

AH878

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)

Brittany Daniher: Release from Service/Duty to Accommodate

Arbitrator: Graham J. Clarke

Date: June 25, 2024

Appearances:

IBEW:

M. Church: Legal Counsel

J. Sommer: Senior General Chair – IBEW, SC 11

S. Martin: International Representative – IBEW, SC 11

B. Daniher: Grievor

CPKC:

D. Zurbuchen: Manager Labour Relations

R. Araya: Labour Relations Officer

B. Stiefel: S&C Manager (Observer)

D. Shannik: S&C Manager (Observer)

Arbitration held in Ottawa on June 13, 2024.

Award

BACKGROUND

1. On November 21, 2022, CPKC released Ms. Daniher, an S&C Helper, from service. She had failed a rewrite of the DC (direct current) Crossing Examination (Exam) which was part of the process to become an S&C Maintainer. The collective agreement's (CBA) Apprenticeship Program (Program) specifies that a failure to pass the exams for an S&C Maintainer allows CPKC to release a candidate from service.

2. The IBEW grieved the termination and alleged that CPKC had failed to accommodate Ms. Daniher's ADHD when she wrote the Exam. In the IBEW's view, CPKC had this medical information about her disability in its possession. Moreover, it alleged that Ms. Daniher had mentioned the issue to CPKC representatives when writing exams under the Program.

3. CPKC denied that Ms. Daniher had a disability and contested the existence of a *prima facie* case of discrimination¹. CPKC further alleged that Ms. Daniher never informed it of any need for accommodation until after she had failed the Exam for the second time.

4. While the parties in the railway model of arbitration often agree on the facts and focus their submissions on legal argument, this case differed. Exceptionally, the facts determine the resolution of this case. This makes the arbitrator's task far more complicated. Unlike in regular arbitrations, the arbitrator does not have the benefit of testimony from all relevant witnesses.

5. For the reasons which follow, the evidence presented obliged the arbitrator to conclude that Ms. Daniher made CPKC aware of her ADHD prior to taking the Exam. Moreover, given the competing versions of the facts, CPKC had a fresh opportunity after the failed Exam to inquire into any potential human rights issues but did not do so.

6. The arbitrator orders CPKC to reinstate Ms. Daniher back into her employment with full compensation. The arbitrator will remit the issue of remedy back to the parties given their history of success in resolving such issues following a decision on the merits of a grievance.

¹ CPKC Brief, Paragraphs 5-6.

CHRONOLOGY

7. Given the importance of the facts in cases involving an allegation of a disability, the following chronology from the documentation provides a partial overview of what transpired in this case.

8. **October 29, 2019:** As part of the pre-hiring health check, Ms. Daniher's doctor advised² that she had ADHD which was being treated successfully with medication. He advised further:

I don't believe Ms. Daniher has any signs or symptoms that would impact her ability to perform most job duties safely.

9. **November 18, 2019:** CPKC hired Ms. Daniher as an S&C Helper.

10. **August 5, 2021:** In AH731³, the arbitrator reinstated Ms. Daniher in an unrelated matter.

11. **March 21, 2022:** Prior to her reinstatement, Ms. Daniher's doctor responded to CPKC's request and advised, *inter alia*, that "She does take medications for ADHD and depression".

12. **July 27, 2022:** CPKC cleared Ms. Daniher for safety sensitive duties⁴.

13. **September 6 – October 6, 2022:** Ms. Daniher successfully passed 3 S&C Maintainer exams under the Program⁵.

14. **October 21, 2022:** Ms. Daniher wrote the Exam for the first time and received 72%⁶. CPKC requires 80% for a pass.

² CPKC Documents, Tab 15.

³ [Canadian Signals and Communications System Council No. 11 of the IBEW c Canadian Pacific Railway Company, 2021 CanLII 70484.](#)

⁴ CPKC Documents, Tab 3.

⁵ CPKC Documents, Tab 4.

⁶ CPKC Documents, Tab 5.

15. **November 21, 2022:** Ms. Daniher rewrote her Exam⁷ but scored 78%, missing the threshold by 2%. Crucially, the parties disputed the conditions under which Ms. Daniher wrote her test⁸. Just after failing the test, Ms. Daniher texted⁹ a CPKC official and advised:

...I suck at writing tests because of my ADHD. Plus, all the stress of recent I was bound to fail at some point.

