

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION  
CASE NO. 4398 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**

By way of my Award in this matter dated June 8, 2015 (the "Award"), the Grievor, Locomotive Engineer Yawney, was reinstated to his employment. A disciplinary penalty of 20 demerit points was substituted for the discharge assessed by the Company. The Award ordered the Company to reinstate the Grievor with compensation.

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; (3) the amount of vacation pay owing.

The premise of a make whole order is that a grievor is entitled to wages and benefits he 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 – May 22 – June 10, 2014*

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 submits that, since the Grievor was assessed 20 demerit points in substitution for his discharge he was not found "blameless" as contemplated by the provision. In the Company's submission this should result in no payment for the period of time in which he was withheld from service.

In this case, twenty demerit points was the appropriate response. As this was not a dismissible offence given what occurred and the seniority of the Grievor, he should be compensated for time held out of service. (See **CROA&DR 1053**).

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

Time Between the date of the Award to the return to active service –June 8, 2015 to July 6, 2015

The Grievor mitigated his losses and obtained alternate employment shortly after his discharge. He was so employed on June 8, 2015, the date of the Award. He gave his then employer two weeks' notice. As he was working that notice, there was a delay in the scheduling of both his medical appointment and rules qualification preceding his reinstatement with the Company. The delay was short and the Grievor subsequently attended to both requirements and was back at work with the Company shortly after his period of notice ended with his former employer. The Grievor was diligent and responsible in attending to his obligations to both the Company and the previous employer. Although the Company is not responsible for the short delay, the fact is that the Grievor earned mitigation income during that period and so the appropriate manner in which to account for the delay is to credit the Company with the mitigation amounts earned. Provided his mitigation earnings during this period are accounted for, the Grievor is entitled to be compensated for the period from the date of the Award until his return to active service.

Annual Vacation (AV) Pay

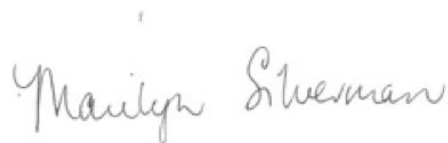
The parties have identified a dispute regarding the Grievor's vacation pay as part of the compensation ordered for the Grievor's time out of work. The Company does not dispute that the Grievor is entitled to monies for annual vacation that he would have

earned had he continued in service over the period for which he lost wages. As a result, there does not appear to be a legal issue in dispute between the parties as to whether the AV should be paid, but rather whether the amount paid to the Grievor was the right amount. The Company says that the Grievor's AV for the period based on prior years earnings is \$7,807.51. The Union relies on the fact that the Grievor's earnings in 2013 were \$125,733.25 and given that the Grievor is entitled to six weeks of vacation (12%), the amount of vacation pay is \$15,087.99 for one year. Given that the Grievor was out of work from the period May 22, 2014 – July 6, 2015, the Company's calculation of \$7807.51 falls short on the Union's assessment. The Company has not elaborated on the basis for its calculation.

The Union suggests that the issue of the amount of vacation pay be remitted back to the parties for resolution and I do so. In the event that the AV calculation is not resolved it shall be referred back to me for determination. As part of that referral, the Company shall produce a detailed breakdown of its vacation pay calculations.

I remit the additional calculations to the parties to be made in accordance with the determinations made herein. I remain seized in the event they cannot agree on those calculations, including the AV calculation.

June 28, 2016



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MARILYN SILVERMAN  
ARBITRATOR