IN THE MATTER OF A DISPUTE

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE

("Union")

-and-

CANADIAN PACIFIC RAILWAY COMPANY

("Company")

SUPPLEMENTARY AWARD
RE: DAMAGES

(Stephanie Katelnikoff)

Arbitrator:
Richard I. Hornung, Q.C.

For the Union
Ken Stuebing – Counsel
Dave Fulton – General Chairperson
Doug Edward – Sr. Vice General Chairperson
Ryan Finnson – Vice General Chairperson
Stephanie Katelnikoff - Grievor

For the Company
Malcolm MacKillop – Counsel
Trisha Gain - Counsel
Dave Guerin - Senior Director Labour Relations
Dave Pezzaniti - Assistant Director Labour Relations.

Hearing
January 26, 2021
Calgary, Alberta

AWARD

I

BACKGROUND

1. In a December 23, 2019 decision, I directed that the Grievor be awarded monetary compensation in lieu of re-instatement and retained jurisdiction in the event the parties were unable to agree on the same. This award deals with the damages ordered.

2. A brief repetition of the background is appropriate and follows.

3. Stephanie Katelnikoff (the "Grievor") began her employment with the Company on July 28, 2014. On December 26, 2014 the train on which she was assigned derailed, due to a broken track, as it was passing over a bridge. The bridge was destroyed and 15 cars fell into the waterway below. In the aftermath of that derailment, the Grievor inhaled fly dust and required medical treatment; as a result, she was absent from work and filed a WCB claim. She returned to work on modified duties on January 14, 2015 and full duties on January 19th.

4. On January 24, 2015, she was dismissed from service for *"failing to report an on-duty injury*" (re: the fly ash as discussed above), and for speaking to the media about the derailment. Her Union grieved the dismissal.

5. The grievance was heard by Arbitrator Flynn (**CROA 4440**) who, on February 17, 2016, reinstated the Grievor and concluded that:

> *…the grounds cited (by the Company) for Ms. Katelnikoff's dismissal are factually inaccurate and are unfounded. Furthermore, those allegations appear to be a camouflage of the Company's actual reasons that are discriminatory and in bad faith.*

6. Furthermore, she concluded that in arriving at his dismissal recommendation, the Investigating Officer:

> *…did not act fairly and in the circumstances, the summary discharge of Ms. Katelnikoff was arbitrary and conducted in bad faith.*

7. For medical reasons, the Grievor did not return to work until June 28, 2016. Following thereafter, and until the second dismissal, the Grievor and the Company engaged in conduct which exacerbated their already strained relationship.

8. On August 11, 2016 the Grievor's physician provided Functional Ability Forms which indicated that she would be unfit for duty until December 20, 2016.

9. On August 12, 2016 she was given a written reprimand for her social media conduct. The Union grieved the letter and it was ultimately expunged from her record.

10. On December 23, 2016 OHS deemed the Grievor fit to attend familiarization trips. She returned to work on January 6, 2017. On March 17, 2017 the Grievor was medically assessed as unfit for duty until May 30, 2017. She returned to work on August 21, 2017.

11. On September 29, 2017, the Grievor was involved in an incident at the Red Deer Travel Lodge at the end of her tour of duty. After investigation, the Company assessed a 10 day suspension (5 deferred) for failing to properly report an injury (she suffered an episode of hyperventilation). The Union grieved and, by agreement, the parties reduced the suspension to three days.

12. On September 30, 2017, the Grievor told CP Management that she intended to file a Human Rights complaint over the manner in which she was treated by the Company. On October 13, 2017, she attended a meeting with an official from the Company to discuss her concerns about discrimination and the Company's violation of her Human Rights. On November 6, 2017, she wrote to the Company and advised that its absence of a response or apology to the events that she

complained of, led her to elect to *"… file a formal complaint with the human rights commission for loss of dignity suffered as a result of the companies* [sic] *actions…"*.

