

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2350

Heard at Montreal, Tuesday, 13 April 1993

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Payment of earnings lost by Locomotive Engineer C.F. Brown from the resolution of a grievance against his dismissal and his reinstatement.

JOINT STATEMENT OF ISSUE:

As a result of a grievance against Locomotive Engineer C.F. Brown's dismissal for a violation of UCO Rule 292, Locomotive Engineer C.F. Brown was reinstated to Company service on November 1, 1990.

Locomotive Engineer C.F. Brown was not informed by CP Rail Vancouver Division officers of his reinstatement until December 12, 1990.

The Brotherhood submits that CP Rail was responsible to fulfill the resolution of this grievance on November 1, 1990 and is required to pay Locomotive Engineer C.F. Brown for the loss of earnings from November 1, 1990, until December 12, 1990.

The Company has declined the Brotherhood's resolution of the outstanding earnings.

FOR THE BROTHERHOOD:

(SGD.) T. G. HUCKER
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) C. E. MINTO
GENERAL MANAGER, OPERATIONS & MAINTENANCE

There appeared on behalf of the Company:

R. E. Wilson - Labour Relations Officer, Vancouver
R. N. Hunt - Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

D. C. Curtis - Vice-General Chairman, Calgary
T. G. Hucker - General Chairman, Calgary
G. Hallé - Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that, by a written agreement, the parties agreed to the reinstatement of Locomotive Engineer Brown into his employment, subject to certain conditions, effective November 1, 1990. In fact, the Company did not notify the grievor that he was entitled to return to work until December 12, 1990. It further appears from the material before me that even at that time Mr. Brown did not return, as he had more lucrative interim employment working for BC Rail. It appears that he only returned to his position with the Company after he was laid off from BC Rail on January 6, 1991, in light of firm warnings issued to him by the Company with respect to the jeopardy of his continued employment should he not return.

The Brotherhood seeks two things before the Arbitrator. Firstly, it submits that the grievor should be entitled to damages in the amount of all wages and benefits attributable to the period between November 1, and December 12, 1990. Secondly, it submits that Mr. Brown's pensionable service should be adjusted to reflect the loss of time between November 1 and December 17, 1990, the date at which he had the first opportunity to return to work following the notice given to him on December 12, 1990.

The Brotherhood seeks to rely on the decision of this Office in the supplementary award to **CROA 1867**. However, that case concerned whether monies paid to a grievor out of a private insurance fund maintained by his union, received during the period of his discharge, should be applied in reduction of his compensation upon an order of this Office for the grievor's reinstatement "with compensation for all wages and benefits lost."

In my view the principles in **CROA 1867**, which deal with the concept of collateral benefits, have no application in the case at hand. The Company's failure to reinstate Mr. Brown into his employment effective November 1, 1990 is, in my view, no different than a decision by an employer to discharge an employee, without just cause, contrary to the terms of a collective agreement. In both instances the employee is wrongfully held out of work in violation of an agreement between the company and the union. It is well settled that in that circumstance the employee who has been deprived of his or her job is under a duty to mitigate the resulting financial losses. As a general rule, this involves making every reasonable effort to obtain alternative employment. In the result, any order for the compensation of such an individual must, in the end, be reduced by the amount of any earnings which the employee received during the period he or she was deprived of his or her normal position. In other words, the employee can recover only those wages which were lost, having regard to all wages which were in fact earned.

When those principles are applied to the case at hand, the Arbitrator can see no merit to the Brotherhood's claim for an order of compensation in favour of Mr. Brown. It is common ground that the earnings which he made in the service of BC Rail between November 1 and December 12, 1990 substantially exceeded those which he would have earned had he been reinstated into employment by the Company. There is, in other words, no loss of wages proved as a result of the Company's failure to implement the reinstatement agreement, and, in accordance with established principle, no order for compensation can be made.

The issue of the grievor's pensionable service, however, is more difficult. The Company submits that the Arbitrator should infer from the fact that Mr. Brown did not return to work even after he received notification of his right to reinstatement on December 12, 1990, that he would likewise have declined to return to the service of the Company effective November 1, 1990. While the Arbitrator appreciates the logic which underlies that submission, it is, in the end, speculative at best. In my view, it does not lie in the mouth of the Company, which has admittedly violated the terms of the reinstatement agreement, to plead hypothetical or speculative possibilities to escape the consequences of its own failure to meet its obligations. There is, very simply, no firm evidence before me to confirm conclusively that the grievor would not, for the period between November 1 and December 12, 1990, have returned to service with the Company in conformance with the reinstatement agreement executed between the employer and the union. In these circumstances I must find, on the balance of probabilities, that Mr. Brown was deprived of the right to pensionable service for the period in question. The Arbitrator therefore directs that the grievor's employment records be adjusted to reflect the recovery of pensionable service for the period of time from November 1, 1990 until December 7, 1990.

April 16, 1993

(SGD.) MICHEL G. PICHER
ARBITRATOR