

IN THE MATTER OF AN ARBITRATION

BETWEEN

CANADIAN PACIFIC KANSAS CITY RAILWAY

(The "Company")

AND

TEAMSTERS CANADA RAIL CONFERENCE

(The "Union")

RE: Grievance of Mr. Demaray

SOLE ARBITRATOR: JAMES CAMERON

Appearing For The Union:

A. Stevens – Counsel, Caley Wray
W. Apsey – General Chairperson, CTY-E

Appearing For The Company:

F. Billings – Director, Labour Relations
S. Arriaga – Manager, Labour Relations

A hearing in this matter was held via Zoom Video Conferencing on July 24, 2024.

The Parties Signed Joint Statement of Issue

DISPUTE:

The issue giving rise to this appeal is whether or not the Company's denial to compensate Mr. Dave Demaray ("the Grievor") is a violation of Article 39.06 of the Collective Agreement.

Mr. Demaray was held from service from December 9, 2022 until February 19, 2023.

JOINT STATEMENT OF ISSUE

On July 3, 2020, the Grievor was reinstated via arbitration award CROA 4746. The Grievor returned to service and was subsequently dismissed and reinstated again via arbitration award CROA 4810 which was issued on April 22, 2022. In both awards, the requirement to successfully complete a screening interview with local management prior to returning to service was required and/or referenced.

Upon receiving notification that the Grievor was medically fit to return to service, local managers set a meeting with him for December 1, 2022. The meeting did not proceed as planned and was set aside to another date when Mr. Demaray would have Union representation, LC Alysha Scott would attend with him, per request of Superintendent McMahon. The meeting was coordinated by the Union LC on December 1, 2022 for the following Monday, the Superintendent than advised it would be held at a later time. Later that day, the Grievor attended Pender Yard where he had an interaction with a Mechanical Manager.

The Grievor attended first aid on December 6, 2022 and rules qualification (RQ) on December 7, 2022.

On December 9, 2022, the Grievor was held from service pending an investigation and attended the investigation proceeded as scheduled on December 16, 2022.

During the statement, an incident occurred, and the investigation was immediately adjourned.

The investigation was rescheduled 2 months later on February 15, 2023 and after several hours of Q&A's the statement was adjourned until the next day, February 16, 2023. The statement was completed on February 17, 2023.

During this investigation the Company presented the Grievor with a new notice to appear for an investigation for February 20, 2023.

On February 19, 2023, the Grievor left active service.

UNION'S POSITION

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union contends the Company's actions are in violation of the Collective Agreement, notably Article 39.06.

Mr. Demaray was held from service and as per Article 39.06 should have been compensated all loss of wages after the initial 10-days were completed. The Company held him from service until they made a decision on his continued employment, or the Company rescheduling any investigation or meeting, the company was clearly in control of this process.

Mr. Demaray did in fact attend first aid and rules as noted and was compensated per the CBA for his attendance at first aid. The Company had every opportunity to reschedule any investigation, any meeting, it was incumbent upon the Company to reschedule, it is not the employee who makes these decisions. The Company for the first time as seen in their Labour Relations grievance response state that the investigation could not be rescheduled until February 15, 2023, this is simply nonsense and an absolute distortion of the facts. Regardless, the company was in full control of this process.

Mr. Demaray in fact had submitted his request to go on pension and the Company stated to the Union Local that as long as he continued with his pension, they would not call a further statement, they obviously changed that position.

There is no doubt that it was the Company and only the Company that was in charge of rescheduling any statement or meeting, not Mr. Demaray. Mr. Demaray in no way prevented or interfered with the rescheduling process that took CP 61-days to do. As provided in our grievances on February 15th the statement started, was then continued on the 17th and the Company issued him another NTA for another statement for February 20, 2023.

