Canadian Human Rights Tribunal

Tribunal canadien des droits de la personne

Citation: 2019 CHRT 51
Date: December 27, 2019
File No.: T1956/3613

Between:

Ken Kelsh

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Canadian Pacific Railway

Respondent

Decision

Member: Olga Luftig

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I. Overview

[1] The Complainant, Ken Kelsh, filed a complaint against his employer, Canadian Pacific Railway (the Railway or the Respondent), with the Canadian Human Rights Commission on August 3, 2011. The Complaint, as amended, alleges:

A. discrimination in employment on account of disability, resulting in adverse differential treatment, contrary to section 7 of the *Canadian Human Rights Act* (*Act*);

B. discrimination in the Respondent's testing, bidding practices, and machine classification procedures, contrary to section 10 of the *Act;* and

C. retaliation, contrary to section 14.1 of the *Act.*

[2] Mr. Kelsh works for the Railway in its Engineering Services division. He and his colleagues are responsible for laying track, and for track maintenance. The work involves numerous pieces of self-propelled heavy machinery (Machines), and the Railway has devised a system of classification whereby certain testing and qualification is required to operate different Machines. In particular, anyone operating a machine that could be in a position of having to take on the responsibility of directing or protecting others from train movements, is required to pass a test to obtain what is known as a "D Rules Card" (D Card).

[3] Mr. Kelsh is an individual of very low literacy and he says that the Railway was wrong in requiring that the testing for the D Card be in writing. He further alleges that the Railway has classified too many machines as requiring the D Card (including in particular one machine called a Stake Truck), and that he was discriminated against when the Railway instituted a computer-based system for bidding for jobs. Finally, he claims that the Railway denied him certain jobs in retaliation for having filed a human rights Complaint.

[4] The Railway's position is that the need to be sufficiently literate to take a written examination is a genuine requirement for all Machines requiring the D Card. It further argues that accommodating Mr. Kelsh by waiving the reading and writing requirements or by allowing him to operate D Card-classed Machines without this certification would represent undue hardship to the Railway based on safety and cost. They deny any overbroadness in their classification of Machines, and say Mr. Kelsh did not experience

any negative consequences from computer-based bidding. Finally, they submit there was no retaliation against Mr. Kelsh.

II. Issues

[5] The Tribunal must determine the following issues in this Decision:

[6] First, has Mr. Kelsh met his burden of establishing a *prima facie* case of discrimination in accordance with section 7 or section 10 of the *Act,* or both?

[7] If so, has the Railway established any valid justification for its otherwise discriminatory actions?

[8] Has Mr. Kelsh established that the Railway retaliated against him for having filed a Complaint, contrary to s. 14.1 of the *Act*?

[9] If the Complaint is substantiated in full or in part, what are the appropriate remedies to be granted pursuant to s. 53 of the *Act*?

[10] And finally, regardless of the outcome of the above questions, the following motions are addressed:

A. Should the Railway be ordered to compensate its employees who appeared at the Tribunal hearing as witnesses for the Complainant?

B. Should the Tribunal grant certain confidentiality measures requested?

III. Decision

[11] For the reasons that follow, the Complaint is partially substantiated.

[12] The Tribunal finds that Mr. Kelsh met his burden of establishing that requiring him to take his D Card exam in writing constituted a *prima facie* case of discrimination. However, the Railway justified the discriminatory practice on the basis that the ability to read and write is a bona fide occupational requirement (BFOR), and that accommodation, by giving Mr. Kelsh an oral D Card test, would constitute undue hardship as outlined in sections 15(1)(a) and 15(2) of the *Act*.

[13] Mr. Kelsh also established a *prima facie* case of discrimination with regards to being barred from operating a Stake Truck because he held only an E Card. In this inquiry, the Railway did not justify the discriminatory practice. While there was insufficient evidence to analyze the Railway's requirements for the operation of every Machine and determine if they are reasonable, the Tribunal finds that Mr. Kelsh could have been accommodated in the specific role of Stake Truck operator without placing undue hardship on the Railway. As such, Mr. Kelsh is entitled to remedies.

[14] The Tribunal dismisses Mr. Kelsh's allegation that the Railway's bidding practices are systemically discriminatory.

[15] The Tribunal does not find that the Railway retaliated against Mr. Kelsh within the meaning of s. 14.1 of the *Act* after he made his human rights Complaint.

IV. Background

A. Engineering Services, Group 1 Machines, and the Rules Cards

[16] The Complainant Ken Kelsh has worked for the Railway in its Engineering Services division (ES) since 1998. Engineering Services maintains, repairs, and replaces track, switches, ties, signals and other physical equipment of the Railway.

[17] He and his colleagues operate in accordance with: the Collective Agreement between the Railway and the Teamsters Union (Collective Agreement or Wage Agreement); the *Railway Safety Act,* R.S.C. 1985, c. 32 and regulations thereunder, Transport Canada's "Canadian Railroad Operating Rules" (CROR), and the Railway's own Rules, which Transport Canada enforces. While the Railway must adhere at minimum to the CROR's, witnesses at the hearing were clear that it is free to introduce higher standards of its own, as well.

[18] The Railway divides the province of Ontario into various subdivisions (Subdivisions), which are in turn divided into Sections.

[19] The work of Engineering Services (ES) is seasonal: For about 8 or 9 months during the spring, summer and fall, ES employees work in what are called Gangs or Crews. These Gangs contain various Machines, operated by Machine operators; usually at least one Foreman; skilled hand-machine operators; signal maintainers, and labourers, all doing the different tasks required in repairing, replacing and laying down track and the Railway's other physical plant and equipment which is integral to the movement of trains. These lines of Machines are together called a "Consist". They work on or right beside the tracks, sometimes quite a distance apart, and they are always moving along the track. The "front" of the Consist is moving in the direction of the work, with the next Machine following, and so on.

[20] For about 3 or 4 months over the winter, which can be from the beginning or the middle of December to the middle or end of March the following calendar year, depending on the snowfall, some of the ES employees work on snow removal from tracks and switches and related winter tasks. The Railway's witness Dan Berek testified that at the time of the hearing, there were approximately 50 winter jobs available, whereas in prior years there were only about 15 or 20. His evidence was that only employees with very high seniority would obtain the available Group 1 Machine Operator jobs in the winter.

[21] The evidence established that several times a year, ES employees have to bid on positions in the Gangs and for winter work. The Railway's Bulletins list the positions required to be filled and the Crews and location in which the Crews will work. The Railway is required to award the positions based on a combination of 1) seniority in accordance with the Collective Agreement; and 2) the qualifications of the bidder to operate the specific Machine.

[22] Witnesses testified that there are different types of Machines, classified into different groups (Groups) – Group 1, 2, 3 and 4 and Special Machines - requiring different qualifications, and in particular, requiring different Rules Card qualifications. To obtain the qualifications, employees must take a course and pass a test. The Group 1 Machines usually require the Operator to have either an E Card (a lower level Card) or a D Card (higher than an E Card).

[23] The evidence established that a significant difference (although not the only difference) between an E Card and a D Card is that with a D Card, the holder is capable of taking out what is called “Track Protection” and “Sub-foreman Protection”, which will be explained in detail later in this Decision. Put simply, the Railway’s evidence established that the E Card course and test is about knowledge of the CROR and the Railway’s Rules; the D Card course and test is about knowing those same Rules but also being able to interpret and apply them on the job, which would necessarily include the act of taking Track Protection.

B. Taking Track Protection on the Rails

[24] The purpose and logistics of taking Track Protection were central to this inquiry, and an understanding of what it entails is required to decide whether literacy is a *bona fide* occupational requirement. During the hearing, there was extensive evidence provided by many of the Complainant’s and the Respondent’s witnesses regarding Track Protection. Testimony was given by, among others:

A. Richard Alward, longtime trainer for the Railway who taught the E and D Card courses and marked the tests,

B. Foremen John Montgomery, Kevin Hutchings, Gilbert Ouellette, and Foreman B (whose name has been anonymized due to reliance on highly personal information about his earnings), who all took out Track Protection throughout their careers,

C. Mr. Kelsh’s former supervisor Kenneth McCormack,

D. the Railway’s General Manager of Regulatory and Operating Practices Keith Shearer, and

E. Mr. Kelsh himself.

[25] The evidence on this matter was largely uncontroverted and I have summarized it here.

[26] ES Crews work on or next to live tracks on which trains run throughout the day. Therefore, when a Crew is working on or near a live track, that Crew must be protected from being hit by a moving train, which could cause injury or death to individuals on the

Crew or on the train, or both, damage to Machines and the train, damage to property, to the public or to the environment.

[27] To protect the Crew, that portion of the track or area near the track on which the Crew is working on any given day must be blocked off from trains travelling on the same track. One Foreman of a Crew usually takes out a Track Occupancy Permit (TOP) to secure the area where the Crew works. He communicates with the Rail Traffic Control (RTC), which is akin to Air Traffic Control in airports, but with respect to railways, and which controls the movements of trains. The Railway's RTC is in Calgary. By radio, the Foreman tells the RTC the location and length of track which the Crew needs the RTC to block off, designating the limits of that length by either mile markers – for example, from Mile 2 to Mile 12, or designating the area by describing it as being from signal X to signal Y, or by using other identifiable markers.

[28] The RTC then tells the Foreman the parameters of the TOP, which the Foreman must write down on a specific form. The Foreman must then repeat to the RTC both the TOP limits and the pre-printed words on the form, word for word. If the Foreman's repetition is correct, the RTC grants the Foreman the TOP within the parameters previously repeated. If the Foreman's repetition is incorrect, he must repeat it again and as many times as necessary until the RTC confirms that the Foreman has it correct.

[29] If the work protected by a TOP is completed and there is time left in the working day to do more, or if for some other reason, the Crew requires another TOP, the Foreman will radio the RTC, cancel the existing TOP once he is certain that no one would be in danger on account of the cancellation (see below), and request another TOP to protect another block of track, and the TOP process is repeated.

[30] At one time, only the Foreman would take out Track Protection. Then the Railway instituted a requirement that the Foreman give the first and last Machines in the Consist what is called Sub-Foreman Protection or Sub-foreman. The evidence was not clear as to when the Railway started to require the Sub-foreman system, but it seems to have been some time after 2003. The Railway's witness Keith Shearer testified that the purpose of

Sub-foreman Protection is to ensure that the Consist is bracketed by operators in the first and last Machines who specifically know the TOP limits and will not go beyond them.

[31] The procedure for Sub-Foreman Protection is that once the Foreman has obtained a TOP, he repeats the TOP parameters to the Machine operators in the first and last Machines in the Consist; those Machine operators then write the information on a specific form, repeat both the parameters and the pre-printed portion of the form back to the Foreman word for word – any errors in repetition mean that the TOP must be repeated again until correct. Before a Foreman can cancel a TOP, he must ensure that he tells each Machine Operator to whom he has given Sub-Foreman Protection that he is going to cancel the TOP, in order to make sure that each Sub-Foreman is in the clear and not still on the track either by themselves or with any other part of the Crew. Sub-Foremen do not communicate with the RTC – they only communicate with the Foreman giving out the Protection. Only the Foreman communicates with the RTC.

