

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

CASE NO. 5081

Heard in Calgary, September 9, 2024

Concerning

CANADIAN PACIFIC KANSAS RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the employment file closure for Conductor Trainee Ryan Campbell of Brandon, MB.

JOINT STATEMENT OF ISSUE:

On September 20, 2019, Conductor Trainee Ryan Campbell sustained a serious work-related injury.

On May 12, 2022, Mr. Campbell received a letter from the Company advising of the intent to close his employment record. Mr. Campbell was invited to provide any new information which may cause the Company to reconsider the decision prior to June 10, 2022.

On June 13, 2022, Mr. Campbell received a closure of employment record which stated the following:

“As of this letter, we received new information from you. The information indicates you continue to have significant long term/permanent work restrictions. These restrictions are insufficient to locate a suitable accommodation.

Please be advised that your employment record has been closed effective June 13, 2022.”

UNION POSITION

For all the reasons and submissions set forth in the Union’s grievances, which are herein adopted, the following outlines our position.

The burden is clearly met, Mr. Campbell suffers from a disability as a result of workplace injury. The Company has failed to respond within established time limits to the Union’s Step 2 grievance correspondence and has not provided what actions the Company has undertaken to accommodate Mr. Campbell to the point of undue hardship. The Company, has failed in its duty to take reasonable steps to accommodate Mr. Campbell to the point of undue hardship.

The Company’s actions are in violation of the Canadian Human Rights Act, Canada Labour Code, Duty to Accommodate, recent jurisprudence, the legal obligation to accommodate an employee, and Article 36 of the Collective Agreement. The employer has a legal obligation to accommodate disabled workers to the point of undue hardship. In that respect, the onus falls upon

the Company to demonstrate that the burden has been met. The Company has failed in its duty to accommodate Mr. Campbell and has otherwise not been reasonable in the handling of this employee, nor demonstrated any undue hardship by not properly accommodating him. The Company has failed to comply with its own policy 1501 Workplace Accommodation, and previous incarnations of this policy.

The Union contends the Company failed to respond within established time limits to the Union's Step 2 grievance in violation of Article 40.03 of the Collective Agreement and the Letter Re: Management of Grievances & the Scheduling of Cases at CROA.

The Union requests that the Company reinstate Mr. Campbell without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. Furthermore, the Company actively participate in the rehabilitation of Mr. Campbell and that he be provided a suitable accommodation. The Union further requests damages resulting from the violations in an amount to be determined. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

The Company disagrees with the Union's positions and requested resolve, including all alleged violations of Article 36 of the Collective Agreement, Canadian Human Rights Act, Canada Labour Code, Duty to Accommodate and Policy 1501 Workplace Accommodation.

The Union suggests the Company has effectively failed to respond to the Step #2 grievance within the mandatory time limits and in doing so allegedly failed to fulfill the requirements of the Collective Agreement. While the Company cannot agree with the Union's allegations pertaining to the Step #2 grievance response, the Consolidated Collective Agreement Article 40.04 is clear in that the remedy for failing to respond is escalation to the next step. Based on the Union's submission of the grievance to CROA&DR, it is also clear that the Union acknowledges Article 40.04 and has progressed to the final step of the dispute resolution process.

The Grievor has been unfit for all work with the Company following September 20, 2019.

The Company has not failed to accommodate the Grievor as alleged.

The Workers Compensation Board (WCB) has outlined that the Grievor has permanent restrictions which include no work associated with trains, including office work associated with trains.

In addition, CPKC Health Services confirms the Grievor has a permanent restriction of unfit for all work.

The Company maintains that it has not been unreasonable in closing the Grievor's employment record. Due to the permanent restrictions, the Company initiated the employment record closure on May 12, 2022. The Grievor failed to provide any new information which would cause the Company to reconsider the employment record closure.

For these reasons, the Company maintains that it has reached the point of undue hardship and the Grievor's employment record was closed effective June 13, 2022.

The Company requests that the Arbitrator be drawn to the same conclusion and dismiss the Union's grievance in its entirety.

For the Union:

(SGD.) D. Fulton

General Chairperson, CTW-W

For the Company:

(SGD.) F. Billings

Director Labour Relations

There appeared on behalf of the Company:

F. Billings	– Director, Labour Relations, Calgary
D. Zurbuchen	– Manager, Labour Relations, Calgary
B. Salter	– Specialist, Disability Management

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
D. Fulton	– General Chairperson, LE-E, Toronto
J. Hnatiuk	– General Chairperson, CTY-E, Montreal
D. Holleman	– Local Chairperson, Brandon, via Zoom
R. Campbell	– Grievor, via Zoom

AWARD OF THE ARBITRATOR

Introduction

[1] On September 20, 2019, the Grievor suffered a horrific accident at the workplace, when he was struck by a Train (the “Accident”). He was working as a Conductor Trainee at the time. The Grievor has not returned to work for the Company since that date.

[2] This Grievance arises from the Company’s decision to close the Grievor’s file on June 13, 2022, for his inability to return to work. The Union grieved that decision, arguing the Company has failed to accommodate the Grievor, resulting in discrimination on the basis of disability, which should attract a monetary Award.

[3] For the reasons which follow, and after careful review of the extensive evidence and the timing of the various determinations made in this case, I agree with that assessment.

[4] The Grievance is upheld.

The Accident

[5] The Grievor had been hired as a Conductor and entered into the Conductor training program on June 17, 2019, working out of Brandon, Manitoba.

[6] On September 20, 2019 the Grievor was working in Estevan, Saskatchewan, as a Conductor Trainee. After detraining, the Grievor was struck by a southbound Train on the main line Weyburn Subdivision.

[7] As noted by the Union, the Grievor was lucky to survive this accident. All present in the hearing room expressed considerable sympathy to the Grievor and there was no doubt his injuries were life-changing. The Union has described the Grievor's injuries as "staggering". That description is apt: The Grievor suffered fourteen crushed vertebrae; a pneumothorax on his right side; a broken right scapula, a crushed pelvis; fractured ribs; a brain bleed; lacerations to his skull and head leaving him with scars; a large hematoma over his mid upper back; and superficial lacerations of his left and right arms.

[8] The Grievor's claim with Workers' Compensation (in Saskatchewan) was accepted, however the Grievor was airlifted back to Manitoba once he was stable, and so applied to Manitoba WCB. The Grievor's claim was accepted in October of 2019 and the Grievor began to receive payments from WCB for his wage loss and reimbursement for various other expenses. WCB plays a part in the events of this dispute.

[9] The Grievor is a father of five, two of whom lived full-time with him at the time of this accident. The Company covered the cost of the Grievor's family's hotel stay and transportation for his family to visit the Grievor in the hospital, during the acute phase of his injury.

[10] As the Grievor recalled portions of the Accident and its immediate aftermath, not surprisingly, he was also subsequently diagnosed with certain "non-physical" (in the words of the WCB) mental conditions resulting from this accident, including post-traumatic stress disorder ("PTSD") and cognitive difficulties.

