IN THE MATTER OF AN ARBITRATION

(AH 730-S)

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE

(Maintenance of Way Employees Division)

(the "Union")

AND

CANADIAN PACIFIC RAILWAY

(the "Company")

RE: Grievance of Richard Cadorette

SUPPLEMENTAL AWARD

(DAMAGES)

ARBITRATOR: John M. Moreau QC

Representing the Union:

David Brown - Counsel
Wade Phillips - President, TCRC-MWED

Representing the Company:

Francine Billings - Assistant Director, Labour Relations

Written Submissions provided on October 8, 2021

SUPPLEMENTAL AWARD

The grievor was dismissed from the service of the Company on June 29, 2019. On May 31, 2021, the arbitrator issued an award upholding the grievance. The grievance was upheld on the basis that the grievor was not provided with a fair and impartial investigation. The grievor was determined to be entitled to damages in lieu of reinstatement. The parties held discussions but were unable to agree on the damages owing to the grievor. The issue of damages was remitted back to the arbitrator for final resolution.

The parties were able to agree on what has been referred to as the "notice model" as the proper method of calculating damages. They were also able to agree on the following calculation for purposes of these proceedings: the grievor's annual salary at $99,022.91 or $8251.91 per month.

The parties, as noted, were unable to agree on a final amount owing to the grievor. The Union summarized the parties' positions in its brief as follows:

> **Union:**
>
> Mr. Cadorette is entitled to *24* months of damages, at the agreed to rate of $8,251.91 per month, for a total of **$198,045.84**.
>
> The Union proposes a general mitigation deduction of 32% of the above total which equals $63,374.67. This reduces the damages amount to **$134,671.17**.
>
> The Union also requests that Mr. Cadorette receive an additional lump sum payment of 10% of the total for the loss of fringe benefits equalling **$19,804.58**.
>
> Total damages: **$154,475.75**.

Company:

Mr. Cadorette is entitled to *23* months of damages, at the agreed to rate of 8,251.91 per month, for a total of **$189,793.90**.

The Company proposes a general mitigation reduction of 40% which equals $75,917.56. This reduces the damages to $**113,976.34**.

The Company proposes no payment for fringe benefits.

Total damages: **$113,976.34**.

The remaining issues are as follows:

1. Whether the number of months of entitlement should be 23 or 24;
2. The percentage to be applied for mitigation; and
3. Whether a benefit premium should be paid.

The notice period:

The Company takes the position that the notice period should be 23 months, which is based on the accepted common law standard of one month per year of service. The Company notes that the time elapsed between the grievor's termination on June 29, 2019 and the date of the arbitration award is just over 23 months. It also happens to coincide, as the Union points out, with the grievor's service starting in 1998 and ending with the issuance of the award in May 2021.

The Union's position is that the proper scale for accrual of damages is at the rate of 1.25 per year of service based on the rationale set out by Arbitrator Clarke in CROA **4663-S** where he states:

> 39…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.

> 40. …The USW has persuaded the arbitrator to award LE Harding damages to be calculated as follows:
>
> > A) Damages will accrue at the rate of 1.25 per month of service at a rate of $115,000 annually to be paid to LE Harding as a lump sum. That calculation will be capped at 24 months. Those damages are further reduced to 18 months to provide for a contingency, but LE Harding will be correspondingly relieved of any duty to mitigate;

Further support for the factor of 1.25 for each year of service, the Union notes, is found in the *Humber River Hospital v. Ontario Nurses Association* (Cherubino) 2017 CanLii 83072 as well as the more recent decision of Arbitrator Hornung in **AH-693S**.

The arbitrator is persuaded by the rationale set out in *Humber River*, and the analysis of Arbitrator Clarke in 4663-S, that the proper formula for calculating the quantum of damages, particularly given the importance and context of an employee's collective agreement rights, should be 1.25 months per year of service. That factor would allow the grievor 28.75 months of damages for each year of service. This office, as the Union points out, adheres to the common law cap of 24 months on the notice period for purposes of calculating damages. Accordingly, in keeping with that practice, the arbitrator awards damages based on 24 months.

MITIGATION

This is the more complicated issue. The Union summarizes the grievor's earnings since his termination as follows:

> **2019**- From July of 2019 until December 31, 2019. No Income. Lived on savings.
>
> **2020**- Started receiving EI CERB *(Canada Emergency Response Benefit)* from March 29, 2020 to October 3, 2022.
>
> Total=$12,000. (*$2000 per month)*;

-Received EI from October 3, 2020 until December 31, 2020.

