

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN NATIONAL RAILWAY COMPANY (CN)

And

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS SYSTEM
COUNCIL NO. 11 (IBEW)**

AH664 SUPPLEMENTAL - COMPENSATION FOR D. REID REINSTATEMENT

Date: December 4, 2018

Arbitrator: Graham J. Clarke

Appearing for IBEW:

R. Church: Counsel
S. Martin: Sr. General Chairman
J. Sommer: Reg. Representative - Central
L. Couture: International Representative
G. Badesha: Reg. Representative – West
L. Hooper: General Chairman

Appearing for CN:

F. Daignault: Manager, Labour Relations
S. Grou: Sr. Manager, Labour Relations
S. Lauzon: Sr. Manager, S&C

Heard in Montreal on November 29, 2018.

AWARD

NATURE OF THE MATTER

1. The parties have asked the arbitrator to resolve certain issues relating to the compensation owing to Mr. Reid following his reinstatement. CN argued that Mr. Reid lost his entitlement to full compensation due to his lack of effort to mitigate his damages. The IBEW argued that Mr. Reid had acted reasonably given the circumstances.
2. The IBEW further suggested that certain sums Mr. Reid had obtained working remotely for his sister's business in Mexico should not be deducted since those funds went to his parents to pay down loans they had provided to him.
3. For the following reasons, the arbitrator concludes that Mr. Reid made sufficient mitigation efforts while awaiting the expedited hearing into his grievance. However, CN is entitled to deduct the amounts Mr. Reid earned working for his sister. Mr. Reid is entitled to interest on all compensation up to the date of June 6, 2018, but not thereafter.

BACKGROUND

4. In [Canadian National Railway Company v International Brotherhood of Electrical Workers System Council No. 11, 2018 CanLII 52755 \(AH664\)](#), the arbitrator concluded that CN had failed to justify Mr. Reid's dismissal:

41. CN did not persuade the arbitrator to discount Mr. Reid's explanations. The rules on which CN relied included multiple references to "track units", and suggested employees were working as part of a gang. The arbitrator would need to know how these terms should be interpreted if Mr. Reid's comments were to be discounted.

42. The arbitrator orders CN to reinstate Mr. Reid in his employment without loss of seniority, remove the 20 demerits points and resulting dismissal from his record and compensate him for his losses.

43. The arbitrator remains seized to resolve any questions arising from this award.

5. On October 30, 2018, CN, on behalf of the parties, wrote to the arbitrator to request the addition of a supplementary hearing to an already pending date in a separate matter:

The Union and the Company have a disagreement with respect to the execution of Award AH 664 as it applies to the compensation owed the grievor, D. Reid. Both parties would like to suggest a supplemental hearing on November 29, a day where we already have another grievance scheduled to be heard in Montreal between the same parties.

6. The parties made their oral submissions and filed supporting briefs on November 29, 2018 regarding the compensation issue.

FACTS

7. The parties had differing positions depending on the timeframe in question. A chronology of key events creates three different time frames:

- **June 26, 2017:** CN holds Mr. Reid out of service due to a workplace incident;
- **July 13, 2017:** CN dismissed Mr. Reid for an accumulation of demerit points;
- **May 30, 2017:** The arbitrator held the arbitration hearing;
- **June 6, 2018:** The arbitrator issued AH664 which ordered Mr. Reid's reinstatement and compensation;
- **July 9, 2018:** Mr. Reid returned to work.

8. This chronology creates three distinct time frames: i) Held out of service (June 26 – July 13, 2017); ii) Dismissal to Reinstatement (July 13, 2017 to June 6, 2018) and iii) Return to paid employment (June 6 – July 9, 2018).

9. Mr. Reid is 38 years old and had 10+ years service with CN. He lives in St. Thomas, which is near London, Ontario. He has joint custody of his daughter. He also had pending criminal charges at the material times, most of which now appear to have been dismissed. Following his dismissal, he relied on Employment Insurance (EI) benefits and his savings.

10. The IBEW adduced evidence concerning the economic situation in the London area (E-2S; Tabs 14 and 15). Unlike Calgary during boom times, London had instead experienced an economic downturn, including during the period when Mr. Reid was off work.

11. On the same date it received AH664, CN asked the IBEW for information regarding Mr. Reid's mitigation efforts (U-1S; Paras 40-47). Initially, the IBEW was only able to provide information on Mr. Reid's receipt of EI benefits. The IBEW was only able to provide CN with further information about Mr. Reid's mitigation efforts on October 29 and 30, 2018. The arbitrator makes no finding on the reasons for this delay, but it does impact the awarding of interest to Mr. Reid, *infra*.