16. **November 21, 2022:** S&C Manager Mr. Denis Gauthier provided a single paragraph memo¹⁰ to others at CPKC about Ms. Daniher:

I received the New Hire & Apprentice Report and noticed that Brittany Daniher had failed DC Crossings Written. She did not arrive to, on the job training till November 7th, 2022 due to illness. I meet Brittany and her Coach John Rose at Coldwell on the heron bay sub on November 9th, 2022 and asked to look at her book. I went through her book with her and asked what she had struggled with in regard the crossing written test. **She explained that she had no problem with the practical but she has issues writing test.** She also explained that she only failed by 1% and the instructor reviewed the test with her so she know what she needs to do different. I went through the DC crossing moves and relay position and she had the practice examples completed and said she understand that. I continued to review the book and notice a few of the sample question were not filled out near the back of the book. I asked her why they were not filed out and she explained it wasn't part of the test. We disused that she had a hard time with crossing gates. When I asked her specifically what about, she explained that she had to remember the degrees and what the gate was doing at each degree. She had practice plans so we reviewed it and I explained to her what part to study. I also told her I would try and bring her to Thunder Bay the following week to work hands on with DC crossings and some gates. I had to travel to Thunder Bay Monday night November 14th, 2022 unexpectedly for work (In regards to BUDA). I talked to her on Tuesday November 15th, 2022 and explained I wouldn't be able to bring her to Thunder Bay as I had something come up. I had spoken to John Rose throughout the previous week and asked him to review the material with Brittany. I met Brittany on Thursday November 17th, 2022 at Marathon Office. She was having expense issues, I was working with her and Greg Osbourne on that for a while. I had a discussion with Brittany, John Rose, Vern Martel and Josh Henderson about a recent crossing trouble call. After I asked Brittany how she was feeling about her test and she said good. I received a Text message form Brittany on November 21st, 2022 at 1030 Est time telling me that she had failed the test a second time and she didn't know what to do. I told her I would make a call. I

⁷ CPKC Documents, Tab 6.

⁸ See, *inter alia*, paragraph 17-18 of the IBEW's Brief and CPKC Documents, Tab 8 (grievance response) at page 36/174, *infra*.

⁹ IBEW Documents, Tab 8.

¹⁰ CPKC Documents, Tab 17.

called Mike Frattaruolo and asked if he knew anything he explained I should speak with Scott Kawohl. I called John Rose and he said did you hear about Brittany I said yes. I asked if he had worked with her on her material and he said he had tried to but she said she was good. She knew what she did wrong, and it was stupid. It was just the order she did it in and she knew what mistake she made so she was good. I Received a call from Scott Kawohl at 1058 est time informing me of the 2nd failed test from Brittany and Brittany was saying she asked for Help but hadn't received it. I explained the Above to Scott Kawohl. (sic)

(Emphasis added)

17. **November 21, 2022:** On the same day of the failed Exam, CPKC by letter¹¹ advised Ms. Daniher that she was no longer a CPKC employee. It further advised she could appeal whether the test was "proper":

Please be advised that your failure to pass on your second attempt, the written portion of S&C Course DC Crossings (Course 256), eliminates you from the Program S&C Maintainer Training (S&C Apprentice).

Appendix 3 of the collective agreement between the company and the IBEW Union. "Apprenticeship program", Item 13 States:

"Apprentices who fail a training or qualification test twice will be released from service." To comply with this clause in the collective agreement, you are hereby-notified effective immediately (November 21, 2022) you are no longer an S&C Employee with Canadian Pacific Railway Company.

For Your Information Appendix 3, Item 14:

"An Employee who fails a test twice and claims he did not have a proper test may appeal the decision under the provision of Article 12.7 of the collective agreement."

Quoted above provides your appeal process. Should you wish to appeal the decision you can contact your union representative and advise him of your concerns with this matter.

18. **December 25, 2022:** The IBEW grieved¹² Ms. Daniher's termination and highlighted:

Ms. Daniher has ADHD which is documented with the Company and although she was provided a separate space to do her rewrite (in the lab)

¹¹ IBEW Documents, Tab 7.

¹² IBEW Documents, Tab 9.

another class came in to do work and made it difficult for her to focus. As such, Ms. Daniher found herself second guessing her answers to select new ones that were incorrect resulting in a 78% score on her rewrite.

