Page 43/272.

¹¹ IBEW Documents; Tab 12; Page 76/493. CPKC Documents; Tab 3g; Page 46/272.

15. **June 17, 2019:** The WSIB convened a return-to-work meeting with Mr. Kirk as well as IBEW and CPKC representatives¹². The WSIB's minutes described how CPKC could accommodate Mr. Kirk's restrictions re "Climbing poles and extension ladders":

WPPs¹³ agreed that this task has been all but eliminated

Extension ladders utilized for inspection every 6 months for 2-3 days of inspection. Schedule is known in advance. Able to request bucket truck in advance; second staff available for use of extended ladders; he could be person at bottom of ladder. Every other weekend he provides coverage. Through modernization, much of the materials have gone underground, in most cases the issue that has arisen is repaired at ground level.

16. **June 20, 2019:** A WSIB memo in the Record¹⁴ indicated that CPKC's Specialist, Mr. Adams, had spoken with WSIB RTWS Ms. Lewis:

On June 19 2019, Robert Adams called-left message.

On June 19 2019, I called and spoke with Mr. Adams:

- **Discussed essential vs non-essential skills; he noted that the employer disagrees with the ladder climbing being non-essential noting that there is use of ladder**
- I noted the option for a bucket truck and/or a second person; he is not certain a second person is always needed as they have areas with fasteners, which don't require a second person, he is researching further
- Mr. Adams noted that they don't want a delay to the trains; discussed the inspection requiring the extension ladder or bucket truck is every 6 months
- Agreed that pole climbing is not an issue
- Mr. Adams noted that he is looking into ladders with wider steps similar to a step ladder noting that it is the footing that is the issue with the extension ladders; he would store the ladder in his own truck
- He advised that he needs to look at pay
- Discussed option of working with younger staff member; the one younger staff member has submitted a letter noting that he will not work with Dennis

¹² IBEW Documents; Tab 14; Page 85/493; RTW Meeting Memo/Plan. CPKC Documents; Tab 3h; Page 47/272.

¹³ WPP: Work Place Parties.

¹⁴ IBEW Documents; Tab 15; Page 90/493.

• I advised that the pre-injury position is suitable; I will be submitting a RTW plan and requested that he advise if Mr. Kirk is not resuming work on Monday as I would need to look into non-cooperation in that event

(Emphasis added)

17. **June 21, 2019:** Ms. Lewis wrote another memo to file¹⁵ which summarized a subsequent conversation she had had with CPKC's Mr. Adams:

Employer Contact

On June 21 2019, I called Robert Adams-left message re: clarified RTW plan sent; start date of Monday; no contact yet for starting work on Monday; requested return call to discuss; previously had indicated that if the employer did not return Mr. Kirk to his pre-injury position non-co-operation¹⁶ would be implemented.

18. **July 12, 2019:** The IBEW's Mr. Duncan emailed¹⁷ Mr. Adams since they had not heard anything since the June 17, 2019 WSIB conference call:

...

As a representative of the Union I must make known the disappointment, frustration and outrage at the apparent intentional misdirection and lack of transparency on the part of Signal Management in a safe and meaningful return to work accommodation for Mr. Kirk.

The fact that Mr. Kirk is still sitting at home speaks volumes about the priority Signal Management management places on this matter.

Please advise as to where we are on the matter so that the Union may consider the next steps. Below is my personal number should you wish to discuss.

19. **July 16, 2019:** Mr. Adams emailed¹⁸ Mr. Duncan to advise:

I have completed my review of Dennis' claim with regard to Return to Work Planning. Unfortunately, prior to proceeding with any recommendations I have

¹⁵ IBEW Documents; Tab 16.

¹⁶ The WSIB can [levy a non-cooperation penalty](#) against an employer. Despite making references to it, the WSIB did not take this step.

¹⁷ CPKC Documents; Tab 3i; Page 52/272.

¹⁸ CPKC Documents; Tab 3i; Page 51/272.

requested clarification from the WSIB with regard to his medical restrictions. I will update all parties once I have received a response from WSIB.

20. **July 25, 2019:** The WSIB provided CPKC with a “Permanent Limitations Update”¹⁹ for Mr. Kirk:

You have requested a review of Mr. Kirk's permanent limitations from a holistic approach.

I have reviewed the medical information available and note that Mr. Kirk has permanent limitations concerning the left ankle injury of October 31, 2018 that requires accommodation in performing his preinjury working duties.

The accepted permanent limitations are as follows;

- **Only capable of climbing a step ladder**
- **No climbing of extension ladders**
- **No climbing poles**

(Emphasis added)

21. **July 26, 2019:** Mr. Adams wrote²⁰ to the WSIB and asked about Mr. Kirk's prior “17% NEL²¹ award” for his back:

At this time, we are still requesting further information regarding restrictions that are associated with a prior claim for a 17% NEL award that we are now aware of.

As per relevant WSIB Policies, permanent impairment means any permanent physical or functional abnormality or loss. If a permanent impairment is identified, the degree of impairment is expressed as a percentage of total impairment of the whole person.

Since we are aware of the 17% NEL award for the back, policy would indicate a loss of function and related precautions is likely to be associated with that award. Noting Canadian Pacific is attempting to identify safe and suitable return to work options for this individual, it is important that we are provided with all limitations and precautions.

¹⁹ CPKC Documents; Tab 3j; Page 56/272.

²⁰ CPKC Documents; Tab 3k; Page 57/272.

²¹ NEL: Non-Economic Loss

If you are indicating there are no restrictions associated with the 17% NEL award we would like written confirmation, otherwise we will await your written response confirming what restrictions do apply to the prior claim.

(Emphasis added)

22. **September 4, 2019:** Mr. Adams emailed²² Mr. Kirk for information regarding the 17% NEL:

The new WSIB Return to Work Specialist, Jennifer, has left me a voice mail message requesting my availability for another Return to Work Meeting. **Prior to arranging another return to work meeting we are attempting to clarify the medical restrictions for your prior back injury for which you received a 17% NEL Award.** Could you please submit a copy of the permanent restrictions you were notified of under your prior WSIB claim. Once we have received this information we can proceed with another return to work meeting. Thanks.

(Emphasis added)

23. **October 3, 2019:** WSIB RTWS Ms. Ruston wrote a memo²³ about a discussion she had had with CPKC's Mr. Johnstone concerning Mr. Kirk's position:

1) Returned telephone call to Mr. Johnstone, 3-Oct-2019

► **RTWS provided an overall of the understanding of Mr. Kirk's pre-injury job position, specifically with the frequency to which he is required to climb a signal.**

- **RTWS noted Mr. Kirk has precautions for no climbing extension ladders or pole climbing. This was further clarified to note that it has to do more with the size of the rung/bar for his ankle placement and not necessarily the act of climbing in itself**

- RTWS noted through previous RTW conversations had with the prior RTWS, it is noted on file that an issue with respect to having to inspect signals which would required Mr. Kirk to climb them. RTWS stated as per the file notes, inspections are conducted every 6 months for 2-3 days for potentially 19 signals on Mr. Kirk's route. Noting that the inspections are known well in advance, accommodations for providing either a bucket truck to utilize rather than climbing or alternatively another staff could be called in to complete this task, as the task is required on a rare basis

²² CPKC Documents; Tab 3I; Page 58/272.

²³ IBEW Documents; Tab 17; Page 94/493.