[11] After the accident, the Grievor ended up moving in with his mother. As a result of his injuries, he also suffered a great deal of pain; endured multiple surgeries and participated in various rehabilitation efforts. Unfortunately, the Grievor also engaged in the overuse of pain medication and marijuana to manage his chronic pain, causing delusions and heightened anger (without a basis) against both the Company and an unwillingness to engage in exposure therapy to trains for a period of time. This began in 2021 and resolved by January of 2022, (after the Grievor's successful thoracic surgery which reduced his pain).

The Medical Evidence

[12] In this review of the evidence, all emphasis is added. The principal doctors involved in the Grievor's care were his treating physician, Dr. Fjeldsted, and a clinical psychologist, Dr. Yury. He had his initial consult with Dr. Yury on December 18, 2019.

[13] On December 19, 2019, WCB records indicate the Grievor was attending in-clinic physiotherapy and was able to weight-bear on one leg only; and suffered pain and sleep issues. Regarding the Grievor's psychological injuries, on December 20, 2019, Dr. Yury prepared his first Report. He indicated he had his first meeting with the Grievor on December 18, 2019, when the Grievor had been recently discharged from the hospital.

[14] Dr. Yury diagnosed that the Grievor "was experiencing PTSD related to the accident, through intrusive thoughts, nightmares, trains eliciting significant fear, being avoidant of trains and poor mood". He noted that Mr. Campbell would benefit from several types of therapy, including "exposure therapy for trains and thoughts of train accident" which would "also be necessary". There was no time period for when that exposure therapy would occur, consistent with the fact Dr. Yury had only had one appointment with the Grievor by that point.

[15] Dr. Stambrook, the WCB Psychological Advisor reviewed Dr. Yury's Report for the WCB. He indicated that:

The claimant experienced significant polytrauma including what the psychologist has reported as psychological trauma related to the CI....The psychologist also diagnosed the claimant with having CI-related PTDS...The treatment outlined would be appropriate and would need to include cognitive and emotional processing of the trauma that he experienced as well as supportive treatment in coping with the next steps in his physical rehabilitation, as a prelude to exposure treatment for trains and thought of the train accident as the psychologist had spoken to....

It would be too early to prognosticate in regards to the claimant's psychological recovery.

[16] Again, no timeline was outlined for when the Grievor would be ready for exposure therapy, or what that would look like. Certain other treatments were explained to be "preludes" to exposure therapy occurring.

[17] Dr. Stambrook recommended follow up after counselling session 6 of the 14 that had been authorized, to determine the Grievor's progress.

[18] A medical opinion was also appended to the WCB records from Dr. Mason, another advisor for the WCB, from December of 2019. This Report indicated the time of healing expected for the Grievor's physical injuries, and noted that:

The psychological impact has been discussed by Dr. Stambrook. **It is understood that the psychological issues may affect his recovery from the physical injuries and his degree of healing of the physical injuries may affect how he does psychologically** (emphasis added).

[19] Almost five months later, on May 5, 2020, Dr. Yury provided a further Report to the WCB, in response to their request for an update. In that Report, he noted the Grievor was described as "*receptive to therapy*" and it was noted he had "*followed through with treatment recommendations*". He noted the Grievor had "*not been travelling to Brandon, and thus have [sic] no opportunity to see trains as they do not live close [sic] any train tracks*". He was also going to join his children at the train museum, but that had been cancelled due to COVID19 restrictions.

[20] It was also noted his mood had worsened due to the social isolation of COVID19, and that his PTSD was continuing.

[21] He noted that the goal prior to the COVID19 restrictions had been to "*get him to go his [sic] employers' offices so they can work with fears associated with seeing co-workers, being asked about the accident, and fears of being judged*". While it was hoped the Grievor would *progress* to the point of being able to engage in that exposure therapy, that point had not yet been reached during 2020. Dr. Yury noted the Grievor was working on "exposure therapy" *for driving* which had to be successful before exposure therapy with trains could begin:

As he is able to drive, and with lowering COVID-19 restrictions, *we will then begin to work on decreasing isolation, and exposure therapy with trains*. I believe he will require at least an additional 10 sessions to work on these treatment goals.

[22] Shortly after, Dr. Stambrook again reviewed the Grievor's file for the WCB. He noted the Grievor had self-reported 'continued positive progress in his psychological treatment' to WCB. His opinion was:

The requested 10 additional treatment sessions would be directly related to the CI and, ***would need to include cognitive and emotional processing of the trauma that he had experienced as well as ongoing exposure treatment over and above chronic pain management and building acceptance-based coping strategies for thoughts related to the accident*** (emphasis added).

[23] There was agreement among the medical personnel that exposure therapy *should* be a prong of the Grievor's treatment, but the Grievor himself was not yet ready for that step.

[24] Eight months later, on January 18, 2021, Dr. Yury provided a follow-up opinion, as had been requested by the WCB. He noted his last session with the Grievor had been on January 14, 2021.

[25] Dr. Yury noted the Grievor continued to experience significant chronic pain, and was limited in his ability to engage in activities. He also stated the Grievor continued to struggle with feelings of isolation and depression due to his limited mobility and his chronic pain; and that he tried ice-fishing, but had a panic attack and "*nearly passed out*". It was stated the Grievor had an increased startle response for a number of activities, and "*not just related to trains*".

[26] Regarding the PTSD, Dr. Yury stated:

Mr. Campbell ***continues to struggle with intrusive thoughts of the accident, is hypervigilant at train crossings, and has a startle response to hearing trains.*** He has done some exposure at home with videos of trains, but *due to COVID restrictions has limited outings to trains and train crossings. He understand [sic] the importance of further exposure to trains, and indicated he is willing to engage in further exposure therapy when restrictions are lessened.* .I believe he will benefit from ongoing psychotherapy while he undergoes further medical procedures related to his accident, further decrease isolation and engage in further exposure therapies when COVID restrictions end.

[27] Dr. Yury felt the Grievor would benefit from continued sessions for one month further (12 more sessions).

[28] Dr. Stambrook again reviewed this Report for the WCB. He noted that the Grievor “*continues to have PTSD symptoms as had been outlined albeit for being complicated by his ongoing reported chronic pain as well as feelings of isolation and depression*”. He was asked if the requested treatment was “appropriate” for the Grievor’s injury. Dr. Stambrook continued to emphasize the need for the Grievor to undertake exposure therapy. He stated:

Yes – **with the psychological treatment not only focusing on chronic pain but also with the need for cognitive and emotional processing of the CI, exposure therapy,** and with anxiety and PTSD symptom management, and coping with his pain and with appropriate behavioral activations.

