

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4821

Heard via Video Conference and in Calgary, April 6, 2022

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Disagreement between the parties' on whether there is any compensation owing to S.B.

THE COMPANY'S EXPARTE STATEMENT OF ISSUE:

On November 9, 2016, the parties convened a grievance arbitration hearing before Arbitrator Moreau whereby the union challenged the administrative closure of S.B.'s (the Grievor) employment file for innocent absenteeism.

In Arbitrator Moreau's December 5, 2016 Award, the Arbitrator found the Company's actions premature, falling "*short of the threshold requirements of accommodations to the point of undue hardship.*"

The Arbitrator directed "*The grievor shall be reinstated to his employment. I will reserve jurisdiction to allow the parties to discuss a proper accommodation process for the grievor as well as any other issues in relation to remedy.*"

Despite its efforts, the Company has been unable to accommodate the grievor due to continuous changes to his temporary restrictions.

Union's Position:

It is the Union's position that the Company has not met its duty to accommodate and the grievor is entitled to compensation.

Company's Position:

The Company disagrees with the Union's position. The Company has made reasonable efforts to accommodate the grievor and it is the Company's position that it is the grievor who has frustrated the accommodation process by putting up barriers and altering his temporary restrictions in

response to suitable employment opportunities. Based on the foregoing, the Company met its duty to accommodate and therefore, no compensation is owed to the grievor.

FOR THE UNION:

(SGD.)

FOR THE COMPANY:

(SGD.) V. Paquet
Labour Relations

There appeared on behalf of the Company:

- | | |
|--------------|---|
| V. Paquet | – Manager, Labour Relations, Vancouver |
| F. Daignault | – Acting Manager, Labour Relations, Montreal |
| S. Miller | – Officer, Workers Compensation Corporate Service |

And on behalf of the Union:

- | | |
|--------------|---------------------------------|
| D. Ellickson | – Counsel, Caley Wray, Toronto |
| R. Donegan | – General Chairperson, Edmonton |
| S. B. | – Grievor, Edmonton |

AWARD OF THE ARBITRATOR

INTRODUCTION

1. The Arbitrator found in the initial award dated December 5, 2016 that the Company's decision to terminate the grievor without consultation with the Union and the grievor fell short of its duty to accommodate. The parties were directed as a result of this procedural breach to "*...discuss a proper accommodation process for the grievor as well as any other issues in relation to remedy*".

2. The Company's view is that it has made reasonable efforts to accommodate the grievor to the point of undue hardship. The Union, for its part, maintains that the Company has failed and continues to fail to accommodate the grievor. The Union requests an Order that the Company provide the grievor with an accommodated position as well as compensation.

3. I agree with the comments of Arbitrator Stout in *Canadian Pacific Railway Company v Teamsters Canada Rail Conference* 2016 CanLII 25247 that, while identifying parties is the normal practice in labour arbitration, arbitrators will often grant anonymity where there is “*personal, private and extremely confidential information such as medical records*” involved in the proceedings. This award contains several personal and private references. I therefore agree with the Union that the granting of anonymity is appropriate in this case.

4. There were numerous individuals involved in the accommodation process, both from the Company and the Union. The Company’s *Client Management Information* document (113 pages in length) entered into evidence by the Company contains individual name references for those who participated in the process, both from the Union side and the Company side.

5. The individuals involved from the Union side in the accommodation process include: Danny Calla (Legislative Representative), Derek White (Local Chairman CTY), Ray Donegan (General Chairman, CTY West).

6. The main individuals involved from the Company side include: Carole Cousineau (Senior Manager-Workers Compensation), Stephanie Miller (Claims Officer, Workers Compensation), Gwenyth Capeness, RN (Team Leader, CN Occupational Health Services), Donna Crossan (Manager, Labour Relations), Kaitlyn Folk (Recruiter),

Christopher Bailey (Manager, Human Resources, Western Canada) and Diane Lucas (Claims Officer, Workers Compensation).

7. Given that the issue in this arbitration involves whether the Company has met its duty to accommodate, I have provided an extensive summary of the evidence including: numerous direct citations from the *Client Management Information* document, excerpts from the medical correspondence from the grievor's treating physicians as well as other relevant letters and email exchanges from those named individuals involved in the accommodation process.

SUMMARY OF THE EVIDENCE

8. Subsequent to the issuance of the arbitrator's award on December 5, 2016 the Company requested, in accordance with its return-to-work protocol, that the grievor have his physician complete a Company medical form entitled "*Medical Progress Report/Return to Work-Restrictions Report*" ("the Report"). The grievor's treating family physician, Dr. Irene Chan, provided a Report dated January 9, 2017 to the Company's Occupational Health & Safety Department ("OHS") which outlined the grievor's work restrictions. Dr. Chan also indicated in her Report that the grievor experienced headaches and anxiety due to PTSD which "*may affect railway operations*".

9. The notes from the *Client Management Information* document indicate that Ms. Diane Lucas called the grievor on January 30, 2017 and left him a voice mail to return her call. On February 2, 2017, the grievor returned the call. Ms. Lucas' note indicates: "S.B.

called back. He is not willing to relocate. Authorization to speak to his Union Rep Danny Calla received.”

10. On February 2, 2017, Ms. Capeness sent the grievor the following email, with a copy to Ms. Lucas:

I received the additional clarification from Dr. Chen. You have been cleared to return to work with the following temporary restrictions, (to be reviewed in one year):

Cannot perform safety sensitive or safety critical duties (cannot drive a company vehicle)

No lifting over 50 lbs

No repetitive bending

The above restrictions were communicated to your managers, Labour relations, Human Resources and the return to work group on January 26, 2017. The person responsible for looking for an appropriate accommodation is Diane Lucas, cc'd above. Diane's contact number is 780-472-3757.

OHS would require updated medical again in January 2018.

11. On February 12, 2017, the Union's Mr. Calla and Mr. White wrote to the Company in what the Union characterized as *"the first step of the return to work accommodation process"*. The Union noted *"...that the grievor had been cleared to return to work with the following restrictions"*:

-Cannot perform Safety Sensitive or Safety Critical Duties
(Cannot drive company-vehicle)

-No lifting over 50 lbs

-No repetitive bending

12. The Union then listed nine positions that it recommended for accommodation including: assisting yardmaster, performing roll-by inspections, assisting facility maintenance, diesel shop duties, cleaning locomotives, training and education of S.B.

in Occupational Health Services (“OHS”), oiling switches, Assisting Clerk’s, janitorial duties in the GVT¹, and bundling multiple duties. The Union requested in its closing paragraph a “...*list of all available positions in all departments in the GVT that would facilitate S.B.’s return to work with his current restrictions. In addition, our office is also seeking information of all steps that have been taken thus far by the Company to seek accommodation for S.B. in the GVT.*”

13. On March 16, 2017, Carole Cousineau emailed the grievor confirming their conversation of the same day that the Company did not have “...*any suitable positions that fall within your work restrictions*”.

14. In a follow-up email to Union representative Mr. Calla, on April 13, 2017, Ms. Cousineau noted:

On March 16, 2017 I spoke with S.B. who confirmed his preference of working in the GVT. He also confirmed in February 2017 the same with Diane Lucas, therefore CN has focussed their efforts in the GVT area since that time.

15. Ms. Cousineau went on to comment in the same email of April 13, 2017 to Mr. Calla on each one of the nine positions suggested by Mr. Calla for accommodation in his correspondence of February 12, 2017. Ms. Cousineau noted that the positions were being performed by other employees; or, the grievor, in her view, was unable to perform the duties of the various positions due to his work restrictions. She also indicated that the Company “...*did not have duties that we can bundle up to make up a job for S.B. at*

¹ Greater Vancouver Terminal

this time.” Ms. Cousineau also indicated she had reviewed five current postings (Trade Specialist, Human Resources Manager, Conductor, Car Mechanic, Assistant Trainmaster and Mechanic) but that the grievor’s physical limitations or educational requirements of the positions prevented him from doing the work set out in the postings. Ms. Cousineau went on to say in closing: *“Please let me know if you disagree with my assessment of the positions provided to you above with a brief explanation so I can pursue the matter further. If S.B. would like CN to consider positions outside of the GVT, please let me know and I will open my search to other areas of Canada”.*

16. On April 15, 2017, the grievor wrote to Ms. Cousineau disputing that he had indicated in their conversation of March 16, 2017 a work preference for the GVT. He stated in that regard:

I clearly recall having the conversation on March 16th 2017 with yourself and I did not confirm my preference to work in GVT with Diane or yourself on March 16th, 2017 or February 2017. Carole you questioned me and mentioned that I am not interested in moving and I said no that’s not true and I replied that I was never offered anything as of yet. You went on to inform me that there is a Carman position in Edmonton and if I am interested. I mentioned that driving will be required and CN OHS does not want me to drive a company vehicle. You finished off the conversation saying you will look in my area and outside and if anything comes up you will email me or call me. Carole there are discrepancies between what you wrote below and the conversation we had on March 16th 2017 and I am hoping this email will help jog your memory and help in the accommodation process.

Ms. Cousineau replied as follows on April 17, 2027 to the grievor:

If Diane and I misunderstood the conversation that both her and I had with you, I apologize. I will look into options across the country for you today. Stephanie Miller will follow up with you to outline the positions that fall within your work restrictions by end of day.

17. On April 18, 2017, Ms. Miller wrote to the grievor and confirmed that he had expressed an interest in relocation. She noted that there was a Train Movement Clerk position available in Prince George and that she would follow up. The grievor responded to Ms. Miller's April 18, 2017 email on May 6, 2017. He stated: *"I wanted to follow up as I have not heard anything as of yet and am eager to return back to work."* Ms. Miller responded in an email on May 10, 2017 that she was advised by the Manager in Prince George that the Train Movement Clerk position had been put on hold but *"...that they were hoping to hear by the end of the week if they are still able to fill the position"*.

18. Ms. Miller also noted in the same email to the grievor of May 10, 2017 that there was a Logistics Coordinator position posted in Winnipeg. The grievor was advised that he would have to apply for the position, if he was interested, through the CN *Careers* website and that she would advise the Company's Recruitment team to expect an application from him. Ms. Miller wrote to the grievor again on May 16, 2017 advising him that the Recruitment team at CN had indicated to her that the grievor had not applied for the Logistics Coordinator position. She went on request that he let her know if he was interested in the position *"...as they would like to make a decision"*.