13. Acting on what it said was an anonymous complaint regarding the Grievor's online posts; the Company monitored the Grievor's "*CP Rail Posts*" as well as her personal posts. On October 31, 2017, it served the Grievor with notice to appear at a formal investigation for the following:

> *In connection with conduct and actions on Instagram, on Facebook and other social media accounts, and the content of and compliance of those postings with Company policies, including those related to CP Code of Business Ethics, Acceptable Use Procedures – Policy 510 I, Internet and Email Policy–1802, railway operating and safety rules.*

14. James Taylor, Manager of Locomotives and EOTD, conducted the investigation. The investigation lasted approximately 15 hours and took place over a three-day period (November 6 - 8, 2017).

15. Thereafter, the Grievor was served with a letter of termination on November 21, 2017:

> *… for conduct unbecoming a Canadian Pacific employee as evidenced by your failure to act in a manner that will enhance CP's reputation, your failure to refrain from making disparaging comments regarding CP and for posting inappropriate internet content on various social media platforms while employed as a Conductor at Canadian Pacific.*

16. I concluded that the investigation which followed the Grievor's notice to appear, was neither fair nor impartial (paras 35-48), and would have, ordinarily, led to the discipline imposed being deemed *void ab initio* but for the decision by *Justice Zerr* in *Canadian National Railway v. Fleishhacker; SK QB;* (*under appeal*).

17. At the conclusion of the exercise of attempting to fashion an alternative resolve to voiding the grievance *ab initio* (as mandated by *Fleishhacker),* it was concluded that the Grievor's conduct – in total – warranted only a 3 day suspension.

18. However, the Grievor's post discharge conduct became a consideration when, on November 18, 2018, she posted suggestive photographs of herself and essentially "*outed*" the Investigating Officer who conducted her interview. My conclusion (as set out in the original award) was as follows:

> *106. The Grievor's post (vi) (Company Tab K) is egregious. While the photographs are suggestive, the most egregious part of the post comes from the comment that:*
>
> > *The investigating officer at CP Rail, James Taylor, called my photos graphic and suggestive. I'll show you suggestive!!*
>
> *107. Even leaving aside the fact that Mr. Taylor's investigation of the Grievor was neither fair or impartial, the fact that the Grievor identified him, by name, on a public post accompanied by the suggestive photograph could both pose a danger to Mr. Taylor and speaks volumes regarding both her lack of respect for the Company and her unsuitability to return to the Company as a fully participating employee.*

19. While not fully enunciated in the original award, the post in question made it apparent that the bond of trust between the Grievor and the Company had evaporated. Considering *"all the facts"* – including the lack of trust *(De Havilland v. CAW-Canada Local 1121 (1999) 83 L.A.C. (4th) 157)* – I concluded that "*… it is inappropriate to reinstate the Grievor and that her continued employment with CP Rail is untenable"*.

20. This award deals with the quantum of the monetary compensation ordered.

II

DAMAGES

21. Normally, when an employee is dismissed without just cause, the remedy is to reinstate her with full or partial compensation (*Alberta Union of Provincial Employees v. Lethbridge Community College* [2014] 1SCR 727):

> *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.*

22. As observed by Arbitrator Stevenson in *S.G.E.U. (McGunigal) v. Government of SK; (March 28, 2011; Unreported*):

> *Where reinstatement is not appropriate, damages generally reflect the losses of the unionized employment, including the security of employment provisions under the collective agreement. … compensation in lieu of re-instatement is not merely a replication of a reasonable notice period to which a non-unionized employee would be entitled to at common law, … [it is also] … for the loss of the employee's rights under the collective agreement. DeHavilland Inc. v. C.A.W., 83 L.A.C. (4th) 157*

23. The longstanding practice has been that, in those circumstances where damages were substituted for re-instatement, arbitrators would follow the "*Notice Model*" and impose a reasonable amount of notice as damages in lieu. More recently, some arbitrators have chosen to follow what has been referred to as, the "*Economic Loss Model*" (ELM).

24. In **CROA 4663** Arbitrator Clarke canvassed the two models and concluded that the Notice Model is more appropriate for application in the **CROA** process:

> *30. ELM represents a different way to approach these questions 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.*
>
> *[…]*
>
> *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;*
>
> *ii) the employee's likely retirement date;*
>
> *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.*
>
> *[...]*
>
> *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.*
>
> *…*
>
> *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.*

25. With respect, I agree with the approach taken by Arbitrator Clarke. (Although Arbitrator Weatherill - in *AH 696* – chose to adopt the ELM, his rationale for doing so, and for his departure from the earlier position taken in *CROA 4663,* was not addressed). Having reviewed the jurisprudence as well as the various factors which apply in the present case, I prefer the more analytical Notice Model which - in addition to fitting more comfortably into the CROA scheme - provides a more exact and measurable tool in order to assess the variables at play and avoids the need for clairvoyance.