[29] When questioned regarding a timeline for “*possible gradual return to work/participation in gradual exposure to workplace*”, Dr. Stambrook stated:

This would be unknown at this time given the psychological and physical symptoms that the worker has and, ***the psychologist should focus on further exposure and processing treatment and then desensitization in collaboration with case management.***

[30] In response to this assessment, on February 1, 2021, WCB approved the extra 12 sessions, and also made the following request of Dr. Yury:

In anticipation of lessening of restrictions in relation to COVID, **please propose a schedule for a Gradual Exposure program to share with Ryan’s employer so a request to accommodate same can be made**

[31] Consistent with its own medical opinions, the WCB was trying to understand the schedule for the Grievor’s exposure program, so the Company could be contacted to accommodate that therapy. A schedule would also be consistent with Dr. Stambrook’s continued emphasis on the Grievor undergoing exposure therapy to address his PTSD.

[32] This evidence supports WCB’s understanding of the Company’s willingness at that time to accommodate a “gradual exposure/GRTW” for this Grievor.

[33] That schedule was never provided, as on February 11, 2021 Dr. Yury noted that the Grievor was not ready to “*begin a gradual return to work plan*”. The Grievor never received that medical clearance to return to work. By the following year, it would be reported by Dr. Yury that the Grievor was “*not yet ready to work with trains*”.

[34] Meanwhile, back to February of 2021, on February 9, 2021, Dr. Mason once again assessed the Grievor’s file. In his Claim Summary, he filled in under “Current claim status (include RTW status, recent update from worker, etc)” the following information:

Employer able to accommodate gradual exposure/GRTW [gradual return to work] **at worksite**. Worker continues to attend for regular in-clinic physio; FCE rand reconditioning being considered following most recent extension of in-clinic (emphasis added).

[35] Under “Current issue (reason for healthcare opinion)”, Dr. Mason filled in the following:

Medical reports not indicating source of ongoing pain for which opioid medications continue to be prescribed and used. Limited objective findings other than in report from Ortho. **Seeking opinion on recovery and prognosis for GRTW and what further treatment may be indicated**. WBC [sic] Psychiatry Advisor has been asked to opine on medications (emphasis added).

[36] The WCB Advisors were becoming worried regarding the Grievor’s dependence on opioids. As the history of the file shows, that concern was not misplaced.

[37] Dr. Mason was asked by Ms. Vanbeselaere to clarify “*worker’s ability to/prognosis for participation in GRTW [“gradual return to work”]*. *In order to determine worker’s capacity is a call-in examination indicated? If so, please arrange*”.

[38] The WCB was focused on developing a gradual return to work plan for the Grievor, as was done for Engineer Parr, who was the LE operating the Train which struck the Grievor.

[39] Dr. Mason’s medical opinion was stated as:

Recovery is likely going as well as can be expected considering the number of serious injuries sustained in addition to the psychological trauma.

It is unclear what level of recovery will be achieved as many of the structural injuries can result in chronic pain. The degree to which that affects his function can be influenced by his psychological recovery.

The physio has provided reasonable physical restrictions to start but the psychologist does not feel Mr. Campbell is psychologically fit to return to work. **If he's not returning to work, then it would be recommended to maximize the physical recovery through a structured rehab program.** By the time that has concluded, an FCE could be done and a call in exam in Brandon may be available.

[40] On February 10, 2021, Ms. Vanbeselaere from WCB sent an email to Melanie Brace, the WCB Specialist at the Company. She reported that the Grievor "*continues to make significant gains and is expected to make a full recovery...Once the review is complete and I have clear restrictions for both his physical and non-physical injuries, I will send out an update*".

[41] Also on February 10, 2021, Ms. Vanbeselaere sent a letter to Ms. Brace at the Company, to "*update you on the status of this claim*". She reported that "Ryan Campbell's capacity for participation in work duties indicates the following temporary restrictions, to be reviewed in four weeks". She then listed two physical limitations: "Able to perform Light/Medium work per Physical Demands Classification" and "Able to participate 5 days per week, 5 hours per day. There were several restrictions under the "Physical Demands Classification" as well.

[42] Under the "Non-physical capacity", she noted "**Unable to participate in Gradual Exposure program for non-physical injuries**". She also indicated she would continue to provide updates as the Grievor's recovery progressed.

[43] As of February 10, 2021, therefore, the Company was being told by WCB that the Grievor was not yet able to participate in a "Gradual Exposure" program.

[44] On February 10, 2021, Ms. Vanbeselaere sent an email to Dr. Yury regarding a physical rehabilitation program for the Grievor, which had been recommended by Dr. Mason. She stated:

I wanted to provide you an update on Ryan's progress in rehabbing his physical injuries; his provider has indicated that at some point in the next month or so, Ryan will have made gains to the point where he'd be ready for some more focused

programming in the form of a Functional Capacity Evaluation and corresponding Physical Reconditioning Program.

This would entail attending a facility in Brandon, Pathway Rehabilitation, for a period of a few weeks, several days per week, where he'd receive individual instruction from OT/PT to further progress his physical capacity towards being able to execute the regular duties of his Conductor position.

While we have acknowledged that Ryan is yet to be in a place where he's ready for the gradual exposure to the Brandon rail yard, I'd appreciate your opinion on his capacity to engage in such a program and whether you feel there would be any benefit to him, mentally, in attending for same, or whether there are risks to participation that may outweigh the benefits at this time.

I believe the provider is recommending we review Ryan's readiness for a program as described above following a period of continued in-clinic physio for another month, so it's likely we'd be looking at commencing something in mid to late March (emphasis added).

[45] That "gradual exposure to the Brandon rail yard" was a possible work accommodation in the eyes of the WCB is evident from this email.

[46] That the Company was also willing to accommodate such a program *at that point* was also made clear in the evidence.

[47] On February 11, 2021, Dr. Yury sent Ms. Vanbeselaere an email. He stated:

I think he is willing to engage in any OT/PT that will help improve his physical abilities, and psychologically he is able to tolerate further rehabilitation. **I also do not believe he is ready to begin a gradual return to work plan.** So I believe he can tolerate it but based on his level of pain and his reporting of requiring further medical procedures, **I do not believe he will be able to attempt a return to work plan any time soon.**

[48] As of February 2021, the Grievor was not yet ready to begin a gradual return to work and no timeline was provided for when that might occur.

[49] The next document in the WCB record filed by the Union was a letter dated June 28, 2021 from Dr. Yury, which was responding to Ms. Vanbeselaere's request for an update.

[50] While it was not initially clear from the Union's evidence what occurred during the period between mid February of 2021 and June of 2021, I am satisfied from a wholistic

review of the evidence that this was a period when the Grievor was overusing opioids and marijuana for pain management and had disengaged from certain treatments as a result. In his letter of June 28, 2021, Dr. Yury wrote his last session with the Grievor was on June 24, 2021, and that the Grievor underwent surgery in May of 2021 for his thoracic injuries, which resulted in a “*significant reduction in improved mobility*” and that he has “*decreased his use of opioids and marijuana due to decreased pain levels*”. It was also reported his sleep had improved, due to decreased pain. It was reported that the Grievor’s “*mood and energy levels of [sic] improved*” with improved pain levels; and that the Grievor was “*very frustrated with his employer and WCB related to his recovery*” prior to his surgery.