19. On May 16, 2017, the grievor replied that he was *"...in the process of updating my resume and cover letter as it is outdated and will forward it as soon as I can"*. Ms. Miller replied to the grievor as follows on May 17, 2017, with a copy to Mr. Calla:

Thanks for the update. Please apply for the logistics coordinator job by the end of the day today. I see from my notes that Diane [Lucas] asked you for a resume in February but I don't see one on file. In addition to providing your resume on the careers if you could also forward a copy I would appreciate it.

20. On May 19, 2017, Mr. Calla wrote to Ms. Miller as follows:

I received an email from S.B. yesterday stating that you have requested from him another copy of his Resume. After our phone conversation on May 17th I was under the impression that there was an understanding that there is no requirement for S.B. to apply VIA eportal or to submit a resume for new potential employment within the company he is already an employee of.

It was discussed that it is simply a convenience for the recruitment department to have an updated resume but not a requirement.

Again it is going to take time for S.B. to create a resume and also an expense that he simply cannot afford due to his current situation.

To speed up the process please have the recruitment department contact S.B. via email or phone to enquire about his qualifications.

21. Ms. Miller replied to Mr. Calla the same day, May 19, 2017, as follows:

I think we got our lines crossed a little bit. I have asked our recruitment team to reach out to S.B. directly regarding the Logistics Coordinator position specifically as there is a deadline for applications and I would like S.B. considered. However, accommodation is a two-way street. S.B. needs to be engaged and looking for work as much as I'm looking for him. This includes reviewing jobs through the e-portal and careers websites and advising me if there is anything posted that he thinks is a good fit for him. This is especially true since I do not have a copy of his resume. Without knowing his background there may be opportunities that I do not consider not realizing he is qualified.

If S.B. is not going to provide me a copy of his resume please let me know and I will stop asking him.

If this Logistics Coordinator position does not work out I'm going to continue to request S.B. apply for jobs that fit within his restrictions through the CN website. The website is not a "convenience" as you state below but a process put in place by our recruitment team. Give me a call if you'd like to discuss this further.

22. The grievor was interviewed for the Logistics Coordinator position located in Winnipeg by telephone on May 29, 2017. The Union noted in its brief (para 29) that the

grievor did not apply for the position for several reasons, including that the position required that he would be responsible for coordinating up to 400 people. Further, the grievor was concerned by the fact that the Company referred to the position as “high intensity”. Furthermore, the Union noted that the grievor’s diagnosed condition of PTSD, as well as other health conditions, left him with concerns that his ongoing recovery could be jeopardized. The grievor, according to the Company, had also indicated in his interview of May 29, 2017 for the Logistics Coordinator position that he did not want to be considered for positions outside his own bargaining unit. He expressed this last concern in an email to Ms. Miller on May 31, 2017:

I spoke with Leanne Paulicelli today regarding the potential positions of Logistics Coordinator which she was screening for me for accommodation. I am highly concerned as one of the requirements for eligibility for this position is to remove myself from the union. If I were to agree and at a later date CN decides that I am not a good candidate for this position then what? The union always stood by my side through my initial termination while on medical disability and leaving the union would ultimately leave me vulnerable. My decision is to remain in a unionized position with CN Rail.

23. Ms. Miller replied to S.B. as follows on May 31, 2017:

I followed up with Leanne Paulicelli to clarify what was said, and there seems to be a miscommunication regarding your discussion. She advised that she explained several times to you that this is a management position, if you were successful and were to take this position your seniority would be secured for one year. After that, your seniority would be maintained but stops accumulating.

Based on this, are you interested in being considered for the position? This job would be a good opportunity for you and is within your restrictions.

If not, I will make a note on your file that you are interested in unionized positions only. Just to clarify, would this be any union or solely ones within your current bargaining unit?

24. On June 1, 2017 Ms. Miller emailed the grievor, with a copy to the Union's Mr. Calla and Mr. White, as follows:

In follow up to my email below, there are attendance officer positions available in Edmonton right now. They are management positions as well. Are you interested in being considered for this position?

Also, the last time I checked you had not applied for the service delivery rep position in Edmonton. This is a unionized position but it is not within your bargaining unit.

In summary, here are the questions I would like you to answer:

- 1) Based on the information in the email below, would you still be interested in the position of Logistics Coordinator?
- 2) Do you want to be considered for any management positions? (if yes, please apply for the attendance officer position)
- 3) If you want to be considered for unionized positions, are you interested in any union? (if yes, please apply for the Service Delivery Rep position)

25. The grievor did not address the questions put to him by Ms. Miller in her email of June 1, 2017 but replied in an email as follows on June 1, 2017:

After speaking to my union I would like to make it clear that I wish all future correspondence be directed to either Danny Calla or Derek White.

26. Ms. Miller wrote the following file note after a discussion with Mr. White on June 2, 2017:

I spoke with Derek White re: accommodation. We discussed the logistics coordinator position. He put up the following barriers:

- Union would need to give permission to EE to keep his seniority beyond 1 year (I said that was fine if they wanted to do that)
- Concerns with the high stress environment of organizing lodging for up to 400 people at once. (his restrictions don't note concerns re: high stress)
- S.B. will need to return to the doctor to discuss the job and whether or not he felt he could do it. Requested I send a job description. (I

agreed but said if he needed to have this discussion prior to accepting then he would need to go to the doctor today).

We discussed S.B.'s restrictions and that based on his restrictions there would be no jobs for him in Vancouver. Running Trades - No SS/SCP Car Mechanic - no low level work, cannot lift more than 50 lbs, cannot drive vehicle.

TMC - cannot drive vehicle

Track - No SS/SCP, no low level work, cannot lift more than 50 lbs

Janitorial - jobs are contracted; no openings; but would likely not be a good fit anyway as he is unable to perform low level work and is unable to drive a company vehicle.

He advised that S.B. is working towards getting all of his restrictions lifted so he can return to his full duties. He does not have a time line for this. Initially he made it seem like it would be happening very shortly, but then later when we were talking about the logistics coordinator position again he said he thought they could be in place for years. He went to the doctor yesterday and is supplying OHS with new medical information. He has not seen it, but it is his understanding at this point that S.B.'s restrictions have not been lifted to date.

Once he agreed that we had exhausted all efforts to accommodate S.B. in Vancouver he stated S.B.'s preference would be to stay in Vancouver but he is willing to relocate. I questioned this as he said that he also wanted to return to his pre-accident duties and if he did that, would he be willing to move to Winnipeg for a year, if not less? Derek stated as there was nothing for him in Vancouver then yes this was the case.

27. Ms. Miller sent Mr. White a follow-up email on June 2, 2017 confirming their discussion of that day:

Thank you for speaking with me today. As requested, please find the job description of the Logistics Coordinator position below for your records. I also reviewed the job postings and currently there are no Crew Dispatcher jobs posted but, as per our discussion, there are Service Delivery and Attendance Management positions posted in Edmonton. Thank you for working with S.B. to have him apply for these positions.

28. On June 13, 2017 Mr. Calla confirmed with Ms. Miller that the Human Resources ("HR") Recruitment office should contact the grievor directly about testing for the crew dispatcher positions. Neither the Union nor the grievor heard anything further about the

crew dispatcher positions after June 13, 2017. The grievor also applied on-line for a Customer Service Representative position on CN's website. He was notified by the HR Recruitment office (on September 11, 2017) that he did not pass the on-line assessment for the Customer Service Representative position.

29. In the summer of 2017, the Company suggested that the grievor test and interview for a Train Reporting Representative position, a position that would require the grievor to work an irregular shift. The grievor attended for testing on August 29, 2017 at the HR office but a miscommunication resulted in the testing recruiter not being prepared for the grievor. The grievor left without taking the test. The Company's notes of August 29, 2017 indicate that HR attempted to contact the grievor to schedule the test for the following day but were unsuccessful in reaching him. A Company note dated September 1, 2017 reads:

Nancy Diaz advises that she sent EE a link to the online portion of the test. If he passes this then we will discuss bringing him in again for the other position.

30. On September 7, 2017, Mr. Calla emailed Ms. Miller indicating how displeased the grievor was for having been unable to take the Train Reporting Representative testing on August 29, 2017. Mr. Calla indicated that the grievor had taken a half-day of work off a job, where he was on probation, to take the test. He further indicated the following:

S.B. has provided CN OHS with medical information with regards to his restrictions. CN OHS has accepted that he cannot work irregular shifts.

31. The grievor, according to Ms. Miller's file note of September 1, 2017, had self-reported to HR Recruitment office that he was unable to work irregular shifts, which was

contrary to the information set out in his most recent physician's Report of January 9, 2017. Ms. Miller responded to Mr. Calla on September 7, 2017 as follows:

I have confirmed with OHS that S.B. does not have any restrictions with respect to shift work. I did receive S.B.'s email last week that refutes this. Gwentyth Capeness will reply to S.B.'s email directly to advise. The only restrictions currently on file for S.B. are as follows:

Long term temporary restrictions to be reviewed in Jan 2018
Cannot perform safety sensitive and safety critical
Cannot drive company vehicle
No lifting over 50 lbs
No repetitive bending

I have asked recruitment to send S.B. the TRR test via email. I believe there is one that is required to be performed in person but we can discuss this further once we receive the results of the online test.

32. The Company's Ms. Capeness confirmed in a follow-up email to the grievor on September 11, 2017 that the grievor's last physician's Report from January 19, 2017 did not indicate, as part of his work restrictions, that he was unable to work irregular hours. She added:

Your doctor noted that these restrictions would be reviewed in one year. An email was sent to you (by me) on February 2, 2017 confirming same.

If there has been a change to your restrictions since February 2, 2017, kindly forward medical documentation of same to OHS.

33. On February 16, 2018, Dr. Chan completed the grievor's OHS's annual work restrictions Report. The Report indicated that the grievor was fit for modified duties for the period February 16, 2018 to February 16, 2019. In addition, Dr. Chan attached a handwritten note on a prescription pad which stated that the grievor could only work shifts "*with consistent start and finish times*" due to his prescription medications. (The

Report was provided by the Union's Mr. White to the Company's Ms. Capeness in OHS on February 22, 2018).