- Every other weekend Mr. Kirk provides coverage and that through modernization much of the materials have gone underground, in about 99% of the time and only 1% of instances require a ladder and as such, an alternate staff could be called to assist

► **Mr. Johnstone noted the understanding of Mr. Kirk's pre-injury job as stated above is incorrect. Mr. Johnstone provided an overall context of Mr. Kirk's Maintainer duties as follows:**

- Inspection of signals is based upon regulatory testing which is performed every 1 month, 3 months, 6 months, 1 year, 2 years and 10 years. This inspection is required on all devices and a Maintainer is responsible for troubleshooting the equipment
- Mr. Kirk would be on call 24 hours per for 12 out of every 24 days. His duties would required him to climb any signal and/or pole within his own territory and also any signal and/or pole within the secondary territory to which he is covering for another Maintainer
- Coverage can be 15 miles (or 30 miles long if covering two territories) and in the event of signal failure, a Maintainer must go out to repair so that it does not affect train operation
- Signals have vertical ladders on them with rungs
- Pole climbing requires the Maintainer to wear spurs and climb a wooden pole
- **Within Mr. Kirk's territory, there are pole lines that are not accessible by a bucket truck and therefore the accommodation to provide a bucket truck to complete his job duties is not feasible. Secondly, CP Rail has access to three bucket trucks across Ontario and it would not be practical for Mr. Kirk to wait for a bucket truck to arrive in order to fix a signal. Again, should a bucket truck be dedicated solely to Mr. Kirk, there are poles within his territory that are not accessible by bucket truck due to the nature of their location**
- **One Maintainer is assigned to each section and therefore it is not realistic to ask for another Maintainer to come within Mr. Kirk's territory for coverage/assistance**
- CP Rail has 92 Maintainers across the province, with only 2-3 Maintainers employed between London to Windsor area, covering a span of 120 miles
- With regards to the statement that through modernization, maintenance is 99% at ground level, Mr. Johnstone indicated that he has been working on modernizing areas within Ontario and that this is a lengthy and costly

project. He stated that within Mr. Kirk's coverage territory, this would not be accurate to state that 99% is at ground level

•A typical workday for Mr. Kirk could involve no climbing of signals or poles, in the event that no issues arise. However, his Maintainer position is to maintain, and as such, he needs to be available and capable of fixing any issues that arise, due to weather or any other unforeseen circumstances. For instance, during a thunderstorm or bad weather, Maintainers perform "storm patrol" where they will look to fix any line wires at crossings. In addition to regular inspection, Maintainers are required to change bulbs as needed which requires climbing

- When discussing a typical week, Mr. Johnstone estimates that Mr. Kirk would be guaranteed to climb ½ dozen times during biweekly checks

- There are 42-44 poles every mile, as they are spaced 120 feet apart. With a coverage area of up to 30 miles (including both Mr. Kirk's territory and covering territory), this could include 1200 to 1400 poles that Mr. Kirk could potentially have to climb. Should an issue come up, he would be required to troubleshoot

- Signals are placed 1.5 to 2.5 miles apart and if an issue comes up somewhere down the line of the signals/poles, Mr. Kirk would be required to troubleshoot and find the affected poles which he would be required to climb to fix

- ▶ Mr. Johnstone noted he would also have concern for Mr. Kirk's ability to walk on uneven ground given that he has an ankle injury

- ▶ He spoke of an alternate flagman position which he is aware of as being potential suitable work, however is unsure as to the availability of this position

- ▶ **RTWS thanked Mr. Johnstone for provided a more detailed description of Mr. Kirk's job duties with respect to his need to climb either a pole or signal**

- ▶ Mr. Johnstone invited any further follow-up calls should further clarification be required

- ▶ **RTWS noted she would be following up with Mr. Kirk and Mr. Adams to discuss appropriate next steps** (sic)

(Emphasis added)

24. **December 5, 2019:** The WSIB RTWS, Ms. Ruston, held a telephone RTW meeting with Mr. Kirk, Mr. Adams, the IBEW's Mr. Duncan, and CPKC's Mr. Johnstone and Ms.

Alonso. The resulting RTW Meeting Memo/Plan²⁴ contained, *inter alia*, these conclusions on how to accommodate Mr. Kirk:

Accommodation Options (for duties that are not suitable)

With regards to duties related to climbing poles, as per safety procedures, staff are not to climb poles alone and therefore must request a second staff to come and assist. Mr. Kirk can be accommodated with pole climbing by being the person at ground level and therefore the duty of pole climbing can be assigned to the second staff. It should be noted that this instance occurs on an extremely rare occasion and noting the ability to be re-assigned, this duty has been deemed non-essential.

Although Mr. Kirk and his union did not reach an agreement with the employer on whether the task of ladder climbing, in particular climbing of rungs on a signal, is determined an essential duty of Mr. Kirk's position, RTWS would argue that the act of maintaining a signal in itself is an essential duty. This duty could on a very rare basis require Mr. Kirk to have to access a signal not a ground level. The means at which the signal is accessed, by way of climbing the rungs or by bucket truck, can in fact be accommodated by ensuring that Mr. Kirk has a bucket truck accessible for use on the very rare occasion that it be determined that he must climb a signal for maintenance and during regulatory testing, performed every 6 months for 2-3 days.

Therefore, RTWS has deemed the duty of signal maintenance (which could on a very rare basis require him to climb the rungs of a signal) as essential, however opportunities to accommodate this duty are available and reasonable to provide to Mr. Kirk. (sic)

(Emphasis added)

The RTW Meeting Memo/Plan, which noted "RTW Pending – RTW services ongoing", also concluded that Mr. Kirk's job duties did not need to be combined with alternate job duties. The WSIB described how CPKC could accommodate Mr. Kirk but also gave it time to provide its comments on undue hardship:

Rationale

In order for Mr. Kirk to be able to perform his job duties safely, in their entirety, the employer is required to accommodate by:

1) Ensuring a second staff is available on the extremely rare case that he would be required to climb a pole for maintenance

²⁴ IBEW Documents; Tab 20; CPKC Documents; Tab 3m; Page 59/272.

2) A bucket truck is to be made accessible for the rare instances that he is required to climb a signal for either maintenance purposes or for regulatory testing. The employer is to review for relocating the Woodstock bucket truck to the Windsor area or alternatively look into the costs involved in purchasing a bucket truck to be dedicated to the Windsor area for Mr. Kirk's access.

Once additional details have been secured regarding the financial implications to purchase a bucket truck and proof of undue hardship has been provided by the company within reasonable timeframes, the WSIB Re-employment Team would review this information to determine appropriate next steps.

Through discussions with the workplace parties, the union shared that the employer is moving towards more safety measures to be put in place, such as offering bucket trucks to all areas for access and modernizing things at ground level to alleviate the need to climb. Noting the accommodation being requested for Mr. Kirk falls within the company's overall projected goals, it would be reasonable to consider Mr. Kirk's accommodation on a priority basis when considering which areas are in greatest need of implementation.

To allow for time for the employer to provide rationale for their inability to accommodate to WSIB, RTWS has projected out a proposed RTW Plan, for Mr. Kirk to return to his pre-injury accommodated job within 6-weeks given the timing of this request and upcoming holiday season.

(Emphasis added)

25. **December 11, 2019:** The WSIB RTWS wrote²⁵ to CPKC to confirm the results of the December 5, 2019 RTW Meeting. That letter provided an opportunity for CPKC to comment why it could not accommodate Mr. Kirk without undue hardship:

In order for Mr. Kirk to be able to perform his job duties safely, in their entirety, Canadian Pacific Railway Company is required to accommodate by:

1) Ensuring a second staff is available on the extremely rare case that he would be required to climb a pole for maintenance

2) A bucket truck is to be made accessible for the rare instances that he is required to climb a signal for either maintenance purposes or for regulatory testing

I would ask that you review whether the Woodstock bucket truck can be relocated to the Windsor area or alternatively look into the costs involved in purchasing a bucket truck to be dedicated to the Windsor area for Mr. Kirk's

²⁵ IBEW Documents; Tab 21; Page 110/493.

access. Once additional details have been secured regarding the financial implications to purchase a bucket truck and proof of undue hardship has been provided within reasonable timeframes, the WSIB Re-employment Team can review this information to determine appropriate next steps.

...

To allow for time for you to provide rationale regarding an inability to accommodate to WSIB, RTWS has projected out a proposed RTW Plan, for Mr. Kirk to return to his pre-injury accommodated job within 6-weeks from the date of the RTW meeting, on January 20, 2020, given the timing of this request and upcoming holiday season. In the interim, support regarding your stance of undue hardship is to be provided to WSIB for further consideration.

