CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5041

Heard in Montreal, May 15, 2024

Concerning

CENTRAL MAINE AND QUEBEC RAILWAY CANADA INC.

And

UNITED STEEL WORKERS – LOCAL 1976

DISPUTE:

The employer offered a signing bonus to newly hired train Conductors, which the Union argues is a violation of Articles 2.0 and 3.0 of the CMQ USW Collective Agreement.

JOINT STATEMENT OF ISSUE:

1. On June 1st, 2022, a grievance was filed at step 1 in regards of that matter.
2. On June 13th, 2022, the Company issued a response, declining the step 1, saying that they don't see anything in the collective agreement preventing them of using common hiring technique.
3. On July 6th 2022, the union filed a step 2 to this grievance.
4. The Company declined the Union's Step 2 grievance on July 21st, 2022.

Union Position

The Union takes the following position: That the employer should acknowledge that the Union is the sole bargaining agent for the employees covered by this collective agreement in virtue of the Canada Labour Code. The Company did not discuss anything related to the signing bonuses and that the signing bonuses create discrimination between new hires and existing employees. Anything related to wages and bonuses should be discussed and bargained with the union.

Company Position

The Company maintains the following position: The Company maintains that the Union has provided insufficient details regarding the alleged violation of Collective Agreement Articles 2.0 and 3.0. There are no provisions in the Collective Agreement that reference or restrict the Company from offering pre-employment incentives, such as signing bonuses, in order to attract candidates. Moreover, recruitment incentives target candidates with the intent of finding prospective employees. As these prospective employees are not members to the Union, the Company submits that recruitment incentives falls outside of the scope of the Collective Agreement. The Company argues that there has been no violation of the Collective Agreement and requests that the grievance be dismissed in its entirety.

FOR THE UNION:
(SGD.) A. Daignault
Staff Representative

FOR THE COMPANY:
(SGD.) L. McGinley
Director, Labour Relations

There appeared on behalf of the Company:

A. Harrison	– Manager, Labour Relations, Calgary
D. Zurbuchen	– Manager, Labour Relations, Calgary

And on behalf of the Union:

A. Daigneault	– Staff Representative, Montreal
N. Lapointe	– President, USW 1976, Montreal
F. Daigle	– President, CMQ Union, Monteregie
M. Ruel	– Witness, CMQ Employee, Monteregie
U. Lefebvre	– Witness, CMQ Employee, Monteregie

AWARD OF THE ARBITRATOR

Context

1. This matter concerns a "signing bonus" given by the Company to meet staffing shortages for New Hire Conductor Trainees. The Company advertised a signing bonus of $5,000 and $15,000 on social media. The contract containing the bonus produced into evidence (see Tab 8, Union documents) was for $10,000, subject to the following conditions:

> **Eligibility: New Hire Conductor Trainee 2022**
>
> | | | |
> |---|---|---|
> | Signing Bonus | $10,000 Payment | See Criteria Below |
>
> 1. A signing bonus allowance subject to tax withholdings will be submitted to Employee services to be processed and paid based on the criteria listed in the table below.
>
> | Amount of Payment | Eligibility Timeframe for Payment |
> |---|---|
> | $2,000 | Upon 2 weeks of completed service with CP |
> | $8,000 | Upon 6 months of completed service with CP |
>
> 2. Eligible employees receiving the signing bonus agree that they will remain available for full time service with CP for a minimum of 2 year(s) from the date of employment. Employees who have received a signing bonus allowance and who resign or who are terminated prior to 2 years of employment, agree by signing and accepting this allowance to repay amounts received, unless accepting a transfer or reassignment to

> another position within CP. By signing this agreement, employees further agree that CP may deduct any repayment amount owed to CP out of the employee's final paycheck to the greatest extent allowed by applicable state and federal law from but not limited to any wages, vacation or any cash pension refund or other amounts payable to you by CP until the full amount has been recovered. The balance (if any) will be paid by you to CP by certified cheque within 30 days from the date your employment ends with CP unless an agreeable repayment schedule has been determined between CP and the employee. CP may take all legal steps necessary to seek repayment of the money owed to CP under the terms of this agreement. The repayment of any signing bonus monies will not form part of any grievance.
>
> Establishment of seniority and all other terms of the collective bargaining agreements, except as described above, are applicable to employees who accept this signing bonus allowance.

2. The dispute between the Parties concerns the characterization of this payment as a "pre-employment contract" or one governed by the collective agreement. If it is the former, the matter is not grievable. If it is the latter, it is grievable, but remedy is in issue.

3. Issues in Dispute:

A. Is the payment a pre-employment contract, or is it governed by the Collective Agreement?

B. If governed by the Collective Agreement, was the Agreement breached?

C. If so, what is the appropriate remedy?

A. Is the payment a pre-employment contract, or is it governed by the Collective Agreement?

Position of the Parties

4. The Company argues that this was a pre-employment contract with an individual who was not yet an employee, and as such, not represented by the Union or covered by the Collective Agreement. Consequently, it argues that the matter is not arbitrable. It notes that the payment to an existing employee was an administrative error. The intention was to recruit new employees, not to reward existing employees.