34. Ms. Capeness then emailed the grievor on February 26, 2018 as follows:

Your current medications (particularly the nabilone, and potentially some of the other medication depending on the frequency of use and side effects) render you temporarily unfit for safety sensitive duties or for driving a CN vehicle or heavy equipment.

35. Mr. Donegan, in the meantime, had emailed Ms. Crossan on February 19, 2018 expressing the concern of the Union that the grievor had yet to be accommodated. He asked what steps the Company had been taken up until that time to accommodate the grievor.

36. Ms. Crossan responded by summarizing in an email on February 28, 2018 the grievor's work restrictions. She also outlined what positions had been reviewed to accommodate the grievor including:

Attendance Management Officer (Edmonton): outside restrictions (rotating shifts)

Chauffeur (Vancouver): outside of restrictions

Bunkhouse Attendant (Boston Bar): outside of restrictions

RTC (Edmonton): outside of restrictions (SCP)

TRR/Crew (Edmonton): outside of restrictions

Engineering Drone Supervisor (Vancouver): outside of restrictions (requires rotating shifts and driving a CN vehicle)

Human Resources Manager (Vancouver): Requires specialized skills and education

Bridges and Structures Supervisor (Edmonton): outside of restrictions
(requires driving a CN vehicle, varying shifts)

37. In May 2017, Stephanie Miller requested that S.B. send his resume to assist with the accommodation process. S.B. advised on May 17, 2017 that he was in the process of updating his resume-to date CN has not received S.B.'s resume. On May 29, 2017, S.B. was interviewed for the Logistics Coordinator position in Winnipeg. S.B. declined stating that he wanted to be considered for "unionized" positions only. Although S.B. was advised that his seniority would be protected for one year and perhaps longer if he talked to the Union. S.B. declined and wasn't interested in the position. An email was sent to S.B. copying Local Chairman Derek White seeking clarification on whether or not he was only interested in "unionized" positions and asked S.B. to apply for the Attendance Officer position and the Service Delivery position in Edmonton. S.B. responded that Ms. Miller converse with his union. S.B. did not answer any of the questions and did not apply for either position. Ms. Miller reviewed S.B.'s restrictions and positions with Local Chairman, Derek White.

Currently, there is a Tariff Service Leader position posted in Edmonton. It is day shifts and would fall within S.B.'s restrictions. I do not have a copy of S.B.'s resume so I am unsure if he is suitable for this position. I've copied the job description below if you would like to discuss with Mr. Donegan.

38. On June 21, 2018 the grievor's treating psychiatrist, Dr. William Hay, wrote to OHS's Ms. Capeness the following letter:

The above-named is a patient of mine. I understand that his family doctor, Dr. I Chan has agreed that he is ready to return to work with CN. There was some concern about his being accommodated with a position elsewhere than his present home.

I would recommend against this as his treatment is presently here. He has an established support network that is critical to his continued well being. His wife works here and family are here. He is in recovery attending a home group in AA and AA meetings, clean and sober since 2008. He has counseling in his community as well as a very therapeutic relationship with his long term family physician as well as seeing myself since 2007. I trust this is helpful in planning his future work.

39. On June 27, 2018, Dr. Chan wrote a two-page handwritten note for the grievor on a prescription pad.

Page #1 reads:

The above patient stopped Nabilone and Neumontine as of Jan 1/18. He is fit to occupy a safety sensitive position and drive a company vehicle on CN Rail. His current medication is Azathioprine (25mg) and Wellbutrin (100 mg)

Page #2 reads:

Asacol (800mg)

Salofolk (500mg)

His restrictions are:

- cannot work rotation shifts i.e. must work one shift within a consistent start and finish time.
- cannot work safety critical duties.

40. A file note from Ms. Miller on June 21, 2018 states:

Requested union discuss retesting clerical so we can consider positions in Edmonton for him.

41. Ms. Miller also sent the following email to Mr. White on June 21, 2018:

I wanted to touch base with you regarding accommodation for S.B.. The positions currently posted in Vancouver are as follows: Class 1 Equipment Operator, Spareboard employee (Intermodal), Mechanical Supervisor, Assistant Trainmaster, Car Mechanic, and Heavy Duty Mechanic. All these positions fall outside of S.B.'s restrictions.

S.B. has suggested in the past that he would be willing to relocate. We have tested him for some clerical positions in Edmonton in the past including Service Delivery and Train Reporting Representative but unfortunately he did not pass. I was hoping he would consider being retested for these roles. Would you please discuss with him and let me know? We could arrange for him to perform the tests in Vancouver.

42. On June 27, 2018, Ms. Miller wrote a letter to the grievor indicating that she had received medical information “...that supports you are unable to return to your pre-disability job as a Conductor”. The letter went on to ask the grievor whether he would consider relocating to other areas given suitable accommodation was not available in the GVT. The letter also asked what geographic areas the grievor would consider for relocation. On July 10, 2018, the grievor responded by email to Ms. Miller’s June 27, 2018 letter as follows:

I have received your letter and would like to make it clear that to date I have not turned down relocation.

As per my Specialist (Dr. Hay) for my continued well being it is critical that I be accommodated in the lower mainland as I am in recovery.

Please refer to my updated medical.

43. On July 16, 2018, Ms. Capeness emailed the grievor thanking him for Dr. Chan’s medical notes “of June 21 and 27, 2018 sent via email on June 27, 2018” and indicated that more detailed medical information would be required in order to assess the grievor’s fitness for safety sensitive duties. A list of the requested medical information, as well as the physician’s forms, were included in the email along with a further request that the grievor attend for a safety sensitive preplacement medical exam. The grievor provided the requested medical information and forms by September 10, 2018. He indicated in an email to Ms. Capeness on September 10, 2018 that she could schedule the preplacement medical examination for him anytime after September 24, 2018.

44. On November 9, 2018, Ms. Capeness emailed the grievor indicating that the Chief Medical Officer had reviewed the grievor's OHS file and all his recent medical information.

She went on to state the following:

You are now deemed fit to return to work with the following temporary restrictions (to be reviewed again September 2019)

- Unfit for safety critical duties
- Must work within local area (able to return to home location after each shift)
- Requires a regular shift with consistent start and end times
- May drive a company vehicle with passengers.

Your restrictions have been communicated to management this morning and Stephanie Miller will be involved in the search for suitable accommodation.

Once you have returned to work, OHS will request periodic medical updates.

45. Ms. Miller became aware of a Patrolman position and wrote to Ms. Capeness on November 21, 2018 asking her to review whether the grievor would be suitable for this position in the lower mainland. After several email inquiries by Ms. Miller to OHS about the suitability of the Patrolman position, Ms. Capeness replied on November 27, 2018 to Ms. Miller that she had been advised by the grievor's physician that the grievor could not travel to Winnipeg for training nor could he work outside of regularly scheduled start and end times. The Patrolman position also required regular overtime. Ms. Miller inquired on November 28, 2018 with CN's Patrick McCaron: *"Is there any way we can remove this from the position for accommodation purposes?"*. She was informed that the overtime requirement could not be removed for safety reasons.

46. On January 14, 2019, a *Physical Demands and Working Conditions* (“PDA”) form for a Yardmaster position was sent by Ms. Crossan to Ms. Capeness with instructions that it was to be forwarded to the grievor for completion by his physician. Further discussions about the suitability of the Yardmaster position took place between Mr. Donegan and Ms. Crossan on January 19, 2019.

47. On March 19, 2019, Ms. Capeness wrote in a file note that OHS had reviewed the grievor’s fitness for the Yardmaster position. In terms of the safety critical component of the Yardmaster’s duties, Ms. Capeness indicated that the grievor was prevented by his restrictions from performing the following duties: being directly in control of any train movement; taking room/protecting the point; lining switches and remote control of signals.

48. On March 25, 2019, Ms. Crossan sent the following email to Mr. Donegan with respect to the Yardmaster position:

In terms of the safety critical component of Traffic Coordinator duties, S.B. would not be able to directly control train movement, e.g. taking room/protecting the point.

Is the Union prepared to grant S.B. seniority as a Traffic Coordinator in the Greater Vancouver Terminal sufficient to displace the junior qualified Traffic Coordinator holding a permanent position in Vancouver on an ongoing basis if he trains and qualifies as a Traffic Coordinator? With the Union’s concurrence the Company is prepared to pursue accommodation for S.B. as a Traffic Coordinator in Vancouver, BC.

In addition, S.B. will be required to:

-Successfully complete the on-line CRO Rules for the purpose of CRO Rules preparation and completion of an exam for Rules qualification. S.B. can contact the QSOC hotline at 1-855-275-7762. As information the next CRO Rules class in Vancouver is April 10th and April 11, 2019.

-Successfully pass the Traffic Coordinator screening tests which will be administered in Vancouver.

-Successfully pass the Traffic Coordinator training.

49. Ms. Crossan followed up with Mr. Donegan on March 28, 2019 with the following email:

S.B. can contact the QSOC hotline at 1-855-275-7762. He needs to complete the on-line studies. A one on one with Rules Instructor Dino Orlando Rizzuto on April 3rd in the Thornton Yard Office has been arranged with QSOC testing scheduled for April 4, 2019.03.28

Please confirm S.B.'s attendance.

50. Mr. Donegan replied to Ms. Crossan on March 28, 2019 as follows:

Donna, it's pretty short notice. I've left an email and a message for him. As you know he has been working all along. He may need to give notice at his current place of employment. I'll let you know once I've heard from him.

51. On March 29, 2019, Mr. Donegan updated Ms. Crossan as follows:

I've been in contact with S.B. He is very interested in the accommodation. However, as I mentioned, he is employed in a full time position and has previous commitments that he cannot change at this time. S.B. will be able to begin the process starting in the first week in May. As you know, S.B. has been away from the railroad for a long time and may need some mentoring in his rules. Can you check on availability for QSOC in the second or third week in May? Thank you.

52. On April 12, 2019, Ms. Crossan replied to Mr. Donegan as follows:

Unfortunately, the next QSOC class in Vancouver is July 25, 2019. S.B. would need to meet with a Company Officer to update his books; contact the QSOC hotline at 1-855-275-7762 to confirm access and complete the on-line studies. A one on one with a Rules Instructor would be arranged for July 24, 2019 in the Thornton Yard Office. Please advise if these dates work for S.B.

