CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5086

Heard in Montreal, October 8, 2024

Concerning

CANADIAN PACIFIC KANSAS RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The issue giving rise to this appeal is whether or not the Company's decision to hold MMR ("the Grievor") Out of Service is a violation of Article 39.06 of the 2019 consolidated collective agreement, and the CTY East, Held Out of Service Letter in force at the time of incident.

JOINT STATEMENT OF ISSUE:

On August 17, 2021 the Company removed the Grievor from service and provided a letter which states;

"This letter is to inform you that you are being held from service immediately as a result of the Company becoming aware of your recent criminal charges. The Company understands that because of your charges you have a scheduled court date in late September. You are responsible to keep the Company updated on the outcome of your court proceedings and criminal charges against you.

Please also be advised that you may be subject to investigation based on the outcome of your court proceedings."

UNION POSITION

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union's position that the Company's actions are in violation of the Collective Agreement Article 39.06. The Union further believes the Company is also violating the Collective Agreement Letter (CTY East Held Out of Service) where after being held from service for 10-days the employee will be compensated all loss of wages.

The Grievor was returned to work after almost three years, the Company did not call an investigation and has concluded that there will be no compensation paid for the Company administratively holding him from service pending any outcome. The Company is aware of the outcome as all charges dropped.

The Company had removed the Grievor from service before he has ever stepped foot in a court. If the Company has concerns, then remove the employee but it is their responsibility to

maintain that employees' wages/benefits. The Company's letter to the Grievor clearly states that he maybe subject to an investigation depending on the outcome of the court hearing.

They were clearly holding him from work where if things go one way he is back at work with all loss of wages, if it goes another way, they will then schedule a statement. This violates the Grievor's collective rights. To hold the employee off without wages in this manner is discriminatory, further affecting the employee and his family with the stress of no income to live on.

As per the facts presented the Union requests, the Company compensate the grievor all loss of wages with interest, without loss of any benefits he has been denied during this improper and discriminatory process, no loss of seniority or pension, AV, and EDO entitlement.

As noted there was no investigation, no discipline, all charges dropped, thus the CTY Letter must be respected, and all compensation paid.

The Union provides (this is a clear case of what purports a violation of rights by discrimination, harassment, punitive punishment) wherein directly affecting the well being of Mr. Recine that damages ought to be awarded.

The Union request damages as provided;

1) $10,000.00 in general damages for breach of the just cause provisions in the Collective Agreement,

2) $25,000.00 in aggravated damages for the Company's bad faith and malicious intent,

3)$25,000.00 in punitive damages owing to the Company's harsh, vindictive, reprehensible decisions in handling MMR,

4) $10,000.00 for breach of the MMR's rights under the employment contract.

COMPANY POSITION

The Company disagrees with the Union's position.

The Company maintains it did not violate the collective agreement nor did it act unreasonably when it held the Grievor out of service, pending the outcome of his criminal charges. The Grievor was held out of service pending his own criminal proceedings and not pending any alleged disciplinary investigation pursuant to Article 39.06 and the Letter Re: Held out of Service (CTY East Application). The Collective Agreement language at the time was not designed nor intended to cover ongoing wages for employees being held out of service pending investigation for reasons entirely beyond the control of the Company.

Due to the nature of the Company's business, the nature of the Grievor's criminal allegations and the safety sensitive duties and responsibilities of the Grievor in question, the Company acted appropriately at the time given the potential harm to the Company's reputation and the potential harm to other employees, contractors and/or Company customers.

With respect to the Union's claim for damages, the Union has provided no rationale in support of its claim. Damages are reserved for conduct, which is found to be harsh, vindictive, reprehensible and malicious, as well as extreme in its nature such that by any reasonable standard it is deserving of full condemnation and punishment. As the Union has failed to allege such conduct on behalf of the Company or supply sufficient details to support such an allegation, the Company maintains the request for damages is without merit.

Based on the foregoing, the Company cannot agree that any violation has occurred and requests that the grievance be dismissed in its entirety.

For the Union:	**For the Company:**
(SGD.) W. Apsey	**(SGD.) F. Billings**
(Retired) General Chairperson, CTY-E	Director, Labour Relations

There appeared on behalf of the Company:

F. Billings	– Director Labour Relations, Calgary
S. Oliver	– Manager, Labour Relations, Calgary

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
D. Psichogios	– General Chairperson, CTY-E, Montreal
J. Bishop	– General Chairperson, LE-E, Toronto
MR	– Grievor, via Zoom Video Conferencing

AWARD OF THE ARBITRATOR

Context

1. The Parties have requested that this matter be anonymized. Accordingly, the grievor will be referred to as “MR”.

2. MR was charged with three counts of sexual assault against a minor in September, 2021. On March 22, 2024, the Court discharged MR with a notation: “Crown offers no evidence-discharged” (Tab 8, Union documents).