...

In order to establish whether it is feasible for a bucket truck to be offered to Mr. Kirk, please provide documentation to support that providing a bucket truck would result in undue hardship to your company.

As Canadian Pacific Railway is claiming "undue hardship" please provide objective evidence, that the costs are:

- quantifiable;
- shown to be related to the accommodation and
- are so substantial that the accommodation would alter the essential nature of the enterprise or so significant that they would substantially affect the viability of Canadian Pacific Railway

Supporting evidence may include:

- Records of documents to show any financial reason of undue hardship, and/or
- Current or previous years' business plans of restructuring or re-tooling done or that will be done with associated costs; and/or
- A signed document by the employer the provides current profit and loss data to suggest a lack of profits for previous or current year, and/or
- Any plans for the future of the business which require extensive monies with associated projected costs

I would ask that you provide this information to me in writing by January 10, 2020. When I receive the necessary information, I will review this information for undue hardship.

(Emphasis added)

26. **January 22, 2020:** CPKC emailed²⁶ certain employees regarding possible alternative positions for Mr. Kirk:

S&C has a long time Maintainer from the Windsor area who has a foot condition that now prevents him from climbing vertical ladders & poles on a PERMANENT basis. Craig Johnstone indicated there may be some projects going on in London & elsewhere that could require a Flagperson on a long term basis.

Which one of you should I reach out to discuss the potential flagging opportunity for our S&C Maintainer?

27. **January 31, 2020:** The WSIB RTWS wrote to Mr. Adams of CPKC and provided an extension to March 1, 2020 to file an objection to the accommodation decision²⁷:

Dear Robert Adams,

Thank you for speaking with me on January 31, 2020. This letter is a follow up to my previous letter dated December 11, 2019 and further explains my decision regarding suitability of the Signal Maintainer position with accommodation.

Time limit to object

The law (Workplace Safety and Insurance Act or WSIA) puts time limits on objecting to a decision. You must notify me in writing by sending a letter or the Intent to Object form so that I receive it by March 1, 2020 to keep your right to appeal this decision.

...

Reasons for Decision

I made this decision because of the information below:

- A telephonic Return-to-Work meeting took place on December 5, 2019 to clarify the frequency of pole and signal climbing in order to make a determination as to whether Mr. Kirk is fit for the essential duties of his pre-injury job. At the conclusion of this meeting, the pre-injury Signal Maintainer position was determined to be suitable with accommodation
- The frequency Mr. Kirk would be required to climb a pole of signal historically has been on an extremely rare, almost never, basis. In order to follow safety

²⁶ CPKC Documents; Tab 3n; Page 68/272.

²⁷ CPKC Documents; Tab 3o; Page 69/272. IBEW Documents; Tab 22; Page 114/493.

procedures for pole climbing, a Signal Maintainer must wait for a second staff prior to climbing a pole. Therefore Mr. Kirk would call on a second staff, wait for their arrival and he would be the staff at ground level while the task of pole climbing is assigned to the second staff on site. Noting this, although pole climbing is a duty of a Signal Maintainer, it is non-essential given that it can be re-assigned to another staff without affecting the overall essence of the job and/or train operation. The duty of pole climbing therefore is suitable with accommodation

- Signal rung climbing does not require calling for assistance from another Maintainer. It is performed every 6 months during regulatory testing and when responding to trouble calls. The means at which Mr. Kirk accesses a signal can be accommodated by providing a bucket truck for access during the rare occasions he is required to access a signal not at ground level

- Therefore, the job duties related to responding to a trouble call at a pole or at a signal are deemed to be essential, however the act of climbing is non-essential as climbing a pole can be reassigned to another staff and climbing a signal can be achieved with a bucket truck

- **As such, Mr. Kirk's pre-injury Signal Maintainer job is suitable with accommodations**

(Emphasis added)

28. **February 7, 2020:** CPKC advised WSIB²⁸ that it had drafted a RTW Plan but it could not take place until Mr. Kirk had completed a course to update his "Rules Card". CPKC could not provide Mr. Kirk with the training until March 9, 2020.

29. **March-April 2020:** CPKC conducted a work trial for Mr. Kirk.

30. **March 30, 2020:** The WSIB RTWS, Ms. Ruston, held another RTW Meeting Memo/Plan with Mr. Kirk and CPKC's Mr. Adams attending. The WSIB's memo repeated its earlier findings on how to accommodate Mr. Kirk.

31. **April 10, 2020:** In a memo to other CPKC managers²⁹, Mr. Johnstone alleged that Mr. Kirk had refused to climb all ladders:

²⁸ CPKC Documents; Tab 3p; Page 71/272. IBEW Documents; Tab 24; Emails between Mr. Adams and Ms. Ruston.

²⁹ The IBEW alleged that neither Mr. Kirk, the union nor the WSIB had been copied: IBEW Brief; Paragraph 58.

Attached is the results of Dennis Kirk's one month work trial.

In summary, on six separate occasions Dennis refused to climb any type of ladder. This work encompassed the regular day to day routine of a signal maintainer which is crucial for the safe operations of the railway. There were more locations requiring regulatory testing that Dennis also refused to test.

The S&C equipment he refused to test or inspect included Signal masts, Crossing Gates and Cantilevers, High/Wide load Detector systems and Pole Line.

I've attached a copy of the assessments by three different managers and the list of regulatory testing that was due during his one month work trial. (sic)

(Emphasis added)

32. **April 20, 2020:** The WSIB RTWS, Ms. Ruston, wrote³⁰ to CPKC after learning that Mr. Kirk's work trial had been deemed unsuccessful. She requested details of how CPKC had accommodated Mr. Kirk during his work trial:

I understand that after the completion of his work trial, Canadian Pacific Railway Company sent Dennis Kirk home after his shift on Monday April 13, 2020 as the work trial was determined to be unsuccessful.

I am requesting that Canadian Pacific Railway Company provide specific details of the outcome of Mr. Kirk's work trial. I would ask that information to support how Canadian Pacific Railway Company ensured Mr. Kirk was able to perform his job duties to the best of his ability, including any accommodations he required, also be provided.

Further to my letter dated January 31, 2020, Mr. Kirk's pre-injury Signal Maintainer job was determined to be suitable with accommodations. Now that Mr. Kirk's work trial is completed, I am asking that Canadian Pacific Railway provide details of what accommodations will assist Mr. Kirk with his return to his preinjury position.

I would ask that Canadian Pacific Railway Company provide all necessary correspondence regarding the outcome of Mr. Kirk's work trial and a written response regarding the supports he received and accommodations required within 10-business days, by May 4, 2020.

(Emphasis added)

³⁰ IBEW Documents; Tab 27; Page 135/493. CPKC Documents; Tab 3r; Page 77/272.

33. **April 21, 2020:** Mr. Adams responded³¹ on behalf of CPKC:

Dennis recently completed his work trial on April 10. Unfortunately, his workplace indicated that Dennis refused/was unable to perform several essential tasks because of his restrictions.

Since he did not clearly demonstrate an ability to perform and transition into the essential duties of his pre accident job he was sent home.

It appears both you and I require a better understanding of the essential duties of the "Work Alone Position of an S&C Maintainer" with regard to government regulatory compliance and timelines. I also believe Dennis's workplace may require a better understanding of what Duty to Accommodate requires and entails. I personally do not have a clear idea of what was or wasn't discussed in order to accommodate Dennis when a task arose that he was unable to do.

The Disability Management Department's goal is always to return employees to their pre accident job and or alternate meaningful gainful employment. Therefore I believe another Return to Work Meeting is in order to go over the Work Alone Job Description, Work Trial results, Duty to Accommodate and next steps.

Please advise as to a possible meeting date and time so that we can all get together and address both Dennis' and the S&C Management team's concerns.