[51] While it was not clear in these documents what led to that frustration, in later documents, it became clear the Grievor was in fact suffering from delusions and heightened anger due to his overuse of opioids and marijuana, prior to May of 2021.

[52] Dr. Yury noted that as a result of the successful surgery, the Grievor was “*more focused on re-engaging in healthy and enjoyable activities, and was more willing to discuss the need for further exposure therapy with trains*”. ***I am satisfied the Grievor’s unwillingness to engage in that therapy previously was due to his overuse of opioids and marijuana***”.

[53] It was noted in Dr. Yury’s Report that the Grievor felt “*hopeful of the opportunity for employment in the future; he indicated he believes he will not be able to return to a manual labour job, but is hopeful his employer will be able to offer employment that is within pain management guidelines*”.

[54] Dr. Yury also wrote:

I believe Mr. Campell is now ready to re-engage in exposure therapy with trains, and he continues to have a startle response to seeing and hearing trains, avoids them when possible, and is avoidant of driving to towns with railway crossings. As COVID restrictions decrease, there is more opportunity for him to travel to locations with trains, which will make exposure therapy easier to engage in. I believe he will benefit from further psychotherapy focused on exposure therapy with trains, as well as further acceptance therapy to help him with chronic pain management...

[55] As noted in this Report, the exposure therapy anticipated at this time was that which the Grievor was able to pursue *himself*, such as “seeing and hearing trains” and “driving to towns with railway crossings”, given his continuing negative reactions just to seeing and hearing trains and his avoidant of railway crossings. COVID restrictions would not have prevented the Grievor from driving himself to areas where he could view and hear trains, such as public crossings.

[56] On July 20, 2021, a medical opinion was obtained by WCB from W. Singer, physiotherapy consultant, which indicated the Grievor was “appropriate for a work conditioning program” and that “[a] 6-week program at a frequency of three times a week is recommended”. The Grievor had not yet received medical clearance for his *psychological* injuries, however.

[57] The next document in the package filed by the Union is dated October 20, 2021 and is a Discharge Report for the Grievor from Pathway Rehabilitation. This was the program earlier referred to by the WCB, to maximize the Grievor’s *physical* rehabilitation while his *psychological* injuries continued to be treated. It was noted the Grievor had reached “*maximum medical improvement*”, for those physical injuries, and was able to return to the workforce “*on a full-time basis with the physical limitations listed above*”. Several physical limitations were listed.

[58] That document did not address the Grievor’s psychological injuries.

[59] On October 20, 2021, Dr. Mason was requested to review the Grievor’s file for WCB. Under “Current Claim Status”, he filled in: “Employer may be able to accommodate into an alternate position; *unlikely to be cleared to return to accident position due to ongoing psychological issues*” (emphasis added).

[60] Under his “Medical Opinion”, Dr. Mason stated:

It has been over two years since Mr. Campbell’s accident. He continues to have symptoms and findings (physical and mental health conditions) which would be consistent with the serious nature of his injuries.

He may be receiving maintenance-type therapy but no further intensive treatment is being considered.

It is not likely that there will be significant future improvement in his clinical status. All these points support that he is at maximal medical improvement.

The therapist did a thorough evaluation of his *physical* capabilities at the discharge of his reconditioning program. The restrictions provided are reasonable, consistent with his injuries, and should be made permanent as related to his CI. [physical limitations listed from that Discharge Report] (emphasis added).

[61] On October 22, 2021, Ms. Brace asked Ms. Vanbeselaere via email for an update.

[62] The next document is from October 26, 2021, and is an email from Ms. Vanbeselaere to Ms. Brace, titled "*Return to Work – Discussion with Participants*" relating to the Grievor. In that email, it was noted the Grievor had returned from his "*extensive reconditioning program*" (for his physical injuries) and that WCB was waiting for "*an opinion on his restrictions and whether they would be considered permanent in nature*", which was the "*physical piece*".

[63] Ms. Vanbeselaere indicated she had "*also asked for an update on the non-physical [psychological] status in the hope that we could soon entertain commencing some gradual exposure similar to the other fellows*" (emphasis added). I am satisfied the "other fellows" reference was to the Grievor participating in a gradual return to work program, like that experienced by Engineer Parr, who was the LE operating the Train who struck the Grievor. The evidence filed by the Union indicates Mr. Parr's gradual return to work program was to "complete 2-3 ride alongs over the next two weeks as an extra person", but this did not occur until July of 2022, almost three years post-accident.

[64] The significant impact on Engineer Parr demonstrates the seriousness of this event.

[65] At this point in time, the evidence established that the Grievor was not yet able to participate in that gradual exposure. At this point, the Grievor's exposure therapy is still focused on just seeing or hearing a train and for not avoiding encountering trains at public crossings.

[66] On October 27, 2021, Dr. Yury again responded to the request by Ms. Vanbeselaere for an update. It was noted that the Grievor "continued to limit his use of opioids and marijuana and has verbalized the problems he previously experienced were due to overuse". It was noted the Grievor's sleep remained poor and his energy level was also poor as he never felt refreshed from sleep. He had difficulties with attention and

short-term recall; with being unsure if he had completed tasks; and “struggling with upcoming events”. His cognitive issues were described as causing frustration and difficulties with his partner.

[67] It was noted that the Grievor did not avoid traveling over train tracks or near trains (as he had in the past), but that he “*continues to experience fear and anxiety when he is close to trains*”. He then stated:

I do not believe he is able to return to work nor is he ready to explore alternative employment or re-training. I believe he will benefit from continued psychotherapy....**Treatment goals will be focused on chronic pain management, exposure therapy of trains, and acceptance of loss of abilities.** He is hopeful to be able to return to work in the near future and understands that he will not be able to complete physically demanding tasks, but **would like to resume his career, earn more money, and have purpose in his life again.** I believe he will benefit from an additional 8-10 sessions through the winter (emphasis added).

[68] Ms. Brace emailed back to state she would follow up if she didn’t hear anything further from Ms. Vanbeselaere.

[69] Ms. Brace then sought another update on November 26, 2021.

[70] This is a key and critical request and her response is likewise critical to the issues in this dispute.

[71] On November 30, 2021, Ms. Carol Bennett Regional Case Manager for WCB emailed Ms. Brace. She stated she was covering for an absence of Ms. Vanbeselaere. She noted the Grievor’s permanent physical restrictions. She then stated “[w]ith regard to Mr. Campbell’s non-physical status medical on file states that he is not capable of return to work at this time”.