C. Mr. Kelsh's background and career with the Railway

[32] Mr. Kelsh testified that he has had problems with reading words and sentences his whole life. He can read and write numbers pretty well and stated that he loved math in school. He is two credits shy of a high school diploma – he quit high school before he finished it because he felt a high school diploma would not mean anything because he could not read or write properly.

[33] He learned the rules of the road by having his brother read the rules to him and then repeating them back to him, and obtained his driver's licence at 16 or 17 by doing an oral test. He successfully trained racehorses for many years. He obtained his A Trainer's licence from the Ontario Racing Commission by taking and passing an oral test after studying the book for about two years. Eventually he left the horse business to go to work for the Railway.

[34] Mr. Kelsh has worked for the Railway in its Engineering Services Division since mid-1998. The evidence established that in 1998, the Railway doctor who examined him

for his pre-employment medical exam helped him fill out the necessary medical form and noted on it that Mr. Kelsh “has difficulty reading”.

[35] Mr. Kelsh started at the Railway as a Labourer on a Gauging Crew on the tracks for about six months, then became a Group 2 Machine Operator.

[36] In early March, 1999, he began operating other Machines, including self-propelled Machines. In 1999, he bid for and was awarded the Spiker, then classified as a Group 2 Machine which did not require a D Card. He operated the Spiker for a couple of weeks, when a more senior employee “bumped” him from the position, in accordance with the Collective Agreement.

[37] There was no dispute about the positions Mr. Kelsh held from March 19, 1999 to the end of 2004, starting with Extra Gang Labourer and including Machine Operator Helper, Groups 1, 2, 3 and 4 Machines Operator and Assistant Machine Operator. He received the basic training given by the Railway when he was hired, but afterward, he learned to operate the Machines on the job. He was taught by his coworkers.

[38] There was contradictory testimony and some disputed documentary evidence about which specific Machines Mr. Kelsh operated and when, particularly from 2006 to the end of 2010. The Position Histories from the Respondent are Exhibits C4-1, C4-2 and C4-3. They set out whether the position was a Group 1, 2 or 3 Machine Operator, a Trackman or other position, but do not name the actual Machine.

[39] I find that whether Mr. Kelsh operated the Stake Truck is relevant to the issues in the Complaint. Therefore, I have reviewed relevant testimony and exhibits and made the following findings of fact on when Mr. Kelsh operated the Stake Truck.

[40] The evidence was clear that Mr. Kelsh operated the Stake Truck for multiple, significant periods of time between the years of 2007 and 2010, with the Railway’s knowledge and informal accommodation in place. Although there were some dispute as to the exact dates and, in some cases, the manner of his obtaining the roles (for example, by bid versus via the “45 day provision”, discussed later), no one argued that he had not

operated this Machine. Below are the periods where I find the preponderance of evidence established that Mr. Kelsh was operating a Stake Truck:

A. June 25, 2007 to December 16, 2007: The Complainant's witnesses John Montgomery, who has been Mr. Kelsh's Foreman with him in the Stake Truck; Foreman B., and Kenneth McCormack, his Supervisor, all testified that Mr. Kelsh operated the Stake Truck in 2007. The Respondent's 2005-2008 Award Summary and Bulletin 07-02 Awards Corrector #1 showed the award of the position to him.

B. September 9, 2009 to January 4, 2010: I accept the testimony of both Mr. Kelsh and Nicolas Rehel, who has been a Supervisor and a Foreman, on this point, and also take into account Position History #3 to find that Mr. Kelsh obtained the Stake Truck position by bid and operated it during this period.

C. September 1, 2010, for approximately one and a half months in Havelock. Based on the testimony of Mr. Kelsh, Mr. Unyi and Mr. Berek, and the Collective Agreement, I find that if a position is required for less than 45 calendar days, the Collective Agreement states that the position does not have to be put up for bid; rather, it can be filled by seniority or movement within a Crew (45-day provision). The evidence established that this occurred in 2010 and Mr. Kelsh obtained a Stake Truck role in this fashion.

   Notwithstanding that Position History #3 shows Mr. Kelsh as operating the Tie Crane until January 6, 2011, I accept his testimony, and that of Mr. Gilbert Ouellette and Mr. Andreas Unyi that around September 1, 2010, the Gangs were split and Mr. Kelsh operated the Stake Truck.

D. Late October/early November 2010 – December 17, 2010: I also find that the 45-day provision factored into the Stake Truck position Mr. Kelsh had in Bolton in 2010. He testified that he was on the Stake Truck from August 2010 to December 17, 2010. He obtained a Stake Truck position in Bolton around the end of October or beginning of November by exercising his seniority and bumping someone from the Stake Truck. I accept the testimony of Mr. Kelsh, Mr. Unyi and Mr. Ouellette, Mr. Kelsh's Foreman in Bolton, on this point.

   According to Mr. Ouellette, Mr. Kelsh took on extra duties in Bolton for approximately 2 to 3 weeks, and Mr. Ouellette arranged to have him paid at Assistant Foreman rates.

[41] The evidence also established that Mr. Kelsh operated the Stake Truck on a swing bridge in Peterborough for a period of two and a half months in the spring/summer of 2015. When the Foreman went on holidays, he was concerned about Mr. Kelsh operating the Stake Truck by himself, so Mr. Kelsh was placed on the Section Crew doing labourer's work.

Mr. Kelsh and the Rules Cards

[42] In August 2002, Mr. Kelsh took the 4-day initial D Card course. He testified that he told the Respondent's Instructor, Richard Alward, that he needed an oral test in order to pass. However, Mr. Alward administered the D Card course tests in writing and required written answers, including for the final test. There was no dispute that Mr. Kelsh failed the final D Card test. Mr. Alward testified that immediately after Mr. Kelsh failed, Mr. Alward asked him questions about the CROR to see if Mr. Kelsh knew enough for CP to issue him an E Card. He did and obtained an E Card.

[43] On April 13, 2005, Mr. Kelsh took the written E Card test because his 2002 E Card was going to expire. He failed on this occasion and on two subsequent attempts on the written test in 2006, with the result that from April 13, 2005 to October 22, 2008, a period of three and a half years, Mr. Kelsh had no Cards at all. He testified that throughout this period, he asked various people in management for verbal E and D Card tests instead of written tests. Although he held no cards, he was accommodated by the Railway during this period – they allowed him to operate Group 1 Machines in the middle of the Consist and he continued to earn his regular rate of pay.

[44] In 2007, after consultations among the Railway's Employee Relations department and other management and departments, the Railway decided it needed a better understanding of Mr. Kelsh's limits in reading and writing, and arranged, at its expense, for a psychologist to assess Mr. Kelsh. Under "Reason for Referral", Dr. Feak, the psychologist, wrote that he was to conduct a psychoeducational assessment of Mr. Kelsh, at his employer's request, to "rule out a learning disability", explore his "cognitive functioning and academic skills" and assess "social and emotional factors influencing his current difficulties".

[45] In his report, which I have designated confidential as set out later, Dr. Feak concluded that a written test would not determine Mr. Kelsh's knowledge of the Rules and that, generally speaking, asking Mr. Kelsh to respond to verbal questions as opposed to written ones would give him a better opportunity to demonstrate his knowledge and comprehension. Dr. Feak testified that he did not have any knowledge of the particular Cards or Rules of the Railway, and that his was a general assessment.

[46] In my analysis later, I rely on the Feak report solely with respect to his assessment of Mr. Kelsh's ability to complete a written test, having attributed very little weight to the remainder of its conclusions and Dr. Feak's testimony on other matters, for reasons which were first outlined in *Kelsh v. Canadian Pacific Railway*, 2016 CHRT 9.

[47] Following receipt of Dr. Feak's analysis and further internal corporate consultations and discussions between various departments and managers, as well as Mr. Berek's and Mr. Alward's assessments of Mr. Kelsh on the job in the field, the Railway allowed Mr. Kelsh to take the test orally for the E Card. On October 22, 2008, Mr. Kelsh obtained his E Card by taking a verbal rather than a written test. Out of forty questions, he had only one wrong answer.

[48] The evidence established that Mr. Kelsh went on to attempt the D card certification again in 2011, but without accommodation, and did not pass the D Card test.

[49] At the time of the hearing, he had renewed his E Card in 2011 and 2014 by passing oral E Card tests.

D. The Railway's approach to Rules Card testing

[50] Mr. Kelsh's history, as outlined above, raises the question of why the Railway did its testing this specific way, and what governed its decision-making on this issue. The evidence established that the *Railway Safety Act* does not prescribe the method in which a railway must test its employees to determine whether they meet the CROR requirements. For instance, the testing for the E and D Cards were established by the Railway itself.

[51] In June of 2013, Transport Canada wrote to the Railway's Director of Regulatory Affairs in response to a query regarding the possibility of alternate methods of examining prospective D Card holders. The response included the following:

> As the CROR has many rules that require the copying of clearances and instructions between foremen, CP Rail would need to clearly demonstrate how an employee who is unable to pass the written exam would be able to fulfill such requirements. If CP determined that an oral rules exam would be administered, Transport Canada would then require CP Rail to demonstrate how such employee would be able to meet the written requirements of the

> CROR for example CROR Rule 136(a), Rules 840.3(b), 842(a) and (b), 843(a), 854, 855, 864, and 865.
>
> Transport Canada is unaware of other methods of testing that would demonstrate an employee's ability to read and understand the CROR.
>
> [Exhibit C-1 Tab 153]

[52] The Railway's witness Kari Giddings, Employee Relations Advisor, testified that in the course of dealing with the Complaint, she asked the Railway's Rules Department why the D Card test had to be in writing. Exhibit R4-126, the September 5, 2012 email answer from Jim Kienzler, included two attached documents, one of which was the Railway's 1991 Regulatory Qualification Standards Manual (1991 RQS Manual).

[53] I find that the 1991 RQS Manual covers, among other things, the Railway's standards for employees to qualify for certification in the CROR and the manner of testing for Rules Cards. It also sets out the Card requirements for all the different types of Machines and vehicles "equipped with hi-rail equipment", for Group 1 and Special Group Machines and for outside contractors operating equipment, trains and Machines (pp.10-12).

[54] Mr. Kienzler wrote, in part of his email:

> "The requirement that all rules qualification exams for D card be in writing has always been a CP requirement going back as far as we can find. In the 1991 version (still the official approved version) there was an exception for E card qualification where the test could be oral for literacy reasons, but never for D card."

