AH 711 B

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

(the "Company")

- and -

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

(the "Union")

Re: Erin Crawford - Compensation

Arbitrator
Richard I. Hornung, Q.C.

For the Company:
Diana Zurbuchen – Manager Labour Relations
Sharney Oliver - Manager Labour Relations

For the Union:
Denis Ellickson – Counsel
Lee Hooper – General Chairman
Brad Kauk – Regional Representative
Erin Crawford - Grievor

Hearing:
October 4 & 25, 2021
Calgary, Alberta

SUPPLEMENTAL AWARD

I

1. On December 23, 2020, I issued an award which directed that the Grievor be reinstated to her employment and made whole. I retained the appropriate jurisdiction.

2. On October 4, 2021 we reconvened the hearing to address the compensation owed to the Grievor.

3. On that date – after hearing submissions from the parties - the matter was adjourned to provide the Company an opportunity to consider the newly introduced information provided by the Union and to allow the parties an opportunity to discuss a settlement or otherwise narrow the issues before me. To their credit, on the return date of October 25, 2021, the parties allowed that they had reached agreement on resolving the outstanding issues but for the determination as to the appropriate mitigation rate, if any, to be applied to the Grievor's claim for damages.

4. The Union suggests that the circumstances do not warrant any reduction while the Company, taking into consideration the Covid-19 realities, argues that the normal rate of 40% ought to be reduced to 35% and applied to the Grievor's claim.

II

5. The law with respect to whether an employee has taken enough steps to mitigate his or her damages is relatively settled. Each case turns on its own specific circumstances, including an assessment of the Grievor's reasonable prospects considering his or her unique situation.

6. The Grievor was dismissed on August 13, 2019. Almost immediately after her initial suspension (August 4, 2019) she applied for Employment Insurance.

7. In September of that year, she moved to Calgary. On September13, 2019, she met with an advisor of Roberson Business School to explore a career as a veterinary assistant (Union; Tab 3).

8. On October 30, 2019, she began work at Pet Smart as a Stylist Apprentice, where she worked a 24-hour week to "*further my knowledge of working with animals*". However, on February 2, 2020, she quit her job at Pet Smart because she "…*found this was not a career I wanted*" (Company; Tab 8).

9. In total, she earned $5,614.47 while at Pet Smart ((Union; Tab 4). This would be the only amount she received in employment earnings during the entire relevant period under consideration.

10. On February 3, 2020, she submitted five applications for work through the website *Indeed*. She then submitted a further three applications on February 5, 2020 and three more on February 12, 2020, again through the *Indeed* website. Finally, she interviewed for a position with CP Rail (Union Tab 16) on March 12, 2020.

11. She did not look for a position again until she filed two further applications, through *Indeed*, on June 30, 2020. No further evidence of her having applied for any other positions was proffered.

III

12. The Union argues that having regard to the realities of Covid-19, which emerged in March of 2020, coupled with the Grievor's pregnancy, her attempts at mitigation were more than sufficient in the circumstances and argues that the damages claimed for loss of income ought therefore to be awarded without any percentage reduction for mitigation.

13. The Company argues that a percentage reduction of the damages claimed by the Grievor ought to be applied in that it is apparent, from the description of her job applications above, that although she listed 13 jobs which she applied for (leaving aside PetSmart and CP), no attempts were made by the Grievor to find employment between her dismissal in August until October (when she started at PetSmart) nor – practically speaking - between February 12, 2020 to June 30, 2020.

14. The Company argues that the explanation given by the Grievor for leaving her position at PetSmart, after such a brief period of time, does not support a conclusion that her attempts to mitigate her losses were reasonable. Further, it points out that no explanations were provided as to why she did not make any efforts to seek other employment as already referred to. It argues that the Grievor did not take reasonable steps to avoid the unreasonable accumulation of damages that she might otherwise be entitled to from the Company.

15. That said, the Company accepts that the onset of Covid-19 would have had an effect on the Grievor's ability to mitigate her damages and therefore accepts the determination by Arbitrator Moreau in the *TCRC V and CPR (Cadorette)* **AH730-S** that due to the unprecedent fall-out from the Covid-19 pandemic, the opportunities for employment, beginning in March 2020, would have been fewer than normal given the effects of the same. Bearing the above in mind the Company agrees that the mitigation rate should be reduced to 35%.

IV

16. In *Firestone Steel Products vs. UAW, Local 27 (1974) CarswellOnt 1405* Arbitrator Weatherill states:

> *The general rule relating to compensation in cases such as this is that the aggrieved person is to be placed, as nearly as possible, in the position he would have been in, had it not been for the wrong done to him.*
>
> *[…]*

> *There are two important qualifications to this general rule which must be noted. One is that there is a duty on the aggrieved person to mitigate his losses. Entitlement to compensation involves a showing that serious attempts have been made to seek employment elsewhere, and that the amount of such earnings is to be set off against the amount of compensation otherwise payable.*

17. Both of the parties provided a number of decisions relative to the interpretation and the application of the mitigation rules. Most helpful here are the comments of Arbitrator Surdykowski in *Toronto Association for Community Living v Canada Union of Public Employees, Local 219 [2006] Canlii 50487* wherein he states:

> *It has been suggested that where mitigation is an issue, the Employer must demonstrate that a discharged Grievor could have mitigated to a greater extent if she had done more; that is that doing more would in fact have made a difference. This is really just another way of saying that the Grievor is obliged to make reasonable efforts to mitigate and should not be taken as an invitation for an employee to do nothing and leave it to the employer to try to prove that making an effort would have led to a job. It is not appropriate for a Grievor to either refuse to say anything about her efforts to mitigate, or to say that she did nothing to mitigate because it would have been fruitless to do so.*
>
> *First, the duty to mitigate is a positive one and requires that the Grievor offer evidence of attempts to mitigate. Second, the test is an objective one. Third, doing nothing is prima facie proof of a failure to mitigate, because one can always do something. Fourth….grievors should be encouraged to mitigate for their own sake, if for no other reason.*

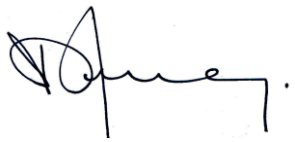
18. In both **AH 730-S** and Arbitrator's Schmidt's decision in **CROA 4294-S**, a mitigation rate was applied in circumstances where it was determined that the Grievor should have made a greater effort to search for alternate employment. As noted, in *Cadorette*, the rate was discounted taking into consideration the Covid-19 circumstances and the consequent difficulty of obtaining available jobs post March 2020.

19. After reviewing all of the evidence and submissions, the Company (see paragraph 14) has persuaded me that the Grievor did not make all reasonable efforts to mitigate her losses and therefore the Company is not properly liable for all her losses as a result of her dismissal contrary to the collective agreement.

20. Further, given all of the circumstances, I accept the logic of Arbitrator Moreau in **AH 730-S**, and conclude that it would be fair to provide a reduction of mitigation rate to 35% and I so order.

21. I shall retain jurisdiction relative to the application, implementation, and interpretation of this award.

Dated this 26th day of November 2021.



Richard I. Hornung, Q.C.
Arbitrator