[72] On November 30, 2021 at 3:57 p.m., Ms. Brace contacted Ms. Bennett. She stated “*Thank you for these restrictions. **Being he is in a very small centre, has very little work experience with us and given these work restrictions, it is unlikely he will ever return to work for CP Rail. Will CP proceed with vocational/re-employment/retraining at this time?***”

[73] This is a startling statement for Ms. Brace to make and is at the heart of this dispute.

[74] The “restrictions” she noted were physical restrictions, since the “non-physical” restrictions were that the Grievor was not capable of returning to work at that time and those injuries were not classified as permanent at that point. At this point in time, there was no evidence filed of any efforts taken by Ms. Brace to locate a job for the Grievor – prior to making this statement - given the Grievor’s stated physical restrictions.

[75] In fact, Ms. Brace’s assessment that it was “unlikely he will ever return to work for CP Rail” was premature, given that the Grievor had not yet been cleared to work, due to his continuing psychological injuries. The statement was also not legally supportable. While the Grievor’s physical restrictions may have prevented his work as a Conductor, at CP Rail, that is not the standard of capability the Grievor must reach to return to work for the Company.

[76] This case illustrates how careful Company officials must be in making broad and sweeping statements to third parties.

[77] It is unclear why Ms. Brace felt the need to make this statement to the WCB. Frankly, as the Grievor’s psychological injuries were not yet either resolved or classified as permanent, there was no role for the Company, other than to seek periodic updates. It was not clear – at that point – that the Grievor would not be able to return to work in *some* capacity in future.

[78] Unfortunately, that statement made to WCB set in motion an unfortunate chain of events.

[79] On December 2, 2021, Ms. Bennett contacted Ms. Brace via email and stated “*It is likely that this claim will proceed to vocational rehabilitation if CP is not able to accommodate even with the physical restrictions. We will keep you informed*”. It is obvious from this response that the WCB feels that the Company has made an assessment it cannot accommodate the Grievor.

[80] However, there is no evidence of any efforts by Ms. Brace in November of 2021 to review and consider potential jobs for the Grievor, even were he to recover from his

psychological injuries. At this point, Ms. Brace could have “walked back” her previous broad and premature assessment that CP could not accommodate the Grievor’s physical restrictions. She could have said “when the time comes that his psychological injuries are resolved, we will then review the job possibilities for the Grievor at CP Rail”. That would have been the appropriate position to take, at that point in time.

[81] The WCB Specialist did not “walk back” her statement, however. She responded on the same date and asked Ms. Bennett to keep her informed of when that would occur.

[82] On January 18, 2022, Dr. Yury again responded to a request from WCB for an update regarding the Grievor.

[83] This is a key and important opinion in this dispute.

[84] He noted there had been earlier concerns (which explains the gap in the medical information in 2021). Those concerns were:

*...about his use of marijuana, delusional thoughts, and anger towards WCB prior to his [thoracic] surgery [in May of 2021], but the reduction in pain has made significant improvement with these issues. He acknowledged overuse of marijuana and the issues it caused and has significantly reduced his use. In session *he no longer demonstrates delusional thought, his frustration with his employer and WCB has decreased, his mood has improved, **and he is motivated to remain in therapy.****

Dr. Yury also commented on the Grievor’s cognitive struggles:

Mr. Campbell continues to struggle with some cognitive difficulties, specifically recall. He reported ongoing difficulties with his partner, as she is frustrated with his recall problems. ...we have also worked on acceptance of any cognitive changes, and that resistance to change and comparisons to the past will only exacerbate his mood and frustration (emphasis added)

Dr. Yury also reports trying to help the Grievor *understand* exposure therapy, noting some improvements in the Grievor’s own efforts at exposure therapy:

*We have worked on developing his understanding of the exposure therapy process, and how avoidance of train only maintains his fear and anxiety. He has made some improvements when hearing trains and see them at in town crossings [sic]. He continues to experience anxiety and startle when he is [sic] contact with a train, but he is less worried about the experience is not avoidant of seeing one. In other words, he will go to place [sic] where he may a train, whereas he used to attempt to avoid when possible. **We had planned for him to start spending time***

at his place of employment in order to further his exposure therapy, going to the parking lot to see the building and trains was an initial goal. He understands that exposure to trains will help [sic] with his trauma symptoms and appears motivated to make improvements. Unfortunately, based on our last conversation, his employer will not be able to accommodate him, his goal of learning to tolerate being around trains to allow from some type of return to work with his employer is longer possible, and we will end this part of therapy. We will continue to encourage him to further engage with trains, such as at train crossings or any place he can readily see and hear trains to further reduce trauma symptoms.

[85] Dr. Yury recommended monthly therapy sessions “for at least the following year”.

[86] Less than one month later, on February 16, 2022, Dr. Yury stated that “[p]sychologically, he is not ready to work with trains”.

[87] As Dr. Yury had recommended to the Grievor that he continue his own exposure therapy to trains on public spaces, presumably this referred to any *employment* around trains, at that point.

[88] The phrase “he is not ready” implies that there could be a point in time when he *was* ready. Given his significant reaction of “anxiety and startle when he is contact with a train”, it is clear that Dr. Yury felt the Grievor had a way to go in his treatment before he could participate in exposure therapy with the Company. However, I do not read this opinion as making a determination the Grievor’s psychological injuries were *permanent*. However, the WCB Psychiatric Advisor did make that determination shortly after.

[89] Ms. Rae took over the file for WCB and requested a medical opinion from Dr. Saligheh, a psychiatric consultant, which was requested on January 18, 2022. That opinion was provided on February 17, 2022, one day after Dr. Yury’s next Report.

[90] When asked what the prognosis was for the Grievor’s recovery, Dr. Saligheh stated:

Based on the treating psychologist’s latest reports, it appears that there has been a significant reduction in symptoms of PTSD. It is reported that Mr. Campbell has reduced his use of THC significant as well. *The prognosis for recovery is considered favourable given the reduction in use of THS and improvement in mental health symptoms.*

[91] When asked “[i]s the worker capable of working at this time? What restrictions would be appropriate? What is the timeline in which to review?” He stated:

Yes. **There is no psychiatric contraindication for returning to work as long as Mr. Campbell is accommodated in a position where he is not exposed to trains.**

[92] Dr. Saligheh is then asked to provide his opinion as to “if/when worker could be referred for Vocational Rehabilitation Services”. He states:

Yes. **Mr. Campbell should be permanently restricted from working on trains. It appears the employer is not able to accommodate this restriction.** It is highlighted that engagement in return to work activities (including vocational rehabilitation) will most likely result in further improvement in mental health symptom and function recovery, and hence is supported by the WCB Healthcare.

[93] It is Dr. Saligheh – and not the Grievor’s treating physician – that determines the Grievor cannot ever work around trains. The only information Dr. Saligheh would have had regarding the Company’s position would have been that relayed in Dr. Yury’s report, which followed up from WCB relaying to Dr. Yury Ms. Brace’s comment of November 2021.