3. On August 17, 2021, the Company removed MR from service as a result of his arrest the previous day. He did not return to work until June 24, 2024.

4. **Issues**

- **A.** Did the Company violate article 39.06 of the Collective Agreement when the grievor was held out of service?
- **B.** Did the Company violate article 39.06 of the Collective Agreement when it did not compensate the grievor during the time he was held out of service?
- **C.** Are the grievor and the Union entitled to damages, as a result of these actions?

A. Did the Company violate article 39.06 of the Collective Agreement when the grievor was held out of service?

Position of Parties

5. The Company argues that article 39.06 of the Collective Agreement was negotiated with the intention of dealing with employees held out of service due to investigations dealing with employment matters, not being held out pending criminal proceedings.

6. It argues that it was entitled to keep the grievor out of service given the safety sensitive nature of his duties, the concern with respect to the charges against him, his personal safety, the safety of his coworkers and the impact to the Company's reputation.

7. It notes that that 2022 version of article 39.06 came into force after the decision was made to hold the grievor out of service. It submits that according to the usual rules of contract interpretation, the article applicable at the time was not breached.

8. Finally, it provides examples of suspensions being upheld, where the Company's concerns were found to be legitimate (see **CROA 3311, CROA 1703** and **Humber Regional Hospital v OPSEU, Loc. 577**, 2003 Canlii 89600).

9. The Union argues that the grievor was held out of service for an investigation. His suspension letter noted that "you may be subject to investigation based on the outcome of your court proceedings" (see Tab 3, Union documents). As such, it argues that article 39.06 squarely applies.

10. The Union submits that the Company has no freestanding right to hold the grievor out from work, except for the purposes of investigation.

11. The Union relies by analogy on the SCC decision of **Cabakian c. Industrielle Alliance, cie d'assurance sur la vie**, 2004 Carswell Que 1744, where the Supreme

Court examines the necessary criteria for an “administrative suspension” under Civil Law and notes that the criteria have not been met in the present matter.

12. The Union submits that arbitrators have found that the fact of criminal charges is insufficient, in and of itself, to warrant removal from the workplace. It notes that a balancing is required of the competing interests of the employee in maintaining his work, with the employer’s interest in maintaining a safe and reputable workplace. It notes further that the Company bears an onus to demonstrate a nexus between the criminal charges and the interests of the Company, which has not been proven here, and further, must provide evidence of risk to other employees or the employer’s reputation (see **Re Phillips Cables Ltd. v USWA Local 7276**, 1974 CarswellOnt 1364, **Re Ontario Jockey Club v Mutual Employees’ Assn., SEIU, Local 528**, 1977 CanLii 2913, **CROA 1703, Domtar Inc. v Unifor, Espanola Local 74,** CanLii 42452). Here, although the charges were serious, there was no evidence of any media reports or other harm to its reputation. As such, it was improper for the grievor to be held out of service.

Analysis and Decision

13. As noted above, the grievor was held out of service for nearly three years, from August 17, 2021 until June 24, 2024. During that period, the agreements between the Parties concerning the rights and obligations pertaining to held out of service were subject to change.

14. In 2018-2021, the applicable Collective Agreement language was as follows:

> 39.06
> 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 sub-clauses 34.01(1), (2), and (4).

15. This Collective Agreement also contained a May 30, 2018 letter of understanding for CTY East:

> This refers to our discussions regarding your concerns pertaining to employees being held out of service for an extended period of time both prior to and pending an investigation.
> Although it was recognized that the Company has the right to hold employees out of service for an investigation according to the terms of the agreement, in order to address your concerns the following was agreed:
> This Appendix C addresses situations when an employee has been suspended for an investigation for more than 10 calendar days due solely to the Company the employee will be paid lost wages for the time in excess of 10 calendar days whatever the decision may be. This period may be extended upon mutual agreement.
> This pilot will continue for the duration of the contract and may be modified or cancelled upon mutual agreement.