26. The above said, it is nevertheless apparent from a reading of the cases (See: *City of Regina v. Regina CMMA, 2014 CanLII 86901, Ish)* that irrespective of which approach is adopted, the same factors are largely taken into consideration. These include: (i) the loss of bargaining rights: i.e., the individual value of a unionized job with its benefits, pension and relative security; (ii) length of service (while keeping in mind that over-reliance on that aspect would skew the results for a short-term employee); (iii) the age, education and work experience and future job prospects of the employee; and (iv) the duty to mitigate.

27. In the absence of actuarial evidence arbitration boards routinely award compensation which includes a top-up amount for the added benefits of the collective agreement without precise evidence of the monetary value of those benefits and without precise calculation of those benefits.

28. In addition to the above, both parties urged me to take into consideration the conduct of the other in assessing the appropriate damages. Arbitrators are divided on whether the conduct of a dismissed employee should be considered in an award for compensation. *In SGGEU (McGunigal) v. Government of Saskatchewan (Unreported; March 28, 2011),* Arbitrator Stevenson canvassed the issue and arrived at the following conclusion with which I agree:

> *One important distinction between the cases which consider the conduct of the dismissed employee in deciding the appropriate quantum of damages and those which do not is that in the former cases the employee's conduct was in some way culpable and contributed to the reason that reinstatement was inappropriate. Therefore, it is reasonable to include consideration of the employee's conduct in certain circumstances.*

See also: *City of Regina v. Regina CMMA (supra); Hay River Health A.G.A.A. No. 66; AH 696.*

29. In keeping with the conclusion in *Lethbridge Community College (supra*), that "… ***all*** *of the circumstances relevant to fashioning a lasting and final solution…"* be considered, it is equally important – in the circumstances here - to consider the

conduct of the Company which contributed to the reasons that reinstatement was deemed inappropriate.

30. The relationship between the Grievor and the Company was fractious and strained from the time of the first derailment. For her part, the deterioration in Grievor's behaviour toward, and respect for, the Company is apparent from a reading of the original award (paras. 100 – 101). It ends with her culpable post and confirms the impracticality of a continued employment relationship.

31. The Company's conduct included two investigations - which led to two dismissals without cause - in which the Grievor's treatment was considered variously to be "*neither fair or impartial*", "*biased", "discriminatory", "arbitrary*" or in "*bad faith*" (*CROA 4440 and AH 693*). Arbitrator Flynn, in *CROA 4440*, determined that the manner in which the Company treated the Grievor in the first investigative process - and her subsequent dismissal - was "*repugnant"*.

32. In the present case the Company's behaviour was no less repugnant than that described in *CROA 4440*. The investigation was tainted from the outset and the Company's conduct reflected a lack of *bona fides* in its disregard for the principles of a fair and impartial investigation, as well as discrimination (*AH 693; par. 71*) and bias (*par. 37/38*). This conduct taken as a whole - and exacerbated by the fact that a fair and impartial investigation is fundamental to the entire CROA process – is deserving of censure by way of aggravated damages which I have included below in paragraph 44.

III

Compensation

33. The assessment of appropriate compensation here is complicated by the fact that the actionable conduct of the Grievor did not take place until more than a year after she was first held out of service. The objectionable post, which prompted the

decision not to re-instate her, was not an existing factor even considered by the Company at the time of her dismissal. In fact, as concluded in *AH 693*, the purported grounds for her dismissal, to that point, warranted only a 3 day suspension. But for her post on November 18, 2018, the Grievor would have been re-instated with full earnings and benefits.

34. Mindful of the directive in *Lethbridge (supra)* - that **all** of the circumstances need to be taken into consideration in arriving at a fair compensation in lieu - it would be unreasonable to fail to compensate the Grievor for the period that she was first held out of service, on October 19, 2017, until the date of her objectionable post on November 18, 2018.