[94] After this assessment, WCB then contacted the Company on February 17, 2022. Ms. Rae states:

...there is now a new, permanent, restriction of no working with trains (see attached letter). Can you please confirm CP’s ability/inability to accommodate these permanent restrictions? If you can confirm CP is unable to accommodate these permanent restrictions, WCB will move forward with a referral for Vocational Rehabilitation Services.

[95] The letter attached was dated the same date, addressed to Ms. Brace and set out “no work with trains” and several physical restrictions, including: only lifting floor to waist up to shoulder of 25 lbs occasionally; a restriction of lifting from waist to overhead of 15 lbs on the left and 12 lbs on the right occasionally; a front/side carry restriction of up to 25 pounds; a push/pull of up to 37 pounds occasionally; a crawl/kneel occasionally; a climb ladder/stairs occasionally; and fine motor skills occasional to frequent.

[96] On February 18, 2022, Ms. Brace emailed Ms. Rae to indicate the Grievor was “overdue to provide us updated medical. The last medical we have is from September 2021 and we currently have him unfit all work”. She then stated:

Once we get updated medical from Ryan we can look at changing his fitness level. ***When this occurs, I can advise whether we can accommodate on a permanent basis.*** I have a meeting with the health nurse on Tuesday and will discuss with her then.

[97] This confirms that when Ms. Brace made her comments in November of 2021, she was aware the Grievor was then unfit for all work and accommodation was not required. While this attitude of “waiting to advise of accommodation until all information is received” was the correct process, unfortunately for the Grievor, it was too late for the Company to act appropriately. Ms. Brace’s earlier comments had already set in motion a determination by the WCB that his psychological restrictions were “permanent”, which flowed from Dr. Yury’s Report, prepared on the basis of those comments.

[98] On February 22, 2022, Ms. Rae wrote to Ms. Brace indicating that the Grievor would fill out the Functional Abilities Form which presumably the Company must have sent to WCB in the interim.

[99] On March 18, 2022, Ms. Brace contacted the WCB to ask:

When you state “no work associated with trains”, can you please clarify? Does this mean around moving trains, or in train yards, or any trains altogether? For example, can he do office work that is associated with trains?

[100] This was an appropriate inquiry, but again – given the Company’s position on November of 2021, it was too late.

[101] On March 21, 2022, Ms. Rae confirmed to Ms. Brace that “[n]o work associated with trains includes office work associated with trains”.

[102] On March 21, 2022 Ms. Brace wrote to Ms. Rae:

Any work within CP Rail, office or otherwise, involves work associated with trains as that is our primary operation. Given this, CP cannot permanent accommodate the restrictions. Please proceed with vocational service.

Arguments

[103] It was the Union's position that the Grievor required more exposure therapy than he could get without the Company's help, including access to the Company's premises, and that the Company failed to accommodate that treatment. It argued that the Company's refusal to allow the Grievor to engage in exposure therapy was a failure in the accommodation process and that to do so would not have been an undue hardship, as can be seen in Engineer Parr's accommodation. It noted that Engineer Parr was off the same amount of time as the Grievor.

[104] The Union maintained that – had the Grievor been given that opportunity - he would have improved to the point he could have returned to work in some capacity. It argued it would not have been undue hardship for the Company to accommodate the Grievor's therapy and that this was a breach of the duty to accommodate, as those principles have been outlined in **AH834**.

[105] It argued the Company told WCB the Grievor was unlikely to return to work. The Union argued this led to the Grievor's restrictions being rendered permanent. It argued the Company never engaged with the Grievor to arrange the exposure therapy, which it argued changed the prognosis for the Grievor's recovery.

[106] For its part, the Company maintained it fulfilled its duty to accommodate and it was reasonable to close the Grievor's file, given that he had permanent restrictions to working around trains, which is the Company's business. To state the obvious, trains are the Company's business and every job is associated in some manner with trains. It also argued it only allowed employees to return to work if they were medically cleared to do so, which this Grievor never was: The Company noted that for the majority of the time, the Grievor was medically unfit for all work. The Company pointed out the Grievor ultimately was not cleared to do *any* type of working involving trains, even administrative work.

[107] It also noted that neither the Union nor the Grievor ever approached the Company and asked the Company to participate in exposure therapy for the Grievor and the Company therefore never denied that therapy. In its submissions it stated that had it been

approached, it would not have said “no”, although it also maintained it only would have allowed exposure therapy on its property once the Grievor had received medical fitness to work from health services; and that the Grievor was never cleared to that point.

[108] The Company noted that Engineer Parr had been cleared to the extent he was able to come on the property and received his exposure therapy, which included ride-alongs. The Company was not relying on any provision in workers’ compensation legislation regarding probationary employees and did not argue that legislation over-rode its duty to accommodate obligations. The Company argued damages are not appropriate as there is no harsh, vindictive or malicious conduct.

Legal Principles

[109] This Arbitrator has summarized the principles to be applied to disputes which allege a failure to accommodate in **AH834**, also referred to by the parties as the *Chute Grievance*. A summary of those principles is appropriate.

[110] Accommodation is a tri-partite obligation, imposing burdens on an employee to cooperate in the search for an accommodation and to accept a ‘reasonable’ accommodation, even if it is not a ‘perfect’ accommodation; on the Union to assist the employee seeking accommodation; and interface with its membership to aid them in understanding the accommodation process and accept accommodations for fellow employees (even when that impacts other employees or the rights under a collective agreement); and on the Company, who must make efforts to accommodate an employee to the point of undue hardship, when that duty is triggered.

[111] As noted in **AH834**, the accommodation process involves shifting burdens of proof.

[112] The Union bears the initial burden of proof for establishing not only that a grievor has suffered a disability, but that he – or she – has experienced an adverse impact as a result of that disability, and therefore requires accommodation to perform work. That is what is referred to as a *prima facie* case of discrimination.

[113] By establishing a *prima facie* case of discrimination, the duty to accommodate of an employer is “triggered”.

[114] The burden then shifts to the employer, who must establish it has accommodated the Grievor to the point of “undue hardship”. “Undue hardship” is recognized in the jurisprudence as a “high bar”. To reach that point, an employer must establish it has taken all reasonable efforts accommodate an employee. If it is determined that a Company has failed to accommodate a Grievor to the point of undue hardship, discrimination on the basis of disability has been established.

[115] The larger the Company, the more difficult it can be to establish that there is no job which an employee can perform, in an accommodated manner.

[116] **CROA 4503** contains a summary of guiding principles from the Supreme Court of Canada in this area. One of those principles is that “*an employer remains entitled to expect the employee to perform work in exchange for remuneration*”.

[117] If a Grievor does not require an accommodation in order to perform work – because for example that employee is *not capable* of performing *any* work – then the Union would not normally be able to meet its initial burden of proof to establish that the employee requires an accommodation.

[118] In other words, the duty to accommodate would not even be “triggered” if it cannot be demonstrated that an employee is at the point where he can perform accommodated work for an employer.

