CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4663 SUPPLEMENTARY

Concerning

CENTRAL MAIN AND QUEBEC RAILWAY CANADA INC.

And

UNITED STEELWORKERS – LOCAL 1976

Written submissions received on March 21, April 5, and April 15, 2019.

AWARD ON REMEDY: DAMAGES

Nature of case

1. This remedial award arises from the tragic train accident in Lac Mégantic on July 6, 2013. Forty-Seven people died as a result of that accident. The grievor, locomotive engineer (LE) Harding, who had decades of experience in the railway industry, operated that train. A court found him not guilty of criminal negligence. LE Harding, as well as others, did plead guilty to violations of the Railway Safety Act. He received a six-month conditional sentence to be served in the community.

2. In the January 17, 2019 award in CROA&DR 4663 (**CROA 4663**), this Office found that CMQR's failure to conduct the mandatory investigation under its collective agreement with the USW rendered locomotive engineer's (LE) Harding's dismissal void *ab initio*. The USW and CMQR had negotiated a clear provision regarding the pre-conditions for discipline at article 8.01 of their collective agreement:

> 8.01 **An employee shall not be dismissed**, suspended or disciplined without justification and **without a fair and impartial investigation**.
>
> (Emphasis added)

3. CMQR, for whatever reason, ignored this key negotiated provision which restricted its ability to discipline USW members unless it conducted a fair and impartial investigation.

4. Notwithstanding the collective agreement violation, the arbitrator accepted CMQR's position, in the tragic circumstances of this case, to award LE Harding damages rather than reinstatement. The arbitrator remitted the issue of quantum to the parties.

5. The parties could not resolve the damages issue which was perhaps not surprising given the current state of the arbitral jurisprudence in the area. The arbitrator suggested this issue be examined by way of a more detailed ad hoc arbitration or at a future CROA monthly hearing. The parties, however, preferred to proceed solely by way of written submissions.

6. The expedited arbitration process used in the railway industry ensures timely and inexpensive resolutions of labour relations disputes, especially when compared with "regular" arbitration which follows more closely a civil litigation model with viva voce evidence. This can limit the information available to the decision maker, but that is a reality the parties accept in the interest of efficiency. For example, while article 16.02 of

the collective agreement refers to a “retirement plan”, nothing was put before the arbitrator concerning this entitlement:

> 16.02 The Employer will maintain the retirement plan in effect on December 31, 1999 for all employees.

7. The USW, using a “Notice” model, asked the arbitrator to award LE Harding damages in the amount of $874,000.82. CMQR, which considered both the “Economic Loss” model (ELM) and the Notice model, suggested an amount in the range of $25,000, but which would be reduced, possibly to zero, due to a failure to mitigate.

8. For the reasons which follow, the arbitrator has considered the different approaches to this issue. The arbitrator adopted the USW’s suggested Notice model but imposed a cap and a contingency for mitigation. That analysis resulted in 18 months notice and a further payment of 10% for benefits.

Parties’ Positions

USW

9. The USW noted that LE Harding, who is 56 years old[1], has a seniority date under the collective agreement of July 7, 1980. He has spent his entire professional life working in the railroad industry. The USW relied on arbitral authority, which has taken inspiration from wrongful dismissal cases, in order to calculate damages in lieu of

[1] CMQR suggested LE Harding was 58 when commenting on damages and retirement prospects (para 98).

reinstatement: see, for example, Humber River Hospital v Ontario Nurses' Association, 2017 CanLII 83072 (*Humber River*).

10. The USW suggested LE Harding would be earning roughly $115,000, including overtime. CMQR did not comment on this amount, but instead suggested that LE Harding had asked to return to a position with a significantly lower rate.

11. The USW suggested that the arbitrator should use the "notice" approach to award damages based on 2 months per year of service ($661,752.13), plus 25% for loss of fringe benefits ($165,438.03) and interest. The USW argued that mitigation did not apply to this type of case and that termination pay ($4791.66) and severance pay ($42019.00) under the Canada Labour Code (*Code)* should be paid in addition to any amount awarded.

12. As noted, the total the USW claimed, not including interest, amounted to $874,000.82.

CMQR

13. CMQR urged the arbitrator to follow the ELM when calculating damages, a model the Federal Court of Appeal (FCA) had accepted in Bahniuk v. Canada (Attorney General), 2016 FCA 127 (*Bahniuk*). However, as an alternative argument, they also calculated amounts based on the "Notice" model.

14. Surprisingly, the written submissions revealed an offer from CMQR to reinstate LE Harding into “the department of his choice” (CMQR Exhibits; Tab 24). However, that offer also stated that “Mr. Harding would not be eligible for back pay, damages, or any other payment…”. The USW in its Reply objected to the inclusion of this offer on the basis that it was a settlement offer (para 25).