16. In 2022, the new 2022-2023 Collective Agreement came into effect, with the following language concerning held out of service:

> "An employee is not to be held off unnecessarily in connection with an investigation. An employee may be held out of service for an investigation for the following reasons:
> 1. The nature of the alleged offence is of itself such that it places doubt on the continued employment of the individual, or
> 2. 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.
> In such cases, an employee held out of service more than 10 calendar days, or as mutually extended, due solely to the Company, will be paid lost wages for each day held out of service in excess of 10 calendar days, or such other agreed upon period. **It is understood that employees held out of service in relation to the alleged criminal charges and alleged Rule G offences, are not eligible for lost wages pursuant to this sub-clause unless later found blameless**." (Emphasis added)

17. It is noteworthy that the earlier letter of understanding dealt primarily with the issue of pay, rather than the holding out of service itself. The LOU does note, however, that: "Although it was recognized that the Company has the right to hold employees out of

service for an investigation according to the terms of the agreement…." The LOU recognizes the Company right to hold out of service for an investigation. I do not find that the 2018 LOU deals directly with when an employee can properly be held out of service. It deals with pay in the event of a lengthy investigation.

18. The 2018-2021 Collective Agreement language directly references when employees can be held out of service. Article 39.06, set out above, when carefully parsed notes the following:

> "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".

19. This language confirms that being held out is not automatic and should only be done if necessary. The language addresses the situation where the employee is being held out for an investigation. Finally, it notes that there is an exception to the requirement that the employee not be held out unnecessarily or automatically, if the nature of the offence is of itself such that it places doubt on the continued employment of the individual. Thus, an assessment will have to be made about the nature and severity of the offence and whether the continued employment of the individual is in doubt.

20. The 2022-2023 Collective Agreement language mirrors the earlier language, with the exception of an express reference to criminal charges: "It is understood that employees held out service in relation to the alleged criminal charges … are not eligible for lost wages … unless later found blameless". Thus, this Agreement specifically recognizes that employees may be held out of service as a result of criminal charges.

21. The decision of the Company to hold the grievor out of service must therefore be examined in light of the facts known at the time and subsequent facts, in light of the applicable collective agreement language.

22. The holding out letter of August 17, 2021 (see Tab 1, Company documents) specifically references “your recent criminal charges” and advises that “you may be subject to investigation based on the outcome of your court proceedings”.

23. The JSI provides the Company’s position at the time:

> “Due to the nature of the Company’s business, the nature of the Grievor’s criminal allegations and the safety sensitive duties and responsibilities of the Grievor in question, the Company acted appropriately at the time given the potential harm to the Company’s reputation and the potential harm to other employees, contractors and/or Company customers”.

24. The Union submits that the grievor was a Conductor on a freight train. As such, he would have very limited contact with any members of the public and the actual risk to minors is illusory. The Union argues further that there had been and were no media reports about the charges, such that the risk to the Company’s reputation was minimal.

25. I find that there has not been evidence led of actual risk to the grievor or to other employees or members of the public. This matter differs from **Domtar Inc. v Unifor, Espanola Local 74**, 2021 CanLii 42452, where evidence was led about actual concerns by fellow employees. It is worth noting that in that matter, the arbitrator found that those concerns, in the particular circumstances, were not reasonable. Here, I do not see any risk to fellow employees or minors in the factual context of a conductor working on a freight train.

26. However, the risk to reputation argument is harder to put aside. The accusations against the grievor are extremely serious, and if proven, would likely have resulted in a sentence of incarceration. Crimes against minors are viewed as odious by members of the public and it is possible that the connection between the grievor and the Company would be harmful to the Company’s reputation.

27. While there were no media reports, Court proceedings are public and there would have been a risk that the charges would be publicized.

28. However, even if this was not the case, I nonetheless find that the Company was entitled to hold the grievor off work, based on the language of article 39.06 and the facts of the case.

29. Firstly, I do not agree that the Company is entitled to invoke the criminal process as an argument that it was uninvolved with the decision to withhold the grievor from work. The Company made the decision to withhold the grievor from work, not the Crown, pending the outcome of the criminal proceedings and a possible Company investigation. The Company could have decided to let the grievor continue working, pending a decision from the Court, or it could possibly have found alternate working arrangements for the grievor. Instead, it made the decision to withhold him from work, in order to protect its own legitimate interests.

30. Secondly, the charges of sexual assault against a minor would fall clearly into the wording of the 2018-2021 version of article 39.06: “unless the nature of the alleged offence is of itself such that it places doubt on the continued employment of the individual”. The Company would clearly be entitled to have at least doubt about the continued employment of the grievor, had he been found guilty of the charges.

