CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4852 & 4853 SUPPLEMENTAL

Heard via Video Conferencing, April 30, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

SUPPLEMENTAL AWARD OF THE ARBITRATOR

Context

1. As a result of decisions in **CROA 4852** and **4853**, the discipline imposed upon Locomotive Engineer D. Haraldson of 59 demerits was overturned and 30 demerits was reduced to a written reprimand.

2. The Company had raised in its pleadings the possibility of damages in lieu of reinstatement. The Union objected to this argument, as it had not previously been raised. The decision in **CROA 4852** was that the parties should be given the opportunity to discuss this matter further and that the issue of remedy would be returned to the Parties, with the arbitrator retaining jurisdiction if the matter could not be resolved (see paras 21-24).

3. The Parties did discuss the remedy issues between September and December 2023 and again during a Mediation held on April 30, 2024. Unfortunately, no resolution was possible, although the number of outstanding issues was reduced.

Issues

4. The remaining issues to be resolved are as follows:

A. Is the Company entitled to reduce the quantum of compensation by 7 months, for the period prior to December 19, 2023, to reflect the period in which the allegedly unvaccinated grievor could not have worked?

B. Is the grievor entitled to damages (subject to mitigation and contingencies) in lieu of reinstatement for the period from December 19, 2023 until age 70, when he would have retired?

C. Is the grievor entitled to aggravated or punitive damages?

A. Is the Company entitled to reduce the quantum of compensation by 7 months, for the period prior to December 19, 2023, to reflect the period in which the allegedly unvaccinated grievor could not have worked?

Position of the Parties

5. The Company argues that Ministerial Order 21-07 required all railway employees to provide proof of vaccination from November 21,2021 to June 14, 2022. It argues that if the unvaccinated grievor had been at work, he would have been placed on unpaid leave during this period.

6. It argues that it is appropriate to deduct seven months from the quantum of compensation.

7. The Union argues that there is no proof that the grievor was unvaccinated. It argues further that when the Ministerial Order came into effect, the grievor had already been discharged by the Company and was not subject to the Ministerial Order. Finally, it argues that the discharge prevented the grievor from having an opportunity to elect to get vaccinated, or to go on unpaid leave.

Analysis and decision

8. I find the Union position more persuasive. The grievor had been discharged at the time of the Ministerial Order. As such, the Company never put him to the election of showing proof of vaccination or going on unpaid leave. In effect, the discharge, which has now been overturned by the decisions in CROA 4852 and 4853, removed the opportunity for the grievor to make an election.

9. The grievor should not be penalized for the effects of a decision to terminate, which has now been overturned.

10. Accordingly, I find that the grievor is entitled to wages, benefits and interest during this period.

B. Is the grievor entitled to damages (subject to mitigation and contingencies) in lieu of reinstatement for the period from December 19, 2023 until age 70, when he would have retired?

Position of the Parties

11. The Company takes the position that the grievor is not entitled to any future damages after December 19, 2023, when his employment file was closed.

12. The Company sets out that extensive and repeated efforts were made to reinstate the grievor following the September 18, 2023 decisions in CROA 4852 and 4853 (see para 11, Company Brief).

13. It argues that while there were extensive negotiations with the Union concerning the terms of the reinstatement and possible damages in lieu of reinstatement, the grievor never made any steps to comply with the repeated Company requests to take steps to return to work. As such, after repeated requests, warnings and extensions, the grievor's file was closed.

14. The Union notes that it made successful submissions to the Company concerning the terms of a possible reinstatement**.**

15. The Union notes that there were extensive communications between it and the Company concerning damages in lieu of reinstatement, in light of the Company's position at arbitration. It put in a detailed proposal, which was modified several times. Unfortunately, negotiations concerning damages were ultimately not successful.

16. The Union further notes that it sought and obtained extensions to the deadlines found in Company communications with the grievor with respect to reinstatement.

17. The Union argues that the grievor is entitled to damages in lieu of reinstatement, based on a "fixed term" approach, but subject to more than reasonable deductions for mitigation and contingencies of 85%. Applying this approach, the Union claims that the grievor is entitled to some $500,000 (see paras 21-47, Union brief).