15. The arbitrator agrees with the USW. It might be one thing to offer employment unconditionally for mitigation purposes. It is quite another to offer employment but make it contingent on LE Harding giving up all his rights. It also ran counter to CMQR’s position, which the arbitrator had accepted in CROA 4663, that the employment relationship was no longer viable.

16. CMQR’s ELM analysis, which was based on a multitude of allegations which the USW contested, resulted in damages of $25,387.05 less amounts earned in mitigation (paragraph 121). In the alternative, if the “Notice” approach were used, then it suggested using a 1 month per year scale, plus 10% in lieu of benefits. However, it also argued that the amount calculated should be reduced to zero because LE Harding had refused to mitigate his damages by accepting employment from CMQR (para 128).

Analysis and decision

An arbitrator’s broad remedial jurisdiction

17. The normal remedy when just cause for dismissal does not exist, either due to procedural violations or due to the merits of the case, is to reinstate the employee with

full or partial compensation: Alberta Union of Provincial Employees v. Lethbridge Community College, [2004] 1 SCR 727, 2004 SCC 28 (*Lethbridge*):

> 56 **As a general rule, where a grievor's collective agreement rights have been violated, reinstatement of the grievor to her previous position will normally be ordered. Departure from this position should only occur where the arbitration board's findings reflect concerns that the employment relationship is no longer viable**. In making this determination, the arbitrator is entitled to consider all of the circumstances relevant to fashioning a lasting and final solution to the parties' dispute. (Emphasis added)

18. In *Lethbridge*, the SCC noted as well that it is only in "extraordinary circumstances" where damages should be awarded rather than reinstatement:

> 53 Decisions in which exceptional circumstances have been found are widely disparate on the facts. A review of such decisions highlights the difficulty with which bright-line distinctions may be marked between culpable and non-culpable conduct in assessing whether circumstances sufficiently exceptional exist so as to justify the board's refusal to reinstate. While culpable conduct is far more likely to lead to a poisoned or inhospitable work environment than conduct characterized as non-culpable, the consequences of the conduct and not its characterization should be the primary focus of the remedial inquiry. It bears repeating that arbitrators are equipped with broad remedial jurisdiction to secure prompt, final and binding settlement of disputes arising out of the interpretation or application of the collective agreement and disciplinary action taken by employers.

19. An arbitrator should be loath to refuse to reinstate. An employer cannot buy its way out of its collective agreement obligations. Nonetheless, in extremely rare situations as noted by the SCC in *Lethbridge*, a remedy other than reinstatement may be warranted.

20. An arbitrator's authority to fashion an appropriate remedy is at the heart of his/her jurisdiction:

> 34 As noted earlier, the purpose of this grievance arbitration scheme, like all others, is to "secure prompt, final and binding settlement of disputes" arising out of the collective agreement: see Parry Sound, supra, at para. 17. Finality in the resolution of labour disputes is of paramount significance both to the parties and to society as a whole. Grievance arbitration is the means to this end; see Brown and Beatty, supra, at §2:1401, that "[t]his legislative framework has been recognized and accepted as establishing an arbitral mandate to fashion effective remedies, including the power to award damages, so as to provide redress for violations of the collective agreement beyond mere declaratory relief".
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> 35 Clearly, **the overarching purpose and scheme of the Code lend considerable support for the arbitrator to fashion a remedy to suit the particular circumstances of the labour dispute in question**.
>
> (emphasis added)

21. In *Lethbridge*, the SCC did not find unreasonable an arbitrator's award of 4 months notice, rather than reinstatement, for an employee terminated after 2 years of service:

> 57 In light of the above, **I am not persuaded that the arbitration board acted in an unreasonable manner by substituting an award of four months' notice for reinstatement**. The arbitration board took due account of all the circumstances before it, and reached a reasonable conclusion as to the continued viability of the employment relationship. **This decision fell well within the bounds of arbitral jurisprudence requiring a finding of exceptional circumstances prior to substitution of remedy**. It is worth noting that a similar decision was taken by the arbitration board in the Van Steenoven Grievance, supra, at para. 32, where the arbitrator denied reinstatement on the basis that the grievor was unable to perform the work required of her position, and despite the employer's failure to properly terminate her employment. The board in that case viewed

> itself in possession of "sufficient evidence" indicating that reinstatement would not provide a lasting solution. (Emphasis added)

22. It has been suggested that the SCC in Cohnstaedt v. University of Regina, [1995] 3 SCR 451, 1995 CanLII 68 had earlier determined that the ELM represented the proper way to calculate damages in these types of cases[2]. It is certainly one possible approach. But the facts in *Lethbridge,* where the Court did not find unreasonable the awarding of notice rather than reinstatement, suggests that more than one reasonable approach exists.