There is no doubt that Mr. Demaray was held from service pending the completion of the investigation and in fact was given another NTA for another statement which the Company, and only the Company had full control over, the Company alone held the employee out and thus per Article 39.06 is entitled to compensation. This is further backed by correspondence between the parties and what was argued by CP at arbitration in 2023, notably **“Mr. Demaray was subsequently held out of service based on the events of December 1, 2022, subject to investigation and remained in that status until his recent, unprompted, resignation from Company service.”** (emphasis added)

As for the Union’s position for damages this is a clear case where the Company has punitively punished Mr. Demaray. Article 39.06 is clear, and the only exceptions are: “It is understood that employees held out of service in relation to alleged criminal charges and alleged Rule G offences, are not eligible for lost wages pursuant to this sub-clause unless later found blameless.

If an employee is unavailable such as but not limited due to illness or unable to be contacted by the Company for an investigation, the 10-calendar day period shall be extended by a period equal to the period the employee was unavailable.”

Neither of these exceptions were present in this case, it is a direct violation of Article 39.06 where Mr. Demaray was not compensated per the noted Article.

The Union request Mr. Dave Demaray be compensated all loss of wages after being held from service as provided in Article 39.06 with interest as shown in our grievances, that Mr. Demaray be paid punitive damages for the Company’s conduct of Mr. Demaray, and in addition to such other relief as the Arbitrator sees fit in the circumstances.

COMPANY’S POSITION

The Company disagrees with the Union’s position.

Upon receipt of the Grievor’s fitness for duty, a screening interview was scheduled with himself on December 1, 2022. As outlined in the Company’s grievance reply, that meeting did not proceed as planned and was postponed until local union representation could be present.

That same day, December 1, 2022, the Grievor drove his personal vehicle to Pender Yard where he was observed showing a recording to other CPKC employees and where he had an alleged inappropriate exchange with a Mechanical Manager. While an inquiry into the aforementioned was being conducted internally, the Grievor attended first aid and rules on December 6 and 7, 2022.

Following this a formal investigation was scheduled for December 16, 2022. During that investigation there was an incident. As a result, the statement was immediately adjourned until such time that it was safe to do so, which was on February 15, 2023. Following this, on February 19, 2023, the Grievor resigned from Company service.

As outlined in article 39.06, 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 of service in excess of 10 calendar days. As outlined above, it was the Grievor’s actions that caused the delay in the investigative process not solely the Company’s. As such, the Company maintains that that the Grievor is not entitled to compensation and that no violation of article 39.06 occurred.

In regards to the Unions request for damages, the Union has provided no rationale in support of its claim. Based on the aforementioned, the Company request that the Arbitrator decline the Union's grievance in its entirety.

FOR THE UNION:

W. Apsey

General Chairperson, CTY-E

FOR THE COMPANY:

F. Billings

Director, Labour Relations

AWARD OF THE ARBITRATOR

Context

1. A brief chronology is helpful in understanding the facts of the case and the claims made by the Union:

- December 1, 2022 Reinstatement meeting postponed due to no Union representation, contested recording. Following adjournment, negative interaction by grievor with Mechanical Supervisor
- December 6-7, 2022 First Aid and Rules Qualification (time paid)
- December 9, 2022 Grievor held out of work, pending investigation of events of December 1
- December 16, 2022 Investigation begins but is immediately adjourned due to actions of grievor during meeting
- February 15-17, 2023 Investigation meetings re events December 1. Notice to Appear given for investigation of events on December 16
- February 19, 2023 Grievor resigns. He receives his pension effective February 1, 2023.

2. The Union is claiming for unpaid wages for the grievor for the period from December 19, 2022 to February 1, 2023, being 10 days after the grievor was held out of service on December 9 to February 1, when he began receiving his pension. In addition, the Union is seeking damages from February 1, 2023 to the date of the grievor's resignation from the Company on February 19, 2023.

3. At issue is the proper interpretation of article 39.06 of the Collective Agreement in light of the facts of this matter.

Position of Parties

4. Both Parties agree that my jurisdiction is limited to interpreting the Collective Agreement and that I have no power to amend or modify it (see CROA Rule 14, AH 243). They further agree that the usual principles of interpretation apply (see **CROA 3601, Gourmet Baker Inc. v UFCW, Local 832**, 2004 MGAD No. 49). They disagree over the results of that application to article 39.06, as well as over some of the facts concerning options available to the Company to complete the investigation.