(Emphasis added)

19. **January 25, 2023:** In its response¹³, CPKC disputed the IBEW's allegations and commented specifically on the testing location:

In response to the claim regarding Ms. Daniher's alleged medical condition, Ms. Daniher did not reveal any condition to any instructor or manager involved with the S&C Apprenticeship program, nor did she ask for any accommodation either in classroom instruction or in testing. Accommodation is a tripartite process in which Ms. Daniher has an obligation to participate in and divulging information after the fact circumvents the process and the Company's ability to accommodate.

Further to the stated claim, specifically of being disturbed in part due to the location of testing, the Company used a common testing location with measures taken to eliminate disruptions and provide privacy. The S&C lab is a location for retesting as it is separate from the rest of the class and other S&C classes do not use the space until testing is completed. **S&C Instructor Brian Boutkan supervised the retesting of Ms. Daniher in the S&C lab and insured that an adequate testing environment was supplied. No classes worked in the lab while Ms. Daniher was tested.**

(Emphasis added)

20. **March 1, 2023:** At Step 2, the IBEW disputed CPKC's comments about Ms. Daniher raising her ADHD and the testing environment (extracts):

The Union must insist that Daniher was not provided a suitable testing environment, or adequate time to practice, leading up to her re-write.

...

The Union asserts that Daniher made her medical condition known to the Company and the Company should have been more diligent in ensuring a safe and supportive learning environment...

...

¹³ IBEW Documents, Tab 10.

It would be trite to say that ADHD - Attention Deficit Hyperactivity Disorder - is a recognized disability by the Canadian Government and grounds for a reasonable accommodation.

...

Daniher asserts that others were using the S&C lab during her examination and, unless the Company can provide proof otherwise, we must consider Daniher's assertion as fact.

(Emphasis added)

21. **April 2, 2023:** CPKC provided a detailed response¹⁴ and noted *inter alia*:

The Company respectfully disagrees with the statement that Ms. Daniher condition was known previously to her failed initial exam Oct 21st or her subsequent rewrite Nov 21st. Furthermore the company would like to point out Ms. Daniher only claimed to have ADHD when being transported to the airport after her failed rewrite Nov 21st 2023 and neither her nor the union has yet to provide any medical proof of such a condition.

The Company acknowledges that ADHD may qualify as a disability, provided that impairment is severe enough however it's incumbent on the employee to notify the Company of any disabilities be it learning, medical, or otherwise and provide medical evidence to the same, Despite the employee not providing evidence the Company made efforts to accommodate her by providing her with a separate testing space.

...

The company does acknowledge that during Ms. Daniher rewrite there was one company employee that entered the lab. As which time there was no noise, no work performed and Mr. Boutkan quickly escorted the individual out of the lab and locked the door. At this time the company would also like to point out that this was hardly an interruption as claimed but that one interruption does not excuse her inability to pass the required tests (sic).

(Emphasis added)

ORAL TESTIMONY

22. At the hearing, the IBEW called Ms. Daniher as a witness. Both parties had the opportunity to question her.

¹⁴ IBEW Documents; Tab 12.

23. These main points came from Ms. Daniher's examination in chief:
- Ms. Daniher, due to her ADHD, learned better by being in the field. Written testing had always been an issue for her;
 - Ms. Daniher denied the allegation that she had never raised her ADHD with CPKC; she advised her trainers of it and another person in the program also suffered from it;
 - She experienced significant stress prior to writing the test a second time since CPKC had not reimbursed her for her travel expenses to Calgary for the original October 21 test;
 - The November 21 test took place in the lab which was not quiet due to 8 other people being present doing training; the other individual with ADHD was also rewriting the test;
 - Ms. Daniher told the trainer giving the test that having other people in the lab when she was trying to do her test "sucked";
 - the trainers knew of her ADHD and she had asked them for accommodations.
24. In CPKC's cross-examination, Ms. Daniher confirmed that:
- Her October 2019 medical information¹⁵ indicated she was fit; the box "Fit with restrictions" was not ticked off;
 - Her October 29, 2019 doctor's report¹⁶ indicated she was fit for job duties and did not require any accommodations. Ms. Daniher indicated that the letter focused on job duties which differed from taking tests;
 - she again distinguished job duties from test taking when asked about her doctor's March 21, 2022 medical letter¹⁷;
 - she had passed 3 earlier tests¹⁸ in the Program but those tests had taken place in a classroom rather than in the lab¹⁹.