(Emphasis added)

34. **April 28, 2020:** Mr. Adams wrote an email³² to Mr. Kirk and the IBEW to advise the work trial had not succeeded:

Hello Dennis and Bill

Based on information received from the workplace it appeared that the Work Trial was unsuccessful. I attempted to follow up with the WSIB Return to Work Specialist, Jennifer Ruston, however I have learned that she is off work on an extended leave and that her caseload has been disbanded. I followed up with the WSIB this morning and learned that the new WSIB RTW Specialist is Karey Lewis. I have left Karey a voice mail message requesting a call back in order to determine how to best proceed with a new meeting to go over the Work Trial, Duty To Accommodate, Essential Duties and next steps. I acknowledged that I knew she inherited a lot of new claims from Jennifer Ruston and I asked if she could make the Dennis Kirk claim a priority.

³¹ CPKC Documents; Tab 3s; Page 79/272; IBEW Documents; Tab 27; Page 137/493.

³² CPKC Documents; Tab 3t; Page 80/272.

I will update you all when I hear back from WSIB.

35. **May 19, 2020:** Mr. Adams wrote³³ again to WSIB requesting assistance:

I am writing to request assistance with this claim.

RTW Specialist, Jennifer Ruston, determined Dennis Kirk was fit for the essential duties of his regular job. In order to determine what Dennis could and couldn't do and where Dennis would require accommodation a Work Trial was initiated after Dennis received some required training updates. Dennis workplace advised me in April that the work trial was unsuccessful as per the attachment.

Rather than go back and forth between Dennis, the workplace and the RTW Specialist about the results of the Work Trial I felt it would be best to arrange another RTW Meeting. I called Jennifer Ruston to request a RTW Meeting only to be informed that Jennifer Ruston was off work indefinitely and that her caseload was disbanded. On April 28, 2020 I left a voice message for the new RTW Specialist, Karey Lewis requesting a call back to discuss this case. I was going to request a RTW Meeting when Karey called me back. Unfortunately Karey NEVER called me back.

I called Karey today to follow up my request for a call back from 3 weeks ago. Karey advised me that the claim had been referred to a Bev Cooper with the Re-Employment Branch since WSIB had not received a written response to Jennifer Ruston's request for information on the Work Trial. I advised Karey that that was why I had left her a message on April 28. I stated that I was looking to have another RTW Meeting. Karey has indicated that she has to wait for the claim to come back from the Re-Employment Branch before she can take any more action. I fail to understand why she needs to wait.

My call with Karey did NOT go well. The original RTW Meeting with Jennifer did not go well. I was hoping for a fresh start with Karey on this claim. I was hoping that Karey would be able to attend a RTW Meeting with the just the employer in order to review the Job Description/Duties in greater detail as I believe Jennifer did NOT fully understand the role/description of an S&C Maintainer who is required to "Work Alone". I was hoping this meeting would assist in a subsequent meeting with Dennis and his Union Representative.

Please advise me as to when a RTW Meeting can be scheduled in order to resume RTW Services. If possible it would be greatly appreciated if a NEW RTW Specialist could be assigned to this case.

(Emphasis added)

³³ CPKC Documents; Tab 3v; Page 83/272.

36. **June 2, 2020:** CPKC's Mr. Johnstone wrote³⁴ to Mr. Adams about another possible position for Mr. Kirk:

As discussed, each of these crews requires a qualified maintainer to work with them. They operate primarily on a 8/6 or 7/7 schedule. It would be a perfect accommodation for Dennis as there isn't any climbing involved in the work.

37. **June 2, 2020:** The new WSIB RTWS, Ms. Lewis, drafted a long memo³⁵ summarizing a May 28, 2020 teleconference RTW meeting held with CPKC's Mr. Adams & Mr. Johnstone, the IBEW's Mr. Duncan, and Mr. Kirk. The parties discussed the work trial and the allegations that Mr. Kirk had refused to perform certain tasks. During the work trial, Mr. Kirk had performed 40 hours of overtime in the first week. The memo described the next steps:

Next Steps

- **RTW plan without an assistant, allow him to plan and use lift truck, plan around his precautions**
- **Intention of the RTW plan is to determine if anything needs to be tweaked with regards to accommodations**
- Mr. Kirk would be paid by the employer
- Communication - biweekly with IP and 3-4 weeks from now for a meeting with WPPs
- Start date: Craig said start date in about a week; he needs to verify actual start date; he will respond at the beginning of the week to advise
- 8-week RTW plan with accommodation

(Emphasis added)

38. **June 2, 2020:** The WSIB RTWS, Ms. Lewis, issued a formal WSIB decision³⁶ regarding the suitability of Mr. Kirk's original position for accommodation and highlighted the time limits for any appeal:

Thank you for speaking with me on May 29, 2020. This letter is a follow up to the previous letters dated December 11, 2019 and January 31, 2020,

³⁴ CPKC Documents; Tab 3x; Page 85/272.

³⁵ IBEW Documents; Tab 28; Page 141/493.

³⁶ IBEW Documents; Tab 29; Page 150/493

which further explains the prior and current decision regarding suitability of the Signal Maintainer position with accommodation.

Time limit to object

The law (Workplace Safety and Insurance Act or WSIA) puts time limits on objecting to a decision. You must notify me in writing by sending a letter or the Intent to Object form so that I receive it by July 2, 2020 to keep your right to appeal this decision.

...

Reasons for Decision

This decision has been made because of the following:

- A telephonic Return-to-Work meeting took place on December 5, 2019 to clarify the frequency of pole and signal climbing in order to make a determination as to whether Mr. Kirk is fit for the essential duties of his pre-injury job. At the conclusion of this meeting, the pre-injury Signal Maintainer position was determined to be suitable with accommodation
- The frequency Mr. Kirk would be required to climb a pole of signal historically has been on an extremely rare, almost never, basis. In order to follow safety procedures for pole climbing, a Signal Maintainer must wait for a second staff prior to climbing a pole. Therefore, Mr. Kirk would call on a second staff, wait for their arrival and he would be the staff at ground level while the task of pole climbing is assigned to the second staff on site. The duty of pole climbing therefore is suitable with accommodation
- Signal rung climbing does not require calling for assistance from another Maintainer. It is performed every 6 months during regulatory testing and when responding to trouble calls. The means at which Mr. Kirk accesses a signal can be accommodated by providing a bucket truck for access during the rare occasions he is required to access a signal not at ground level
- Therefore, the job duties related to responding to a trouble call at a pole or at a signal are deemed suitable with accommodation as climbing a pole can be re-assigned to another staff and climbing a signal can be achieved with a bucket truck
- **As such, Mr. Kirk's pre-injury Signal Maintainer job is suitable with accommodations**
- A follow-up telephonic Return-to-Work meeting took place on May 29, 2019³⁷ in order to review the completion of the 30-day work trial. Upon review of the pole and signal climbing demands, it was determined to be suitable with

³⁷ The arbitrator believes the year should be 2020 and not 2019.

accommodation and that climbing requirements for both are infrequent to extremely rare. In particular, the bi-annual and annual inspections where climbing may be required was and has been in the past successfully completed with pre-planning and the assistance of a second staff member. Alternately, it has been recommended that a bucket truck or bucket on a trailer, both of which are available between Windsor and London, would be an alternate suitable accommodation. **Overall, it is determined that climbing higher wrung ladders is infrequent to rare generally occurring during the bi-annual and annual inspections. Accommodation options reviewed include alternate staff to assist with climbing, bucket truck or bucket on a trailer, planning ahead for inspections, use of extendable pole for certain repairs. At the conclusion of this meeting, the decision that the pre-injury Signal Maintainer position was determined to be suitable with accommodation is maintained.** (sic)

(Emphasis added)

39. **July 9, 2020:** CPKC sent the IBEW a proposed RTW Plan³⁸.