5. The Union takes the position that article 39.06 is clear that employees who are held out of service for more than 10 days are entitled to pay, unless one of the exceptions set out with respect to criminal charges or Rule G infractions apply. It submits that as neither exception applies, the grievor should be paid.

6. It submits that the Company had complete control over how long the grievor was held out, and that it has never provided a good explanation why no investigation occurred between December 16 and February 15-17, when the first investigation was finally completed.

7. It argues that the grievor would have been entitled to his wages and benefits from December 19 until the date of his resignation on February 19, had it not been for the receipt of his pension on February 1. In the circumstances, the grievor is entitled to damages for the period between February 1 and February 19.

8. The Company argues that a plain reading of article 39.06 requires that the Company be solely responsible for the period after 10 days that the grievor was held out of service. It points to the outrageous behaviour of the grievor and submits that he was responsible for the delay in completing the investigation. Had it not been for the actions of the grievor on December 16, the investigation would have been completed within 10 days of the grievor being held out of service.

9. The Company further argues that damages are wholly inappropriate in the circumstances.

Analysis and Decision

10. This matter requires a careful analysis of article 39.06. The article reads as follows:

39.06 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:

- 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.

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 alleged criminal charges and alleged Rule G offences, are not eligible for lost wages pursuant to this sub-clause unless later found blameless.

If an employee is unavailable such as but not limited due to illness or unable to be contacted by the Company for an investigation, the 10 calendar day period shall be extended by a period equal to the period the employee was unavailable. 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). **(Emphasis Added)**

11. A parsing of the article reveals the following:

- a) Employees are not to 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.

12. The context of the article is set out in sub-paragraph a), that employees are not to be held out of work unnecessarily. Work is important to both the employee and to the Company. The article establishes a presumption that employees who can work while any investigation takes place should be working. Sub paragraph b) sets out when employees may be held out of work. Sub paragraph c) provides a limited time for investigations to take place and decisions to be made, without cost to the employer. Sub paragraphs c) and d) set out when the employee will be paid for days held out over 10 days.

13. It does not appear that sub paragraphs a) or b) are in issue. The Company may well have taken the position that the events of December 1 put the grievor's continued employment in doubt. In any event, the Union has not contested the Company's decision to hold the grievor out of service as of December 9.

14. Nor does it appear that sub paragraph d) is in issue, as the Company has not invoked the provision.

15. Squarely at issue is the meaning of sub paragraph c), and in particular, the meaning to be attributed to the phrase "due solely to the Company", within the context of the article read as a whole.

16. In my view, sub paragraph c) sets out a proviso that payment of time held out over 10 days is not automatic. The Union must establish that the holding out was "due solely to the Company". This would involve an examination of the facts surrounding the circumstances and decision concerning the holding out.

17. Here there is no doubt that the grievor behaved in a completely irresponsible and threatening manner during the investigation meeting of December 16. The manager set out the circumstances clearly:

Shortly after, both Mr. Demaray and Ms. Scott return and we begin the investigation at approximately 10:48hrs. At approximately 1108hrs, I observed Mr. Demaray stand up from his chair while staring at me, he started walking towards me, reached into his right pocket and pulled out a knife. He continued walking towards my direction while "flicking" the

knife open. The knife was approximately 7-8 inches in length, had a double edged blade with a pointed tip and also had an ivory colored handle with metal ends. He never broke eye contact with me. I started to question his intentions at this point as he never said a word as to what he was doing. He got roughly half way to me (6ft or so) and stopped, maintained eye contact and started slicing open a case of water that was on the table, all the while never breaking eye contact with me. This was clearly an intimidation tactic at this point. He then proceeded to grab the case of water and move it closer to my direction, and continue to slice it open. Again, he never broke eye contact with me. He proceeded to grab a bottle of water and returned to his seat, folded up his knife and put it back into his pocket. I called for a recess and stepped out of the meeting room.