53. On May 13, 2019, Ms. Crossan sent a follow-up email to Mr. Donegan as follows:

Does July 24 and 25, 2019 work for S.B.?

54. On July 2, 2019, Dr. Hay wrote to the Company confirming that the grievor found the online studies to be overwhelming and that he would be better accommodated in a less stressful position.

55. On July 15, 2019, Ms. Miller emailed Ms. Crossan as follows:

I spoke with Gwentyth today regarding S.B.'s restrictions. Given his doctor has deemed him unable to return to the stressful position of yardmaster I would assume we need to look at other options. Since the restrictions regarding irregular shifts and overtime are gone, my first thoughts are that he may be able to return to a position in mechanical (HDM, car mechanic, labourer) or a track position.

I was thinking we should send some PDAs to the physician to determine if the doctor finds these positions suitable. Would you agree that this is a reasonable next step or would you suggest something else?

56. On August 6, 2019, Ms. Capeness sent Ms. Crossan the following email:

Sent [to grievor] for both car mechanic and HDM position to him today with a letter to take to his physician.

57. The Union noted that the grievor, on July 25, 2019, found a posting on CN's website for a Freight Car Repairer [Car Mechanic] position. The grievor wrote an email to Ms. Crossan about the position on August 8, 2019 stating the following:

The position of Freight Car Repairer that we inquired about was posted since April 19, 2019 and then mysteriously the posting was taken down soon after Ray [Mr. Donegan] had emailed you.

The posting of freight car repairer was for VANCOUVER and I had all the credentials the job required to be successful.

Now to my complete surprise the posting is back on CN's career job page but the location has been changed to PRINCE RUPERT and the posting date has been changed to April 24, 2019.

It's clear CN does not wish to pursue ideal accommodation for me as OHS sent me forms for two different positions [Car Mechanic and HDM] that I may or may not qualify for.

58. Ms. Crossan responded to the grievor as follows: on Aug 13, 2019:

Postings are advertised and taken down when filled or when it has been determined that the position is no longer required. As you may or may not be aware training for a Freight Car Repairer and other positions is provided at CN's Campus in Winnipeg. According to the last information we received from your treatment provider, travelling to and remaining in Winnipeg for training was not possible given your restrictions. The medical forms for Freight Car Repairer and Heavy Duty Mechanic, including new requirement to travel and attend training in Winnipeg were provided to you to take to your physician for completion. We are waiting to hear back from your treatment provider whether or not these positions, including the training in Winnipeg can be considered at this time. CN will continue to review other options and positions that fall within your restrictions, including that of a Freight Car Repairer. Please continue to monitor CN's career website and apply on-line for any and all positions you are interested in.

59. The next day, August 14, 2019, Dr. Hay wrote to Ms. Capeness which reads in part as follows:

1. I have reviewed the two positions outlined in your letter of August 6, 2019, heavy duty mechanic and/or yard carman position. From a psychiatric perspective I see no concerns with these positions. Previous positions had too much stress or neurocognitive demand. I have not physically assessed the patient. This is what an occupational therapist would do if it was necessary. However I have discussed each of the physical requirements with him and confirmed that in his present labouring job with the City of New Westminster he is already capable of doing this. I see no reason for any restriction in that regard. I have further checked and commented on the individual activities.

2. Regarding the restriction requiring working in the local area, this could be temporarily lifted because the time away from his treatment and support community will only be 3 weeks and 2 weeks. ...

60. On August 15, 2019, Ms. Miller emailed the grievor as follows:

I received notification from Gwenyth in OHS that your specialist has reviewed the positions of Heavy Duty Mechanic and Car Mechanic and agreed they are suitable based on your restrictions. Your specialist also confirmed you would be able to perform the required training in Winnipeg. Do you agree with this assessment?

Currently, there are HDM positions posted in Vancouver on CN's website. I have reached out to our recruitment department to ensure you are considered but I do not have a copy of your resume. In order to streamline the process, I would request that you apply for the HDM Vancouver position online. This will ensure our recruitment department is able to contact you and keep track of your credentials and qualifications accurately.

Please let me know when this has been completed and if you have any questions.

61. On August 16, 2019, Ms. Miller emailed both the grievor and Mr. White as follows:

There will be a CN recruiter in Vancouver area next week. Could we arrange to have S.B. come in to be tested for the HDM role? It is a written test, called a FIT test that assesses mechanical aptitude.

62. On August 19, 2019, Mr. White replied as follows:

S.B. is definitely interested in the positions listed below [HDM and Car Mechanic]; however given the short notice will be unable to meet with the recruiter as he is out of town on vacation.

He will be back in a week's time and available after that to perform the testing.

63. The grievor attended on August 29, 2019 for the mechanical aptitude interview and passed the test for the HDM position. Ms. Miller summarized the interview and the test results in a file email note to Ms. Crossan (copied to CN's Kaitlyn Folk and Angela McHardy) on August 30, 2019:

I spoke with Kris Engler and Jai Takhar yesterday after they interviewed S.B.

S.B. arrived as expected to complete the FIT Test. He scored a 9/20, which is a pass (pass is 8).

Jai and Kris advised that they would proceed with the interview. S.B. advised that he did not want to participate in an interview, his union advised him it was a test only. Jai and Kris advised that they would be proceeding with the interview portion and the worker did agree after his initial negative comments about not participating.

S.B. did not bring a resume to his interview although this was requested in writing by Kaitlyn Folk.

The only mechanical experience that was disclosed was the worker advised that he works on his personal vehicle from time to time and changes his own oil.

S.B. made it clear when he was being interviewed that he was not interested in the HDM position, he would prefer to be a car mechanic. He was rude and dismissive to Kaitlyn Folk, and refused to answer various questions regarding his past discipline history, safety record, or any of his past history at CN.

S.B. also disclosed why he was wrongfully dismissed including his attendance record, past MVAs and his history with rehab.

When asked for three reasons for why they should give him the job his responses were: CN needs to accommodate me as I was wrongfully dismissed

Good with his hands
Hard working

.....

Katilyn: Would you please elaborate on your interview with S.B.?

Angela: As we discussed yesterday, would you please arrange to touch base with S.B. prior to the Car Mechanic interviews? I think at this point it is important to give him some feedback to set him up for success moving forward.

64. On September 17, 2019, the Company's Ms. Angela McHardy provided interview coaching for the Car Mechanic position to the grievor. The grievor was interviewed the following day by the Company's Vanessa James who in turn recommended the grievor

for accommodation to the position. A conference call with HR took place indicating that the grievor was fit for the job of Car Mechanic.

65. On Sept, 27, 2019, Ms. Miller wrote to the grievor that she had received notification from the HR Department that the Vancouver Car Mechanic position had been put on hold and was not being filled immediately. She also indicated that she did not have a timeline when the position would reopen.

66. On November 1, 2019, the grievor wrote back to Ms. Miller as follows:

I understand that the car mechanic position is back on hold although I was interviewed for two different positions.

First one being the freight car repairer position and the other was the heavy duty mechanic position.

You got back to me regarding one position the freight car repairer [Car Mechanic] but have not gotten back to me regarding the heavy duty mechanic position.

Please kindly let me know about the other position for which I was interviewed for.

67. On April 21, 2020, HR Manager for Western Canada Chris Bailey wrote to Mr. Donegan with an update about the grievor's accommodation in the Car Mechanic position (based out of the Thornton yard in Surrey, B.C.). His email indicated that prior to the accommodation process concluding for the Car Mechanic position, the Company had instituted a hiring freeze for all positions, layoffs and a restructuring within the Mechanical Function Department. His email further indicated that the Mechanical Function Department had confirmed with him that they had no active positions available. He concluded the email as follows:

Once this changes, Stephanie [Ms. Miller] will reach out to S.B. to see if he is interested in returning to CN as a Carman [Car Mechanic] and resume the process accordingly.

68. On August 13, 2020, Mr. Donegan emailed Mr. Bailey (with a copy to Ms. Miller) requesting that the grievor be accommodated “...with bundled duties of chauffeuring and or passing out disinfecting/Covid 19 related supplies or delivering lists, S.B.U’s etc. “. Mr. Donegan went on to say that if the grievor could not be temporarily accommodated into these positions, he would be requesting a supplemental hearing in front of this arbitrator. He concluded by stating that the grievor’s restrictions remained the same as of August 14, 2019. Ms. Miller replied on August 13, 2020 that her understanding was the grievor was working elsewhere in a full-time position and for this reason she was not considering temporary positions. She confirmed that she would follow up to review options for temporary accommodation and report back to Mr. Donegan.

69. On August 18, 2020, Ms. Miller emailed Mr. Donegan suggesting a temporary accommodated position at the Boston Bar bunkhouse. She acknowledged that the position would require the grievor to work outside the GVT but indicated that he would be allowed to return home on weekends. She then offered to work with OHS in order to follow up with his physician on his suitability for the position. She concluded by stating that “she

would continue to review temporary positions as they become available in the GVT” if the Boston Bar bunkhouse position did not work out.

70. Mr. Donegan replied to Ms. Miller on September 18, 2020, that the suggested accommodation temporary position was neither reasonable nor acceptable. He further noted that Ms. Miller “...had failed to consider our suggested accommodation of driving crews, delivery paperwork, hand out Covid cleaning supplies etc.” Mr. Donegan went on to say that the Union was willing to negotiate with the Company to find an accommodation position and suggested the grievor be placed in the meantime into a temporary Utility/Driver position.

71. An email was also sent to Ms. Miller on September 18, 2020 from CN's Suzanne Fusco which reads in part “...we have a position available that we are currently hiring for as Car Mechanic in Thornton Yard. I understand there is a delay in getting the offer to the employee. Please expedite this offer today so we can mitigate any further risk to CN on this file per the attached letter”.

72. On September 24, 2020 the Company's Ms. Vanessa James contacted the grievor and offered him the accommodated position of Car Mechanic position at the Thornton yard in Surrey. The formal written offer (dated September 23, 2020) included the following:

CN's Occupational Health Department has received confirmation from your specialist physician that supports you are fit to perform all aspects

of the Car Mechanic position. Your specialist has also confirmed that you are able to attend training in Winnipeg for a period of 2 or 3 weeks, if, and when required.