Analysis and decision

18. In **CROA 4852** and **4853**, I allowed the grievances contesting the discipline and dismissal of the grievor.

19. In the normal course, reinstatement would be ordered once the grievances were allowed. Damages in lieu of reinstatement would only occur in one of two ways: a) if the Parties agreed to that as a remedy or b) if damages were ordered, after hearing submissions from the Parties.

20. In this case, the Company raised the possibility of damages in lieu of reinstatement. The Union objected and the entire issue of remedy, including the possibility of damages in lieu of reinstatement, was remitted to the Parties.

21. Shortly after the decisions were released, the Company took multiple steps to have the grievor come back to work. These steps are set out at paragraph 11 of their Brief as follows:

> 11. The Company took the following steps to return the Grievor to active service.
>
> a. On September 29, 2023 the Company reached out to the Union via an email to the General Chairperson and the Vice General Chairperson to initiate the return to work process as per the award. The Company requested the Union provide the Grievor's earnings over the period of discharge as well as any efforts he had made to mitigate his losses.
> (Copy of September 29, 2023 email attached as Exhibit 1)
> b. The Union did not provide the requested information to the Company.
> c. On October 3, 2023, the Company sent an email to the Grievor and his Union representatives to outline the return to work process and the necessary steps to initiate his return to work.
> (Copy of October 3, 2023 email attached as Exhibit 2)
> d. On October 4, 2023, the Union responded via email to note they took issue with the necessary retraining the Company had outlined in the above noted email. They offered changes to the verbiage outlined in the original email to the Grievor.
> (Copy of Union's comments attached as Exhibit 3)
> e. On October 5, 2023, the Company modified the original email to the Grievor, reissuing the email with the requested changes.
> (Copy of October 5, 2023 email attached as Exhibit 4)
> f. The Grievor did not respond to the email and failed to follow the outlined return to work process.
> g. On October 18, 2023, the Company issued a follow up email to the Grievor. The email reinforced the return to work instructions and provided the Grievor with a deadline to respond by October 26, 2023.
> (Copy of October 18, 2023 email attached as Exhibit 5)
> h. The Grievor failed to respond to this follow up email and failed to follow the return to work instructions.
> i. On November 14, 2023 the Company once again emailed the Grievor and provided another opportunity to respond to the request to return to work. This email was accompanied by a registered letter which again outlined the return to work process. Additionally, the Grievor was provided with a deadline to respond by November 30, 2023 or his employment file would be closed.
> (Copy of November 14, 2023 email and letter attached as Exhibit 6)
> j. Yet again, he failed to respond.
> k. On December 19, 2023, due to his failure to return to work as instructed, The Grievor's employment file was closed via email and registered letter, dated December 19, 2023
> (Copy of December 19, 2023 email and letter attached as Exhibit 7)

22. Simultaneously with the efforts to effect reinstatement, negotiations took place between the Union and Company concerning damages in lieu of reinstatement. Ultimately, these efforts were not successful.

23. In my view, the Company was quite clear with the grievor that he had to take steps to return to work. On October 3, the Company emailed him with the necessary steps. He did not respond, so an October 18 email was sent with instructions to respond by October 26 (Tab 5, Company documents). Again, the grievor did not respond, so on November 14 an email and registered letter was sent providing a November 30 date to contact the Company by November 30 (Tab 6, Company documents). The letter included the explicit warning:

> "Failure to respond by the deadline indicated, namely end of business on **November 30, 2023**, will result in the closure of your employment file". (Underlining added)

24. Again, the grievor failed to respond. The Company afforded him still another opportunity by not acting immediately after November 30, but on December 19, 2023, his employment file was closed.

25. All indications are that the efforts of the Company to reinstate the grievor were made in good faith. Multiple attempts were made to have him communicate with the Company, to no avail. Additional time and explicit warnings were given about the consequences of a failure to respond. The grievor never contacted the Company.

26. Here, there was no agreement to substitute damages in lieu of reinstatement. No claim was made by the Union setting out the grounds for damages, rather than reinstatement. Indeed, the Union objected to an attempt by the Company to raise the issue, which objection was sustained. At no time did the grievor or the Union respond in writing to the Company's repeated written efforts to begin the reinstatement process, by saying that reinstatement could not happen.