PARTIES' POSITIONS

25. Certain extracts from the parties' Briefs helpfully summarize their positions.
26. CPKC alleged the IBEW had not met its burden of proof:

¹⁵ CPKC Documents, Tab 13.

¹⁶ CPKC Documents, Tab 15.

¹⁷ IBEW Documents, Tab 5.

¹⁸ CPKC Documents, Tab 4.

¹⁹ Ms. Daniher also confirmed this difference during her re-examination.

6. **The Company maintains for reasons provided below that the Union has not met their burden of proof that the Grievor had a disability that required an accommodation in order to write her exams. The Union has also not established a *prima facie* case for discrimination.** Given this, the Company did not violate its duty to accommodate the Grievor, nor did it act unreasonably when the Company released her from service in accordance with the provisions of Appendix 3 of the Wage Agreement.

...

12. **There is no dispute that the Grievor had previously disclosed to Health Services in her pre-employment medical her diagnosis of Attention-Deficit/Hyperactivity Disorder (ADD/ ADHD).** However, all throughout her employment medical, including a pre-employment medical check list from October 2019, her medical fitness is cleared fit for full duties. There are no restrictions identified nor any noted accommodations required for her ADHD diagnosis. In fact, her medical confirms that “Dr. notes no current symptoms and has been stable since August 2019. Fit for SSP of S&C Helper” [Tab 13].

13. The Company even went further in its duty to inquire at the time, when reviewing her pre-employment medical, on October 7, 2019, when Health Services sent the Grievor a written request for further documentation from her psychiatrist or prescribing provider to provide further documentation into her Mental Health [Tab 14].

...

15. Dr. Marchi provided confirmation that the Grievor has a diagnosis of ADHD for which she is treated for and that there are no signs nor symptoms that would impact her ability to perform most job duties safely. Dr. Marchi further confirmed that the Grievor takes medication which supports the Grievor in her alertness and focus and to perform complex tasks requiring a high level of alertness and judgement. **It is notable that nowhere in this documentation does Dr. Marchi indicate the Grievor has any restrictions or requirements to be accommodated for her ADHD diagnosis in the workplace.**

16. If the Grievor’s very own physician confirmed that there are no “signs or symptoms that would impact her ability to perform most job duties safely” and that she is fit to perform Safety Sensitive tasks with no accommodation required, where then, does the need for these alleged accommodations for her test writing come from? There are certainly no guarantees of quiet railroad tracks or wayside locations out in the field, areas which she is fit full duties with no required accommodations to work out of.

17. Employee medical files and any related reviews conducted by Health Services and/or the Disability Management teams are kept confidential. Company Officers and front line managers – such as the S&C instructors and coaches responsible for training apprentices in the Apprenticeship program –

would not be privy to any such confidential health information on employees unless they are required to on a 'need to know' basis for circumstances such as requests for accommodations. **The Company maintains that the Grievor had never informed the S&C managers or instructors of any alleged accommodation requirements until after her second failed attempt at her DC Crossings Theory written examination (her fifth written exam in two and a half months).**

(Emphasis added)

27. The IBEW disagreed with CPKC's alleged facts and argued that Ms. Daniher had asked for accommodation. Moreover, it stood by its position that the November 21, 2022 testing environment failed to respond to Ms. Daniher's accommodation needs:

14. Prior to the tests being written, the Grievor had told her instructors and examiners that she had ADHD and needed a quiet room with no distractions. The Grievor asked for these accommodations, which were reasonable and imposed no undue hardship whatsoever on the Company. The Company did not accommodate her requests.

...

17. The Grievor arrived at the lab in Calgary to write her second test. The lab was filled with another class. It was noisy and distracting. The environment was entirely the opposite as the accommodation the Grievor had requested.

18. The Grievor could not concentrate and had a terrible time trying to take the test. She was not accommodated at all by the Company during her test notwithstanding all of the above. The Grievor informed her trainers and examiners that she knew the answers but did not do well because of the noisy and distracting environment. One of her examiners (Scott Quoll) told her he also had ADHD, and on that basis, she could not use her disability as an excuse because he had made it through the program.

...

31. There is no doubt that the Company is obliged to interpret its management rights reasonably; follow its own human rights policies and adhere to statutory legislation like the *Canada Labour Code* and *Canadian Human Rights Act*. The Company is obliged to interpret, apply and make decisions involving disabilities in a wide, flexible and purposeful manner. The same is true for accommodation. **The Company did not conduct any investigation after the Grievor's failure on November 21, 2023. Instead, it issued a discharge letter on the same day.** (sic).