[119] It is well established in jurisprudence from both arbitrators and human rights tribunals that damages flow for discriminatory conduct. It is not necessary to prove any malicious intent; as those damages flow from the fact that discrimination has occurred.

Application to the Facts

Summary

[120] In this case, the Grievor was never medically cleared to begin “work” for the Company of any type, given his significant symptoms of PTSD, which were still evident in January of 2022. I cannot agree with the Union that – had the Grievor been given an opportunity to access the Company’s premises – he would have been able to return in

some capacity to work for the Company in an accommodated position, given the significance and severity of his injuries, even years on from the Accident.

[121] The medical evidence does not support that position. Even in January of 2022, the Grievor's aversion to trains remained intense, which is not surprising, given the trauma he experienced. The plan was to progress the exposure therapy, but there were no statements that the exposure therapy would necessarily be successful.

[122] There is also no evidence the Company was ever approached by the Grievor; the Union or the WCB to access its premises for exposure therapy at a particular point in time.

[123] However, I am satisfied that the reason for that flowed from the Company's own actions.

[124] What I am prepared to find occurred was a negligent and careless statement made by the Company's WCB Specialist to the WCB in November 2021 that the Grievor could *not* be physically accommodated by the Company *even though* at that time his psychological injuries prevented his return to work.

[125] That statement then set in motion a chain of events with its own momentum; for which the Company bears responsibility, as described below. I am satisfied the Company knew – or should have known – that the WCB would act on that statement.

Application

[126] I am satisfied that several care-givers, WCB personnel and Advisors were working hard on the Grievor's behalf, to help him reach his maximum medical improvement, both from his physical and his psychological injuries.

[127] The Grievor was working on his recovery as well, although during the period he was over-using opioids and cannabis for pain management, his engagement in treatment – including his willingness to engage in exposure therapy – stalled.

[128] While the Grievor had reached “maximal medical improvement for his physical injuries” after his time with Pathways Rehabilitation, there had been no similar

assessment for his psychological injuries, which did not keep pace with the healing of his physical injuries.

[129] His psychological injuries included not only PTSD (relating to *both* trains and his co-workers judging him initially); but also cognitive difficulties with memory and recall for tasks and events (including whether he had even completed certain tasks) which limitation caused considerable frustration to both he and his partner.

[130] The Grievor also suffered from acute and chronic pain; sleep and mood disturbances; and social isolation, due to both his injuries and to the restrictions surrounding the COVID-19 pandemic.

[131] Not surprisingly given the Accident, the Grievor's aversion to trains remained intense in late 2021. His ability to expose himself to even *looking at* or *hearing* a train at a public crossing was slow, as was his willingness to even drive a personal vehicle, which took some time to overcome.

[132] There is evidence the Grievor was making some improvement. By January of 2022, his overuse of opioids and marijuana to manage his pain had resolved; his mood had improved and he was at least willing to "re-engage" in exposure therapy to trains.

[133] The evidence also demonstrated that the WCB medical personnel were concerned that the exposure therapy was not being pursued more aggressively by Dr. Yury with the Grievor, and continually noted that exposure therapy was key for treating the Grievor's psychological injuries.

[134] To address its concerns, the WCB further sought a timeline for that treatment, which was never provided by Dr. Yury.

[135] Up to November of 2021, a gradual return to work plan was to be instituted when the Grievor was ready for that to occur. The evidence up to that point had in fact demonstrated that the Company had been prepared to undertake a type of "gradual exposure" to its workplace, when the Grievor was psychologically ready.

[136] Ms. Brace unfortunately set in motion a chain of events with its own momentum, when she stated to the WCB in November of 2021 – prior to the Grievor reaching *any*

medical clearance to return to work – that the Grievor was “unlikely to return to work” at CP Rail.

[137] Ms. Brace’s statement was not grounded in any evidence of any attempts to accommodate the Grievor. It was made at a point in time when the Grievor did not yet even *have* medical clearance to return to work due to the continuation of his *psychological* injuries. While the Grievor perhaps could not have returned *as a Conductor*, given his physical injuries – the Company’s obligations to accommodate the Grievor went beyond accommodating him back to that position. There was at that time no evidence of any attempts by the Company to consider what positions or jobs the Grievor could perform, given his physical injuries.

[138] The statement about the Company’s position was premature, unnecessary and negligently made.

[139] As noted in the Report of Dr. Yury dated January 18, 2022, the plan had been for the Grievor to begin to attend at the workplace as part of his exposure therapy to trains, which Dr. Yury opined would “*helps [sic] with his trauma symptoms*”. In that Report, Dr. Yury indicated the next step would be attendance at the Company’s premises – *in the parking lot* – to advance the Grievor’s exposure to trains.

[140] That the Grievor was only ready to access the Company’s parking lot demonstrates the slow pace of that exposure therapy. It must be recalled that at that point in time – as of January of 2022 – the Grievor was still experiencing intense aversion to the sounds and sights of trains, although he no longer avoided train crossings.

[141] Had the Company’s WCB Specialist not chosen to make her sweeping determination of whether the Company could – or could not – accommodate the Grievor’s physical restrictions prematurely, this Award would have ended here, with a finding that the Union had not met its burden of proof to establish the Grievor *required* an accommodation, since the Grievor was not yet medically cleared to return to *any* work – and may well have never been cleared to return to any work at the Company - given his significant and continuing reactions to trains.

[142] However, in this case, the Company's Officer made what was accepted by the WCB to be a pre-emptive "predetermination" – before the Grievor was even ready to return to work due to his psychological injuries – that it could not accommodate the Grievor's physical restrictions, and it communicated that position to the WCB, who then acted on it.

[143] This was not a harmless statement. Dr. Yury then noted in his Report of January 18, 2022 that, given the Company's decision, that aspect of the Grievor's treatment – which was expected by his physician to help his psychological injuries – was discontinued.

[144] Dr. Yury's assessment was *then* used by WCB medical advisers, who made an assessment the Grievor could never return to work around trains. It is not clear from the medical evidence what the basis was for that determination. It may well have been the very slow pace of the Grievor's exposure therapy to that point allowed the WCB advisers to determine he would not be successful returning to work around trains, but the basis of that decision is not clear from the evidence.

[145] While Dr. Yury encouraged the Grievor to continue to seek out situations for exposure therapy to trains, he also described the Grievor as being disappointed and frustrated with the Company's decision, especially because a CP representative had visited him in the hospital and assured him there would be a job waiting for him when he was ready to return.

[146] Had the Company's WCB Specialist *not* made an unnecessary and premature statement, I am satisfied that the Company would have been approached to participate in the Grievor's exposure therapy – as noted by Dr. Yury had been the plan.