31. Thirdly, the removal letter specifically referenced that the grievor “may be subject to investigation based on the outcome of your court proceedings”. The Company undoubtedly would have had a subsequent investigation had the grievor been found guilty of the sexual assault charges. The Company could have had an investigation, given the differing standards of proof, even if the grievor had been found not guilty. The investigative process was a live issue from the date of the decision to withhold the grievor from service and as such, article 39.06 applies.

32. Fourthly, the language of the earlier LOU refers to “the right to hold employees out of service for an investigation”, while the Collective Agreement language refers to “…held out unnecessarily in connection with an investigation…”. The Collective Agreement

language is clearly broader and its plain language must be given effect, according to the well known principles of interpretation referred to by the Parties. Here, the removal was at least “in connection with an investigation”.

33. The 2022-2023 Collective Agreement language, in my view, changes nothing from the earlier language, with respect to the rights and obligations of the Parties concerning the withholding of the grievor from work. While the language now specifically references criminal charges, the earlier, and continuing, language of: “nature of the alleged offences” and “doubt on the continued employment of the individual” remain applicable to the current matter.

34. As the withholding is captured by the Collective Agreement language of the Parties, there is no need to explore whether a right to remove an employee from work exists under the Common Law and whether it would be appropriate to do so here, given the facts of the current matter.

35. Accordingly, I find that the grievor was withheld from work by the Company, as it was entitled to do under article 39.06 of the Collective Agreement.

B. Did the Company violate article 39.06 of the Collective Agreement when it did not compensate the grievor during the time he was held out of service?

Position of the Parties

36. The Company argues that the Collective Agreement language in effect in 2021 was not intended to cover ongoing payments for employees being held out of service for reasons beyond the control of the Company.

37. It argues that payments were only negotiated as of 2022, and that according to CROA rules and generally accepted rules of contract interpretation, the arbitrator has no power to add to the language to which the Parties have agreed.

38. It notes that the Union bears the burden of proof in this matter, which it has failed to meet.

39. The Union argues that the grievor is entitled to pay after he is held out for more than 10 days under the terms of the LOU.

40. The Union submits that article 39.06 only permits an employee to be held out for limited reasons and that these do not permit a three-year de facto unpaid suspension. It argues that it was incumbent on the Company to investigate in a timely way. It notes that even in Quebec, where "administrative suspensions" are permitted, the Supreme Court in Cabiakman has held that such suspensions should be of short duration and with pay.

Analysis and Decision

41. Article 39.06 of the Collective Agreement of 2018-2021provided for conditional payment of employees held out of service:

"An employee who is found blameless will be reimbursed for time lost in accordance with sub-clauses 34.01 (1), (2) and (4)".

42. Article 39.06 of the Collective Agreement of 2022-2023 provides for the same conditional payments:

> "It is understood that employees held out of service in relation to the alleged criminal charges and alleged Rule G offences, are not eligible for lost wages pursuant to this sub-clause unless later found blameless".

43. In this matter, the charges were dismissed against the grievor and the Company chose not to have its own subsequent investigation. Consequently, the grievor, for the purposes of the Collective Agreement, has been found blameless.

44. Accordingly, the grievor should be reimbursed pursuant to the terms of the applicable Collective Agreement for the time he was held off work.

45. However, I do not find that the Company violated the Collective Agreement in not paying the grievor during the period he was held out of service. The Collective Agreement of 2018-2022 and 2022-2023 both require that the grievor be "found blameless" before the Company is required to reimburse for lost time and wages.

46. This is in contrast to the LOU, where "the employee will be paid lost wages for the time in excess of 10 calendar days whatever the decision may be".

47. The LOU and the Collective Agreement are contradictory concerning when, and under what conditions, pay will be made. The later, and more specific Collective Agreement language must apply here.

48. The importance of specific collective agreement language was noted by Arbitrator Flageole in **Syndicat des employés et employées de soutien de l'Université de Sherbrooke, SCPF section locale 7498 et Université de Sherbrooke**, 2018 Carswell Que 8360, in which he distinguished the case before him from another where "the collective agreement expressly provided that, "in cases where the teacher is prosecuted criminally", the School Board may relieve him of his duties without pay until the end of his trial". Here too, the specific Collective Agreement language of article 39.06 permits the holding out to be without pay, but subject to reimbursement, if the employee is "found blameless".

49. I therefore find that the Company did not violate article 39.06 prior to 2024, prior to the charges being dismissed against the grievor. It did violate article 39.06 in not reimbursing lost time and wages once the charges were dismissed.