40. **July 29, 2020:** Jeff Switzer, CP's General Manager, S&C, wrote³⁹ to the IBEW's Steve Martin about a Return to Work Plan and different positions for Mr. Kirk:

Have reviewed the proposed and continue to have concerns that due to the many barriers and complexity of this issue that we are not able to reach agreement. With the current work restrictions there are collective agreement considerations including requiring multiple additional employee involvement during working, overtime and standby hours. This in order to perform regulatory and basic job requirements. In addition, modifying standard employee training and qualifications to align with specific equipment requirements.

I would ask that we look at other work that is currently available within our department that are within Mr. Kirk's current restrictions and don't require addendums or specific interpretations within the RTW for all the above noted.

(Emphasis added)

41. **July 31, 2020:** CPKC exchanged internal emails⁴⁰ regarding an alternate Wireman position for Mr. Kirk.

³⁸ CPKC Documents; Tab 3y; Page 86/272.

³⁹ IBEW Documents; Tab 32; Page 172/493.

⁴⁰ CPKC Documents; Tab 3z; Page 91/272.

42. **August 10, 2020:** Mr. Martin responded⁴¹ to Mr. Switzer's July 29, 2020 email about a RTW Plan:

In consideration as to why this has "many barriers and complexity of this issue" for the company to come to an agreement, can you please provide copies of other agreements that have been put in place to deal with the barriers. We have been dealing with work place accommodations for physical restrictions for many years, I assume you will have at least a few samples of similar agreements that you can provide as past practice.

43. **November 4, 2020:** The WSIB RTWS, Ms. Lewis, held another return to work meeting the contents of which she recorded in a memo to file⁴². Ms. Ruston and Ms. Lewis attended for WSIB; Mr. Duncan (and Mr. Kirk) for the IBEW; Mr. Switzer, Mr. Strilchuk, Mr. Johnstone and Ms. Alfonso for CPKC. The WSIB reviewed the situation and noted the potential for fines:

Reviewed goal of meeting and overview of events to date

- Reviewed events thus far:

- o Pre-injury position reviewed

- o Determined that it is suitable in the January 2020 letter from Jen Ruston

- o Accommodations were recommended which included either preplanning for assistance from the mobile unit or the use of a bucket truck

- o Work trial was arranged in order for Dennis to trial the position; the intent was for him to work on his own putting the recommended accommodations in place. He was assigned a daily partner, which is not a normal aspect of the pre-injury position nor a daily realistic option. He was not given the opportunity to trial his position by implementing pre-planning or the use of the bucket truck. Alternately, the goal of a work trial is to have regular open communication to discuss any potential issues in an effort to resolve concerns as a person moves through the work trial. At no time was Dennis advised of any issues with his performance until work trial completion. As a result, he was not made aware of any potential issues that needed to be discussed or resolved.**

⁴¹ IBEW Documents; Tab 32; Page 172/493.

⁴² IBEW Documents; Tab 36; Page 195/493.

- o Overall, the intent of RTWS is to work collaboratively to return Dennis to safe and suitable work implementing accommodations into his pre-injury position if needed.

- o Reemployment was then involved; they are in agreement with the suitability of the accommodated pre-injury position. Although they are not currently involved, as I have indicated a willingness for workplace parties to meet to discuss further they will become involved again if we are unable to resolve the current issues with return to work.

- o **Noted that the employer has since offered an alternate job however this is not considered at this time as the pre-injury position with accommodations is currently a viable option**

- o **Reemployment expectations are ongoing; reviewed the duty to cooperate and obligations potential for fines**

- o If negative results from this meeting then another referral will be made to the reemployment team with the potential for fines

- Proposal to either have Dennis return to his pre-injury position with the recommended precautions or to redo the work trial as it was initially intended- on his own obtaining accommodations as needed such as the use of a bucket truck and preplanned assistance from the mobile unit

- o On this occasion I would like to recommend that regular communication be put in place in order to discuss the position and resolve any issues if any arise

- There is a Duty to Accommodate as per policy 19-02-02 as well as Ontario Human Rights Code (sic)

(Emphasis added)

The parties also discussed the possibility of custom boots assisting Mr. Kirk to perform his duties:

Work Trial

- I inquired re: how do we move forward with the proposed work trial. The employer rep noted a need as noted above to meet with WPPs as well as the Union in order to review the proposed agreement further.

- Discussed moving forward with work trial, not delaying the start due to potential benefit of custom boots; review the option but not to delay the trial. Dennis noted potentially implementing custom boots during the trial in order to see how they may benefit in order to discuss with the surgeon or medical provider on any improvements, which may also alter his current precautions.

- Jeff noted concern re: health and safety; I noted there could be concern re: anyone working, all workers need to work safely

Next Steps:

Following the meeting, I sent an activity to the CM to request a referral to the SC

I will provide Dennis with contact information to review option of custom orthotics

Jeff and Bill to meet to review potential return to work agreement further (previous draft imaged to file)

Rob to meet with employer to review further

All parties to meet on Nov. 9 2020 in order to review and potentially confirm a return to work plan

44. **November 12, 2020:** The WSIB held another meeting with the parties⁴³.

45. **November 28, 2020:** Dr. Pozzuoli advised that a custom boot should allow Mr. Kirk to perform his duties⁴⁴.

46. **January 19, 2021:** The WSIB wrote⁴⁵ to Mr. Kirk, with a copy to CPKC, advising that he would “continue to receive full loss of earnings benefits while you participate in your return to work planning activities”. The WSIB further decided:

Decision:

Mr. Kirk, I have decided that you are entitled to ongoing loss of earnings benefits at the rate of \$1,155.75 per week noting the following:

1. Your work-related injury prevents a return to your pre-accident job without accommodations and pending a decision on whether custom boots will allow you to return to your pre-accident duties.
2. You continue to participate in return to work planning activities.
3. You have confirmed by signing an earnings questionnaire that your only source of income are your loss of earnings benefits.

⁴³ IBEW Documents; Tab 37; Page 202/493.

⁴⁴ IBEW Documents; Tab 38; Page 207/493.

⁴⁵ CPKC Documents; Tab 3aa; Page 93/272.

47. **April 22, 2021:** The Ontario Workers Network, Advanced Rehabilitation Centre, provided a summary report⁴⁶ which included the following information:

He is recommended regular work boots for daily use - recommended to be replaced every 6 months He is also recommended custom made work boots - with appropriate support in order to initiate climbing rung ladder - recommended to be replaced as needed basis.

48. **June 14, 2021:** A WSIB RTWS, Ms. Roy, held a meeting with the parties and noted that Mr. Kirk's custom work boots would allow him to return to work without restrictions⁴⁷:

Accommodation Options (for duties that are not suitable)

Use of custom work boots for ladder climbing tasks. RTW full job duties/hours without restrictions recommended by SPEC.

...

SPEC consultation held 10Jun2021 supports that he has demonstrated the ability to RTW to his full job duties/hours with use of his custom work boots.

...

Meeting Outcome

RTW - No Further RTW services

(Emphasis added)

49. **June 21, 2020:** Mr. Kirk received the custom orthotic boots and returned to full unmodified S&C Maintainer duties.

50. The arbitrator will next consider i) the IBEW's objection to CPKC arguing that the grievance was filed out of time and ii) whether CPKC violated its duty to accommodate Mr. Kirk.

⁴⁶ CPKC Documents; Tab 3bb; Page 96/272.

⁴⁷ CPKC Documents; Tab 3cc; Page 100/272.

CPKC'S TIMELINESS OBJECTION

51. During CPKC's presentation, and in paragraphs 38-40 of its Brief, it alleged that the IBEW had failed to respect the collective agreement's (CA) time limits. It asked that the arbitrator dismiss the grievance:

38. Within the grievance correspondence the Company outlined that the Union was outside of the timelines prescribed in the Collective Agreement which state in part:

12.7 ... The employee, Local Representative or his/her duly authorized representative shall present the grievance electronically to his/her designated Company Officer **within thirty-five (35) calendar days from the date of the cause of the grievance became known. (Emphasis Added)**

39. As per the joint statement of issue and grievance correspondence, the date the Union takes exception to and which the cause of this grievance became known was June 3, 2019 however the Union filed their Step 1 grievance 133 days later on October 14, 2019.