[55] The Respondent's witness Keith Shearer testified that what was meant by "the official approved version" was not legislative approval of the 1991 RQS Manual, but rather internal Railway corporate approval.

[56] It is difficult to establish whether the 1991 RQS Manual was in force at the relevant times in this Complaint and indeed whether it was enforceable or an informal policy, what it meant and how it intersected with the Railway Safety Act and Regulations, the CROR and CP's own Rules. In her closing submissions, the Respondent's counsel candidly stated that the evidence was confusing.

[57] I find that the relevant part of the 1991 RQS Manual is the following:

> "In order to comply with CROR General Rule A(vii), Minimum Qualification Standards Regulations (CTC 1987-3 Rail) … the following instructions apply:
>
> (a) No railway company shall permit any person to work in any of the positions listed herein which is subject to Operating Rules without first having passed the required written examination at prescribed intervals.
>
> Exception: The incumbent of a Maintenance of Way position subject to minimum E level of examination on the Operating Rules, who cannot pass the required written examination due to literacy problems, must pass an oral examination at prescribed intervals."

[58] The Railway's witness Richard Alward retired November 1, 2014 after working for CP for 31 years. He started on a Gauging Crew and worked up to Section Foreman. In February 1998 he became a Canadian Rail Operating Rules (CROR) Trainer, instructing Engineering Services Crews, in Southern and Northern Ontario, for all departments, including Track Programs, Maintenance of Way, Signals and Communications and Bridge and Building. He was in that role from 1998 to November 1, 2014. He was the Rules Instructor who taught the D and E Card courses and administered and marked the tests for those Cards when Mr. Kelsh took the courses and did the tests. He continued in that position until his 2014 retirement.

[59] Mr. Alward testified that in 2005, the Railway no longer permitted any oral testing on any Rules Card. He testified that even though the proposed revised Administrative Guidelines for testing in Exhibit R1-32 referred to September 30, 2005 as being the effective date of this change in policy, he and the other Trainers were told earlier in 2005 that this would become policy and they had started administering only written tests before September 30. I find that this was why when Mr. Kelsh tried to renew his E Card on April 15, 2005, he was given a written E Card test, which he failed.

[60] Mr. Alward concurred that the Draft Administrative Guidelines for testing (2005) brought some changes to the 1991 RQS Manual. The change meant that there would be no further grandfathering, and only written tests – there were no oral tests anymore. The Trainers also had to follow the new grading guidelines.

[61] The documentary evidence confirmed that in 2007 the Railway drafted proposed revisions to the RQS Manual which were still being followed as of 2012 though never formally approved, (Exhibit R4-126, pp. 15-21). I find that the portion of the Draft 2007 RQS Policy relevant to the availability of oral testing is on page 21, and states:

> "All final examinations are in writing.
>
> EXCEPTION: Those that have had rules qualifications previous to this policy are permitted to conduct a [sic] "E" level test orally. Such employees must additionally demonstrate competency during field observation."

[62] I also find that the 2007 proposed Exception is materially different than that in the 1991 RQS Manual, as it does not refer at all to "literacy problems" and requires the employee to have been previously Rules-qualified – a form of "grandfathering". It also adds the requirement for a demonstration of competency in the field.

[63] Mr. Kelsh testified that he was not aware of the 1991 RQS Manual or the exception for oral testing therein until December 2015, when he was preparing for the hearing with his lawyer, who read it to him. Many of the Railway's and Complainant's witnesses also testified that they did not know the Manual existed until it was produced to them at the hearing, including the Respondent's witness Dan Berek and the Complainant's witness Kenneth McCormack, who had been Mr. Kelsh's Supervisor on many Crews. Mr. Kelsh also testified that when he took his first written D Card test in 2002, Mr. Alward did not tell him about the 1991 RQS Manual.

[64] I conclude from the above documentary evidence and testimony that the Railway's general approach to oral Rules Card testing was and is as follows:

A. Except in a very rare instance, oral testing was only available for the E Card;

B. Between December 1, 1991 and some time in 2005, in accordance with the 1991 RQS Manual, it only permitted such oral testing if an employee could not pass the "required written examination due to literacy problems".

C. From 2005 until sometime in 2006, a Draft revised RQS Policy (2006 Draft of Revised RQS Manual) was being followed, which ruled out oral testing for any reason for any employee, grandfathered or otherwise.

D. From sometime in 2007 until the time of the hearing, a later draft (2007 Draft of Revised RQS Manual) was being followed. This document permitted oral testing for the E Card, on the conditions that the employee had obtained rules qualifications before the Draft 2007 RQS Policy was composed, and that the employee demonstrated competency in the field.

V. Law: Discrimination under the *Canadian Human Rights Act*

[65] A discrimination complaint based on a disability in employment is brought pursuant to sections 7(b) and 10(a) of the *Act* which state, respectively:

> 7 "It is a discriminatory practice, directly or indirectly…
>
> (b) in the course of employment, to differentiate adversely in relation to an employee,
>
> on a prohibited ground of discrimination."
>
> 10 It is a discriminatory practice for an employer, employee organization or employer organization
>
> (a) to establish or pursue a policy or practice …
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[66] To prove a *prima facie* case of discrimination, the Complainant is required to show:

A. that he had a characteristic protected from discrimination under the *Act*,

B. that he experienced an adverse impact with respect to employment,

C. and that the protected characteristic was a factor in the adverse impact (*Moore v. B.C. (Education)*, 2012 SCC 61 (*Moore*), para. 33.

[67] This must be established on a balance of probabilities (*Québec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc.,* 2015 SCC 39 (*Bombardier*), at paras. 59, 65).

[68] In this case, the Respondent relies on a test laid out in *Shakes v. Rex Pak Ltd.* (1981), 3 C.H.R.R. D/1001 (*Shakes*) at para. 8918 (Ont. Bd. Inq.) in its arguments about whether or not Mr. Kelsh has discharged his burden. The Tribunal notes that the Federal Court of Appeal, in *Canada (Canadian Human Rights Commission) v. Canada (Attorney*

General), 2005 FCA 154, made it abundantly clear that *Shakes* is not to be automatically applied in a rigid or arbitrary fashion in every hiring case:

> [24] Counsel for the Attorney General argued that, as a matter of law, a *prima facie* case of discrimination can normally only be established in employment cases if the Commission adduces comparative evidence in the form of information about the successful candidates. While there can be exceptions (as, for instance, where there were no other candidates or comparative information is not available), a Tribunal must apply *Shakes*. It is a question of law whether *Shakes* is applicable to the adjudication of any given employment discrimination complaint. Therefore, counsel said, because comparative information was available in this case, the Tribunal erred in law by not applying *Shakes*.
>
> [25] I do not agree. The definition of a *prima facie* case in the adjudication of human rights complaints was considered in *Lincoln v. Bay Ferries Ltd*., which was decided after the decision under appeal in the present case was rendered. Writing for the Court, Stone J.A. said (at para. 18):
>
> > The decisions in Etobicoke, supra, and O'Malley, supra, provide the basic guidance for what is required of a complainant to establish a *prima facie* case of discrimination under the Canadian Human Rights Act. ... The tribunals' decisions in Shakes, supra, and Israeli, supra, are but illustrations of the application of that guidance. ... As was recently pointed out by the tribunal in Premakumar v. Air Canada, [2002] C.H.R.D. No. 3, at paragraph 77:
> >
> > While both the Shakes and the Israeli tests serve as useful guides, neither test should be automatically applied in a rigid or arbitrary fashion in every hiring case: rather the circumstances of each case should be considered to determine if the application of either of the tests, in whole or in part, is appropriate. Ultimately, the question will be whether Mr. Premakumar has satisfied the O'Malley test, that is: if believed, is the evidence before me complete and sufficient to justify a verdict in Mr. Premakumar's favour, in the absence of an answer from the respondent?
>
> [26] In my opinion, *Lincoln* is dispositive: *O'Malley* provides the legal test of a *prima facie* case of discrimination under the Canadian Human Rights Act. *Shakes* and *Israeli* merely illustrate what evidence, if believed and not satisfactorily explained by the respondent, will suffice for the complainant to succeed in some employment contexts.

> [27] In other words, the legal definition of a *prima facie* case does not require the Commission to adduce any particular type of evidence to prove the facts necessary to establish that the complainant was the victim of a discriminatory practice as defined in the *Act*. Paragraph 7(b) requires only that a person was differentiated adversely on a prohibited ground in the course of employment. It is a question of mixed fact and law whether the evidence adduced in any given case is sufficient to prove adverse differentiation on a prohibited ground, if believed and not satisfactorily explained by the respondent.

[69] The leading test for establishing a case of *prima facie* discrimination remains *Moore, supra,* and this is the test I have applied.

[70] A Respondent has three options in responding to an allegation of *prima facie* discrimination. The Respondent may refute the evidence of discrimination presented by the Complainant; it may establish a statutory defence that justifies the discrimination (a *bona fide* occupational requirement); or it may do both (see *Bombardier,* supra, para. 64).

[71] In this case the Railway relies on section 15 of the *Act*, which is interpreted in light of the three-step test set out by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3 (*Meiorin)* at paragraph 54, to establish that an occupational requirement is *bona fide*:

> [...]
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job.
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work related purpose, and;
>
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

VI. Reasons

[72] In this case, Mr. Kelsh has made complaints of discrimination pertaining to his specific case regarding written D Card testing, as well as broader complaints about the Railway's policies and procedures. They will be addressed in turn for each step of the test below.

[73] The Railway's position is that Mr. Kelsh has not proven a *prima facie* case of discrimination. The alleged discrimination, they argue, is framed in the language of failure to accommodate, which is not a stand-alone ground of discrimination under the *Act*.

[74] Should a *prima facie* case be made out, the Railway argues that it accommodated Mr. Kelsh to the point of undue hardship, and that accommodating him further would impose serious risks to safety and costs.

A. Was requiring Mr. Kelsh to take the D Card test in writing discriminatory?

(i) The test for discrimination

Protected Characteristic

[75] The *Act* defines "disability" in s. 25 as follows: "disability means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug."

[76] The evidence established that Mr. Kelsh is permanently functionally illiterate due to cognitive impairments, and has been for his whole life. Both parties agree that he has a disability as contemplated by the *Act*, and I am satisfied of this as well.

Adverse Impact

[77] As outlined earlier, Mr. Kelsh was unable to pass the written D Card test and thinks he would have been able to pass if he had been given the opportunity to take it orally. Therefore, he says he was adversely affected by the written requirement because it

prevented him from obtaining a D Card. His belief is that he does possess the necessary skills and knowledge for the test. He thinks he knows as much as the people who have passed the written test.

[78] The Railway argued that Mr. Kelsh did not experience any adverse impacts. They based their analysis on the fact that all Group 1 Machine Operators earn the same hourly wage, whether they have an E Card or a D card.