73. Ms. James followed up on September 30, 2020 with further correspondence to the grievor indicating that she had not received a response to the offer of Car Mechanic and requested one by October 13, 2020.

74. On October 27, 2020 Dr. Hay wrote to OHS as follows:

He is currently restricted to work to:

1. Cannot Work Safety Critical
2. Must Work in Local Area

He had previous restriction lifted that included:

1. Could not leave local area for job or training for a training position
2. Must work consistent day shift 6-2:30 or 7-3:30
3. Accommodate him in a not so stressful position

The latter conditions which had been lifted depended on his situation and mental state at the time. This has now changed with the death of his father who had lived with him and his mother's increased dependency. Further his wife and he are at the last stages of fertility procedures, if not done now she will not have any further chance and they won't be able to have a family. All this has created the need for him to be present and extraordinary mental and emotional stress. He is able to work and be accommodated now with these 5 restrictions in place at this time. I trust this will be helpful.

75. The grievor did not provide the October 27, 2020 Report from Dr. Hay to Ms. Capeness until November 24, 2020.

76. On December 4, 2020, Ms. Capeness sent the grievor the following email:

Thank-you for providing the updated medical information dated October 27, 2020. As your restrictions have increased since our last review, more detailed information regarding your current status is

required. Please find attached a letter for Dr. Hay, a medical report on mental health, and an updated description of the car mechanic position which is being considered as a possible accommodation position.

Please have the information returned to our office asap but no later than December 18, 2020.

77. The grievor then attended at the offices of Dr. Chan (not Dr. Hay) who completed OHS' *Medical Report on Mental Health* form by the deadline of December 18, 2020. Dr. Chan noted: *"good recovery if restrictions followed and will be assessed by Dr. Hay in one year's time for his 5 restrictions"*. Dr. Chan also attached a handwritten note on a prescription pad which read: *"The above patient may try the carman position to see if it is suitable for him and not so stressful"*.

78. On February 16, 2021, Dr. Hay wrote an updated letter addressed to OHS in response to Ms. Capeness' email to the grievor of December 4, 2020. The grievor provided Dr. Hay's letter to OHS that same day. Dr. Hay identified the grievor's restrictions for the next year as being unable to work in a safety critical position, must work in the local area, and must work a consistent shift. Dr. Hay also referenced Dr. Chan's medical documentation, indicating his agreement with Dr. Chan's medical assessment and noted that the two professionals worked collaboratively treating the grievor.

79. Ms. Capeness also advised the grievor by email on March 3, 2021 that the Chief Medical Officer supported the restrictions of Dr. Hay for a further year. The Company's

Chief Medical Officer also determined that, given the Grievor's medications, he could not drive a CN vehicle nor be responsible for the safety of others.

80. On May 13, 2021, Ms. Miller wrote in a file note:

Reviewed current jobs in GVT, all jobs fall outside of EE's [grievor's] current permanent restrictions.

81. On May 26, 2021, the grievor emailed Mr. Bailey as follows:

As you are aware, yourself and Gwentyth Capeness were adamant that the further medical information requested by OHS and CN regarding my restrictions come from my specialist and not my family physician.

I have sent this medical to OHS and yourself in February 2021 to see if the Carman position is a good fit.

To date, I have not heard back from OHS (Gwentyth Capeness) or yourself regarding the status of my accommodation as a carman.

Like I have said in the past, CN Rail has failed following through on the award or accommodation.

It seems this will only get resolved with the Arbitrator or in Federal Court.

82. On May 31, 2021, M. Bailey wrote to the grievor and indicated that the Car Mechanic position was not suitable given the grievor's restrictions. The email reads:

I wanted to provide you an update on your file per your email below.

If you recall on March 3, 2021 OHS emailed you directly in response to medical information you submitted dated February 16, 2021. Further, they confirmed that your file and restrictions have been reviewed by the CMO who supported the temporary accommodation restrictions noted by Dr. Hay, which would be reassessed in one (1) year. OHS also advised you of additional indefinite restrictions put in place by the CMO in light of the medical treatment you were receiving, and that should your medical treatment change, to please provide them with an update so that restrictions could be reviewed again. To summarize, OHS confirmed your restrictions as follows:

Temporary restrictions as per your physician and reviewed by the CMO-to be **reassessed by your physician in one (1) year.**

- **Cannot work in safety critical position**
- **Must work and train in local area only**
- **Must work consistent day shift 06-1430 or 07 to 1530**

Indefinite restrictions per CMO-can be reviewed at any time if your medical treatment changes:

- **Cannot drive a CN vehicle**
- **Cannot be responsible for the safety of others.**

The Company is appreciative of you participating in the accommodation process by having a discussion with your physician [Dr Hay] about the suitability for the Car Mechanic position. In addition, we are appreciative of your physician's assessment that you could try the position to see if it was suitable.

That being said, it was unfortunately not an option at this time given once the Company received your updated restrictions from your physician, OHS reviewed them. Further, the Return to Work group reviewed the Car Mechanic's essential functions (per the attached document) against all your restrictions from both your physician and OHS. Again, it was determined that your restrictions prevented you from performing the essential duties of the previously offered Car Mechanic position and as such, the position would no longer be suitable for you...

[list of 9 essential functions].

Both HR and the Return to Work group have been advised of your restrictions. I can confirm that the Return to Work Group is continuing to review all potentially suitable jobs against your current restrictions given the offered Car Mechanic position was deemed not suitable for you given your most recent restrictions on file as outlined by both OHS and your physician.

Please be advised that the Return to Work Group will reach out to you with any possible options they determine are suitable, depending on availability.

In addition, if you see anything (sic) positions of interest on our careers page which you feel would be appropriate and safe for you, I invite you to apply and let myself or the Return to Work group know so that the position can be assessed per your restrictions. Or, as per OHS' direction, if your treatment plan or restrictions change, please ensure you immediately reach out and communicate that to OHS so they can reassess you and have a copy of your most recent medical on file.

83. On July 16, 2021, an email note from Ms. Miller addressed to Mr. Bailey indicates that she had spoken with a number of managers, directors and supervisors regarding potential accommodated positions. Included in her search were a number of clerk redeployment positions. Ms. Miller indicated that she was looking into whether there were any potential vacancies for those positions. The clerk positions, she noted, were represented by a different union. She also noted that any potential management positions were “moot” given the grievor lacked the qualifications for these positions.

84. On March 3, 2022, just over a month before the date of these proceedings, Ms. Miller wrote the following email to the Company’s Ms. Maud Boyer (copied to Ms. Paquet and Ms. Capeness):

I provided the summary of all jobs in Vancouver terminal to Vanessa the other day (first attachment).

After that, I spoke with Steve Dale who confirmed there were no further suggestions or ideas for accommodation based on S.B.’s extensive restrictions (second attachment).

The following is a list of employees in BC that CN was able to accommodate in 2021. If you would like the full list with names please let me know but I’ve removed the names for privacy reasons. As you can see from the below, the only positions that we accommodated people in 2021 are outside of S.B.’s restrictions.

Finally, regarding other positions that have come up in BC, the only one that comes to mind is the Boston Bar Bunkhouse position which is outside of S.B.’s restrictions given his inability to relocate temporarily or permanently from the GVT. Let me know if you’d like to discuss further.

SUBMISSIONS OF THE PARTIES

85. The Union maintains that, but for the Company’s breach of its contractual duty when it terminated the grievor on January 30, 2015, he would have reasonably been

expected to perform accommodated work from the date the Company's disability insurer (Great-West Life) terminated his benefits on February 9, 2014 to the date he was reinstated on December 5, 2016. The Union argues that the law is clear that an aggrieved person such as the grievor is entitled to be placed in the same position he would have been had it not been for the wrong that was done to him. See *Firestone Steel Products v. UAW* [1974] CarswellOnt 1405 (Weatherhill).

86. The Union submits that the Company had a continuing duty to accommodate the grievor after he was reinstated to his employment on December 5, 2016 to the present day. The Union characterizes the Company's efforts to accommodate the grievor since his termination as "apathetic". The Union further submits that the Company spent almost five years sporadically suggesting positions for the grievor and overlooked documented medical restrictions. The Company also attempted to shift its accommodation obligations by requiring the grievor to apply for positions on the CN *Careers* website in a manner similar to a new hire.

87. The Union further notes that while the duty to accommodation is a tripartite process, neither the grievor nor the Union have the knowledge to identify potential accommodation positions. The Union underlined that, at various times throughout the last five years, the Company has not provided the grievor with the opportunity to perform duties once it had identified a suitable position which conformed to the grievor's restrictions.

88. The Union seeks compensation for the grievor by way of lost wages and other Company benefits from the time of the award on December 5, 2016 to the date of the hearing on April 6, 2022, less any mitigated earnings. It also requests that the Company provide him with a suitable, accommodated position as he continues to this day to remain an employee of the Company.

89. The Union further maintains that the grievor was forced to rely heavily on his spouse's income after his disability benefits were terminated. The Union noted that the financial stress exacerbated his existing medical conditions, including his PTSD. The grievor continues to experience an aggravation of his depression symptoms, as well as anxiety and insomnia. The Union also points out that the grievor delayed starting a family due to the family's income being reduced by half. The lengthy delay in starting a family due to the grievor's inability to work in turn resulted in the family having to rely on in-vitro fertilization in order to have children, at significant financial cost. The Union also notes that the grievor's loss of employment and aggravation of his medical conditions has caused him to become withdrawn and reclusive. Accordingly, given the above, the Union seeks \$20,000.00 in compensation for what it submits as the wilful and reckless discriminatory practices of the Company in breach of s. 53(2)(3) of the *Canadian Human Rights Act*. The Union also requests that any compensation order flowing from this supplementary proceeding include an order for interest. See: *Audet v. CN Railway* 2006 CHRT 25.

90. The Company, for its part, submits that it engaged in an extensive review of available positions in which the grievor could be accommodated that spanned several years after the grievor was reinstated. This analysis was carried out within the framework set by the grievor's extensive work restrictions, as well as his refusal to work in a management position or outside of the GVT. Throughout this process, the Company notes that several positions compatible with the grievor's work restrictions were identified, including offers for the Logistics Coordinator, Yardmaster and Car Mechanic positions, all of which the grievor declined or were deemed unsuitable as a result of ongoing changes in his restrictions.