12. At the November 29, 2018 hearing, the IBEW described Mr. Reid's attempts to mitigate his damages. On September 27, 2017, ZeeElectric wrote to him to advise it would not hire him given his uncertain situation (U-2S; Tab 10):

Unfortunately, due to your circumstances regarding your possibility of returning to CN pending arbitration, we are not willing to invest in an employee whose future with us would be uncertain. We wish you the best of luck with your pending position and continuing your career with CN.

13. The IBEW also provided CN with a text message chain suggesting that Mr. Reid had attempted to get work with a contractor in Port Frank, Ontario (U-2S; Tab 11).

14. Mr. Reid did perform work remotely for his sister's business which she operates out of Mexico. This led to revenue of approximately \$2000.00. The IBEW suggested this was not income in the traditional sense since it was paid directly to Mr. Reid's parents to repay loans they had provided to Mr. Reid.

LAW

15. The parties do not dispute that Mr. Reid had an obligation to mitigate his damages during his time off work. Indeed, article 13.6 of their collective agreement ends with this sentence:

The parties acknowledge the duty to mitigate as per jurisprudence.

16. The Supreme Court of Canada's (SCC) seminal case in [Red Deer College v. Michaels, \[1976\] 2 SCR 324, 1975 CanLII 15](#) (*Red Deer*) confirms two key propositions. First, the employee must prove the damages suffered:

In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. **He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages.**

(Emphasis added)

17. Second, the employer has the burden to prove that an employee has failed to mitigate some or all of his/her damages:

If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.

18. The parties do not have a significant dispute on the amount owed to Mr. Reid but first require certain decisions from the arbitrator, especially on mitigation efforts, before being able to calculate the final amounts.

ANALYSIS AND DECISION

19. While the employer has the burden to demonstrate that an employee failed to take all reasonable steps to mitigate his/her damages, the employee must still cooperate. In this instance, CN immediately asked the IBEW for the relevant mitigation information and received the information described above. The evidence did not disclose to what extent CN followed up with either Mr. Reid or his possible or actual employers to verify that information.

20. The facts and the law described above permit the arbitrator to decide the various issues separating the parties.

Work for Mr. Reid's sister

21. The arbitrator agrees with CN that it is entitled to full credit for all sums Mr. Reid earned by performing this ad hoc work. The fact that these sums may have been paid directly to Mr. Reid's parents to repay loans for legal fees has no bearing on this conclusion.

22. Mr. Reid had an obligation to mitigate. He could not both respect this obligation and claim that income he earned did not count against the compensation CN owes him. Arbitrators generally deduct amounts an employee earns when off work from the compensation owing following reinstatement: [CROA&DR 4629](#). There is no reason to do otherwise in this case.

Return to paid employment (June 6 – July 9, 2018)

23. At the hearing, CN did not dispute that it owed Mr. Reid his full compensation from the date of the arbitrator's award to the date when he returned to work. During this period, Mr. Reid updated his rules testing and obtained a required medical clearance.

Held out of service (June 26 – July 13, 2017)

24. The workplace incident which later led to Mr. Reid's termination occurred on June 26, 2017. CN terminated Mr. Reid on July 13, 2017.

25. The arbitrator concludes that Mr. Reid had no duty to mitigate his lost remuneration during this period. He remained an employee throughout. Indeed, CN might have had him continue to work which would have eliminated this loss entirely.

26. This conclusion is consistent with that in [CROA&DR 4355S](#) and *CROA&DR 4294S* (U-2S; Tab 21), two awards which both parties put before the arbitrator.

Dismissal to Reinstatement (July 13, 2017 to June 6, 2018)

27. The most challenging question in this case concerned whether Mr. Reid did enough to attempt to mitigate his damages or whether the amounts owing should be reduced to reflect inadequate efforts on his part.

28. The SCC in *Red Deer*, supra, indicated that an employee cannot stand “idly or unreasonably by” while damages accumulate. The arbitrator must answer the question the SCC suggested in *Red Deer* ie whether Mr. Reid “tried without success to obtain other employment”.

29. The arbitrator concludes that CN did not meet its burden for the following reasons.

30. Context is essential. CN’s decision to terminate Mr. Reid for cause placed him in a challenging situation when he attempted to mitigate his damages. If CN could not prove cause, which it was later unable to do, then it was entirely foreseeable that significant compensation might result.