(Emphasis added)

ANALYSIS AND DECISION

Process

28. The arbitrator heard 4 separate grievances on June 12-13, 2024. The parties agreed²⁰ to follow the November 1, 2023 Rules for the Canadian Railway Office of Arbitration & Dispute Resolution (CROA)²¹. Those Rules impose pleading time limits and require, *inter alia*, the exchange of written briefs in advance of the hearing. The pleading time limits can be increased if the parties give advance notice that witnesses will be called²².

29. Apart from CPKC objecting that the IBEW had expanded its case beyond the issues found in the JSI, neither party objected to the June 13, 2024 hearing process.

How to reconcile conflicting evidence in an expedited railway arbitration?

30. The parties regularly work together to ensure the Record placed before the arbitrator contains the facts of the case. This allows them to plead the merits of a case in one hour and often complete several separate matters in a single day.

31. However, not every situation fits neatly within that process. In exceptional cases, such as where the facts conflict or the case raises complex legal issues, the parties may agree on a modified expedited process. Such hearings can take multiple days to complete and may involve oral testimony²³.

32. The challenge for all parties comes from identifying which cases fit comfortably within the negotiated Rules and which require a modified process.

33. In AH837²⁴, the arbitrator faced a similar factual challenge. An employee's email had alleged that the grievor had made certain very concerning statements. However, during the employer's formal investigation under the CBA, the grievor denied making those statements.

²⁰ The CBA at article 13.3 (arbitration) notes "For the application of this Article, it is understood that the rules and principles of the Canadian Railway Office of Arbitration (CROA) will be adhered to".

²¹ [CROA Rules, November 1, 2023](#). The IBEW is not a CROA member, but it has agreed to adhere to the railway model for its arbitrations.

²² CROA Rules, Paragraph 11.

²³ See, as just two examples, [AH657](#) and [AH663](#).

²⁴ [International Brotherhood of Electrical Workers \(System Council No. 11\) v Canadian National Railway Company, 2023 CanLII 99782](#).

34. AH837 noted an arbitrator's duty to explain findings of fact (Footnotes omitted):

43. The fundamental issue in this case asks whether Mr. Moses made the comments that CN used to justify his termination.

44. An arbitrator's role goes beyond making factual determinations. When faced with an evidentiary conflict, the arbitrator must explain why one version of the facts prevailed over another. The railway model can make this essential task more challenging since the parties plead labour arbitrations in a matter of hours. Unlike in "regular" arbitrations, railway arbitrators rarely have the benefit of witness testimony, including cross-examination.

45. Nonetheless, the expediency of the railway model does not relieve an arbitrator from the obligation to resolve and explain factual and credibility issues. Railway arbitrators invariably explain how they came to important factual conclusions based solely on the parties' written Record.

46. Implicitly, the parties consent to these determinations in the greater interest of their unique arbitration regime which allows multiple cases to be heard in a single day. In contrast, "regular" arbitration often requires multiple hearing days before an arbitrator can provide the parties with a single arbitral award.

47. However, an arbitrator who simply adopted one version of the facts, without explaining why, would provide the grounds for a simple judicial review application.

35. In AH837, the arbitrator explained why an email did not prevail over the grievor's evidence given during his statement taken under the CBA (Footnotes omitted):

62. As noted in the introduction, CN did not meet its burden of proof in this case. It had the obligation to demonstrate, on a balance of probabilities, that Mr. Moses' had made the comments which led to his dismissal. Mr. Moses denied making them. CN asked the arbitrator to discount his evidence taken pursuant to article 13.1 of the collective agreement and prefer Mr. Lambert's email.

63. CN did not persuade the arbitrator to come to this conclusion. On what basis can the arbitrator prefer an email over the evidence Mr. Moses gave during an investigation?

64. CN could have taken steps to resolve this crucial evidentiary conflict. As noted above, it could have required Mr. Lambert to provide a statement during the investigation. Another option involved conducting a supplementary

investigation. In rare cases where credibility remains a lynchpin issue, the parties could agree to present oral evidence at the hearing.

65. These methods would have provided the arbitrator with a full Record on which to resolve the crucial evidentiary conflict in this case.

66. Given that CN did not demonstrate that Mr. Moses made the comments which led to his termination, the arbitrator must allow the IBEW's grievance. Given this scenario, the extensive submissions about the appropriate penalty lose their relevance.

