# CANADIAN RAILWAY OFFICE OF ARBITRATION

# & DISPUTE RESOLUTION

# CASE NO. 4354 and 4355 SUPPLEMENTARY

Heard in Toronto

Concerning

**CANADIAN PACIFIC RAILWAY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

Written submissions received on February 26, March 14 and April 1, 2016.

## SUPPLEMENTARY AWARD OF THE ARBITRATOR

Further to my Awards in this matter dated February 5, 2015 (the "Awards"), the Grievor, Locomotive Engineer Cinq-Mars, had his suspension reduced from twenty-one days to ten days (**CROA&DR 4354**) and was reinstated to his employment with compensation (**CROA&DR 4355**).

The parties cannot agree on the appropriate compensation. The dispute is in three areas: (1) compensation for time held out of service; (2) compensation for the delay between the date of the Award and the Grievor's return to active service (and his subsequent resignation) and; (3) the sufficiency of the Grievor's mitigation efforts.

The legal principles applied to determine a compensation order following reinstatement is that a grievor is entitled to wages and benefits they would have earned

had it not been for the dismissal which was found to be unwarranted. This is subject to the requirement that a grievor take reasonable steps to avoid any losses claimed – that is, mitigation.

*Time Held out of Service – 19 days*

The parties have negotiated terms in the Locomotive Engineer's agreement that deals with payment for time held out of service. Article 23.05 provides that:

> 23.05 An employee is not to be held off unnecessarily in connection with an investigation unless the nature of the alleged offence is of itself such that it places doubt on the continued employment of the individual or to expedite the investigation, where this is necessary to ensure the availability of all relevant witnesses to an incident to participate in all the statements during an investigation which could have a bearing on their responsibility. Layover time will be used as far as practicable. An employee who is found blameless will be reimbursed for time lost in accordance with Clause 5.05.

The Company suggests that the claim for pay for time held out of service is a new issue advanced by the Union and should not be entertained. I disagree. The Union made it clear from the outset of its grievance that it sought to make the Grievor whole for all losses. The fact that the Union sought reimbursement for time held out of service was or should have been known to the Company. Accordingly the Company cannot succeed in this submission.

The Company relies on the fact that although the Grievor's penalty of suspension was reduced, he was culpable of conduct worthy of discipline and so he was not "found blameless". As a result, in the Company's submission this should result in no payment for the period of time in which he was withheld from service.

The Grievor was not in a position where his continued employment was or should have been in doubt. The Grievor was found blameless in respect of the discharge portion of the case. Furthermore, the Company did not discharge the Grievor for the incident that led to the suspension. I found there to be just cause for discipline in relation to that incident, but reduced the length of the suspension. In respect of the discharge levied by the Company, I found that to be unwarranted. The event that resulted in the Company's decision to terminate the Grievor without just cause was not one that can be said to have put his continued employment in doubt. More generally, in agreeing to the language in Article 23.05 the parties agreed in the first sentence that an employee should not be held out of service unless his continued employment is in doubt, ie – if the offence was not dismissible, the employee would not be held out of service.

Accordingly the Grievor is entitled to payment for the period held out of service (see **CROA&DR 4294**).

*Time Between the date of the Awards to the Grievor's resignation – February 5, 2015 to August 7, 2015*

The Award issued on February 5, 2015. The Company arranged a medical appointment for the Grievor for February 20, 2015. The Grievor is entitled to compensation in that intervening period. The Grievor advised on the day before the appointment, February 19, 2015 that he was unable to attend and would contact the Company at a later

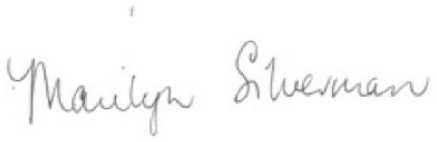
date. He did attend an appointment on March 13, 2015. He is not entitled to compensation for the period from February 19 to March 13, 2015, as the Grievor has not provided a good reason for that delay. The Company claims that further delays beyond their control occurred between March 13, 2015 and May 11, 2015 including the Grievor not returning calls promptly. It appears however from the documentary material presented that, after the March 13, 2013 medical appointment the Company advised that it wished more medical information (letter dated April 7, 2015). I am not persuaded on the material before me that the administrative delays that occurred in the period from March 13, 2015 to the Grievor's return to active service on May 11, 2015 should be borne by the Grievor. He is entitled to compensation for that period as well. The Grievor returned to work for a brief period from May 11 to May 31, 2015. The Grievor then sought and obtained a leave of absence (although some portion of that time may have been his use of vacation days), following which he resigned his employment effective August 7, 2015. Therefore, he is not entitled to compensation for the period after May 31, 2015 until his resignation as he was not available to the Company to work.

The Company asserts the legitimacy of the delays in the return to work process, given the ultimate resignation by the Grievor. It suggests no compensation or reduced compensation in light of this fact. The fact that the Grievor decided to resign shortly after his reinstatement is not a factor that operates to reduce his compensation entitlements in the relevant periods before that resignation (see *Integra and Ontario Public Service Employees Union, Local 426 (Larocque grievance*) 215 L.A.C. (4$^{th}$) 398 (Cummings))

*Mitigation*

The Grievor earned $5,688 working at a relative's in farm during the period he was unemployed by the Company. There are no records or supporting documents of job search and no evidence that the Grievor applied for any other work in this period. The Company provided statistics and employment rates in Alberta at the relevant time indicating a robust economy. The Company says that at a minimum a 40% reduction in compensation is appropriate and relies on **CROA&DR 4294S.** I am of the view that the considerations in that case are the same as those in the present case. Accordingly, I am prepared to reduce the Grievor's compensation in the period after his discharge at a rate of 40% to reflect his lack of mitigation.

I remit the calculations of compensation payable to the Grievor to the parties to be made in accordance with the determinations made herein. I remain seized in the event that they cannot agree on those calculations.



June 27, 2016

MARILYN SILVERMAN
ARBITRATOR