91. During the course of the accommodation process, the Company did review a bundling of tasks and also offered the grievor temporary work in the bunk house position once it was advised that the grievor was no longer gainfully employed. The Company also submits that at no time during the accommodation process were the medical restrictions CN was working from ever contested. On all occasions where the grievor brought new restrictions to the Company's attention, they were integrated into the continuing search for accommodated positions within CN's operations.

92. The Company relied on several authorities including the leading decision of *Central Okanagan School District No. 23 v. Renaud* [1992] S.C.R. 970 which stressed the importance of an employee accepting a proposal of reasonable accommodation and to facilitate the implementation of the process. The Company also cited further decisions of this office including: **CROA 3173, 3354, 3449, 3531 and 4433.**

ANALYSIS

93. It is helpful at the outset to reference the principles set out by the Supreme Court of Canada regarding the tripartite effort and involvement expected of the Union, the Company and the individual employee in the accommodation process. In *Renaud*, now some thirty years old, the Supreme Court of Canada highlighted the importance of this multi-party process:

The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this Court in *O'Malley*. At page 555, McIntyre J. stated:

Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfil the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *O'Malley*. The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

94. At the outset of the accommodation search the grievor's work restrictions, according to the Union's letter to Ms. Crossan of February 12, 2017, were: no Safety Sensitive/Safety Critical duties (cannot drive company vehicle), no lifting over 50 lbs and no repetitive bending. The Union suggested in the same letter nine different positions for potential accommodation, as well as a bundling of duties. Ms. Cousineau replied to Mr. Calla on April 13, 2017. She reviewed in detail all nine positions and provided reasons why the grievor could not be accommodated in any of those positions. She also mentioned in the same email five positions available in the GVT at the time. Ms. Cousineau again noted that the grievor was not suitable for the five positions because of his work restrictions, or because he did not meet the educational requirements. The Company also indicated to the grievor that it would search for positions outside the GVT if the grievor was interested.

95. According to the email correspondence from Ms. Cousineau to Mr. Calla of April 13, 2017 the grievor had also confirmed with CN's Ms. Diane Lucas, in a conversation with the grievor in February 2017, a preference for working in the GVT and that "...CN had focused their efforts in the GVT area since this time". Ms. Lucas, in that regard, also indicated in a file note on February 13, 2017 that she had spoken to the grievor on February 2, 2017 about relocation outside the GVT: "*S.B. called back. He is not willing to relocate. Authorization to speak to Union Rep Danny Calla received.*" A further conversation between the grievor and Ms. Cousineau on March 16, 2017 (as documented in the same email of April 13, 2017) indicates that the grievor "...confirmed his preference of working in the GVT".

96. The Union had similarly confirmed on February 12, 2017 in a letter from Mr. White/Mr. Calla to Ms. Crossan, the understanding that the search for accommodated positions should only extend to the GVT. The February 12, 2017 letter also requested a *“...list of all available positions in all departments in the GVT. In addition, our office is also seeking information of all steps that have been taken thus far by the company to seek accommodation for S.B. in the GVT”*. On April 10, 2017, Mr. Calla emailed Ms. Cousineau asking for an update on *“...what steps have been taken thus far to accommodate S.B. in the GVT?”*

97. The grievor, now some four months into the accommodation process, indicated in an email to Ms. Cousineau on April 15, 2017 that both Ms. Lucas and Ms. Cousineau misunderstood their respective conversations with him. He states that he in fact did not say in his conversation with Ms. Cousineau on March 16, 2017 that he was not interested in moving but had only said *“...he was not offered anything as of yet”*.

98. Both Ms. Lucas and Ms. Cousineau, as noted, confirmed in their conversations with the grievor of February 2, 2017 and March 16, 2017 respectively that the grievor told them he was not interested in working outside the GVT. In addition, Mr. Calla's correspondence with the Company of February 12, 2017 and April 10, 2017 supports that the understanding amongst the Company and the Union was the accommodation process should be limited to searches within the GVT.

99. On the face of this evidence, I find the assertion in the grievor's April 15, 2017 reply email to Ms. Cousineau that he did not say in his conversations with Ms. Lucas or Ms. Cousineau that he was not interested in working outside the GVT, but only stated that he was "*...not offered anything as of yet*", to be disingenuous. The grievor, in my view, attempted to mislead the Company into thinking that he was prepared to accept accommodation outside the GVT from the outset when in fact the evidence clearly indicates otherwise. His lack of candidness on such a key work restriction at the beginning of the search for suitable positions undermined the accommodation process.

100. On the strength of the grievor's email of April 15, 2017 indicating that he would consider positions outside the GVT, Ms. Miller wrote to the grievor on May 10, 2017 indicating that there was a Logistics Coordinator job opening in Winnipeg that fell within his restrictions. She followed up with the grievor in an email on May 16, 2017 which stated that she had been advised by the Company's Recruitment team that he had not as yet applied for the Logistics Coordinator position. The grievor replied to Ms. Miller the same day that "*...he was in the process of updating his resume and cover letter as it is outdated and will forward it as soon as I can.*" Ms. Miller replied to the grievor in an email the next day on May 17, 2017 which states in part: "*I see from my notes that Diane [Lucas] asked you for a resume in February but I don't see one on file. In addition to providing your resume on the careers if you could also forward me a copy I would appreciate it*". That email from Ms. Miller prompted a response from Mr. Calla on May 19, 2017 which stated that he thought "*...there was an understanding that there is no requirement for S.B. to apply via e-portal or to submit a resume for new potential employment within the company*

he is already an employee of. It was discussed that it is simply a convenience for the recruitment department to have an updated resume but not a requirement. Again it is going to take time for S.B. to create a resume and also an expense that he simply cannot afford due to his current situation". Ms. Miller emailed a further reply on May 19, 2017 to Mr. Calla where she set out her views on the accommodation process. It reads in part:

...accommodation is a two-way street. S.B. needs to be engaged and looking for work as much as I am looking for him. This includes reviewing the jobs through the e-portal and careers websites and advising me if there is anything posted that he thinks is a good fit for him. This is especially true since I do not have a copy of his resume. Without knowing his background there may be opportunities that I do not consider not realizing he is qualified.

101. On May 26, 2017 Ms. Miller indicated in a file note that the grievor would be interviewed for the Logistics Coordinator position on May 29, 2017.

102. On May 29, 2017, the grievor was interviewed by the Company's Ms. Leanne Paulicelli for the Logistics Coordinator position. The grievor indicated to Ms. Miller after the interview in an email on May 31, 2017 that he would only consider unionized positions and that *"...he was highly concerned as one of the requirements for eligibility for this position is to remove myself from the union"*. Ms. Miller replied to the grievor on May 31, 2017 that she had spoken with Ms. Paulicelli who indicated that she had advised the grievor during their interview that the Logistics Coordinator was a management position. Further, Ms. Paulicelli told Ms. Miller in the same conversation that she had advised the grievor several times at the interview that, if he was successful, his seniority would be secured for one year after which time it would be maintained but stop accumulating.

103. Ms. Miller also inquired again in an email to the grievor on June 1, 2017 whether he was interested in the Logistics Coordinator position which she stated “...*would be a good opportunity for you and is within your restrictions*”. The grievor’s email reply did not respond to Ms. Miller’s inquiry about whether he was interested in the Logistics Coordinator. Instead, he replied curtly by stating that all further correspondence should be directed to his union representatives.

104. Ms. Miller, as indicated in her file note, discussed the Logistics Coordinator position with the Union’s Mr. White on June 2, 2017. Mr. White indicated in their discussion that the grievor had concerns because of the high stress environment of organizing lodging for up to 400 people and would need a doctor’s note to see if his doctor felt he could perform the job duties. Ms. Miller also reviewed other job postings with Mr. White for which the grievor might potentially be accommodated, including the Service Delivery and Attendance Management positions in Edmonton.

105. I find that the Company made significant efforts to try and place the grievor in the Logistics Coordinator position. The grievor expressed in his email of May 31, 2017 to Ms. Miller a concern over losing his seniority and removing himself from the Union if he accepted the position of Logistics Coordinator. This was an item that Ms. Paulicelli indicated to Ms. Miller that she covered repeatedly during her interview with the grievor.

106. In my view, it is more likely than not that Ms. Paulicelli did explain the critical implications on the grievor’s seniority if he accepted a management position when she

interviewed him for the Logistics Coordinator position on May 29, 2017. Seniority, after all, is one of the most important and fundamental safeguards to maintaining job security for unionized employees. I find on the evidence that the grievor's true motive for not pursuing the Logistics Coordinator position, which fit within his restrictions, was more likely due to a lack of interest rather than any concern over his seniority or potential stress due to the supervisory duties of a Logistics Coordinator.

107. One of the other areas which I find reflects the grievor's lack of effort in holding up his end of the accommodation process was his demonstrated lack of initiative in preparing a proper resume and the assumption that it was unnecessary for him to apply for accommodation through CN's e-portal and careers websites given that he was already an employee of the Company.

108. In terms of the request for a resume from the grievor, it is significant in my view that the grievor was first spoken to about this request back in February 2017. The grievor indicated in his email to Ms. Miller of May 16, 2017 that he was in the process of updating it as well as his covering letter and "...that he would forward it as soon as I can". Mr. Calla then indicated to Ms. Miller a few days later on May 19, 2017 that he felt there was no obligation on the grievor to provide a resume and that S.B. was unable to afford the expense of preparing a resume at that time.

109. In terms of the need for the grievor to prepare a resume, I agree with Ms. Miller's comment to Mr. Calla of May 19, 2017: "*Without knowing his background there may be*

opportunities that I do not consider not realizing he is qualified". The request for a resume was a simple one which should have taken the grievor just a short time to prepare. There is no indication from the Company that anything sophisticated was expected which would have required him to incur any expense for its preparation. Indeed, the grievor never mentioned the personal cost to him of preparing a resume in his response to Ms. Miller on May 16, 2017. He only indicated that he was in the process of updating his resume and cover letter. There is no evidence, in the end, that the grievor ever did provide a resume to Ms. Miller or to anyone else as part of the accommodation process.