Disposition

67. This award makes no negative finding about Mr. Lambert and his email. Instead, this award reflects the fact that an allegation differs from an investigation's evidence. CN had an obligation to investigate the facts prior to dismissing a long-term employee.

68. This case also does not dispute the importance of health and safety matters. Both parties at the hearing emphasized how important those issues are, as has the arbitrator in other awards. But a case involving safety issues does not lessen a party's burden of proof.

69. This case involved a party's fundamental obligation to satisfy its burden of proof. As noted above, CN did not prove, on a balance of probabilities, that Mr. Moses made the crucial statements attributed to him. Multiple ways existed to examine the facts, including via a supplementary investigation, but CN did not to pursue those routes. (sic)

36. Ms. Daniher's case differs from AH837 since it is not a discipline case. No investigation under the CBA takes place in non-disciplinary cases, a reality which sometimes makes it more difficult to come to conclusions about the facts²⁵ (Footnotes omitted):

32. The railway arbitration model deals with both disciplinary and non-disciplinary matters. The Record in discipline cases benefits from the obligation to hold an investigation which results in a written transcript. Moreover, if an employer fails to provide key documents, then an arbitrator may declare any discipline void ab initio.

33. Discipline cases therefore provide an arbitrator with a significant Record for the expedited arbitration.

34. Non-disciplinary cases present greater challenges. The parties have not negotiated a process which would mandate evidentiary statements and

²⁵ [AH809-M](#) at paragraph 34.

document disclosure. In some cases, the lack of disclosure until the eve of an arbitration could impact the fairness of the process.

35. While an arbitrator in a regular labour arbitration might remedy these challenges through expensive adjournments, the current parties have required an expedited process. They do not want an arbitrator to decide a single case after multiple hearing days sometimes over a number of years. Instead, their agreement often requires an arbitrator to hear multiple cases in a single day.

36. To get these benefits, the parties have accepted certain important obligations, such as clearly identifying the issues before the arbitrator.

37. The arbitrator thus faces a significant challenge given the parties' clearly unreconcilable versions of the facts.

Did the IBEW expand the issues beyond those in the JSI?

38. The parties' expedited arbitration regime cannot function if new issues come to light when a party files its written Brief²⁶. Issues need to be raised in the grievance procedure and then summarized in the JSI.

39. CPKC alleged that the IBEW's Brief had added a new issue of inadequate training²⁷ and another about the good faith administration of the CBA.

40. For the purposes of this decision, the arbitrator has dealt with the issues as the IBEW described them in the JSI²⁸:

The Union contends that the Company failed to properly accommodate Daniher's medical disability during her testing.

The Union contends that Daniher properly disclosed her medical diagnosis of Attention Deficit Disorder to the Company, yet the Company did not provide her a quiet and distraction free environment to complete the examination.

The Union contends that Daniher was not provided sufficient time to study and practice for her rewrite of the examination.

The Union requests that Daniher be reinstated and made whole, including but not limited to for all lost wages, benefits, and seniority. The Union further

²⁶ See, for example, [AH825](#).

²⁷ The arbitrator notes that CPKC in its Step 1 response specifically responded to the claim "that Ms. Daniher was not allotted time with a coach with gated crossings...".

²⁸ IBEW Documents, Tab 1.

requests that Daniher be returned to the Company's Signals & Communications Apprentices Program. (sic)

Did CPKC fail to accommodate Ms. Daniher?

41. As the above Chronology disclosed, CPKC and the IBEW disagreed on certain key facts from the very beginning. They disputed whether Ms. Daniher had disclosed her disability and asked for an accommodation before failing the Exam for a second time. Moreover, their factual dispute further included the conditions in the lab in which Ms. Daniher had to take the test.

42. CPKC's written grievance positions bear repeating. In its Step 1 grievance response²⁹, CPKC alleged that Ms. Daniher had never disclosed her disability. It further argued that CPKC had provided her with an adequate testing environment:

In response to the claim regarding Ms. Daniher's alleged medical condition, Ms. Daniher did not reveal any condition to any instructor or manager involved with the S&C Apprenticeship program, nor did she ask for any accommodation either in classroom instruction or in testing.

...

The S&C lab is a location for retesting as it is separate from the rest of the class and other S&C classes do not use the space until testing is completed. S&C Instructor Brian Boutkan supervised the retesting of Ms. Daniher in the S&C lab and insured that an adequate testing environment was supplied. No classes worked in the lab while Ms. Daniher was tested.

