

**CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE**  
**RESOLUTION**  
**CASE NO. 4400 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 Award in this matter dated May 14, 2015 (the "Award") the Grievor, Conductor Yamazaki, was reinstated to employment. The Award dealt with a thirty day suspension and subsequent discharge of the Grievor. The two disciplinary penalties were unrelated. In the Award I reduced the suspension to ten days and overturned the discharge. The Grievor was ordered reinstated to employment with compensation for all wages and benefits lost, subject to the period of suspension.

The parties are unable to agree on appropriate compensation. The dispute is in three areas: (1) whether the Grievor should be compensated for time held out of service; (2) the method of calculation and; (3) the delay between the date of the Award and the Grievor's return to active service.

The legal principles applied to determine a compensation order following reinstatement 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.

I deal with the three areas of dispute as follows:

*Re 1 – time held out of service – November 20, 2013 – December 23, 2013*

The parties have negotiated terms in the CTY agreement that deal with payment for time held out of service. Article 70.05 provides that:

70.05 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 30.01 (1), (2), (4) or Clause 49.01(1), (2), (4).

The Company suggests that is a new argument 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 not a new fact to the Company. The Grievor was not in a position where his continued employment was or should have

been in doubt. Accordingly, the Grievor is entitled to payment for his time held out of service.

Re 2 – the method of calculation –

The parties are unable to agree on how to calculate the Grievor's average daily rate; the rate they would then apply to the time out of work. The Union says that the manner in which to do this is to determine what the next more senior employees to the Grievor earned in the period he was out of work. The Company wants to introduce a control factor for the Grievor's pre-dismissal work history. It refers to *Brown and Beatty, Canadian Labour Arbitration at 2:1522* for the approach used in the calculation of lost incentives and overtime opportunities. The Union's comparators are two junior employees in the Grievor's work location. The jurisprudence of this Office supports the proposition that the appropriate comparator is an employee who has approximately the same seniority as the Grievor with the same qualifications (See **CROA&DR 4294** Supplementary and **CROA&DR 525** Supplementary). I am not persuaded to depart from that method in the calculation in this case. Accordingly, the Union's earnings figures are to be used in the calculations.

RE 3 – Time between the date of the Award and the return to active service – May 29, 2015 – Sept 14, 2015

The Grievor was returned to work approximately 3.5 months after the issuance of the Award. During this period he was willing and able to work. The Company contends that there was no undue delay on its part in returning the Grievor to service. It does not assert any action or inaction on the part of the Union or the Grievor that contributed to the delay. The Grievor is entitled to be compensated from the date of the issuance of the Award, May 15, 2015 to the date of his return to duty, September 14, 2015.

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.

June 27, 2016



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MARILYN SILVERMAN  
ARBITRATOR