[79] I disagree with this narrow view, since Mr. Kelsh had fewer choices of jobs as a holder of only an E Card, regardless of pay, and the evidence establishes that the inability to get a D Card clearly impacted his sense of self-worth and confidence.

[80] I find that Mr. Kelsh did experience an adverse impact, namely that he was unable to obtain a D Card, which in turn limited his choices and impacted him psychologically

Nexus between Characteristic and Adverse Impact

[81] Dr. Feak's basic conclusion was that Mr. Kelsh would not be able to show what he knows in a written test. Rather, the psychologist opined, he would be able to demonstrate his knowledge and abilities much better by way of an oral test.

[82] Mr. Kelsh also testified that he cannot read well enough to pass the test in writing. The documentary evidence confirmed that he failed the written E and D Card tests on multiple occasions, and he described himself as "going blank" when he had to spell words. However, he passed the E Card test in 2008 with only one error out of 40 questions when Mr. Alward read the test aloud to Mr. Kelsh; and Mr. Kelsh gave oral answers, and again passed the E Card tests via oral testing in 2011 and 2014.

[83] The Tribunal finds that the evidence clearly established that Mr. Kelsh's disability prevented him from passing the written D Card test; there was a nexus, and a strong one.

[84] Therefore, I find on a balance of probabilities that Mr. Kelsh has met his burden for establishing a *prima facie* case of discrimination regarding the requirement that the D Card test be in writing. I must now consider whether the Respondent has established that the requirement can be justified under s. 15(2) of the *Act*.

(ii) The Test for Justification

Did the Railway adopt the standard for a purpose or goal rationally connected to the function being performed

[85] The Railway's position is that the D Card exam is a facsimile of the reading and writing functions required in field operations, particularly the procedures and requirements for TOP and Sub-foreman Protection. Mr. Kelsh, by contrast, argues that many D Card operators actually rarely, if ever, have to take out Track Protection.

[86] Based on the evidence, I find that the effective difference between the D and E Cards is that a D Card means that the holder can take out TOP or receive Sub-foreman Protection, and an E Card holder cannot. TOP is absolutely required for the safety of individuals working in the Consist; individuals on a movement or train; the safety of the environment; the general public; and the Railway's property (being the Machines and infrastructure).

[87] Therefore, I find that the evidence established that the standard was adopted for a purpose (namely safety) rationally connected to the function performed (operating Machines where taking out Track Protection may be necessary).

Did the Railway adopt the standard in good faith and belief that it was necessary to fulfil the purpose or goal?

[88] The Railway's position, as stated in its closing argument, is that "[T]he safety standards at CP have evolved over time as a result of accidents or incidents which have occurred in the past. The rules, in effect, have been written in blood."

[89] The evidence established that it is necessary to write down the TOP and to read it and read it back correctly word for word to the RTC, or, if acting as Sub-foreman, read it back to the Foreman word for word to ensure that the TOP has been correctly received and recorded. The evidence established that Foremen and Sub-foremen cannot safely rely on memory and that the risks of going outside of Protection are great. For example, the Railway's Keith Shearer was one of the witnesses who recounted a situation which

happened in March 2016 in Northern Ontario where a Canadian National Railway Foreman took his Crew outside the limits of Protection and it collided with a train travelling 50 miles an hour. The Railway's witness Dan Berek testified that he would not feel comfortable having himself or his employees on the track under the Protection of someone who could not read.

[90] Similarly, the Complainant's witness, retired Foreman Clifford Saith testified that, in his view, it was a much safer system to have Protection documented by writing it down: "Documentation helps us remember. If you have a piece of paper, you can refer to it. If they call you up and say stop at this limit, if you write it down, you can look at it. It helps to remind the Sub-foreman or Machine operator that if he goes past the limit, there could be a train in the vicinity, and hit him."

[91] This is not a quantitative issue as framed by Mr. Kelsh, it is a qualitative one. A single error, in an otherwise unblemished record, could be catastrophic. Trains are not easy to stop and the risks they pose are great.

[92] Therefore, I find that the standard was adopted in good faith.

Was the standard reasonably necessary to accomplish its purpose or goal, because the Railway could not accommodate functionally illiterate employees without incurring undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost?

[93] The evidence established that while the Railway accommodated Mr. Kelsh in a variety of ways, they very clearly drew the line at accommodating by means of an oral D Card test. They never offered that accommodation to Mr. Kelsh, or any other employee. They say they did accommodate him, however, by:

- having him assessed for a learning disability to determine the scope of accommodations required;
- sending him for remedial reading classes, which he dropped out of;
- allowing him to continue operating Machines within the Consist even when he did not hold any Card at all; and

- making arrangements for him to take his E Card examination orally.

[94] Certain of the Complaint's witnesses, most notably retired Foreman Clifford Saith, did take the view that Mr. Kelsh could have operated many of the D Card Machines safely.

[95] However, with respect to the link between literacy and Track Protection, I was more convinced by the evidence of the many witnesses who echoed the sentiments expressed in the Transport Canada letter. For example, Keith Shearer testified that, in his view, a requirement of any D-Carded position itself "is that you have to be able to write the instructions, and if you can't write the exam, you certainly can't write the instructions." Likewise, as a recently retired CROR Trainer, Mr. Alward testified that an oral D Card test would not properly measure the candidate's ability to take out a TOP or receive Sub-foreman Protection.

[96] Although his main position was that taking out Track Protection was a rare occurrence and one that a Machine operator could always turn down, Mr. Kelsh also argued that he would be capable of both taking out Track Protection and receiving Sub-foreman Protection if needed, despite his literacy deficit. He testified that he had informally practised and discussed TOPs and Protection with his former Foreman in Oshawa, Clifford Saith. However, I find that Mr. Saith, in his testimony, when questioned about this, "walked back" the concept of his practising TOP and Sub-foreman Protection with Mr. Kelsh, stating in effect that he could not call what he and Mr. Kelsh did on the job as really replicating taking out a TOP or doing Sub-foreman Protection. Given all of the evidence provided as to the crucial role of reading, writing and repeating in this process, I find that the weight of the evidence militates against Mr. Kelsh's argument.

[97] The evidence established on a balance of probabilities that the requirement for a written D Card test is a *bona fide* occupational requirement and therefore, this aspect of Mr. Kelsh's Complaint is not substantiated.

B. Was the Railway's policy of classifying Machines discriminatory?

[98] The *Act* states at s. 10(a) that…

> It is a discriminatory practice for an employer, employee organization or employer organization
>
> to establish or pursue a policy or practice
>
> ....
>
> that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[99] Mr. Kelsh's position was that the majority of D Card holders were never required to take out Protection, or would be unwilling to if asked to and that fewer Machines should require the operator to have the D Card.

[100] The Railway's witness Dan Berek's testimony was that the Railway had done a review of the Card requirements for Operators of Engineering Systems Machines in January, 2014, as evidenced also in Exhibit R2-203, titled "Position Qualifications in 2014".

[101] The evidence established that there are many considerations which go into the decision regarding whether a Machine should be designated as requiring a D or E Carded operator, and in which Group a Machine belongs. For example, the same Machine can be a D Card in one Crew and an E Card in another depending on its position in the Consist. Further, Mr. Kelsh himself testified that at one point pursuant to negotiations between the Union and the Railway, the Spiker's Group designation changed to a Group 1 Machine. Mr. Shearer also testified that while he believed the Engineering Services department and not the Rules department was responsible for deciding which Card an operator had to hold to operate a specific Machine, he also thought there was an element of negotiation between the Railway and the Union on this issue under the Collective Agreement.

[102] It is important to note that the Union is not a party to this Complaint. It has not had an opportunity to make submissions on the changes the Complainant proposes for the Rules Card requirements for Group 1 Machine Operators.

[103] Most importantly, I find that the Complainant's submissions on the proposed changes were so vague as to preclude an analysis under the *Moore* test: for example, he submits that too many Group 1 Machines require D-Carded Operators because in his view many of those Operators will never have to take out protection. However, with respect to

certain Machines, there was virtually no evidence led at all. Moreover, with respect to other Machines, the allegations were not fully particularized. Finally, although there was hearsay evidence to this effect from multiple witnesses, the Complainant did not introduce a single witness who held a D Card, occupied a D Card position, and had never taken out Track Protection.

[104] Mr. Kelsh made specific claims regarding snow fighting Machines, and the Stake Truck. In regards to the snow fighting Machines, there was evidence led on two fronts. One, that an operator of a snow fighting Machine or snow plow almost always works by themselves and that the operator is typically responsible for his own safety and Protection when at risk of fouling the track. Although some of the Protection required for snow removal work in a Yard is only the placement of flags around the work, Protection is nevertheless required. Two, there were very few winter jobs available and those were obtained by the employees with the very highest seniority, which likely would not have included Mr. Kelsh for the periods under consideration.

[105] By contrast, there was extensive evidence and argument about the role and requirements of the Stake Truck Operator position, and specific allegations were made in the Complaint and Statement of Particulars in relation thereto. Therefore, I have limited my inquiry into the overbroadness allegation to this Machine only.

C. Was the decision to bar Mr. Kelsh from driving the Stake Truck because he did not have a D Card discriminatory?

(i) The test for discrimination

Protected Characteristic

[106] As outlined earlier, this step is satisfied.

Adverse Impact

[107] The adverse impact as framed by Mr. Kelsh is that the Railway stopped allowing him to operate a Stake Truck for most of the time after December 2010. Mr. Kelsh did

testify that he operated a Stake Truck in 2015 in Peterborough, but when the Foreman went on holidays he removed Mr. Kelsh from the Stake Truck because the Foreman was concerned that Mr. Kelsh would be operating it alone.

[108] Mr. Kelsh testified that he felt hurt by the loss of Stake Truck operator opportunities. His evidence was that he believed this reflected a mean-spiritedness on the part of the Railway because they had let him operate it before, which he did without incident. He felt that when the Railway needed him operationally to do the job, he had done it and could do it, but when they no longer needed him, he could not.

[109] Mr. Kelsh's testimony was that he felt that being denied the opportunity to operate his preferred Machine was reflective of the Railway's view of him as someone having a lack of intelligence and a lack of ability, who the Railway wanted to push out.

[110] In determining whether this constitutes an adverse impact, the following from *Royal Canadian Mounted Police v. Tahmourpour*, 2009 FC 1009 is useful:

> What is the meaning of "adverse differentiation"? "Differentiation" is a noun that in its ordinary meaning means a distinction between things. "Adverse" is an adjective that in its ordinary meaning means harmful, hurtful or hostile. In my view, "adverse differentiation" means a distinction between persons or groups of persons that is harmful or hurtful to a person or a group of persons. It can also, in my view, mean a distinction that is made or indicated in a hostile manner, where it is the manner of its making that harms or hurts. If it is to be an adverse differentiation that is prohibited by human rights legislation, the distinction must be based on or made because of one of the prohibited grounds set out in the legislation.