5. The Union argues that the terms of the payment arrangement include the necessity of working for the Company for periods of time, such that the arrangement is covered by the Collective Agreement, the individual is represented by the Union, and the matter is arbitrable.

Analysis and decision

6. I agree with the argument of the Company that a pure pre-employment clause is not caught by the Collective Agreement. The Company cites the Supreme Court of Canada decision in Goudie v. Ottawa (City), 2003 1 SCR 141, where the Court held:

> **"If, as alleged, the appellant's officials agreed to a pre-employment agreement with the respondents in September 1983, it seems apparent that a dispute over such an agreement, in its essential character, could not arise from the collective agreement between CUPE and the City. For one thing, the respondents were not employees of the City in September 1983. For another thing, the respondents were not at that time in the bargaining unit or members of CUPE, Local 503**. They were employed by the Ottawa Police Force, which is an entity separate and distinct from the Corporation of the City of Ottawa. (Under s. 8(5) of the *Police Act*, R.S.O. 1980, c. 381, the Board of Commissioners of Police "may contract and may sue and be sued in its own name".) … **If a pre-employment agreement was made in September 1983, as alleged, a claim for its enforcement cannot be said to arise from the interpretation, application, administration or violation of the CUPE collective agreement." (Emphasis added)**

7. The Company further cites Arbitrator Whitaker in Metropol Security v USWA, Local 5296 (Tab 5 Company documents):

> "**It is beyond dispute that the Union's bargaining rights are only with respect to persons who are "employees" of the Employer. This means that the Union has no right to intervene in relations between the Employer and prospective employees**. To the extent that the Union seeks a declaration from me with respect to these relations, I am without jurisdiction to do so I would note in obiter that my conclusions with respect to the Code would appear to apply equally to persons in their pre-employment dealings with the Employer**. To the extent that they may be breached by the Employer's testing policy, they must be enforced elsewhere.**" **(Emphasis added)**

8. The Company recognizes the Union as "the sole bargaining agent for employees in virtue of the Canada Labour Code" (article 2.0, Collective Agreement, Tab 7, Company documents).

9. At issue, though, is whether the bonus offered here, subject to its particular conditions, is a pure pre-employment contract. For the reasons that follow, I find that it is not.

10. The employment contract notes that: "A signing bonus allowance…will be submitted to Employee Services to be processed and paid based on the criteria listed in the table below. The table notes $2000 to be paid "upon 2 weeks of completed service with CP" and $8000 to be paid "Upon 6 months of completed service with CP". Employees who receive the bonus agree to repay it if they resign or are terminated within two years of the date of employment.

11. The terms of the contract require service with the Company and repayment of the bonus if the service of two years is not fulfilled.

12. The cases cited by both parties note the distinction between a bonus which is paid "without strings" prior to employment beginning and a bonus which requires service and repayment if the service requirements are not met.

13. In CKF Inc. v Teamsters, Local 213 (Hiring Incentive Grievance) 2022 343 LAC (4th)86, Arbitrator Noonan cited the decision of Arbitrator Stout in Ontario Power Generation and Society of Energy Professionals 2017 CarswellOnt 11547 with respect to a pre-employment bonus:

> **38** In further analysis, Arbitrator Stout said:
>
> 30. I find that the reasonable compensation paid the external candidates for agreeing to accept employment does not violate the comprehensive compensation scheme of the Collective Agreement. The comprehensive compensation scheme found in the Collective Agreement relates to bargaining unit members' compensation during or after employment (in the case of post-retirement benefits). The comprehensive compensation scheme does not include pre-employment compensation relating to moving and accepting employment. As such, I am of the view that the signing bonus

> is a matter that falls outside the terms of the Collective Agreement.
>
> 31. In my view, payment in a lump sum does not change the characterization of the payment. One must examine what the payment represents. In this case, the payment is clearly related to the act of hiring and is a "signing bonus" given in consideration for coming to Ontario and accepting employment with OPG. The payment is not in respect for providing work or in relation to the terms and conditions of employment with OPG.
> 32. In addition, I do not see the timing of the payment to change the nature of the compensation. I agree with OPG that payment on the first pay cheque is purely a matter of administrative convenience.
> 34. In my view it is only when the pre-employment agreement extends beyond the acceptance of employment and creates a continuing obligation or conflicts with the Collective Agreement that the Society's exclusive bargaining rights are compromised.
> 35. Accordingly, I find that this is clearly a case of a permissible pre-employment contract outside the Collective Agreement.