Total=$6000. *($2000 per month*)

Working for Northway Bus Lines from October of 2020 to December 2020 *(3 months*).

Total gross: $3730.99

The grievor maintains in an email to the Union that he started working on his resume in January 2020 with Boreal College.

- The Union copied the following information to the Company (email on July 8, 2021)

  ►had interviews during this time with the following
  [I no longer have any of the emails with this info therefore I cannot provide you with any specific dates that these interviews took place]
  →Lifelabs
  →Northern Uniforms
  →Home Depot
  ►also dropped off resumé for
  →CN Rail

- **2021:** Continued working with Northway Bus Lines from January 2021 to June 7, 2021 (6 months). Total gross: $6583.22
- Received EI from January 1, 2021 to June 7, 2021. Total=$7100

The Company calculates the grievor's actual earnings of $35,414.31 from June 2019 to June 2021 equates to 19% mitigation based on monthly earnings in his former position ($8251.91 x 23 months). The Company, in a proposal to the Union as noted above, indicated that the grievor had failed to adequately mitigate his losses and that a 40% mitigation factor for the 23 months he was out of service was appropriate.

The Union submits that a mitigation factor of 40%, which it notes is the traditional maximum amount applied in the case law for mitigation, is unreasonable in this instance and that 32% is a more appropriate mitigation factor when all the facts are considered. The Union notes that in **CROA 4505-S**, the 40% mitigation factor was applied in

circumstances where the grievor made no efforts to either prepare a CV or apply for any positions at a time when the local economy was booming. Similarly, the Union notes that in **CROA 4294-S**, Arbitrator Schmidt applied a 40% mitigation rate in circumstances where she determined that the grievor should have made greater efforts to search for alternate employment, given the prosperity and availability of jobs in Calgary at the time.

The Arbitrator accepts the view that a discharged employee cannot be expected to start looking for employment after going from being employed one day and then terminated the next day. As Arbitrator Schmidt stated in **CROA 4294-S**:

> Even the most resilient and responsible person cannot be expected to find and begin a new job immediately after being dismissed. Generally speaking, a discharged employee should be given a reasonable period of grace to provide for the adjustment to his or her circumstance and to prepare to do a reasonable job search.

The grievor, while being entitled to a grace period after his termination, should have been more aggressive and not waited from July 2019 to January 2020 before he started looking for work. In addition, the arbitrator is sceptical that the grievor in fact had actual interviews for three positions at Lifelab, Northern Uniforms and Home Depot. One would reasonably expect to see an email trail if the grievor not only applied for these positions but actually went through the interview process. On the other hand, the grievor did work on his resume through Boreal College in January 2020 and I am satisfied that he did submit a CV at the railway Company, CN.

Turning to the unprecedented fallout from the COVID pandemic, the arbitrator accepts the Union's point that the opportunities for employment have been far fewer than normal given the effects of the pandemic, beginning in March 2020. Although a vaccine

has had the effect of opening up employment opportunities, there are still ongoing challenges ahead in returning the economy to a sustained recovery.

Further, the Arbitrator accepts the Union's point that the grievor, due to the effects of COVID, was unable to maintain more than part-time hours as a school bus driver with Northway Bus Lines. Under the circumstances, and bearing in mind in particular the unprecedented consequences on the devastated economy due to the COVID crisis, the arbitrator sets the mitigation rate at 35% of the amount of damages.

Benefit Premium

The Union is also seeking an amount in lieu of benefits. Under the circumstances, and keeping in mind that the grievor received benefits during his years of service, the arbitrator is prepared to award an amount in lieu of benefits. Following the recent decision in **CROA 4663-S,** the arbitrator awards a lump sum amount equivalent of 10% for loss of benefits on the amount of damages, after application of the 35% mitigation factor. Accordingly, the grievor is entitled to the following amount, less all statutory deductions:

1) A lump sum amount based on 24 months of damages in lieu of reinstatement calculated as follows:

   $198,045.84 ($8251.91 per month x 24 months) less 69,316.04 mitigation (35%)

   =$128,729.80

2) plus a 10% lump sum for loss of benefits (10% of $128,729.80)

   =$12,872.98

3) Grand Total: **$141,602.78**

The arbitrator shall retain jurisdiction should there be a need to reconvene to deal with the above calculations.

JOHN M. MOREAU, Q.C.

October 14, 2021