[111] In the Federal Court judge's view the treatment at issue in that case (an RCMP cadet being told in front of his troop-mates that he was being permitted to wear a religious pendant as an exception to the general prohibition against jewellery) did not qualify as "adverse" treatment.

[112] The Federal Court of Appeal seemed to agree that "adverse" treatment connoted "…something harmful, hurtful or hostile." (See 2010 FCA 192, para. 12). However the FCA disagreed with the FC that adverse treatment had not been proven on the facts of the case. In the FCA's view, there was evidence that the incident was hurtful to the complainant, and that it caused him to be subjected to uncomfortable questioning over the

next couple of days about his religious practices, adversely affecting his relationships with his troop-mates for a short time afterwards (paras. 13-14).

[113] The facts of the *Tahmourpour* case are significant, because they give context to what the Federal Court of Appeal is willing to accept as being “hurtful” or “harmful”.

[114] The Tribunal finds that a fairly broad and permissive definition of “adverse” is in keeping with the scheme of the *Act*, most notably s. 15(1), which in establishing the BFOR defence makes reference to “…any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment…” The words of the *Act* need to take into account the scheme of the *Act: Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at para. 33.

[115] In this case, I believe that the loss of the Stake Truck operator role was “harmful, hurtful or hostile” to the Complainant within the meaning of *Tahmourpour (supra)*. Therefore, this constitutes an “adverse impact” within the meaning of s. 7(b) and the *Moore* test (supra).

[116] Consequently, I find Mr. Kelsh did experience an adverse impact in relation to the Railway’s decision that he could not operate a Stake Truck without a D Card.

Nexus between Characteristic and Adverse Impact

[117] The Railway stopped allowing Mr. Kelsh to drive the Stake Truck based on his lack of a D Card. The Railway’s policy was that Stake Truck operators were required to have a valid D Card. Mr. Kelsh was unable to obtain a D Card, because of his disability as outlined above. Therefore, I find that there is a nexus between Mr. Kelsh’s disability and the adverse impact to him of not being permitted to operate the Stake Truck.

(ii) The Test for Justification

Did the Railway adopt the standard for a purpose or goal rationally connected to the function being performed?

[118] As the Stake Truck may operate on hi-rails, thereby giving it the ability to go on and off the track, taking out TOP is necessary when leaving and re-entering the Consist. Therefore, holding a D Card is rationally connected to the function being performed.

[119] Further, the evidence established that the Stake Truck is at times in the front of the Consist. While it is primarily the Foreman who takes out TOP throughout the working day, there was evidence that the Foreman periodically leaves the Stake Truck in order to perform other functions of his job, thereby leaving the Stake Truck operator alone.

Did the Railway adopt standard in good faith and belief that it was necessary to fulfil the purpose or goal?

[120] The Railway's evidence was persuasive that the standard was adopted in good faith. The Complainant's witness John Montgomery, and the Railway's witnesses Dan Berek, Keith Shearer, and Richard Alward all testified that the Railway's Rules are formulated in response to accidents and near-accidents that have occurred, whether on the Railway's job sites or those of other federally-regulated railways.

[121] The Railway established that the motivation behind the standard was sincere and based in a good faith belief that it was necessary for the safe and operation of the railroad.

Was the standard reasonably necessary to accomplish its purpose or goal, because the Railway could not accommodate functionally illiterate employees without incurring undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost?

[122] The Railway argued that being able to take out TOP or Sub-Foreman protection is a function interwoven with operating the Stake Truck. John Montgomery, Mr. Kelsh's onetime Foreman, testified about his perception of the risk should the Stake Truck

operator make an error, testifying that if the Stake Truck at the lead of a Consist were to erroneously go outside the limit of the track protection, the rest of the Machines could possibly follow it outside the limits, which would put all the Machines and operators in danger.

[123] The Railway argued that in the absence of literacy, an operator would have to rely on memory alone in staying within the limits of Protection. Additionally, there would be one fewer record of the steps taken in the event of an investigation of an incident. Even imperfect literacy could pose a major risk, the Railway argued: one of its witnesses, Richard Alward, testified that even one number or letter wrong on a TOP could lead to an operator going outside of the TOP limits.

[124] Furthermore, the Railway claimed that having a qualified employee supervise an unqualified one who is in control of the Group 1 Machine would create untenable safety risks. As a secondary concern, the Railway also argued that accommodating Mr. Kelsh would impose excessive costs on the Railway. An E Card holding operator on a D Card designated Machine, they argued, would slow production and create unreasonable excess cost for the Railway.

[125] This was not borne out by the evidence. For example, if the Foreman in the Stake Truck had to leave the Machine, Mr. Kelsh could have parked it off the rails and assisted with other tasks until the Foreman returned. Alternatively, Mr. Kelsh would seek permission from the Foreman to move the Stake Truck to a certain place, by calling the Foreman. He testified that he would never move the Stake Truck on his own volition without the Foreman present or instructing him. He further testified that over the course of his times operating the Stake Truck, his Foreman only had to leave the Machine and be out of its sight only once for an extended period to check on a derailed machine.

[126] The evidence established that another Machine operator, Vasily Cazacu, who also holds only an E Card, operated the D Card-required Speedswing. I accept Mr. Cazacu's testimony and that of others that Mr. Cazacu never took out Sub-foreman Protection because he did not hold a D Card.

[127] Foreman B testified that there were many different configurations and workarounds for determining who would take Protection, during his time as a Foreman. For example, he testified that sometimes an extra Foreman would be put into a given Machine in order to ensure the front and back of the Consist had people to take out Sub-foreman Protection. Foreman B's testimony was that there were D-Card holding Operators on D Card-required Machines who had never taken Sub-foreman Protection.

[128] Kevin Hutchings, a Foreman who has also acted as a Supervisor, Manager, and Roadmaster, also testified that some D Card holders refused to take Protection. He saw no reason why an E Card holder could not operate the Stake Truck, due to having a Foreman in it, and given that, in his experience, the Speedswing was always out front.

[129] Brent Hann, a D-Carded Group 1 Operator who has known Mr. Kelsh since he started working at the Railway, testified that he would have total trust in Mr. Kelsh's knowing his limits and not going beyond them. His belief was that if he were a Foreman and told Mr. Kelsh not to go beyond a certain mileage or a certain switch, he would have no concerns at all that Mr. Kelsh would fail to comply. Others, such as Andreas Unyi, echoed this testimony.

[130] Mr. McCormack testified that approximately twice a season a Stake Truck operator might have to go outside the Consist, perhaps onto the highway to obtain materials when there was a shortage and would therefore need to take out TOP or Sub-foreman protection in order to exit and re-enter the Consist. I find that another employee in the Consist, who holds a D Card, could have accompanied Mr. Kelsh in the Stake Truck without the Railway suffering undue hardship on the basis of cost, either for the second employee's wages or lost production time. These would be very infrequent occurrences which would last a few hours at most, and further, the second employee could assist Mr. Kelsh in carrying the materials on and off the Stake Truck, thereby potentially shortening any production down time.

[131] The evidence established that even if unintentionally, the Railway could have, and in fact did, accommodate Mr. Kelsh in the Stake Truck, in a way that did not represent an undue hardship considering safety or cost.

[132] The evidence established that while the imposition of a D Card requirement for Stake Truck operator was adopted for a rational purpose and in good faith, the Railway could still have accommodated Mr. Kelsh in the Stake Truck after 2010 and did not do so. To be clear, the Tribunal would never ask the Railway to lower or compromise its safety standards. However, the Railway has not established on the balance of probabilities that accommodation of Mr. Kelsh's specific needs in order for him to operate the Stake Truck would have imposed, or will impose, undue hardship on the Railway, having regard to health, safety or cost.

[133] Therefore, this aspect of the Complaint is substantiated and remedies will result from it.

D. Was the imposition of a Computer-based bidding process discriminatory?

[134] In his original Complaint, Mr. Kelsh wrote the following: "[M]y employer is not accommodating me in the bidding process. When the bidding was paper-based, I had no difficulties bidding on the job. Now that my employer has computerized the bidding process, I have difficulty bidding on jobs. I asked for paper-based bidding, which my employer provided, but not in a timely fashion. I have lost jobs due to this."

[135] Mr. Kelsh testified that 2011 was the first year the Railway sent the Bulletins by computer. Mr. Kelsh did not know how to use the computer to bid. Before 2011, the bidding had been done by fax, and although by the time of the hearing, he had a personal computer, he still faxed in his bids because he did not know how to bid by computer. He also does not know how to use email. In 2011, because he was working in Lambton Yard in Mississauga, he faxed his bids from there.

[136] The Railway usually mailed the Bid Sheets to him, but he did not get them in 2011, so he called Mr. Berek in January 2011, who quickly arranged to have the Sheets couriered to him. At the hearing, an Employee Relations Advisor for the Railway, Kari Giddings, testified that she also followed up by contacting the Engineering Crew Management Group and the local office to ensure that he got the bids in time.

Nevertheless, Mr. Kelsh felt he did not have much time to put in his bid, and felt this was discriminatory. I note that the Closing Date for Bids was January 28, 2011.

Protected Characteristic

[137] This step is satisfied.

Adverse Impact

[138] I find that the evidence, as outlined above, did not establish on a balance of probabilities that Mr. Kelsh lost any jobs or was late getting his bids in because the Railway put the bidding process online in 2011.

[139] The Respondent's witnesses provided evidence that they acted quickly to remedy any issue or delay experienced by Mr. Kelsh, and this evidence was not disputed. There was no evidence of any bidding concerns for Mr. Kelsh in the 2012 year or thereafter, arising from the Railway's bidding practices or policies.

[140] Therefore, I conclude that Mr. Kelsh did not experience any adverse impact as a result of the Railway's bidding practices or policies. The analysis of this allegation of discrimination under the *Act* will stop here, and I find that it has not been proven on a balance of probabilities.

E. Did the Railway retaliate against Mr. Kelsh for filing his Complaint?

[141] Section 14.1 of the *Act* states:

> "It is a discriminatory practice for a person against whom a complaint has been filed under Part III, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim."

[142] Mr. Kelsh amended his Complaint on March 12, 2013 to add a claim of retaliation. Mr. Kelsh's position is outlined in his Amendment to Complaint: "I allege that the

Respondent denied me the Front End Loader position in December 2012 and continues to do so in retaliation for the filing of my present human rights complaint."

[143] During the hearing, Mr. Kelsh raised numerous other allegations of retaliation, including various controversial comments, issues around bidding, and erosion of seniority. However, these allegations were never formally added to the Complaint or the Statement of Particulars. Furthermore, many of the allegations were not tied to the filing of the Complaint but were rather framed as retaliation in the more colloquial sense, or would be more properly characterized as alleged continued discrimination rather than a separate discriminatory practice, as Mr. Kelsh's counsel submitted during closing arguments. Therefore, I am only dealing with the allegation which was formally added to the Complaint via amendment.