14. In contrast to the Stout OPG decision, Arbitrator Noonan found that the CKF clause did infringe the Collective Agreement:

> **49** Had the Employer just created a term that said, in effect, "If you come to work for us, we will pay you a $5,000 hiring bonus," that would be a different matter and may well have led to a different result. But that is not what happened here. The Employer here placed a further condition beyond acceptance of employment to be paid the money. The payment would only be made upon completion of a number of hours working for the Employer. If a newly hired employee accepted and commenced employment but did not complete 100 hours of employment, then that employee would not be entitled to any amount -- there would be no "hiring bonus." If the employee worked over 100 hours but less than 600 hours, the employee would only be entitled to half of the bonus.
>
> **50** In those circumstances, the "incentive" paid by the Employer was not only a "hiring incentive," but was also clearly a retention incentive that would have to be *earned*. The deal for the employee was, effectively, if you work for 100 hours, you will be paid the amount set out in the collective agreement plus $2,500 for those hours. That is, in effect, exactly what the Union claims -- the newly hired employees would be paid a bonus of $25 per hour for those first 100 hours and a subsequent bonus for the next 500 hours. Those bonuses obviously exceed the

> amount negotiated by the Union for those positions and amount to individual contracts that violate the exclusive bargaining agency of the Union.
> **54** In *Ontario Power Generation*, the arbitrator found that the pre-employment agreement had "no strings attached to this compensation that would reach into the continuing employment relationship and infringe upon the Society's exclusive representation rights" (para. 25). In this case, however, there were strings attached. The pre-employment agreement set out an obligation to continue to work for the Employer to earn the bonus. The timing of the payment was not just an administrative convenience, rather it was a term and condition of employment.
> **55** At para. 22 of *Ontario Power Generation*, Arbitrator Stout said, "OPG, quite rightly in my view, concedes that if they required the external candidates to repay a portion or all of the signing bonus upon leaving employment, then such a condition would breach the Collective Agreement." In this case, while there was no repayment requirement, that is only because there was no money paid out until the working conditions had been met. It is, metaphorically, the flip side of the same coin. If the hours were not worked, the new hire did not get the bonus.
> **56** For these reasons, I find that the incentives offered and paid to the newly hired millwrights violated the Union's exclusive bargaining agency set out in Article 1.05 of the Collective Agreement and violate the negotiated pay rates set out in Article 1.02.

15. Here, like the CKF clause, employees are required to work for periods of time and to repay monies should they not complete the necessary service requirements. The situation is unlike the OPG clause, although OPG recognized that a repayment requirement would have infringed the Collective Agreement.

16. For the above reasons, I find that the bonus with its attached conditions was not a pure pre-employment payment and is subject to the Collective Agreement.

B. If governed by the Collective Agreement, was the Agreement breached?

Position of the Parties

17. The Union argues that the Company breached articles 2.0 (Union recognition) and 3.0 (no discrimination) of the Collective Agreement. It argues that paying new hires more than existing employees constitutes discrimination against existing employees.

18. The Company argues that there was no breach of the Collective Agreement, as the bonus was a pre-employment payment. It argues that the payment was based on employment, and not union membership. It argues that the payment was merely the exercise of a management right.

Analysis and decision

19. Given my finding above, it is clear that negotiations by the Company with individuals, with respect to a bonus requiring service and repayment, constitute a breach of the Union recognition clause as the sole bargaining agent (see article 2.0, Collective Agreement, Tab 7, Company documents).

20. I am not convinced, however, that the payments constitute discrimination against existing employees. Existing employees received the pay they were due under the Collective Agreement. New employees received a payment to which they were not entitled. As Arbitrator Noonan noted in CKF:

> Nevertheless, there are, of course, cases in which no financial losses can be identified. This is such a case. I have found that the Employer has violated the Union's exclusive bargaining authority by negotiating an agreement to pay and by paying newly hired employees compensation beyond that set out in the Collective Agreement. The newly hired employees benefitted by being paid amounts that should not have been paid to them (under Article 1.05, the individually negotiated agreements were null and void). It is beyond my jurisdiction to order them to repay those amounts. They were not parties to this dispute, were not served notice of the hearing, and the Union did not seek an order that they pay back that money. They were innocent parties in the transaction. In short, there was an enrichment to them but no financial loss to anyone.

21. Consequently, I find that article 2.0 (Union recognition) was breached but not article 3.0 (No discrimination).

C. If so, what is the appropriate remedy?

Position of the Parties

22. The Union seeks damages for both it and the existing employees who did not receive a bonus.

23. The Company submits that it acted in good faith to deal with a human resources issue and damages are not appropriate.

Analysis and decision

24. In CKF Arbitrator Noonan awarded $10,000 to the Union for the breach of its bargaining rights. In SRI Homes v United Steelworkers, Local 1-423 (Unilateral wage increase grievance) (Tab 19, Union documents), Arbitrator Noonan awarded $30,000 for a deliberate breach of the Union's bargaining rights. In West Park Healthcare Centre and SEIU (Tab 20, Union documents), the Board awarded $10,000 for a deliberate breach of the Union's bargaining rights.

25. Here, the breach was clearly not a deliberate one. If the bonus had been structured somewhat differently, there would have been no breach. However, respect of the Union recognition clause is fundamental to the proper bargaining relationship between the Parties. Given that this is a first offence, I award damages of $5000 to the Union.

26. Given my finding with respect to article 3.0 (no discrimination), no damages are awarded to individual employees.

27. I remain seized with respect to any issues of interpretation or application of this Award.

June 7, 2024

JAMES CAMERON
ARBITRATOR