110. I also agree with Ms. Miller's comment to Mr. Calla that the grievor, in keeping with his role in the tripartite accommodation process, had a responsibility to review jobs through the CN portal and *careers* website in order to keep the Company up-to-date on postings that, as Ms. Miller put it, *"he thinks is a good fit for him"*.

111. The Company, as noted, continued to suggest possible accommodation positions through the fall of 2017 and onwards. The following summary with respect to the Company's efforts to accommodate the grievor was provided by the Company's Mr. Bailey to Mr. Donegan on September 28, 2020 in response to a request by Mr. Donegan of September 18, 2020:

STEPS:

April 2017: Union requested we bundle tasks in Vancouver, Carole Cousineau responded to them in April 2017 summarizing all their suggestions and that they weren't productive for CN. Worker had advised Carole Cousineau and Diane Lucas that he was not interested in relocation but then in May 2017, advised CN had misunderstood and would be willing to relocate.

May 2017: Interviewed for Logistics Coordinator position in Winnipeg by Leanne Paulicelli. He advised Steph Miller in an email 31 May 2017 that he would only consider unionized positions

June 2017: Union advised that worker would take Management jobs.

Sept 2017: Worker advises recruitment that he cannot work irregular shifts (requirement for Train Reporting Rep positions). OHS got involved, could not confirm.

Sept 2017: Failed SDR/TRR testing

Oct 2017: Reviewed positions: Mechanical Shift Supervisor (outside restrictions), Engineering Drone Operations Supervisor (Outside restrictions)

Feb 2018: Provided a summary to Donna Crossan, reviewed the positions considered:

Attendance Management Officer (Edmonton): outside restrictions (rotating shifts) Chauffeur (Vancouver): outside of restrictions Bunkhouse Attendant (Boston Bar): outside of restrictions RTC (Edmonton): outside of restrictions (SCP) TRR/Crew (Edmonton): outside of restrictions Engineering Drone Supervisor (Vancouver): outside of restrictions (requires driving a CN vehicle) Mechanical Shift Supervisor (Vancouver): outside of restrictions (requires rotating shifts and driving a CN vehicle) Human Resources Manager (Vancouver): Requires specialized skills and education Bridges and Structures Supervisor (Edmonton): outside of restrictions (requires driving a CN vehicle, varying shifts)

June 2018: Positions in Vancouver are all outside of EE's restrictions – EO, Spareboard Employee, Mechanical Supervisor, Assistant Trainmaster, Car Mechanic, HDM.

July 2018: Worker advises he cannot relocate due to medical reasons.

Nov 2018: Reviewed Patrolman position, OHS had EE's doctor review, he could not take it because he could not travel to Winnipeg for training and he could not start early or stay late (outside of scheduled start/end time)

Jan 2019: Donna discussed Yardmaster position with Ray Donegan. OHS reviewed and deemed suitable as long as EE was not directly in control of any train movement, taking room, protecting the point, lining switches, remote control of signals.

March 2019: Donna offered EE Yardmaster job through Ray Donegan. Requested Union accommodate EE on day shift assuming he passed all testing and requirements. Start date of 11 April. Ray declined as it was too short notice and EE could not get time away from work. Next class 25 July 2019.

July 2019: Yardmaster not suitable, as per OHS

Aug 2019: HDM and Car Mechanic positions posted in Vancouver. EE agreed to come in for HDM testing and Interview. EE passed the test and advised he was not interested in the position (wanted to be a Car Mechanic).

Sep 2019: Vanessa James interviewed EE for Car Mechanic position. Notes went pretty well, highlighted mechanical abilities and the fact he already understands the business. She put a recommendation fwd to Ops to take EE over the two external candidates. Conf call with HR, OHS and Paul Kennedy to confirm EE was fit for the job.

Sep 2019: Car Mechanic positions put on hold while Mechanical re-organizes.

Oct 2019: Hiring freeze confirmed.

Aug 2020: EE requested temporary accommodation as he has been let go/laid off from his other external position.

Aug 2020: Offered Bunkhouse Attendant in Boston Bar, outlined that the job was outside of restrictions but as it was close I wanted to advise him in the event his restrictions had changed.

Aug 2020: Car Mechanic role came up again. Will work with HR/LR on next steps prior to formally offering to discuss with the Union and formally offering to the EE.

Sep 2020: Ray Donegan replied to Boston Bar request saying it wasn't a suitable job.

Sep 2020: Formalized offer for Car Mechanic role was offered. The EE said that he would have to review with his physician.

112. The Company, as noted above, worked collaboratively within their OHS, Human Resources and the Recruitment team to try and find a suitable position which met the grievor's restrictions. One noteworthy example was the Yardmaster position in Vancouver which the Company and the Union discussed in January 2019. It was determined by OHS to be a suitable fit for the grievor as long as he was not directly in control of any train movement, line switches, or having to protect the point. A formal offer of employment for a day-shift Yardmaster position in the Thornton yard was made to the grievor through the Union on March 28, 2019 with a start date of April 11, 2019. The only condition of the offer was that the grievor had to pass the testing requirements for the position which was scheduled for April 3, 4, 2019.

113. The Union wrote back to the Company on March 29, 2019 indicating that the grievor was unable to attend on April 3, 4, 2019 for the testing as he was employed in a full-time position and also had previous commitments that he could not change. On April 12, 2019, the Company replied that the next class would be held in Vancouver on July 24, 25, 2019 and inquired whether the grievor was available at that time. The Company, having not heard back from the grievor, sent a reminder email to the Union one month later on May 13, 2019 inquiring again about the grievor's availability on July 24, 25, 2019 for testing.

114. On July 2, 2019, Dr. Hay, the grievor's treating psychiatrist, wrote a letter to OHS indicating that the grievor's previous overtime and irregular shifts restrictions were lifted as he felt the grievor was doing better. He also mentioned that the grievor had extreme

anxiety about the Yardmaster position and recommended that he be accommodated in a less stressful position. Ms. Crossan then wrote to Mr. Donegan on July 15, 2019 advising that the grievor's physician had determined that the Yardmaster position would be too stressful and that CN would "...continue to review other options and positions that fall within his restrictions". The Company then continued their search for other positions that fell within the grievor's restrictions. Ms. Miller wrote a note that same day to Ms. Crossan indicating that the grievor "*may be able to return to a position in mechanical (HDM, car mechanic, labourer) or a track position*" given that the restrictions regarding irregular shifts and overtime had been removed.

115. The above example of the Yardmaster position is illustrative of the ongoing and concerted efforts of the Company to try and work with the grievor's restrictions and accommodate the grievor. I find that the grievor's reply through the Union of March 29, 2019 that he was "*very interested in the accommodation*" but unavailable for the April 24, 25, 2019 testing because he was working elsewhere-and had "*other commitments*"-demonstrates a lack of engagement in the accommodation process. In my view, in keeping with his obligation to actively participate in the accommodation process, the grievor should have advised the Union that he was prepared to take whatever steps were necessary, including time off from his full-time work, to meet the April testing deadline.

116. It was not until July 2, 2019 that Dr. Hay wrote to the Company that the responsibility of the Yardmaster position was unsuitable because it would cause the grievor too much stress. The Company, now well over two years into the accommodation

process, and despite all the effort that went into trying to accommodate the grievor in the Yardmaster position, continued on looking for other positions that fit within the grievor's restrictions. Ms. Miller, as noted, emailed Ms. Crossan on July 15, 2019 that the grievor might be accommodated in a HDM or Car Mechanic position and suggested that PDA's be sent to the grievor's physician to determine if these positions were suitable.

117. On August 14, 2019 Dr. Hay wrote to Ms. Capeness of OHS indicating that he had reviewed the two positions of HDM and Car Mechanic and recommended that the grievor could fulfill the duties of the two positions. Dr. Hay noted that he did not anticipate the grievor would have any physical restrictions as he was working at that time as a labourer with the City of New Westminster. Dr. Hay also felt the restriction of having to work in the local Vancouver area could be lifted for two or three weeks if the grievor had to travel to Winnipeg for training. Ms. Miller in turn emailed the grievor on August 15, 2019 requesting that he apply on-line for HDM positions in Vancouver and also confirm that he could travel to Winnipeg for training.

118. Ms. Miller emailed the grievor and Mr. White on August 16, 2019 stating that there would be a CN recruiter in Vancouver the following week and whether the grievor could attend to take a mechanical aptitude test called a FIT test. Mr. White responded that the grievor was unavailable the following week because he was away on vacation but could attend on August 29, 2019 for the FIT test. The grievor then wrote to Ms. Miller on August 27, 2019 indicating that he did not have the qualifications for a HDM position because he did not have Diesel Mechanic experience or a Diesel Mechanic Diploma but was qualified

and interested in a Car Mechanic Position (freight car repairer) which he had seen posted on CN's *Careers* page. He confirmed that he had applied for the Car Mechanic position. On August 30, 2019, Ms. Miller received notice from the Recruitment team that the grievor had passed the FIT test for the Car Mechanic position.

119. The grievor was accepted for the Car Mechanic position in Vancouver on September 18, 2019. On September 27, 2019, Ms. Miller received notice from the HR Department that the Vancouver Car Mechanic position had been put on hold and advised the grievor accordingly. The grievor followed up on November 1, 2019 with Ms. Miller inquiring whether an HDM position was still available. Ms. Miller was advised that the HDM position was also on hold due to a hiring freeze throughout the Mechanical Department.

120. The fact that neither the Car Mechanic position, nor the HDM position for that matter, were not offered to the grievor in September 2019 was not the fault of the Company individuals who were looking for positions where the grievor could be accommodated according to his restrictions. Those individuals had worked earnestly to obtain all the necessary updated information from OHS to ensure that the grievor was capable of performing the Car Mechanic position and to place him in that position. It is unfortunate that the hiring freeze in the Mechanical Department occurred at that time. The evidence is that it was a business decision of CN administration and certainly not because the Company was out to target the grievor and deny him an accommodated position.

121. The same Car Mechanic position in the Thornton yard surfaced again in August 2020. The grievor was formally offered the position in writing on September 23, 2020, with a start date of October 19, 2020. The *“Offer of Alternate Work Placement”* for the Car Mechanic position indicated that the grievor’s medical specialist had previously confirmed in his letter to OHS of August 14, 2019 that the grievor was able to attend training in Winnipeg for two or three weeks.