27. The grievor could have returned to work, or he could have provided evidence, including possibly medical evidence, why he could not have returned to work with the Company, prior to the closure of his file. Neither happened.

28. In my view, in the face of the grievor's refusal to respond to the repeated communications from the Company about his return to work, the Company was entitled to close his file.

29. Given this decision, the grievor is not entitled to damages in lieu of reinstatement.

C. Is the grievor entitled to aggravated or punitive damages?

Position of the Parties

30. The Union argues that $15,000 in aggravated damages and $10,000 in punitive damages should be awarded to compensate the grievor for the manner in which he was terminated and to deter the Company from such actions in the future.

31. The Company argues no such damages should be awarded, as punitive damages should be reserved for the most exceptional cases, which this case is not (see CROA 4855). It further notes that the dismissal took place in the context of Covid and that the actions were taken in good faith.

Analysis and decision

32. The distinction between aggravated and punitive damages is set out by Arbitrator Surdakowski in Lakehead University as follows:

> "Aggravated damages are appropriate in a case of wrongful termination (which this case is) when the employer acted in egregious bad faith (i.e. with malicious intent to violate the employment contract when it terminated the grievor's employment). Damages for the manner of dismissal are only appropriate when the employer has engaged in conduct that was unfair or in bad faith by being untruthful, misleading or unduly insensitive that they demonstrate a wilful, calculated attempt to cause the grievor harm. Punitive damages are

> restricted to advertent wrongful acts in connection with the termination of employment that are so malicious or outrageous that they are deserving of punishment on their own. Punitive damages are appropriate only in exceptional cases for conduct which is so harsh, vindictive, reprehensible or extreme that it is deserving of punishment. Aggravated or punitive damages are not payable for the normal frustration, distress or hurt feelings which result from a dismissal or manner of dismissal from employment (*Keays v. Honda Canada Inc.*, [2008] 2 S.C.R. 362, 2008 SCC 39 (S.C.C.) (CanLII), which considered *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 (S.C.C.), 1989 CanLII 93, and *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), 1997 CanLII 332, among others). I respectfully agree with and am in any event bound by the Supreme Court of Canada's pronouncements with respect to aggravated and punitive damages."

33. There is no doubt that arbitrators have the jurisdiction to award aggravated and punitive damages, where appropriate. As the Supreme Court of Canada found in Alberta Union of Provincial Employees v. Lethbridge, 2004 SCC 28:

> "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, note at s. 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." (Emphasis added)

34. At issue, is whether it is appropriate to award such damages here.

35. In **CROA 4853**, I found that the investigation was not fair and impartial, exculpatory witnesses not having been contacted:

> 42."However, the grievor is entitled to a fair and impartial investigation establishing his responsibility before any discipline may be imposed, based on the Collective Agreement and an unbroken line of CROA jurisprudence. There cannot be a conclusion about responsibility if the complaints are disputed, and neither the complainants nor the

> witnesses speaking in favour of the grievor are contacted by the investigating officer. If the investigation is not fair and impartial, it cannot legally establish the responsibility of the grievor.
>
> 43.I find that the investigation was not fair and impartial and therefore the discipline based on it cannot stand. "

36. In **CROA 4852**, I found that the employer had not met its burden of proof with respect to the presence of the grievor at a rally, contrary to Covid regulations. However, I also found that the Company had failed to provide key video evidence to the Union, despite repeated requests:

> "Here, the Union was deprived of the source of the key and only piece of evidence about the presence of the grievor at the Rally. It was deprived of the right to question the taker of the video. The video was in the hands of the Company for some two years and only produced on the eve of arbitration. This is not how CROA is intended to operate, according to the agreement between the parties. Had it been necessary, I would have found that the discipline, based on a screen shot from the video, was void ab initio."

37. The failure of the investigating officer to question exculpatory witnesses in CROA 4853 and subsequent discipline would undoubtedly have caused unnecessary stress to the grievor. I find that he is entitled to aggravated damages of $5000.

38. The failure of the Company to provide a copy of the key piece of evidence to the Union for two years in **CROA 4852,** despite repeated demands, is inexplicable and cannot be condoned. I find that the Union is entitled to $5000 in punitive damages.

39. I remain seized for any questions of interpretation or application.

May 22, 2024

JAMES CAMERON
ARBITRATOR