31. What are some of these key contextual factors?

32. Mr. Reid was able to manage his pending criminal charges and family responsibilities while working for CN. But those factors, especially the former, can make it far more difficult to find new employment until they are successfully resolved (assuming they are).

33. The IBEW satisfied the arbitrator that the London area was not experiencing any type of economic boom at the time when Mr. Reid was attempting to mitigate his damages. Economic times in London have been challenging.

34. CN suggested that Barrie, Ontario had the lowest unemployment rate in all of Canada in December 2017 (E-1S; Paragraph 26). However, Barrie is far from London. The arbitrator cannot accept that in the context in which Mr. Reid was placed that he should have applied for jobs in Barrie and then tried to commute there. The driving distance in one direction is roughly 257 kilometres. There was no evidence that anyone

does that type of daily commute, presumably given the distances and the traffic involved.

35. CN also suggested Mr. Reid could have applied for jobs at other rail companies or with the contractors they use (E-1S; Para 23-25). The challenge in this regard is two-fold. First, CN had terminated Mr. Reid for an accumulation of demerit points. The culminating incident had involved safety. Objectively, this context does not appear helpful to obtaining a new job in the railway industry.

36. Second, CN has a policy of not providing employees with reference letters. Employers are free to adopt such policies, though the courts have noted, in cases not involving allegations of cause, that the lack of a reference letter may hinder an employment search: [Liboiron v. IBM Canada Ltd., 2015 BCSC 1523](#). The impact would be greater in a case involving termination for cause.

37. Evidently, reference letters and allegations of cause do not go together. But that does not eliminate the fact that the lack of a helpful reference letter will impact job prospects.

38. *CROA&DR 4294S*, *supra*, does not assist CN since the employee in that case, instead of looking for other employment, initially spent his time working on his already-existing embryonic coffee truck business. Arbitrator Schmidt also noted that the grievor lived in Calgary during a boom time in its economy. She reduced compensation by 40% as a result of his actions. [CROA&DR 4355S](#) had a similar factual background involving a booming Alberta economy.

39. The time frame covered in *CROA&DR 4294S* was also significantly longer than the time period in this case. The quick resolution of Mr. Reid's case under the parties' expedited arbitration system differs from the situation Arbitrator Schmidt examined.

40. While CN came close to persuading the arbitrator that some reduction on the compensation owing to Mr. Reid might occur, the contextual factors prevented CN from meeting its burden. Mr. Reid met the minimum standard.

41. Mr. Reid did apply for at least one position (ZeeElectric). CN questioned in its oral submissions whether Mr. Reid ever applied for a position in Port Frank. CN

however had the burden of proof. If it believed that Mr. Reid was not being truthful, it could have investigated the matter further. Mr. Reid's cooperation would be relevant to any argument about mitigation.

42. Information about mitigation efforts in a wrongful dismissal action would come from examination for discovery and at trial. In a regular arbitration, it would arise from cross-examination. In the expedited arbitration process CN and the IBEW use, evidence comes from an investigation if concerns exist. Decisions on mitigation always flow from the evidence placed before the decision maker.

43. Mr. Reid did work for his sister and advised CN of the approximate amount in issue. CN is entitled to deduct all sums earned in this endeavour from the compensation owing.

44. Employees in future cases should not interpret the specific conclusion in this case as supporting inadequate efforts to mitigate. Arbitrator Schmidt rightly demonstrated that a failure to mitigate can have a significant financial impact on the compensation owing to a reinstated employee. It is only the overall context arising from Mr. Reid's specific situation which distinguishes the two cases.

DISPOSITION

45. The arbitrator has concluded that Mr. Reid attempted to mitigate his damages. His compensation should not be reduced, other than for the sums earned when working for his sister.

46. He is entitled to compensation for the three periods examined above.

47. The arbitrator understands from the parties' comments at the hearing that these conclusions will permit them to calculate the precise amounts owing to Mr. Reid. The arbitrator awards Mr. Reid interest up to June 6, 2018. No interest shall be owing beyond that date since Mr. Reid was unable to provide CN with relevant evidence about mitigation before the end of October 2018.

48. The arbitrator remains seized should the parties have any further issues regarding the compensation owing to Mr. Reid.

Signed at Ottawa this 4th day of December 2018.



Graham J. Clarke
Arbitrator