(i) The test for retaliation

[144] The *Act* treats retaliatory acts as a discriminatory practice like all other allegations of discrimination. The *Act* specifies that it is a discriminatory practice for a person against whom a complaint has been filed, or any person acting on their behalf, to retaliate or threaten retaliation against the individual who filed the complaint or the alleged victim.

[145] In *Tabor v. Millbrook First Nation*, 2015 CHRT 18 aff'd 2016 FC 894, the Tribunal established that intent is not necessary to prove retaliation. The basic test for establishing retaliation on a balance of probabilities was laid out as follows at paras 6-9:

> The onus of establishing retaliation rests on the complainant, who must present a *prima facie* case. That is, the complainant must provide evidence which, if believed, is complete and sufficient to justify a verdict that the respondent retaliated against him or her (see Ont. Human Rights Comm. v. Simpsons-Sears, 1985 CanLII 18 (SCC), [1985] 2 SCR 536 at para. 28 [O'Malley]). To establish a *prima facie* case of retaliation, complainants are required to show that they have made a complaint under the CHRA; that they experienced adverse treatment following the filing of their complaint from the person they filed a complaint against or any person acting on their behalf; and, that the human rights complaint was a factor in the adverse treatment (see Moore v. British Columbia (Education), 2012 SCC 61 (CanLII) at para. 33).

> To prove a previous human rights complaint was a factor in any adverse treatment a complainant suffered, the Tribunal has sometimes required the complainant to establish proof of an intention to retaliate (see *Virk v. Bell Canada*, 2005 CHRT 2 (CanLII); *Malec, Malec, Kaltush, Ishpatao, Tettaut, Malec, Mestépapéo, Kaltush v. Conseil des Montagnais de Natashquan*, 2010 CHRT 2 (CanLII); and, *Cassidy v. Canada Post Corporation & Raj Thambirajah*, 2012 CHRT 29 (CanLII)). Others have examined a complainant's reasonable perception that the act is retaliatory instead of requiring proof of intent (see *Wong v. Royal Bank of Canada*, 2001 CanLII 8499 (CHRT); and *Bressette v. Kettle and Stony Point First Nation Band Council*, 2004 CHRT 40 (CanLII)). In the second group of cases, the reasonableness of the complainant's perception is measured so as not to hold the respondent accountable for unreasonable anxiety or undue reaction by the complainant.
>
> In my view, to require proof of intent in order to establish retaliation places a higher burden to substantiate this discriminatory practice than for any of the others outlined in the CHRA. This is not consistent with a broad and liberal interpretation of the CHRA or human rights legislation in general (see *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada),* 2015 CHRT 14 (CanLII) at paras. 3-28).
>
> Retaliation is a discriminatory practice under the *CHRA* (see sections 4 and 39 of the *CHRA*). The *CHRA* is primarily aimed at eliminating discrimination, not punishing those who discriminate. Therefore, "the motives or intention of those who discriminate are not central to its concerns" (*Robichaud v. Canada (Treasury Board)*, 1987 CanLII 73 (SCC) at para. 10 [*Robichaud*]) Rather, the *CHRA* is "…directed to redressing socially undesirable conditions quite apart from the reasons for their existence" (*Robichaud* at para. 10). Furthermore, to require proof of intent to establish discrimination would "…place a virtually insuperable barrier in the way of a complainant seeking a remedy" as "[i]t would be extremely difficult in most circumstances to prove motive…" (*O'Malley* at paragraph 14). As the Tribunal has stated many times: "Discrimination is not a practise which one would expect to see displayed overtly" (*Basi v. Canadian National Railway*, 1988 CanLII 108 (CHRT)).

[146] The Complainant bears the onus of establishing a *prima facie* case of retaliation on the civil standard of the balance of probabilities (*Bombardier*, *supra*, paras. 59 and 65).

[147] The Complaint at issue is the within Complaint filed August 24 2011, thereby satisfying the first question.

[148] Next, I find that Mr. Kelsh did experience adverse treatment from the Railway following the filing of his Complaint. Specifically, he did not obtain the position he bid on.

[149] However, the evidence established that the Front End Loader was a D Card-required Machine, and one which the Operator operated on his own. As a sole operator, the Front End Loader driver would at all times be responsible for his own Track Protection, even if this was only flagging in a yard.

[150] Therefore, I find that this is why the Railway denied him the position. There was no evidence led during the hearing which could lead a person to reasonably perceive that Mr. Kelsh's human rights Complaint played any role in the Railway's decision regarding who would be awarded this Machine.

[151] The evidence did not substantiate the allegation of retaliation on the balance of probabilities.

VII. Remedies

[152] Remedies under the *Act* are awarded pursuant to subsection 53(2). I will now determine which remedies the Complainant is entitled to, if any, based on the conclusion that the Complaint of discrimination with respect to disability was partially substantiated.

[153] Before beginning, I must note that the calculations in this case were doubly complicated: first, there were weaknesses in the Complainant's evidence, specifically, some of the testimony and documentary evidence the **C**omplainant led was speculative and vague in nature, requiring the Tribunal to infer certain parameters and amounts. The following sentence from the passage in Professor Waddams' text, *The Law of Damages* (at 13-30), which was cited by Evans JA, in *Public Service Alliance of Canada v. Canada Post Corporation*, 2010 FCA 56, affirmed by the Supreme Court of Canada in 2011 SCC 57 is particularly apt in this context:

> If the amount [of a loss] is difficult to estimate, the tribunal must simply do its best on the material available, though of course if the plaintiff has not adduced evidence that might have been expected to be adduced if the claim were sound, the omission will tell against the plaintiff.

A. Restoration of Rights, Opportunities or Privileges (s. 53(2)(b))

[154] S. 53(2)(b) of the *Act* states that where a complaint is substantiated the Tribunal may order the Respondent to, on the first reasonable occasion, make available to the victim the rights, opportunities, or privileges that were denied as a result of the practice.

[155] Mr. Kelsh sought to be able to operate the Stake Truck or to be able to take the D Card test orally.

[156] Given that I have found that the Railway discriminated against Mr. Kelsh with respect to the Stake Truck on account of his disability, I make the following order.

[157] I order that the Railway shall allow Mr. Kelsh to bid on a Stake Truck with Hi-Rail position the next time this position is placed as available for bidding in the next Bulletin or Corrector Bulletin the Respondent issues for the Eastern Region or whatever that Region is now or in future called, and shall do so every time thereafter when a Stake Truck position is up for bid in any Bulletin for the Eastern Region, provided that that the Respondent would have permitted such a bid but for the fact that Mr. Kelsh does not have a D Card. Then, if the only factor disqualifying Mr. Kelsh from being awarded the bid is that he does not have a D Card, the Respondent shall award the Complainant the Stake Truck with Hi-Rail position.

B. Lost Wages and Overtime and “Forced Expenses”

[158] Mr. Kelsh sought compensation for wage loss, which he claims stemmed from the full range of opportunities that were denied to him due to all of the Respondent’s alleged discriminatory practices.

[159] However, I have found that the only discriminatory practice substantiated in this Complaint has to do with the Respondent’s refusal to accommodate the Complainant on the Stake Truck with his E Card. Therefore, my consideration of his wage claim is limited to the loss of income attributable to the refusal to provide him with the opportunity to bid on Stake Truck work.

[160] There are two components to the wage claim. An overtime claim and a regular wage claim. I will deal first with the overtime claim.

[161] Mr. Kelsh claimed lost overtime wages for both Stake Truck work on the Gangs (in the amount of $52,500), and for clearing snow on the Division in winter (in the amount of $69,300).

[162] I have only substantiated Mr. Kelsh's claim with respect to the Stake Truck and therefore, I will not consider compensation for winter work clearing snow.

[163] In particular, the Stake Truck lost wages claim is founded on the Complainant's assertion that he would have earned more overtime had he been able to receive Stake Truck work. He asserts that he would have worked almost the same overtime hours as the Foremen who would have been with him in the Stake Truck. In final submissions, the Complainant calculated this loss in the amount of approximately $52,500.00. He bases this figure on the testimony of Foreman B and John Montgomery. According to the Complainant, these witnesses worked "perhaps 400 hours annually" in overtime, whereas his overtime earnings, he testified, averaged 123 hours annually. Overtime pay at the relevant time was $42 per hour and the Complainant seeks compensation for these losses, commencing in early 2011 with no clearly expressed end-date.

[164] The Railway did not directly challenge this specific assertion in its final submissions, as they took the position that Mr. Kelsh did not establish any wage loss as a result of any of its impugned actions. In any event, I do not find that the evidence supports the Complainant's Stake Truck overtime claim in its entirety.

[165] Holding a D Card does not entitle a unionized employee to a higher hourly rate of pay than an E Card holder for operating a Group 1 Machine. However, the evidence established that at the relevant times, there was the potential for Stake Truck operators (who were required to hold D cards) to work overtime.

[166] Mr. Hutchings, Foreman, testified that overtime for the Foreman in the Stake Truck and Stake Truck operator were quite similar. Multiple other witnesses, including former Foreman Gilbert Ouellette, attested to this as well. One key difference was a half hour at

the end of each working day for the Foreman to complete his daily report, to which the Stake Truck driver would not be entitled because he was not involved in this report.

[167] The evidence on the question of overtime was unfortunately not as complete as it could have been, given its central importance to this matter. However, Foreman B, a Foreman who worked in the Stake Truck with Mr. Kelsh in the past, provided extensive evidence as to his earnings, including overtime, and I have extrapolated from the Railway's documentary record of his earnings (Exhibit C1-174) and his oral testimony to test Mr. Kelsh's assertions.

[168] Foreman B's overtime hours between 2011 and 2015 were as follows: 2015: 337 hours; 2014: 495 hours, 2012: 60.5 hours, 2011: 363.5 hours The evidence from multiple witnesses established that in 2013, there was a general freeze on overtime pay across the Railway and this was borne out in Foreman B's records and testimony, which reflected no overtime for that year. This results in a total of 1, 256 hours over the five-year period, for an average of 251.2 overtime hours annually.

[169] I find that from the above amount, the aforementioned half hour overtime reporting duty worked by Foremen must be subtracted, to reach an estimate of how many overtime hours a Stake Truck driver would have worked. The documentary evidence of Foreman B's overtime hours indicates that between 2011-2015 he earned overtime on 326 days. One half hour of each of these days would have been devoted to reporting work in which the Stake Truck driver did not participate. Over the 326 days, this means that 163 hours of Foreman B's overtime would not have been earned by the Stake Truck driver. This sum must be deducted from the total hour figure of 1,256 calculated above, generating an adjusted total of 1,093. This total allows us to use Foreman B's hours as a rough proxy for what a notional Stake Truck driver would have earned as overtime during the same period. Distributed across the 5 years, this means that Mr. Kelsh would have worked an average of 218.6 hours.