23. The *Lethbridge* case dealt with an arbitrator's remedial powers in Alberta. Those powers did not differ significantly from those currently in the *Code*. Section 60(2) of the *Code* states:

> (2) Where an arbitrator or arbitration board determines that an employee has been discharged or disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration, the arbitrator or arbitration board has power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances.

24. The Alberta provision the SCC examined in *Lethbridge* read:

> 142. . . .
>
> (2) If an arbitrator, arbitration board or other body determines that an employee has been discharged or otherwise disciplined by an employer for cause and the collective agreement does not contain a specific penalty for the infraction that is the subject-matter of the

[2] See Lakehead University v Lakehead University Faculty Association, 2018 CanLII 112409 (*Lakehead*) at paragraphs 79-81.

> arbitration, the arbitrator, arbitration board or other body may substitute some other penalty for the discharge or discipline that to the arbitrator, arbitration board or other body seems just and reasonable in all the circumstances.

25. The SCC commented as follows about the pitfalls of narrowly interpreting the Alberta provision:

> 47 In my opinion, the Court of Appeal's interpretation of s. 142(2) is somewhat incompatible with the object of the legislation and the overall purpose of the provision. As discussed earlier in these reasons, the purpose of the legislation is to facilitate arbitral dispute resolution, and the content of the legislative scheme provides for arbitrators to do so. Given this context, there is no practical reason why arbitrators ought to be stripped of remedial jurisdiction when confronted by labour disputes that turn on a distinction between culpable and non-culpable conduct and a finding of cause thereafter. A restrictive interpretation of arbitral jurisdiction in s. 142(2) results in legislative lacunae; a broad interpretation of the provision produces results more consonant with statutory objectives.

26. The arbitrator adopts a similarly broad interpretation of the *Code*'s remedial authority.

Damages rather than reinstatement

27. This Office has a broad remedial jurisdiction "to fashion a remedy to suit the particular circumstances of the labour dispute in question" (*Lethbridge,* paragraph 35).

28. The "Notice" model suggested by the USW has certain pitfalls, given that the loss of employment occurred under a collective agreement rather than a contract of employment. Arbitrators have noted that a wrongful dismissal analysis focuses on the

concept of reasonable notice, a concept that is alien to a collective agreement. It does not as a result address the issue of damages for the loss of a bargaining unit position which is protected by a collective agreement.

29. But the Notice model does address the employee's personal situation when faced with a loss of employment based on factors like age, position and length of service. It also has the advantage of decades of development and application. Some arbitrators have added a multiplier to account for the collective agreement while still preserving some form of certainty and predictability.

30. ELM represents a different way to approach these questions[3] and views the collective agreement more like a fixed-term contract. But, like the Notice model, it also has some challenges.

31. First, it assumes that the only remedy for an arbitrator to order must be based on the value of the loss of job security inherent in a bargaining unit position. It is not clear why that is the only the possible focus when considering an appropriate remedy for an employment relationship which is no longer viable. It certainly can be one, but the SCC suggested in *Lethbridge* it is not the only reasonable one.

32. The perfect way to attain the value of the loss of job security inherent in a bargaining unit position is to reinstate the person. There are no contingencies involved.

[3] In First Canada ULC v International Union of Operating Engineers, Local Union No. 955, 2017 CanLII 86407 (*First Canada*) the arbitrator conducted an extensive and thoughtful analysis of this approach and suggested how it might be fine tuned.

But, as considered in *Lethbridge*, if "exceptional circumstances" exist and the employment relationship is no longer "viable", then the arbitrator's task is to fashion an appropriate remedy.

33. Secondly, ELM invites an uncomfortable amount of speculation about the future. Certainly, labour and employment lawyers are familiar with this type of guesstimating in certain cases, such as where an employee resolves a dispute with an insurer about the future value of LTD benefits. But the contingencies required in the ELM approach do impact the worthwhile goals of certainty and predictability.

34. For example, in *Bahniuk* and *First Canada*, *supra,* some of the possible guesstimates included:

> i) how long an employee might work;
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> ii) the employee's likely retirement date;
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> iii) whether the employee might have been terminated for cause at some point in the future; and
>
> iv) determining the "contingency" which may reach 90% in some cases.

35. The speculation needed about an employee's retirement date is somewhat troubling given the abolition of mandatory retirement. But the arbitrator understands the concern of double dipping.

36. The arbitrator sees benefits and pitfalls with the competing models. For current purposes, the arbitrator must provide a remedy to LE Harding. In the specific

circumstances of this case only, the arbitrator prefers the USW's suggestion of following an analysis more in line with that applied in *Humber River*. The concept of notice is one with which those working in labour and employment law are very familiar.