B. Are the grievor and the Union entitled to damages, as a result of these actions?

Position of the Parties

50. The Union argues that the grievor and the Union are entitled to general, aggravated and punitive damages:

> The Union request damages as provided;

1) $10,000.00 in general damages for breach of the just cause provisions in the Collective Agreement,
2) $25,000.00 in aggravated damages for the Company's bad faith and malicious intent,
3) $25,000.00 in punitive damages owing to the Company's harsh, vindictive, reprehensible decisions in handling MMR,
4) $10,000.00 for breach of the MMR's rights under the employment contract.

51. It argues that while such damages are exceptional, my discretion should be exercised here, given the lengthy period the grievor was held out without pay and without investigation. It submits that there is considerable jurisprudence where such damages have been awarded (see paragraphs 85-99, Union Brief). It relies on a recent case, **AH 884**, in which I found the Company liable under article 39.06 for delaying an investigation.

52. The Company argues that such damages are entirely exceptional and only to be awarded for harsh and vindicative conduct, which is clearly not present in the instant matter.

Analysis and Decision

53. I agree that arbitrators have jurisdiction to award general, aggravated and punitive damages under the Canada Labour Code, where the appropriate evidence has been led establishing the damages and there are no legal impediments to doing so.

54. It is troubling that this matter took 3 years to resolve, while the grievor was held out without pay. There is no doubt that such holding out would cause harm to him, even if payment with interest is made after the fact. I have no doubt that more money later does not do away with the harm of being held out of work, where ultimately there is no finding of wrongdoing on the part of the grievor.

55. In **AH 884**, I dealt with the application of article 39.06 in the context of an internal, rather than criminal investigation:

> 11. A parsing of the article reveals the following:
>
> a) Employees are not be held out of service unnecessarily;

> b) Employees may be held out of service if: i) continued employment is in doubt or ii) to expedite the investigation;
> c) Employees held out "in such cases" (referring to bi) or bii)), for more than 10 days, "due solely to the Company", will get paid for each day held out over 10 calendar days;
> d) Employees held out in relation to: i) alleged criminal charges or ii) alleged Rule G offences are not eligible for payment unless later found blameless.
>
> 24. The Union has the burden of proof to establish that it was solely the Company's decision to hold the grievor out of service, for the purposes of article 39.06, from December 19, 2022 until February 1, 2023. Given the grievor's outrageous behaviour, I am prepared to accept that it would have taken some short additional time after the incident of December 16 for the Company to be able to decide how to appropriately continue the initial investigation. In my view, by December 21 the Company should easily have been in a position to proceed. The decision to continue to hold out the grievor after that point until his retirement was solely that of the Company. As such, the payment provisions of article 39.06 apply.

56. In **AH 884**, the issue was whether the grievor was held out "due solely to the Company", and when he was entitled to pay under the article. Here, the issue is with respect to alleged criminal charges, an issue not found in **AH 884**.

57. For damages to be awarded, I must find wrongdoing on the part of the Company, which is not otherwise captured by the language of the Collective Agreement. Here, I have found that the Company was entitled to hold the grievor out of work according to the terms of article 39.06. I have also found that the Company was entitled not to pay the grievor until the charges were resolved and he was found blameless, again according to the terms of the article. It was only after the charges were discharged and the Company opted not to do an internal investigation that the grievor was entitled to be reimbursed for lost time and wages.

58. There was an exchange of information concerning the discharge, reimbursement and return to work between the Union and the Company in May-June 2024 (see Tab 9, Union documents), but the Company has continued to refuse reimbursement.

59. I find that the Company was wrong in not making the reimbursement as required by article 39.06 once it knew that the grievor had been found blameless. The delay between May-June 2024 and the date of this decision is not long, but it comes after the grievor has been held out of work without pay for three years. The Company should have made immediate payment. The grievor is awarded $1000 in damages in recognition of this unwarranted delay in payment.

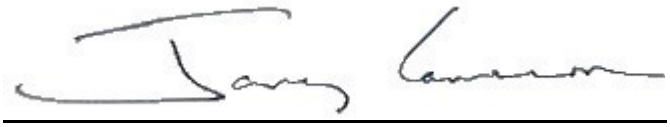
60. Given the above findings with respect to the application of article 39.06, I do not find it appropriate to award damages to the Union.

Conclusion

61. Accordingly, the grievor is to be made whole, with no loss of seniority, with respect to the time period from August 17, 2021 until June 24, 2024, less mitigation.

62. In addition, he is awarded $1000 in general damages for the delay in reimbursement after he had been found blameless.

63. I retain jurisdiction with respect to all issues of interpretation and application of this Award.



November 21, 2024

JAMES CAMERON
ARBITRATOR