[170] However that is not the end of the matter. Foreman B's data is premised on a 12 month work year. This amount must be further reduced to reflect the fact of the seasonal nature of the potential Stake Truck Operator position. The evidence established that, on

average, the Gangs ran for eight and a half months. Therefore the 218.6 hour (12 month amount), pro-rated for 8.5 months, yields a new figure of: 154.84 hours. This is the best estimate of the number of overtime hours Mr. Kelsh would have earned on the Stake Truck over this period but for his discriminatory exclusion from this work.

[171] Mr. Kelsh testified about Exhibit C1-174, which he identified as the Railway's printout of his own Daily Sheets for the period January 2011 through to November 30, 2015. It sets out the jobs he worked, his regular hours and overtime hours. He testified that he had previously gone through the document and totalled his yearly overtime hours. Respondent counsel submitted that she would not object to the calculations because the Respondent produced the document and could check the mathematics. The Complainant's counsel wrote the summary of the amount of overtime hours the Complainant worked each year in the period and his annual average overtime hours in the period, which was 123 hours. Accepting his actual annual average overtime earnings of 123 hours, and that Foreman B's adjusted annual average overtime for the period was 154.84, this results in an actual annual overtime wage loss for Mr. Kelsh of 31.84 hours.

[172] The last day of hearing was May 13, 2016. I am satisfied of a causal link between the discriminatory practice and the specific overtime wage loss up until this date. However, Mr. Kelsh did not specify a future loss claim for the post-hearing period, nor did he provide any evidence to potentially substantiate such a claim. The Tribunal is therefore unable to make any compensation Order for a period beyond May 16, 2016, and in accordance with the principles outlined in *Chopra* 2007 FCA 268 (*Chopra*) this is the end date of the compensation period.

[173] The Respondent's position is that the Tribunal ought not to award the Complainant compensation for lost wages for the period March 20, 2011 to August 7, 2011, when he was working in Oshawa as a Track Maintainer, because notwithstanding that he had an E Card, he only bid five or six D Card required Gang positions in January, 2011 and the Railway did not award him any of them because he did not have a D Card. Therefore, they argue, he failed to mitigate his damages, in accordance with *Chopra,* supra.

[174] Further, the Railway's Dan Berek testified that the Railway would have awarded Mr. Kelsh an E Card-required Spiker advertised in the same Bulletin, because Mr. Kelsh was senior to the individual who was awarded it. When asked why he did not bid that particular position, Mr. Kelsh responded that he did not wish to drive the long distance between his Marmora home and the position location, and that it was his choice what job he bid on.

[175] When asked why he only bid the D Card positions in January 2011, Mr. Kelsh responded that he had assumed that because he drove the Stake Truck in prior years, particularly because just operated it in Bolton and had been in charge of part of that Utility Crew, he had shown the Railway that he was a safe operator, and that he could be trusted. Further, he also thought that Mr. Berek knew and had permitted Mr. Kelsh to operate the Stake Truck in the past, and, on an occasion in 2010, including with respect to Bolton, permitting him to be paid at an Assistant Foreman rate. He therefore thought there would be no problem with his January 2011 bids, for which Mr. Berek handled the awards of positions. I find that Mr. Kelsh did not realize that Mr. Berek had objected to Mr. Kelsh being paid as Assistant Foreman. However, I also find that Mr. Berek knew that this was the situation, for at least part of the time Mr. Kelsh was in his quasi-leadership position in Bolton.

[176] I also find that soon after Mr. Kelsh realized that he did not obtain any Machine operator positions in the January 2011 Bulletin, he continued to bid for Group 1 positions until he obtained one in August of 2011, thereby mitigating his losses as per *Chopra (supra)*.

[177] Based on the above, I am declining to reduce Mr. Kelsh's wage loss compensation on the basis of failure to mitigate.

[178] Therefore, lost overtime wages under this section are compensable, on an annual basis of 31.84 hours, the quantum to be calculated based on the hourly overtime rates of pay for Group 1 Machine Operators in accordance with the Collective Agreement, commencing February 1, 2011 (being the date on which I deem the discriminatory practice to have crystallized) and continuing until May 13, 2016.

[179] I turn now to the claim for regular wages:

[180] Mr. Kelsh claims for the regular hourly wages he would have lost but for the discrimination. However as mentioned before, his claim is based on a larger liability finding than the one I have made: he seeks compensation for all time spent as a trackman versus a Group 1 Operator from 2004-2015 ($27,000), all lost wages for ten winters without being able to operate snow clearing Machines ($26,500) and finally compensation for the wage difference between a trackman and a Group 1 Operator during the period of March 29, 2011 and August 7, 2011 ($3,146).

[181] As with the overtime claim, I can only entertain this claim insofar as it relates to regular wages he would have earned on the Stake Truck. He claims that, between March 29, 2011 and August 7, 2011 he would have earned $3,146 more working on the Stake Truck because of the difference in the hourly wage between the trackman position that he had and the Stake Truck position he was denied. I find that the evidence has established that Mr. Kelsh incurred this hourly wage loss claim as a result of the Railway's discriminatory practice, and the Railway shall pay him $3,146.

[182] To the extent he is claiming additional lost wages as outlined above, these claims are dismissed because they fall outside my liability finding.

(i) Expenses

[183] The Complainant claims that on several occasions in 2011 he had to take jobs in Oshawa, far from his home in Marmora, for which he was not paid mileage and certain so-called 'forced expenses'.

[184] Forced Expenses are an entitlement in the Collective Agreement if an employee is "forced" to bid on a temporary position far enough away from home such that the employee incurs expenses for lodging, meals, mileage and other enumerated expenses in order to work in the position. Mr. Kelsh sought Forced Expenses for three (3) distinct periods when he worked in Oshawa.

[185] The Railway argued that Mr. Kelsh was not entitled to Forced Expenses because, first, the Oshawa position was a permanent rather than a temporary position and secondly,

because he did not disburse money for accommodation, meals, or any of the other components which make up Forced Expenses.

[186] I find that both subsections 12.9(e) and 12.9 (f) of the Collective Agreement, when referring to Forced Expenses, state that the employee is entitled to those expenses when the employee is "Forced to temporary vacancies…". I find that Mr. Kelsh does not qualify because the Track Maintainer position he bid on in Oshawa was permanent.

[187] I find that during the period March 29, 2011 to August 7, 2011, Mr. Kelsh did not incur expenses for lodgings, meals or laundry as a result of CP's discriminatory practice. He commuted from his Marmora home to his Oshawa work site 5 days a week. He lived at home, did laundry and had meals at home except for lunch.

[188] Nevertheless, this Complaint is made pursuant to the *Act,* and I find that it is to the *Act* that we must look to determine if Mr. Kelsh is entitled to any expenses. Subsection 53(2)(c) of the *Act* provides that compensation for expenses must be for "expenses incurred by the victim as a result of the discriminatory practice."

[189] I find that as a result of the Railway's discriminatory practice in that period, Mr. Kelsh incurred the expense of travelling in his own car from his Marmora residence to Oshawa, a round trip of 304 kilometres per day.

[190] Mr. Kelsh led evidence at the hearing regarding two other periods for which he sought forced expenses, being November 29 2011 – April 22, 2012 and January 3 2013 – March 31 2013. Although his written closing argument and submissions did not deal with these periods, I will address them nonetheless in explaining why no order for mileage in these periods would have been awarded. Given that these two periods covered largely what would have been Winter work and not Stake Truck operating work, the mileage he accrued did not flow from the substantiated discriminatory practice. These particular situations did not arise as a result of the Railway's discriminatory practice, therefore he is not entitled to be compensated under the *Act* for travelling to and from Oshawa in these periods.

[191] However, for the period March 29**,** 2011 to August 7, 2011, pursuant to subsection 53(2)(c) of the *Act*, he is entitled to the mileage expenses he incurred because he had to work in Oshawa as a Trackman and drive to and from work with only some compensation on account of those expenses, because I have found that a D Card is not a BFOR for Mr. Kelsh to operate the Stake Truck. Therefore he incurred the mileage expense as a result of the Respondent's discriminatory practice.

[192] He testified that CP did pay him mileage for 80 kilometres per day.

[193] Notwithstanding the Collective Agreement, there was conflicting evidence about what the Railway would pay for mileage. I leave it to the Parties to determine the correct rate for the period in question, and Mr. Kelsh is to be compensated at that rate for 93 days, at 224 kilometres per day (the distance travelled less the 80 kilometres he was already compensated for).

C. Compensation for Pain and Suffering (s. 53(2)(e))

[194] Under the *Act*, a victim of a discriminatory practice may be compensated up to $20,000 for any pain and suffering that he experienced as a result of a respondent's actions.

[195] Although in his Statement of Particulars, Mr. Kelsh sought $75,000.00 in "general damages", both in the Complainant's written Closing Argument and Submissions and in his counsel's oral closing at the hearing, the "General damages" sought was $40,000.00 for what the *Act* describes in subsection 53(2)(e) and 53(3) respectively as compensation for pain and suffering and special compensation. It was unclear whether the Complainant sought compensation on account of the Respondent engaging in a discriminatory practice wilfully or recklessly, but because the Complainant sought $40,000 in total, it is reasonable to infer that he sought $20,000 under each head of compensation.

[196] The evidence showed that Mr. Kelsh did, in fact, suffer from the discriminatory treatment.

[197] Although he expressed respect for, and gratitude to, the Railway in his testimony, Mr. Kelsh's distress over the situation was also very evident. He became visibly emotional on numerous occasions and testified to having felt humiliated, judged, embarrassed, and singled out by his employer. He described feeling unequal, and like a second or third-class employee when he went into work. There was evidence that he regularly sought out support from a social worker to manage these stressors.

[198] Furthermore, I find it significant that Mr. Kelsh did not know about the 1991 RQS Manual and its exception for oral examinations until December of 2015 when he was preparing for the hearing in this matter. It was not clear when the Manual was disclosed to Mr. Kelsh, but in terms of seeing it during his working career, I find that he was not aware of it. Finding out about it significantly upset him, because he felt that knowing about the Exception may have prevented the stress of the various requests for accommodation that he had to make between 2005 and 2008, including the time spent waiting to find out whether the Railway would give him an oral E Card test.

[199] The Tribunal makes an award of $12,500 for damages for pain and suffering, under s. 53(2)(e) of the *Act*.

D. Compensation for Willful and Reckless Discrimination (s. 53(3))

[200] In some circumstances the Tribunal may order a respondent to pay compensation to the victim if the respondent is found to have engaged in the discriminatory practice wilfully or recklessly. As above, I extrapolate that the Complainant asked for an award of $20,000 for special compensation.