40. As such, the Union is well outside of the timelines prescribed by the collective agreement and the Company therefore maintains that the grievance should be denied on that basis alone.

(Emphasis in original)

52. The IBEW objected to this timeliness argument on the basis the matter had already been dealt with and the parties had not included the issue in their Joint Statement of Issue (JSI). The IBEW argued that it is not enough to have raised an issue during the grievance process. The JSI must contain the issues the parties will plead at arbitration.

53. In the alternative, the IBEW argued that the *Code* allowed the arbitrator to extend any time limits and CPKC, through its conduct, had waived its right to object.

54. The arbitrator upholds the IBEW's objection.

55. The arbitrator agrees with the IBEW that the JSI limits the issues the arbitrator will hear at arbitration. On July 26, 2023 the arbitrator heard this case, as well as 3 other grievances for a different employee contesting 4 separate disciplinary measures, including 2 dismissals. Raising something not identified in the JSI prevents the parties' extremely efficient arbitration process from functioning fairly.

56. In AH825⁴⁸, the arbitrator upheld CP's objection contesting a railway union's raising of arguments not contained in the JSI [Footnotes omitted]:

22. CP alleged that the TCRC, by raising efficiency tests (ETs), pleaded a different case from the one on which the parties had agreed in the JSI:

1. The Company objects to statements made in the Union's brief submissions in reference to:

- Efficiency Testing and the Company's actions around a failed efficiency test

- Efficiency Tests resulting in targeted discipline

2. The Union is expanding their allegations. Plainly missing from the Joint Statement of Issue is any reference to efficiency testing and the Company's procedures and processes relating to E-tests or how they would have resulted in targeted discipline.

3. Throughout the grievance correspondence there is only a reference to efficiency testing in the Step 1 grievance – where they refer to the incident as – for all intents and purposes, an e test failure.

4. There is an extreme prejudice to the Company when at Arbitration the thrust of the Union's whole argument relies on Efficiency Testing and Jurisprudence relating to them. A review of the jurisprudence cited by the Union – specifically the Joint Statement of Issue for those cases – indicated that at arbitration, the Parties had a clear understanding that Efficiency Tests and the associated Company policies would make up a portion of the discussions – See Tab 1 of the Rebuttal Submission.

23. The TCRC referred the arbitrator to its Step 1 grievance, where it wrote:

Testing is NOT intended to entrap an employee into making an error, but is used to measure efficiency (knowledge and experience) and to isolate areas of noncompliance for immediate corrective action. Efficiency testing is also not intended to be a discipline tool. - Therefore the TCRC finds this investigation to be neither fair nor impartial.

24. The TCRC did not point to any other references in the Record to ETs either in the Statement, the Step 2 materials or in the JSI.

25. **The arbitrator agrees with CP that the TCRC took a new position in its Brief despite the parties' agreed upon JSI. A vague reference to an**

⁴⁸ [Teamsters Canada Rail Conference v Canadian Pacific Railway Company, 2023 CanLII 26191](#)

ET in a Step 1 grievance, and nothing else thereafter, does not justify filing a Brief which focussed mainly on the arbitral case law examining ETs.

(Emphasis added)

57. The arbitrator then reviewed why adding new issues not contained in the JSI harmed the parties' expedited arbitration process [Footnotes omitted]:

27. First, the parties' expedited arbitration process is not equipped to handle surprises, whether from pleading a new issue or disclosing new documentation only when the parties exchange their Briefs:

29. Since there was no objection to the timing of the disclosure to Dr. Snider-Adler's report (Expert Report), the arbitrator will not comment further on that specific aspect of the case. However, from a systemic point of view, the arbitrator reiterates the concerns previously expressed about the late filing of medical information. This impacts the success of the parties' railway model and an arbitrator's ability to ensure a fair hearing. This same concern exists if a party waits until just prior to an arbitration before obtaining clearly relevant medical or expert evidence.

28. Second, as noted in AH689, a vague one-off reference does not then allow a party to plead a different case at arbitration [Footnotes omitted]:

31. The arbitrator agrees with the sentiments expressed by these experienced railway arbitrators. The situation may well be different in regular arbitration where the parties have not negotiated the types of procedures which exist in this expedited regime. A regular labour arbitration system can also take many days to hear a single grievance, which allows for more leeway than does the parties' expedited regime in this case.

32. The parties benefit from an extremely efficient expedited arbitration system. In order to obtain those benefits, they have negotiated clear provisions which require that all issues be identified and discussed during the grievance procedure. A vague oral reference to alcohol and 3 AA meetings during the investigation, especially given the IBEW's burden of proof for prima facie discrimination, *infra*, was insufficient for CN to know that Mr. S alleged that his rights under the CHRA had been violated. Documentation was only produced for this issue roughly 18 months after Mr. S's termination.

33. There is further prejudice which can arise from the addition of a new issue close to the arbitration date. CN could not explore that issue during its investigation or conduct a timely supplementary investigation. The arbitrator notes further that the CHRA contains time limits for complaints.

34. The IBEW expanded its grievance beyond that which was discussed throughout the grievance procedure. The arbitrator accordingly upholds CN's objection. This conclusion, however, would not apply to situations where a party was willfully blind to a clear duty to accommodate situation.

(Emphasis added)

29. Third, by pleading a different case, the TCRC obliged CP to use its limited rebuttal time to address an entirely new issue not found in the JSI. This is not only disruptive to the other party which had to prepare to plead 4 cases in just 2 days, but it deprives the arbitrator of a succinct rebuttal about the agreed-upon issues in the case.

30. Fourth, the TCRC provided no evidentiary support for its suggestion that an ET had taken place. The TCRC asked no questions of ATM Heintz or Trainmaster Gavde despite receiving their memoranda with the Notice of Investigation. Instead, the TCRC's Note simply put in "evidence" contesting certain points in CP's managers' memos. The arbitrator notes that in other recent cases, including for AH828 which was heard during the same March 22-23, 2023 2-day session, the parties' JSIs clearly referenced the ET issue.

31. Accordingly, the arbitrator will examine this case as a discipline case without reference to the nuances which might have been relevant had an ET occurred.

58. In summary, the IBEW satisfied the arbitrator that the timeliness issue had not been included in the JSI. It is therefore not an issue before the arbitrator.

59. Additionally, if it had been necessary, section 60(1.1) of the Code grants the 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.

60. The arbitrator would have exercised this authority to extend the disputed time limits since there was no evidence CPKC suffered any prejudice. The instant scenario may also have raised the principle of waiver⁴⁹.

61. CPKC did not raise any other objections to the arbitrator's jurisdiction for the matters the parties included in the JSI. Accordingly, the arbitrator will now deal with the merits of Mr. Kirk's grievance.

DID CPKC FAIL TO ACCOMMODATE MR. KIRK?

Introduction

62. The IBEW orally acknowledged the challenges which sometimes occur in this expedited arbitration process for fact intensive duty to accommodate cases⁵⁰. However, both parties wished to plead this case based on the written Record. As noted in AH815:

75. The parties have negotiated and prefer to follow an expedited arbitration process which requires initial intense effort on their part preparing the Record and Briefs. An arbitrator then holds a short hearing lasting often just a few hours. The parties expect the arbitrator to issue an arbitral award shortly thereafter. The arbitrator respects the parties' procedural preference which avoids, inter alia, the scheduling challenges and daily costs associated with regular labour arbitrations.

76. Nonetheless, railway awards must be read with this procedural context in mind especially when the key issues before the arbitrator depend on findings of fact.

63. The parties do not dispute that Mr. Kirk suffered an injury while at work. Neither do they dispute that he had a disability as that term is used in the *Canadian Human Rights Act*⁵¹ (CHRA).