43. In its Step 2 response³⁰, CPKC maintained its position about the testing facilities:

The company does acknowledge that during Ms. Daniher rewrite there was one company employee that entered the lab. As which time there was no noise, no work performed and Mr. Boutkan quickly escorted the individual out of the lab and locked the door. At this time the company would also like to point out that this was hardly an interruption as claimed but that one interruption does not excuse her inability to pass the required tests.

44. This is the only CPKC version of the facts, which evidently involves hearsay, in the Record.

²⁹ IBEW Documents, Tab 10, PDF page 73/261.

³⁰ IBEW Documents, Tab 12, PDF page 79/261.

45. The issue then becomes, as it did in AH837, *supra*, whether to prefer CPKC's position set out in its grievance responses over the other evidence in the Record, most notably Ms. Daniher's testimony on June 13, 2024.

46. For multiple reasons, the arbitrator has concluded that CPKC knew about Ms. Daniher's disability and failed to accommodate her ADHD disability when she wrote the Exam. The evidence can be divided between the documentation in the Record and the testimony at the hearing.

47. The written Record reveals that, on two separate occasions, CPKC received medical evidence confirming Ms. Daniher's ADHD diagnosis. The arbitrator acknowledges that, for confidentiality reasons, managers may not know what information an employee has provided to the occupational/health department.

48. However, even if, as CPKC alleged, Ms. Daniher had only raised her ADHD after failing the Exam a second time, it may well have had a duty to inquire whether such information existed in its records. This differs from a scenario where an employer first learns of an alleged disability only after an employee's termination.

49. CPKC terminated Ms. Daniher on the same day she failed the test. It then told her in the same letter that she could appeal and claim she did not "have a proper test"³¹. Ms. Daniher's raising of her ADHD, as she did in a text message with a Mr. Osborne³² might cause an employer to consider when it had any duty to inquire³³.

50. The arbitrator accepts that the above documentary evidence is not definitive. But what changes this case fundamentally is Ms. Daniher's testimony that she advised her trainers of her ADHD and her need for a quiet testing area. She further indicated that she had to write the exam in the lab, which had other people in it, rather than in a quiet classroom like she had had for her first 3 successful tests.

51. This evidence brings this case closer to the situation in AH837. CPKC in its grievance responses clearly contested Ms. Daniher's facts. But the arbitrator only has Ms. Daniher's June 13, 2024 evidence. CPKC exercised its right and cross-examined Ms. Daniher.

³¹ CPKC Documents, Tab 12 (Apprenticeship Program – Wage Agreement).

³² IBEW Documents, Tab 8.

³³ [AH793](#) at paragraph 57.

52. Even in expedited railway arbitrations, sometimes only oral evidence can resolve fundamental factual conflicts³⁴:

26. As the arbitrator mentioned in passing during the hearing about various recent cases, it is challenging when new facts first come to light at an expedited arbitration. Article 13.19 of the parties' collective agreement seems to assume that the parties have fully discussed all relevant facts, especially if a Joint Conference (Article 13.8) has been held.

27. Article 13.21 regarding the parties' right to present evidence seems to assume that any oral evidence will focus mainly on key contradictions. Otherwise, if the evidence presented raises new facts, then the parties might as well hold a traditional multi-day arbitration. Similarly, raising potentially new grounds for discipline can be problematic in any expedited arbitration process: CROA&DR 4628.

53. The arbitrator cannot ignore Ms. Daniher's evidence and prefer the hearsay evidence in CPKC's grievance responses. Instead, the oral evidence confirmed that Mr. Daniher told her trainers about her ADHD and that, despite this notice, she had to write the Exam in the lab when others were present. CPKC did not provide her with the classroom she had used previously when she passed the first 3 exams.

DISPOSITION

54. For the foregoing reasons, the arbitrator upholds the grievance and orders CPKC to reinstate Ms. Daniher forthwith. The arbitrator remits all remedial questions to the parties given their usual success in resolving these issues themselves.

55. The arbitrator remains seized for any disputes about the appropriate remedies.

SIGNED at Ottawa this 25th day of June 2024.



Graham J. Clarke
Arbitrator

³⁴ [AH664](#) (*Canadian National Railway Company v International Brotherhood of Electrical Workers System Council No. 11*, 2018 CanLII 52755).