37. In a regular arbitration, the parties can perhaps lead significant evidence, including from experts, in order to lessen the need for the speculation or guesstimates inherent in the ELM. As noted in *Lakehead*:

> 107. I am also satisfied that the suggestions of the difficulties or dangers inherent in the fixed-term approach have been exaggerated. **The objections to the fixed-term approach substantially disappear when the assessment of damages is made as it should be on the basis of evidence having regard to relevant contingencies in the particular case, and not on the basis of speculation or "by guess and by golly".** An arbitrator can reasonably infer how long a grievor would likely have continued to be employed on the basis of the evidence that led to the determination that reinstatement was not appropriate or additional evidence called with respect to remedy. **An arbitrator can also draw reasonable inferences from the evidence, or lack of evidence, about the probabilities of an individual's ability to secure other employment or how long the individual is likely to remain sufficiently healthy to engage in gainful employment, or about any of the other contingencies in the particular case**. The wrongful dismissal approach is easier, but it takes no account of the value of collective agreement employment security that a wrongful dismissal plaintiff typically cannot claim (except in the case or a term contract which depending on the terms of the particular contract may mirror collective agreement employment in some ways).
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> …
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> 111. Further, none of the prior cases that I am aware of refer to any sort of expert evidence (from which I infer none was provided). **The case before me appears to be the only case in which expert forensic accounting evidence has been presented. Not only does an assessment of past and future lost income and benefits losses lend itself to the sort of forensic accounting analysis commonly used in civil litigation, it serves to reduce or even**

> **eliminate the concerns that arbitrators have expressed about arbitrary, speculative or excessive awards of damages by providing an evidentiary foundation for the determination required.**
>
> 112. Of course it is up to the parties to provide the evidence necessary for a proper assessment of damages. A union may be reluctant to go to the expense of obtaining expert evidence for a claim by a grievor who by definition is no longer a bargaining unit employee (notwithstanding that its duty of fair representation arguably requires it to put the grievor's best evidentiary foot forward). On the other hand the employer may be reluctant to go to that expense when the onus is on the union to prove the grievor's damages. **But be that as it may, it is up to the parties to provide the arbitrator with the evidence necessary to a proper assessment of damages, and a party which fails to produce appropriate evidence in support of its case has no right to complain about the result.**
>
> (Emphasis added)

38. This analysis may be appropriate for regular arbitrations. But the parties using this railway expedited arbitration regime consciously chose not to adopt a model that followed too closely one inspired by civil litigation. The civil litigation model has its own well-known issues, including with access to justice. Instead, the railway industry chose a streamlined arbitration model, one which has far lower costs for both trade unions and employers and which frequently has non-lawyers pleading arbitrations.

39. Given this reality in the railway industry, the arbitrator prefers an analytical model which fits comfortably within an expedited arbitration regime, already has deep roots in labour and employment law, does not exclude laypeople from pleading labour arbitration cases and which limits, if not eliminates, the need for clairvoyant arbitrators.

Calculation of damages

40. The USW has persuaded the arbitrator to award LE Harding damages to be calculated as follows:

> A) Damages will accrue at the rate of 1.25 per month of service[4] at a rate of $115,000 annually to be paid to LE Harding as a lump sum. That calculation will be capped at 24 months[5]. Those damages are further reduced to 18 months to provide for a contingency[6], but LE Harding will be correspondingly relieved of any duty to mitigate;
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> B) The lump sum in "A" is inclusive of any statutory entitlements owing under the *Code*[7]; and
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> C) CMQR will pay LE Harding an additional lump sum equivalent to 10% of the value of "A" in lieu of benefits.

41. The result is not totally satisfactory from a principled point of view.

42. While challenging guesstimates inherent in the ELM have been avoided, the notice-based analysis is not devoid of issues. For example, for extremely long service employees like LE Harding, some of the principles associated with notice, such as a soft cap, can impact the collective agreement "multiplier". But the USW did not convince the arbitrator than an award of $874,000.82 based on an uncapped Notice analysis represented the appropriate remedy.

[4] *Humber River*, supra.

[5] There is no hard "cap" under a notice analysis, but a soft one is frequently applied subject to exceptional circumstances. The arbitrator did not conclude that the facts of this case warranted an exception to a soft cap. See, for example, Saikaly v. Akman Construction Ltd., 2019 ONSC 799 at paras 27-30.

[6] Peterko v. Centric Health Corporation, 2019 ONSC 1068 at paragraph 33.

[7] Lakehead, supra, at paragraph 120.

43. The parties did not put before the arbitrator any past awards which had considered the situation of an employee with the significant service of LE Harding. That issue can be revisited in future cases.

44. This award provides LE Harding with an appropriate remedy in a situation where "exceptional circumstances" existed and the arbitrator concluded the employment relationship was no longer viable. The arbitrator was not persuaded to use the ELM especially given, among other factors, the parties' expedited arbitration process.

45. Any further issues arising from this award may be brought back to this Office for resolution by a current CROA arbitrator.

Ottawa, April 25, 2019

GRAHAM J. CLARKE
ARBITRATOR