I approached the 2 CP officers that were stationed just outside of the meeting room and informed them both of what just took place. They advised me that they would handle it and ban him from CP property. I proceeded to the Superintendents office and advised Mr. McMahan of what just happened. He immediately began calling and escalating while I recounted the event to him. Approximately 20 minutes passed and I left Mr. McMahan's office and wanted to follow up with the CP Police officers. They advised me to re-enter the meeting room and adjourn my investigation and then ask Mr. Demaray to leave. They would then follow Mr. Demaray out to his car. I re-entered the meeting room, sat down and asked if Mr. Demaray and Ms. Scott were ready to proceed. They said yes and I adjourned the investigation at 11:25hrs. Mr. Demaray looked at Ms. Scott and said "See, I told ya!". He then proceeded to ask me questions about getting his switch keys and radio back etc to which I replied that he would not be receiving those today and to please leave. He then left.

I asked Ms. Scott if she was ok as I could see her eyes swelling up and that she was holding back tears. She tried to answer but began crying. I stood up and closed the door so she could have some privacy and proceeded to comfort her by acknowledging that what she just witnessed was not of the ordinary and that it was overwhelming. We recapped what happened briefly and she seemed to begin to calm down. Mr. McMahan then walked into the room and also re assured Ms. Scott that this was not an ordinary way of behaving in investigations. Ms. Scott voiced her discomfort and frustrations again.

I then provided a statement with one CP Police officer while Ms. Scott provided a statement for the other officer.

18. It is noteworthy that the version of the Union representative present at the meeting does not differ significantly from that of the Investigating Officer (see statement of Local Chair A Scott, Tab 8, Company documents).
19. If the grievor had behaved in that manner at an investigation meeting held 10 days after being held out, it would have been completely reasonable for the Company to require

additional time to set up the necessary security precautions before reconvening a face to face meeting. Some time would have been required even to set up a virtual meeting. In these circumstances, I would have held that the additional time held out was not “due solely to the Company”.

20. However, that is factually not what took place here. The December 16 meeting was adjourned and was only reconvened on February 15-17. It was a face to face meeting with no additional security measures having been identified.

21. Indeed, it was the Union who pressed for the meeting to be reconvened during the first week of January, to be assured that it would take place that week. The meeting did not take place for some five weeks (see e-mails between Union and Company, Tab 7, Union documents).

22. After December 16, when the grievor behaved in such a reprehensible manner, the grievor and the Union were available and indeed pressing for the investigation to conclude. The Company doubtless had valid security concerns about the grievor. However, nothing would have prevented the Company from holding a virtual meeting in the circumstances. If a face to face meeting was required, it could have been conducted with security personnel present. Neither of these options would have taken much time to institute and the investigation could have been completed before the end of the 10 day delay, or very shortly thereafter.

23. The Company submits that the delay was caused by the grievor’s request for his pension, obviating the need to complete the investigation. Indeed, there were explicit Union requests questioning the need for any further investigation (see Tab 10, Union documents). However, the Company continued to insist on the completion of the initial investigation and provided a Notice to Appear for a second investigation, all the while continuing to hold the grievor out of service. When the facts of the matter are examined, it is clear that it was the Company’s decision to continue to hold the grievor out of service until his resignation.

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.

25. The Union has claimed punitive damages from February 1 until February 19, given the on-going decision to hold the grievor out of work. I do not agree that damages are appropriate. Unlike the claim under article 39.06, punitive damages are a discretionary remedy, designed to punish harsh, vindictive, reprehensible and malicious conduct (see **CROA 4810, AH 727**). Given the behaviour of the grievor, I do not find the conduct of the Company to warrant punitive damages.

26. Accordingly, the grievance is partially allowed from December 21, 2022 until February 1, 2023 and the grievor should be made whole for this period. Damages thereafter are denied.

27. I remain seized for any questions of interpretation or application of this Award.

August 8, 2024

A handwritten signature in black ink, appearing to read "James Cameron", written over a horizontal line.

JAMES CAMERON

ARBITRATOR