[147] There was no evidence in that Report that the Company had been approached and had denied that access and I cannot find any evidence that was the case. *However*, Dr. Yury also noted that the Grievor's goal of "*learning to tolerate being around trains to allow for some type of return to work with his employer is no longer possible*" given his conversation with the WCB. The only information the WCB had at that point in time about the Company's unwillingness to accommodate the Grievor – that it could pass on to Dr.

Yury – came from Ms. Brace’s comment in November of 2021 and I am satisfied this reference by Dr. Yury is to that “assessment”.

[148] The Company in its submissions stated that it would not have allowed the Grievor to access its premises until he was medically cleared. While it is by no means certain that the Grievor could have improved to the point that he could have worked in any accommodated position at CP Rail, *even with* further exposure therapy at the Company’s premises, I am not convinced it would have been an undue hardship to the Company to allow the Grievor access to *their parking lot* as part of his gradual return to work plan, to allow him to undertake increasing exposure therapy to trains on a closer basis than he would have been able to do with his own efforts.

[149] Had that occurred – and even assuming the Company would have agreed to that access (which is not clear from their submissions), the Grievor may – or may not – have recovered to the point he would have performed some accommodated work at the Company with that therapy. It is unclear what impact his *other* cognitive issues may have had on his ability to return to work in any capacity for the Company, although there is evidence he took place in a job trial as a Clerk at a Co-op.

[150] There was no evidence filed regarding the result of that trial, or of the impact of the Grievor’s cognitive difficulties on his ability to hold that position.

[151] The Company’s assessment of its ability to accommodate the Grievor’s physical injuries was neither necessary or timely. However, I am satisfied that when the Company chose to make the statement it did regarding whether it was likely to accommodate the Grievor on this pre-emptive basis in November of 2021 – and communicated that position to WCB – it was required to do so consistently with the principles outlined in **AH834**.

[152] I have no difficulty in determining that the statement made by the Company’s Officer in November of 2021 – unsupported by any evidence of any efforts to determine if it could accommodate the Grievor – did not meet this standard.

[153] In these unique circumstances, the Company has therefore not met its burden to establish it appropriately accommodated the Grievor. Its decision to close his file was therefore unreasonable. Discrimination on the basis of disability has been established.

Remedy

[154] Pursuant to the *Canada Labour Code* – and as recognized in arbitral jurisprudence – arbitrators have a broad jurisdiction to craft an appropriate remedy, giving due regard to all of the circumstances. As this determination is factually dependent, precedents are of limited value.

[155] This case is complicated by the unusual fact that at the point in time when the careless statement was made regarding the Company’s ability to accommodate the Grievor, the Grievor was not yet medically cleared to return to work. Yet that statement had significant ramifications for this Grievor.

[156] What the Grievor was denied by the Company’s careless statement and its impact was an “opportunity” to undertake exposure therapy as part of a gradual return to work plan.

[157] However, I cannot agree the medical evidence has established that “but for” the Company’s actions, the Grievor would have been able to return to accommodated work, as argued by the Union. The medical evidence simply does not extend to that conclusion.

[158] The Grievor’s PTSD was slow to respond to therapy. That evidence establishes the Grievor’s aversion to trains was significant, intense and entrenched *even 28 months after the accident*, in January of 2022. While this was not surprising, given the trauma he experienced, it does not lead to a probability he would have been able to successfully return to perform work that is associated with trains.

[159] That said, it is not clear from the evidence what the Grievor’s *current* medical status is, or whether – even if he undertook exposure therapy to trains at this point – that would result in any improvement in that status, to allow him to undertake work for the Company. As noted in **CROA 4503**, the Company is entitled to receive work in exchange for compensation, for accommodated employees. It is also not clear if the Grievor even desires to try to return to work with the Company, or if he has moved on.

[160] Against these background facts and issues, a suitable remedy must be crafted.

Conclusion

[161] The Grievance is upheld. The following directions are issued:

- a. The Company failed to accommodate the Grievor when it prematurely – and without any supporting evidence of its efforts – communicated to the WCB that the Grievor could likely not be accommodated at CP Rail due to his physical injuries, even though he had not yet had medical clearance due to his psychological injuries.
- b. It was not reasonable for the Company to close the Grievor's employment file, in these circumstances.

[162] The Company is directed to re-open the Grievor's employment file.

[163] The Company is also directed to provide to the Grievor supervised access to its premises – beginning with its parking lot – for the purpose of the Grievor undergoing exposure therapy to the Brandon yard, if the Grievor chooses to undertake that therapy. That therapy is to occur *under medical guidance and direction*.

[164] That is the opportunity that was lost for this Grievor, with the Company's premature decision and that is the opportunity that will be given to the Grievor.

[165] It may well be the Grievor has moved on, and does not wish to expose himself to the Company's workplace. That would be his choice. If that is the case, the Company is entitled to proceed to close the Grievor's employment file.

[166] Should the Grievor decide to undertake exposure therapy, the Grievor's treating caregiver is to make an assessment of whether the Grievor is able to progress to *any* job relating to trains, after a reasonable attempt at exposure therapy to the Company's premises – under appropriate supervision – has been undertaken.

[167] If in the opinion of the Grievor's caregiver the Grievor remains unable to progress to the point where he can work in any position involving trains after that reasonable time period, the Company is entitled to close the Grievor's employment file.

[168] If the Grievor is medically considered to be able to perform work associated with trains in any capacity, the Company is directed to engage in an accommodation exercise.

[169] If the parties disagree on whether those accommodation efforts have been appropriately exercised, they are directed to set that question down to be heard at a future CROA session, over which I preside, and are entitled to have that scheduled by this Office on an expedited basis.

[170] No wage loss Order will issue, beyond what the Grievor has received from WCB. It has not been established – on a balance of probabilities – that the exposure therapy of the Grievor – even if provided – would have resulted in his return to accommodated work, given both the severity of his PTSD and the fact the Grievor has also been left with cognitive difficulties that are not related to the Company's actions.

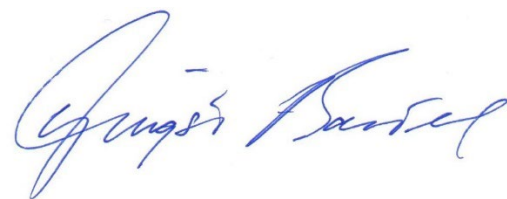
[171] A monetary award of damages is appropriate in these circumstances, given that discrimination against the Grievor occurred.

[172] Although questioned, the parties did not have positions on the appropriate amount of that type of an Award. I am prepared to Order that the Company pay to the Grievor the amount of \$20,000, as damages for discrimination.

I retain jurisdiction to address any issues or questions resulting from those directions, including any future question of whether the Company can accommodate the Grievor, after the exposure therapy is undertaken.

I also retain jurisdiction to address any issues relating to the implementation of this Award and its remedy Order and directions; to correct any errors and to address any omissions, to give this Award its intended effect.

December 12, 2024



**CHERYL YINGST BARTEL
ARBITRATOR**