122. Dr. Hay provided the grievor with a letter dated October 27, 2020 for delivery to OHS. The letter confirmed five restrictions, including the grievor’s inability to travel for training and that he could not be placed in a stressful position. Dr. Hay documented that the reason for the change in restrictions was due to a change in the grievor’s family circumstances as a result of the passing of his father and his need to be present during the last stages of his spouse’s fertility procedures.

123. The grievor did not email the October 27, 2020 letter from Dr. Hay to OHS’s Ms. Capeness until November 24, 2020. The letter was significant as it altered the grievor’s restrictions, particularly with respect to the fact he was once again restricted from travelling for training, which was key part of the Car Mechanic offer. Instead of advising the Company immediately of his new restrictions after he received the letter dated October 27, 2020 from Dr. Hay, the grievor chose instead to wait almost a month until November 24, 2020 to provide the Company by email with Dr. Hay’s letter. This is another example of delay that indicates the grievor continued to be uncooperative in the accommodation process.

124. The Company continued to press ahead with determining whether the grievor could fit into the Car Mechanic position despite his modified restrictions, as outlined by Dr. Hay in his letter of October 27, 2020. Ms. Capeness, noting that the grievor's restrictions had increased since the last review in 2019, requested more medical details from the grievor on December 4, 2020. Ms. Capeness' email to the grievor reads in part: *"As your restrictions have increased since our last review, more detailed information regarding your current status is required. Please find attached a letter for Dr. Hay, a medical report on mental health and an updated description of the car mechanic position which is being considered as a possible accommodated position. Please have the information returned to our office asap but no later than Friday, December 18, 2020."* The Company then wrote to the grievor on December 7, 2020 reminding him of the December 18, 2020 deadline and that the Company would only hold the Car Mechanic position until that time.

125. The grievor failed to meet the deadline of December 18, 2020 for the requested medical information from Dr. Hay, as clearly stated in Ms. Capeness' email of December 4, 2020 to the grievor. Instead, the grievor had his family physician Dr. Chan complete the medical forms on the deadline date of December 18, 2020 along with a note on a prescription pad indicating that *"the patient may try the carman position if it is suitable to him"*.

126. The fact that the grievor did not follow the clear instructions from OHS's Ms. Capeness of December 4, 2020 - which explicitly stated that he was to obtain updated medical forms from his specialist by December 18, 2020 - is another example of his cavalier approach to the accommodation process. This is especially concerning when it was Dr. Hay who modified the travel restriction in his letter of October 27, 2020. The travel restriction set out in Dr. Hay's letter was, as noted, especially pertinent given that it was a condition of the Car Mechanic offer of employment dated September 23, 2020.

127. The Company wrote to the grievor again on February 4, 2021 indicating that it had not received the requested medical information from his specialist Dr. Hay and, as such, *"...the accommodation process is stalled"*. The grievor then waited until February 19, 2021, before he emailed a letter from Dr. Hay, which Dr. Hay had prepared for OHS on February 16, 2021. The February 16, 2021, letter from Dr. Hay set out the grievor's diagnosis and that *"...he can try the carman position and see if it is not too stressful and he can do it. I have reviewed the car mechanic position the patient sent to me. I believe he is able to do this"*. Dr. Hay also stated that he agreed with the medical information provided by Dr. Chan of December 18, 2020.

128. The grievor was advised in an email on May 31, 2021 that both HR and the OHS group had been notified of his latest restrictions, including one that he *"must work and train in local area only"*, and had determined that the Car Mechanic position *"...was deemed not suitable for you given your most recent restrictions on file as outlined by both OHS and your physician"*. The email went on to ask the grievor to advise the Company if

he saw anything of interest in CN's *Careers* website which was appropriate and safe for him.

129. In the end, the Company's ongoing efforts to place the grievor in the Car Mechanic positions is a prime example of the depth to which the Company was prepared to go in order to accommodate the grievor, despite his lack of effort and timely cooperation spanning several months starting from September 2020 through to February 2021.

130. The Union relied on the case of *Jean-Raymond Audet v. Canadian National Railway* (2006) CHRT 25, a case that was argued before the *Canadian Human Rights Tribunal*. Mr. Audet, a conductor, alleged that CN refused to continue to employ him or accommodate him after he had an epileptic seizure on September 10, 2002 in breach of s.7 of the *Canadian Human Rights Act*. In that case, Mr. Audet did not receive any communications at all from the Company until December 2003, which was almost four months after he had filed his human rights complaint in September 2003.

131. In *Audet*, the Chief Medical Officer initially consulted two physicians about the grievor's medical condition and his epilepsy seizure. The Tribunal noted that the focus was on the cause of the seizure but did not address his position for accommodation purposes, as set out at paragraph 57 of the decision:

[57] I am not persuaded, from the evidence adduced in this case, that CN made any efforts to individually assess Mr. Audet with a view to determining whether his medical condition prevented him from performing his duties and responsibilities in his positions of brakeman and conductor. CN's sights seemed focussed on determining whether it was responsible for having provoked Mr. Audet's seizure due to of his workload over the summer of 2002. In this respect, it is very telling

that one of Dr. Lapierre's final remarks in his e-mail is that Mr. Audet has very little chance of convincing any tribunal that he only had provoked seizure [*sic*]. There is no mention about whether Mr. Audet, as an individual, could still safely perform his job, and if not, how he could be accommodated.

132. The Union submits that the facts in *Audet* are similar to those of the grievor as the Company did not take further steps at any time to assess the grievor's disabilities and restrictions by requesting that the grievor attend for an independent medical examination.

133. I find, with respect, that the facts in this case are distinguishable from those in *Audet*. In *Audet*, the Company did not pay any attention to the grievor's human rights claim until four months after the claim was filed. In the instant case, the Company evidently took steps in short order to activate the accommodation team from OHS after receiving the December 6, 2016 award. I note in that regard that Dr. Chan had completed CN's *Medical Progress and Return to Work-Restrictions Report* for OHS by Jan 9, 2017. With the enumerated restrictions in hand, including an additional clarification from Dr. Chan, the grievor was advised by Ms. Capeness on February 2, 2017 of his work restrictions: could not perform safety sensitive duties; no lifting over 50 lbs; and, no repetitive bending.

134. By January 27, 2017, the grievor had been placed on a permanent accommodation list and by February 13, 2017 the Union had provided the Company with a list of potential positions for the grievor. There was no need for further clarification from an independent medical assessment, as the Union argues, on the grievor's medical restrictions given the

amount of ongoing medical information OHS received from Dr. Chan and Dr. Hay who had treated the grievor since 2002 and 2007 respectively.

135. The Company's efforts to accommodate the grievor continued over the next four years. OHS was continually kept up to date on the grievor's functional abilities and work restrictions through the annual *Medical Progress/Return to Work* forms completed by Dr. Chan. The Human Resources Department then received the final word on the grievor's ongoing work restrictions from CN's Chief Medical Officer. On those occasions where OHS received letters from Dr. Chan or Dr. Hay outlining new restrictions or changing existing restrictions, the Company carried on with the accommodation process by looking for positions that fit with the new or altered work restrictions.

136. As the Company pointed out, it did review a bundling of tasks when it received the Union's letter of February 12, 2017. Ms. Cousineau wrote back to the Union on April 13, 2017 and indicated that, after her review of available positions, there were no duties that could be bundled up which fit within the grievor's restrictions. The Company also offered the grievor temporary work in the bunkhouse once it received notice from the Union on August 13, 2020 that the grievor was no longer employed full-time outside of CN. Ms. Miller indicated in her reply email to the grievor of August 18, 2020 that she would continue to review temporary positions as they became available if the grievor was unable to accept the temporary position at the bunkhouse. Just over a month later, on September 23, 2020, the grievor was formally offered the Car Mechanic position, a permanent accommodated position that fit within the grievor's restrictions at that time according to

the Company's medical information and one that had been on hold for a year due to the freeze on hiring.

137. I find the comments of Arbitrator Picher in **CROA 4313** to be instructive. In that case, the grievor, who suffered from seizure disorders, refused an accommodated position in his home area of Capreol, Ontario performing light janitorial duties. In dismissing the grievance, the arbitrator stated:

It is axiomatic that in the exercise to find reasonable accommodation there is a responsibility shared by the employer, the Union and the employee himself, or herself. On a review of the evidence before me I am satisfied that the Company made every reasonable effort to find the grievor accommodated employment, and that that effort was severely constrained by the grievor's refusal to work other than in Capreol. Nor can the Arbitrator ascribe significant weight to the grievor's wish to work exclusively within his own bargaining unit, it being effectively agreed that no work suited to his limitations could be found within the bargaining unit at Capreol. In the end, for reasons he best appreciates, employee A simply refused to accept the accommodated janitorial duties offered to him by the Company...

In the result, I cannot find that the Company violated its duty to offer the grievor reasonable accommodation to the point of undue hardship, to perform work at Capreol consistent with his physical limitations. For reasons he best appreciates, the grievor simply insisted on establishing unrealistic parameters for the work which he would accept and ultimately frustrated the accommodation process by his own actions. (*Emphasis Added*)

138. Overall, I find, as did Arbitrator Picher above, that all the Company's efforts to accommodate the grievor over the years were constrained by the grievor's lack of commitment to the accommodation process. The long-held view first articulated in *Renaud* is that the tripartite process requires the complainant to do his or her part in the accommodation process. Both the Employer and indeed the Union stood by the grievor at every step along the accommodation process beginning in January 2017. The

Company, in my view, demonstrated through its ongoing efforts over the years that it has met the threshold requirement to accommodate the grievor to the point of undue hardship.

CONCLUSION

139. The grievor failed to cooperate in the accommodation process ordered on December 6, 2016. A review of the evidence leads to the conclusion that the Company did not violate its duty to offer the grievor reasonable accommodation to the point of undue hardship. I agree with the Company that to require it to continue in its search for suitable employment for the grievor would amount to undue hardship. The grievor, by his own actions, has continually frustrated the accommodation process over more than four years and in so doing has done irreparable harm to the employment relationship. He is not entitled to any further remedy, including an order for damages requested by the Union pursuant to the *Canadian Human Rights Act*, and stands dismissed from his employment from CN.

140. The grievance is dismissed for all the above reasons.

June 1, 2022



JOHN M. MOREAU, Q.C.

ARBITRATOR