64. The IBEW argued that CPKC failed to accommodate Mr. Kirk from June 3, 2019 to June 21, 2021 and requested monetary relief as well as damages:

111. Given that CP failed to pursue any accommodations in these circumstances, any remedial orders should send a message to the Company that its disregard for its statutory duties have consequences. Such a deterrent

⁴⁹ [International Brotherhood of Electrical Workers System Council No. 11 v Canadian National Railway Company, 2018 CanLII 87236](#)

⁵⁰ AH815 - [International Brotherhood of Electrical Workers \(System Council No. 11\) v Canadian National Railway Company, 2023 CanLII 44118](#) at paragraphs 69-76.

⁵¹ [RSC 1985, c H-6](#)

would start, at a minimum, with ordering Mr. Kirk whole for his above-described losses during the period under review.

112. In addition, the Union submits this is an appropriate case for an assessment of damages beyond “make whole” remedies. The Company’s disregard for Mr. Kirk’s right to timely accommodation...

65. CPKC argued that the Chronology demonstrated its diligence in pursuing accommodation with the IBEW and Mr. Kirk as well as cooperating with the WSIB:

45. As demonstrated by the above timeline of events, the Company maintains that it was sufficiently diligent in pursuing accommodation opportunities for the Grievor and actively working with WSIB.

...

48. As outlined by Arbitrator Ponak in *Calgary District Hospital Group and U.N.A., Local 121-R (1994)*, 41 L.A.C. (4th) 319 (Tab 6), an employer is obligated to consider whether or not existing positions can be “adjusted, modified, or adapted” to allow for the employee to continue working. Again, as demonstrated by the above timeline of events, the Company was continually seeking both temporary modified duties for the Grievor and meeting with WSIB however, due to the Grievor’s work restrictions and location various positions were unsuitable.

49. As outlined in extensive detail above, the Company was actively seeking suitable accommodations for the Grievor throughout the process and proactively working with WSIB on a future return to work plans.

...

54. In addition and as noted above, the Grievor was in receipt of full WSIB benefits from November 9, 2018 through to March 5, 2020 and again from April 14, 2020 through to June 24, 2021, which the Company continued to find him suitable work that met his restrictions.

...

55. Within the grievance correspondence and joint statement of issue, the Union requests damages. The Company respectfully submits that the Union has provided no support to their claim.

56. Damages are reserved for conduct which is found to be harsh, vindictive, reprehensible, malicious, as well as extreme in nature. The Company maintains that no such conduct has occurred in this instance and therefore the Union’s claims are without merit. (sic).

66. The parties did not dispute the general principles governing the duty to accommodate which multiple CROA cases have summarized and applied⁵². The application of those principles explains the parties' different views on Mr. Kirk's case. This case also differs from most cases involving these parties given the involvement of the WSIB in determining a reasonable accommodation for Mr. Kirk in his home position.

67. Neither party persuaded the arbitrator to adopt its position in full. The facts do not support the IBEW's contention that CPKC failed to accommodate Mr. Kirk for the entire period from June 3, 2019 to June 21, 2021⁵³. Nonetheless, CPKC did not demonstrate that it fulfilled its duty to accommodate throughout the entire time frame⁵⁴.

68. In the arbitrator's view, a point can be identified when CPKC, despite being advised multiple times how to accommodate Mr. Kirk in his home position, failed to do so.

CPKC initially respected its duty to accommodate

69. Until April 2020, CPKC worked with the IBEW and the WSIB to find an appropriate accommodation for Mr. Kirk's limitations. During this time frame, CPKC raised its concerns with the WSIB about the suggested accommodation and received a full opportunity to describe its position.

70. For example, CPKC reasonably asked the WSIB for further information about Mr. Kirk's limitations. It also inquired about a previous 17% NEL award⁵⁵ for Mr. Kirk's back. Similarly, CPKC's Mr. Johnstone had an October 3, 2019 discussion with the WSIB to ensure they fully understood the facts about Mr. Kirk's working environment⁵⁶.

71. The arbitrator does not find that the delays during this period are solely attributable to CPKC. The WSIB process seemingly involves multiple discussions with only one "party" whether CPKC, the IBEW or Mr. Kirk⁵⁷. While the WSIB follows the excellent practice of reducing all such discussions to memo form, the Record does not disclose if all interested parties remained fully informed of these discussions⁵⁸.

⁵² See, for example, [CROA 4503](#) and [CROA 4648](#).

⁵³ IBEW Brief, paragraph 119.

⁵⁴ CPKC Brief; paragraph 45.

⁵⁵ The arbitrator cannot find in the Record what happened with this issue but that does not diminish its initial relevance to the accommodation process.

⁵⁶ IBEW Documents; Tab 17; Page 94/493.

⁵⁷ See, for example, IBEW Documents at Tabs 15-19.

⁵⁸ Both parties included copies of WSIB memoranda in their materials so perhaps all information is exchanged.

72. This practice differs from the usual duty to accommodate scenario, as described in AH822⁵⁹, where the employer, the union and the employee continually exchange their respective views on an appropriate accommodation [Footnotes omitted]:

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, 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.

73. The fact that the WSIB process differed from the more common tripartite route the parties regularly follow did not reduce CPKC's obligation to accommodate Mr. Kirk. But until April 2020, the arbitrator has concluded that CPKC participated in the statutory process and respected its obligation to accommodate Mr. Kirk.

⁵⁹ [International Brotherhood of Electrical Workers System Council No. 11 v Canadian Pacific Railway Company, 2023 CanLII 13643](#)

From April 20, 2020, CPKC failed to accommodate Mr. Kirk

74. However, as the Chronology illustrates, in late 2019 and early 2020, the WSIB started to advise CPKC on several occasions how to accommodate Mr. Kirk. That accommodation required providing Mr. Kirk with the services of a bucket truck and/or a fellow employee⁶⁰. The WSIB also advised CPKC several times that the *Workplace Safety and Insurance Act*⁶¹, (*WSIA*) allowed it to file an objection to its decisions.

75. The WSIB also gave CPKC an opportunity to comment on its claim of undue hardship⁶². Despite this opportunity, the Record does not disclose CPKC ever filing material that the accommodation constituted undue hardship. At the arbitration, CPKC still maintained that undue hardship had existed⁶³.

76. Moreover, while CPKC did conduct a work trial in the Spring of 2020 after Mr. Kirk had renewed his Rules training, the arbitrator could find little evidence that CPKC provided Mr. Kirk with any of the WSIB's required accommodations like a bucket truck⁶⁴.

77. On April 20, 2020, the WSIB asked for information about how CPKC had attempted to accommodate Mr. Kirk during the trial period⁶⁵. The arbitrator has concluded that this date identifies the start of the period when CPKC failed to respect its duty to accommodate.

78. CPKC did not seemingly respond to the WSIB's work trial accommodation questions but instead wrote that Mr. Kirk could not perform his essential duties due to his restrictions⁶⁶:

Dennis recently completed his work trial on April 10. Unfortunately, his workplace indicated that Dennis refused/was unable to perform several essential tasks because of his restrictions. Since he did not clearly demonstrate an ability to perform and transition into the essential duties of his pre accident job he was sent home.

⁶⁰ See above, for example, IBEW Documents; Tab 20; CPKC Documents; Tab 3m; Page 59/272.

⁶¹ [SO 1997, c 16, Sch A](#)

⁶² See the WSIB letter to CPKC: IBEW Documents; Tab 21; Page 110/493.

⁶³ See for example CPKC's Brief at paragraphs 44-47.

⁶⁴ IBEW Documents; Tab 36; Page 195/493. The Record does refer, however, to Mr. Kirk having a "daily partner".

⁶⁵ IBEW Documents; Tab 27; Page 135/493. CPKC Documents; Tab 3r; Page 77/272.

⁶⁶ IBEW Documents; Tab 27; Page 137/493. See also CPKC's letter requesting further assistance from the WSIB: Page 138/493.