[201] The Railway took steps to accommodate the Complainant between 2005 and 2008, and they have given him an oral E Card test. That was as far as the Railway was prepared to go – it did not give him an oral D Card test because it took the position that a written D Card test would impose undue hardship on the Railway on account of safety. Although the Railway's process of making this decision was slow, the Railway took many steps to ascertain whether it could accommodate the Complainant's request for an oral D Card test. Further, the Railway accommodated the Complainant financially by placing him in

Group 1 Machine positions on the Gangs, so that he would not lose income while the Railway was deciding if it could accommodate the Complainant's request.

[202] Although I did find that the Railway's refusal to let Mr. Kelsh operate the Stake Truck without a D Card was a discriminatory practice, the evidence did not establish any wilful or reckless discrimination on the part of the Railway. The Tribunal does not make any award for special compensation for wilful and reckless discrimination, under s. 53(3) of the *Act*.

E. Interest

[203] Pursuant to subsection 53(4) of the *Act* and Rule 9(12) of the Tribunal's *Rules of Procedure*, the Complainant is entitled to interest on the compensation ordered, from February 1, 2011 to the date of payment. This interest shall be simple interest calculated on a yearly basis, at a rate equivalent to the Bank of Canada rate (monthly series), set by the Bank of Canada. In no case shall the accrual of interest on the award made under subsection 53(2)(e) result in a total award that surpasses the statutory maximums prescribed therein.

F. Systemic Remedy

[204] Mr. Kelsh asks the Tribunal to issue an order to the Railway to remove machines not "practically requiring" the taking of track protection from D Card designation. In the alternative, he asks that the Railway be ordered to allow him to take an oral D Card test.

[205] The Complainant did not make out a *prima facie* case on these aspects of the Complaint and the Tribunal will not order any such remedies.

VIII. Outstanding Rulings

A. Should the Railway intervene regarding witness payments?

[206] On November 12, 2015, the Complainant made a motion requesting that the Tribunal order:

A. The Respondent to request the attendance at the hearing of all the Complainant's witnesses who are unionized employees of the Respondent, thereby triggering the requirement that the Respondent pay those witnesses, in accordance with section 2.23 of the Wage Agreement, or alternatively,

B. The Respondent to undertake not to pay any salary or wages to any of its employees, including management, absent from work because of giving evidence at the hearing.

[207] Although the Complainant alleges that the Respondent is being discriminatory by paying its own witnesses their wages, and not paying the Complainant's witnesses, the Complainant provides no ground of discrimination in the *Act* to support his claim. Nor has he identified a discriminatory practice under ss. 5-14.1 that would provide a foundation for his claim. Finally, while perhaps understandably this claim did not form part of the Complaint and the Complainant's SOP, no amendment was ever sought to include it. The Complainant submits that the fact that the witnesses who the Respondent will not pay are the Complainant's witnesses is itself discriminatory. This is not a ground under the *Act.* This situation may be one which is captured by other internal Railway or Union policies, but the Tribunal cannot take jurisdiction over a matter which is alleged to be discriminatory on a ground that is not in the *Act*.

[208] The Tribunal is the master of its own procedure, but it only has the authority that is either expressly or implicitly given to it by Parliament through its enabling legislation. No provision in the *Act* was identified as empowering the Tribunal to grant either of the orders sought. No jurisprudence was cited demonstrating that the *Act* empowers the Tribunal to make such orders. The Tribunal cannot go beyond the substantive grounds of discrimination enumerated in the *Act* to create a new ground. That is for Parliament to do.

[209] Therefore, the Tribunal declines to issue an order regarding payment and dismisses this request in the motion as outlined here.

B. Confidentiality issues

[210] Multiple motions for confidentiality orders were made throughout the hearing. They will be addressed here.

[211] Section 52 of the *Act* provides that the inquiry shall be conducted in public, but that the member may impose confidentiality measures or orders where a public inquiry would impact public security, affect the fairness of the inquiry, cause undue hardship through the disclosure of personal or other matters, or possibly endanger the life, liberty or security of a person.

[212] In the context of requests for confidentiality to prevent disclosure of personal information (s. 52(1)(c)) the Tribunal must be satisfied that "…there is a real and substantial risk that the disclosure of personal or other matters will cause undue hardship to the persons involved such that the need to prevent disclosure outweighs the societal interest that the inquiry be conducted in public."

[213] In *Egan v. Canada Revenue Agency*, 2019 CHRT 27, the Tribunal noted as follows at para. 37:

> The goals of the open court principle are extremely important in establishing the independence and impartiality of the justice system and fostering public confidence in its integrity. However in exercising the discretion I have under section 52(1)(c) of the CHRA the cases establish that it is necessary to balance the public interest of openness and transparency with private interests of privacy, on a case by case basis (see *Day and Endean* supra and *Canadian Newspapers Co. v. Canada (Attorney General)),* 1988 CanLII 52 SCC).

[214] In *T.P. v. Canadian Armed Forces*, 2019 CHRT 10, the Complainant sought a confidentiality order, also pursuant to s. 52(1)(c), on the grounds that if his identity became public through the proceeding, he would experience stigma, both personally and professionally, with respect to perceptions about his cognitive abilities and mental health, and that this stigma could affect his future job opportunities, as well as his own self-respect

and sense of self-worth. The complainant asserted that he had never made public his learning disability or his psychiatric or psychological history and that the decision to disclose an intellectual impairment like his was a very personal decision and the chilling effect of a loss of privacy with respect to such information outweighs the public interest in making his identity known (para 12). The Tribunal noted as follows:

> It is difficult to dispute that there is still a stigma surrounding mental illness, real or perceived, in our society, and I understand the Complainant's concerns about the disclosure of such medical information. His concern about the impact of the public disclosure of this information on his feelings of self-worth and possible future job prospects is legitimate. [para. 24]

[215] Ultimately the Tribunal issued a number of orders, including a ban on the publication of the Complainant's personal information.

[216] On a number of occasions, the Tribunal has taken measures to protect the privacy interests of non-parties who have been drawn into the inquiry through its disclosure process or the presentation of evidence at the hearing: See *Karimi v. Zayo*, 2017 CHRT 37, para. 14; *A.B. v. Eazy Express Inc*., 2014 CHRT 35, paras. 5-7; *Fahmy v. G.T.T.A.*, 2008 CHRT 12, para. 6; *Premakumar v. Air Canada*, 2002 CanLII 23561 (CHRT) footnote 9.

[217] Drawing on the above caselaw and being mindful of the importance of the open court principle, the Tribunal designates the following as confidential, pursuant to section 52 of the *Act*:

A. Exhibit R1-4: Dr. Feak's Psychoeducational Assessment Report dated March 28 2007;

B. Exhibit R1-51: copy of an email string between CP managers, containing, *inter alia*, a list of individuals without Rules Cards as at March 28, 2006;

C. Exhibit C1-174: a printout of a Time History of Foreman B from January 4, 2010 to December 31, 2015;

D. Exhibit R2-214, which is a series of T4s for the years 2011 to 2014 from the Respondent for seven employees, five of whom were the Complainant's witnesses.

E. Exhibit R2-218, a chart made by the Railway's Ms. Giddings containing a list of six of the Respondent's employees' T4s for the calendar years January 1, 2011 to and including to December 31, 2014;

F. Exhibit R3, being a Statement about a D-Carded employee's T4 for 2012;

G. All Daily Rail Crew Time Sheets (DRCTS) which were admitted into evidence shall be confidential and stored in sealed envelopes marked "Confidential". No party, counsel or witness shall discuss, refer to, or transmit in any form any information whatsoever therein, including, without limitation, any personal information of any nature or kind, such as names, wages, overtime, dates of birth, home addresses, telephone numbers, email addresses, of any individuals in any of the DRCTS, except for the purposes of including them in the Tribunal's record if there is an application for judicial review or a further appeal of this Decision.

IX. ORDER

[1] For the reasons above, I hereby order the Respondent:

A. Pursuant to s. 53(2)(b), to permit the Claimant to bid on a Stake Truck with Hi-Rail position the next time this position is placed as available for bidding in the next Bulletin or Corrector Bulletin the Respondent issues for the Eastern Region or whatever that Region is now or in future called, and shall do so every time thereafter when a Stake Truck position is up for bid in any Bulletin for the Eastern Region, provided that the Respondent would have permitted such a bid but for the fact that he has no D Card. Then, if the only factor disqualifying the Complainant from being awarded the bid is that he does not have a D Card, the Respondent shall award the Complainant the position.

B. Pursuant to s. 53(2)(c), to pay the Complainant an amount to be calculated as outlined in these reasons for Decision as compensation for lost overtime wages.

C. Pursuant to s. 53(2)(c), to pay the Complainant the amount of $3,146 as outlined in these reasons for Decision as compensation for lost regular wages.

D. Pursuant to s. 53(2)(c), to pay the Complainant an amount to be calculated as outlined in these reasons for Decision, for compensation for his mileage expense incurred between March 29, 2011 and August 7 2011.

E. Pay the Complainant the amount of $12,500 as compensation for pain and suffering, under s. 53(2)(e) of the Act.

F. Pursuant to s. 53(4), to pay the Complainant interest on the total amount of compensation as outlined in these reasons for Decision.

G. Pursuant to s. 53(2)(c), to pay the Complainant a gross-up amount sufficient to cover any additional income tax liability arising from the order for the Respondent to pay the Complainant in a lump sum the amounts in paragraphs B and C above, which amounts would ordinarily have been earned over a period of years.

H. Pursuant to s. 52, I order that all exhibits in paragraph 217 (A-G) are designated as confidential. The Registry is hereby directed to ensure that these exhibits are not accessible to the public.

X. Retention of Jurisdiction

[2] It is the Tribunal's expectation that the parties will attempt to negotiate the resolution of any dispute that may arise in connection with the remedies ordered. That said, if the parties fail to resolve any such dispute, the Tribunal hereby retains jurisdiction to decide any dispute that may arise with respect to the quantification or implementation of any of these remedies. A party seeking the Tribunal's adjudication of the foregoing must serve and file a notice to this effect no later than six months following the date of the present Decision. If the Tribunal does not receive notice within this time limit, the retention of jurisdiction order will be spent and this Decision will be final in all respects

Signed by

Olga Luftig
Tribunal Member

Ottawa, Ontario
December 27, 2019

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1956/3613

Style of Cause: Ken Kelsh v. Canadian Pacific Railway

Decision of the Tribunal Dated: December 27, 2019

Date and Place of Hearing: January 11 to 15, 2016
January 18 to 22, 2016
February 29 to March 3, 2016
May 2 to 6, 2016
May 9 to 11, 2016
May 13, 2016

Peterborough, Ontario

Appearances:

Ian Wilson, for the Complainant

Erin Ludwig and Wilson Chan, for the Respondent