35. Accordingly, adjusting to the specific circumstances here, I direct that the Grievor shall initially be compensated for damages in lieu of reinstatement calculated at 13 months of salary at the rate of pay that she earned for the 2018 year.

36. There was no agreement between the parties on a comparator employee to construct a wage rate. The assessment of damages here is made more difficult both by the lack of such agreement as well as the Grievor's historical work record. Nevertheless, in the absence of an agreement, the Company – with knowledge of the Grievor's work record - constructed a 2018 wage rate of $70,668.71 based on a modified work year of 315 days (*Employer Brief; Tab B*). The Union, using a comparator employee, constructed a wage rate of $90,490.22 (*Union Brief; par. 17*). Applying the Solomon like wisdom that arbitrators often use, I have taken the average of the two and arrived at a 2018 wage rate (for the purposes here) to be: $80,600.00, or $6,715.00* per month.

(**Note: The numbers here (and subsequently) are rounded for ease of calculation*).

37. Multiplying an estimated monthly amount of $6,715.00 x 13, I arrive at the sum of $87,295.00 as damages based on an initial period of October 19, 2017 to November 18, 2018.

38. In addition to the damages calculated above, it is reasonable to further compensate the Grievor, beginning on November 18, 2018, at the same monthly rate ($6,715.00) for 1.25 months for each year of service (*see: CROA 4663*). Taking as her years of service the period between July 28, 2014 – October 19, 2017 (3.4 years) and the salary referred to earlier, she is entitled to a further 3.4 years x 1.25 = 4.25 months of salary x $6,715.00 = $28,538.00.

39. The damages in lieu of re-instatement thus arrived at is: $28,538.00 + $87,295.00 = $115,833.00.

40. In that the calculations here are based on historical data, there is no need to apply a discount to address the Grievor's obligation for future mitigation as argued by the Company. Based on the Union's unchallenged calculations (*Union Brief; para. 17*), the Grievor's mitigated earnings are as detailed therein. There was no evidence which would lead me to conclude that she had not employed reasonable efforts to mitigate her damages - either until November of 2018 or for the 4.25 months thereafter.

41. Accordingly, from the $115,833.00 the Grievor's income of $12,707.68 received in mitigation in 2018, and 2.25 months of income she received in 2019 (2.25 months of $35,987.90 = $6,748.00), shall be deducted in the appropriate proportionate amounts for a total mitigation deduction of $12,708.00 + $6,748.00 = $19,456.00.

42. As a result, the total is adjusted to $115,833.00 – 19,456.00 = $96,377.00.

43. That amount shall attract a 15% premium for fringe benefits of $14,513.00 for total damages in the amount of $110,890.00.

44. It would ordinarily be appropriate to discount the damages having regard to the Grievor's culpable conduct in posting the letter which prompted the finding that the trust relationship had been broken. However, having regard to the Company's conduct (paragraphs 29-32 above), I would award an equal, offsetting, amount as aggravated damages to the Grievor for the repugnant manner (as described earlier herein) in which she was treated by the Company leading up to her dismissal.

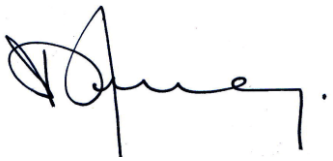
45. Taking into consideration the average rates of interest over the period of 2018 – 2020, calculated pursuant to the *Judgement Interest Act, RSA 2000; Chapter J-1* - the $110,890.00 shall bear interest at the rate of 1.5% which I fix here to be: $1,670.00.

46. Accordingly, the total amount of **$112,560.00** ($110,890.00 + $1,670.00) shall be paid to the Grievor as damages in lieu of re-instatement and in full settlement of the matter.

47. The funds shall be paid forthwith in any lawful manner that the Grievor may direct with a view to minimizing tax consequences and subject to such documentation and deductions as may be required.

48. Given that this award has called upon the board to do a series of mathematical calculations, I will retain jurisdiction with respect to the application, interpretation, and implementation of the same.

Dated at the City of Calgary this 14th day of April, 2021.



Richard I. Hornung, Q.C.