It appears both you and I require a better understanding of the essential duties of the "Work Alone Position of an S&C Maintainer" with regard to government regulatory compliance and timelines. I also believe Dennis's workplace may require a better understanding of what Duty to Accommodate requires and entails. I personally do not have a clear idea of what was or wasn't discussed in order to accommodate Dennis when a task arose that he was unable to do.

79. The work trial seemingly took place to confirm Mr. Kirk had restrictions. But the WSIB had long before identified those restrictions. The issue was whether CPKC could accommodate them.

80. CPKC did not attempt to accommodate Mr. Kirk's ladder restrictions in the ways the WSIB had suggested. Instead, CPKC seemingly maintained its position that it could not accommodate Mr. Kirk without undue hardship. One will never know whether a proper work trial, incorporating the WSIB's recommended accommodations, might have allowed Mr. Kirk to fulfil the essential duties of his position. Mr. Kirk should not be prejudiced for this failure to attempt to accommodate him.

81. Similarly, CPKC continued to attempt to find other positions for Mr. Kirk rather than implement the WSIB's accommodation measures⁶⁷.

82. The WSIB clearly described the required accommodation. But CPKC never attempted it. Had it done so, the evidence gathered might have led to changes in the required accommodation. The WSIB itself had described such changes as tweaks⁶⁸ which are a natural part of any accommodation process. But without a proper attempt to accommodate, the arbitrator has no evidence on which to evaluate what might have been.

83. The arbitrator acknowledges that CPKC continued to have discussions with the WSIB about accommodating Mr. Kirk. For example, the WSIB issued another essentially identical decision on June 2, 2020⁶⁹ which concluded:

Accommodation options reviewed include alternate staff to assist with climbing, bucket truck or bucket on a trailer, planning ahead for inspections, use of extendable pole for certain repairs. At the conclusion of this meeting, the decision that the pre-injury Signal Maintainer position was determined to be suitable with accommodation is maintained.

⁶⁷ See CPKC's June 2, 2020 email about another position: CPKC Documents; Tab 3x; Page 85/272.

⁶⁸ IBEW Documents; Tab 28; Page 141/493.

⁶⁹ IBEW Documents; Tab 29; Page 150/493.

84. The WSIB then provided CPKC with yet another opportunity to object to its decision by July 2, 2020. The Record does not disclose CPKC filing any objection.

85. The arbitrator notes that the WSIB referred to possible fines for non-cooperation on a couple of occasions but never pursued them⁷⁰. The WSIB in its January 19, 2021 letter⁷¹ also continued Mr. Kirk's benefits while he participated in RTW activities:

Decision:

Mr. Kirk, I have decided that you are entitled to ongoing loss of earnings benefits at the rate of \$1,155.75 per week noting the following:

1. Your work-related injury prevents a return to your pre-accident job without accommodations and pending a decision on whether custom boots will allow you to return to your pre-accident duties.
2. You continue to participate in return to work planning activities.
3. You have confirmed by signing an earnings questionnaire that your only source of income are your loss of earnings benefits.

This award is subject to periodic reviews.

86. The fact that orthotic boots ultimately allowed Mr. Kirk to perform his duties without the need for accommodation does not justify CPKC's failure to attempt to accommodate him from April 20, 2020 onward. A later successful resolution does not relieve an employer of an earlier failure to accommodate, particularly where an employer has been advised of the specifics of that accommodation on multiple occasions.

87. The parties' JSI has placed a human rights matter before the arbitrator. This case does not involve a review of the WSIB's decisions. Any such analysis would constitute an impermissible collateral attack⁷². CPKC's opportunities to contest the WSIB's findings lapsed, despite receiving multiple opportunities, when it decided not to object.

⁷⁰ IBEW Documents; Tab 15; Page 90/493 contains the first non-cooperation mention in June 2019.

⁷¹ CPKC Documents, Tab 3aa, Page 93/272.

⁷² [Lacasse v Public Service Alliance of Canada, 2014 CIRB 739](#) at paragraphs 15-18.

88. Instead, CPKC continued throughout, *de facto*, to dispute the accommodation measures⁷³ but without following the proper legal channels to do so. CPKC's decision should not prejudice Mr. Kirk's human rights entitlements.

89. The arbitrator has concluded that as of April 20, 2020, CPKC violated Mr. Kirk's entitlement to reasonable accommodation. The issue then becomes the appropriate remedy.

REMEDY

90. The arbitrator has decided to remit the issue of remedy to the parties for further examination and partial or full resolution.

91. The parties may return before the arbitrator to resolve any issues on which they cannot agree. The arbitrator will require the parties, given their significant resources and expertise, to plead fully any legal issues.

92. At the hearing, the IBEW submitted multiple pages of alleged losses Mr. Kirk suffered by not returning to work until June 2021. This issue is somewhat routine in most cases. However, this case involves a situation where Mr. Kirk, at all material times, remained eligible for, and received, full *WSIA* benefits due to his workplace injury.

93. If the parties cannot resolve the issue, the arbitrator will need the parties' expertise on how Mr. Kirk's *WSIA* situation impacts remedy.

94. The arbitrator agrees with CPKC that the facts in this case do not justify an award of general damages. CPKC cooperated to a large extent with the WSIB over the entire period. The WSIB itself never commenced non-cooperation proceedings. However, CPKC still violated the *CHRA* when it failed to accommodate Mr. Kirk in the way the WSIB had established.

95. The fact general damages are not owing does not end the legal analysis for compensation given that this case involves an application of the *CHRA*. The IBEW has clearly pleaded this case as, *inter alia*, a violation of the *CHRA*. Section 60(1)(a.1) of the *Code* defines the arbitrator's powers:

⁷³ See, for example, CPKC's July 29, 2020 memo to the IBEW - IBEW Documents; Tab 32; Page 172/493.

60 (1) An arbitrator or arbitration board has

...

(a.1) the power to interpret, apply and give relief in accordance with a statute relating to employment matters, whether or not there is conflict between the statute and the collective agreement;

96. The *CHRA* contains various remedial provisions for a successful complaint, including one for “pain and suffering as a result of the discriminatory practice”: s.53(2)(e)⁷⁴:

Complaint substantiated

53(2) If at the conclusion of the inquiry the member or panel finds that the complaint is substantiated, the member or panel may, subject to section 54, make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in the order any of the following terms that the member or panel considers appropriate:

...

(e) that the person compensate the victim, by an amount not exceeding twenty thousand dollars, for any pain and suffering that the victim experienced as a result of the discriminatory practice.

97. While the parties did not cite this provision explicitly⁷⁵, it clearly remains in play despite the arbitrator concluding that CPKC is not liable to pay general damages. Numerous cases have analyzed a complainant’s entitlement to this type of compensation⁷⁶.

98. The arbitrator will need the benefit of the parties’ expertise on if and how this section applies to Mr. Kirk’s case.

⁷⁴ [CHRA, S.53\(2\)\(e\)](#).

⁷⁵ In answer to the arbitrator’s question during the hearing, the IBEW advised that article 53(2) was subsumed in paragraph 115 of their Brief which stated, “Railway Arbitrators have confirmed its jurisdiction to award damages in human rights cases; such jurisdiction flows from the human rights legislation...”. (sic).

⁷⁶ See, as just two examples, [Luckman v. Bell Canada, 2022 CHRT 18](#) and [International Union of Operating Engineers, Local 772 v University of Ottawa, 2019 CanLII 29865](#) (Ontario).

DISPOSITION

99. The arbitrator has concluded that CPKC failed to accommodate Mr. Kirk, though not for the entire period claimed by the IBEW. The start date for that failure is April 20, 2020.

100. Given that this matter involves Ontario's *WSIA* and the *CHRA*, the arbitrator has remitted the question of remedy to the parties for full or partial resolution. For any issues which the parties cannot resolve, the arbitrator will require the parties' full legal submissions in support of their respective positions.

101. The arbitrator remains seized.

SIGNED at Ottawa this 15th day of August 2023.

A handwritten signature in black ink, appearing to read 'G. Clarke', written in a cursive style.

Graham J. Clarke
Arbitrator