CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4294 SUPPLEMENTARY

Heard in Toronto, January 20, 2015

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

There appeared on behalf of the Company:

M. Moran	- Labour Relations Officer, Calgary

There appeared on behalf of the Union:

M. Church	- Counsel, Caley Wray, Toronto
M. Clougherty	- Student-at-Law, Caley Wray, Toronto
D. Fulton	- General Chairman, CTY, CP Lines West
C. Fossum	- Grievor,

SUPPLEMENTAL AWARD OF THE ARBITRATOR

This matter was initially heard on March 12, 2014. By Award dated March 17, 2014, I wrote that to uphold the outright dismissal by the Company of Mr. Fossum (the “grievor”), an employee with nineteen years service and zero demerit points on his disciplinary record, in the factual circumstances, would have been unprecedented in the jurisprudence of **CROA&DR** and inconsistent with the concept of progressive discipline.

I directed the grievor's reinstatement, his compensation for all wages and benefits lost and that his discharge be substituted with 15 demerit marks.

The Company returned the grievor to work on June 17, 2014. The parties dispute the amount of compensation owing to the grievor. They agree, however, that any calculation of wages ordered payable to him should be based on the wages earned by Scott Clarke, who has approximately the same seniority as the grievor, and who is not a qualified locomotive engineer.

The Union claims that the grievor should be compensated in full for the period from approximately April 12, 2012 (when the grievor's WIB benefits ceased) through to June 17, 2014. The Company disagrees.

Chronology

A brief chronology of events culminating in the grievor's discharge and the processing of the grievance through to arbitration is warranted.

The grievor was held out of service pending the investigation pertaining to his tour of duty on December 7, 2011. He booked off sick at the end of his tour and his misconduct on that tour led to his discharge. The grievor was off on a medical leave until cleared to return to work on April 2, 2012. He was paid WIB benefits until approximately April 12, 2012. Though the Company took no issue with respect to the

grievor's leave or clearance for work, OHS did not it did not clear the grievor's return until late July 2012. The grievor's first investigative meeting was held on August 28, 2012. The Company suspended that meeting given concerns raised by the Union. It was rescheduled for September 4, 2012. The grievor was discharged on September 18, 2012.

The Union filed the Step 1 grievance within the timelines outlined in the collective agreement. Between Step 1 of the grievance process and Step 2, within the timelines prescribed by the collective agreement, the Union sought release of the grievor's OHS file (with his consent). The Company refused to produce it. A delay ensued and the Union was ultimately able to secure medical documents through the insurer rather than OHS. The Step 2 was filed on October 1, 2013, and the grievance progressed through to arbitration in the normal course. The arbitration was held approximately one and a half years after the discharge – on March 12, 2014.

Mitigation

The grievor's attempts to mitigate his wage losses post-discharge were set out in the Union's brief submitted at the hearing into remedy.

The grievor had started a side coffee truck business in 2010 while he was working full time for the Company. He worked this job in the morning and then would

attend at the Company for tours of duty commencing at 15:00 hours and ending at 23:00 hours.

The grievor earned no income from his business in 2010. He earned no income from his business in 2011. After his discharge in September 2012, the grievor focussed his energies on his coffee truck business. In 2012, the grievor earned $8,450.00 from his business. Through 2013 the grievor continued to work on building his business and was paid a dividend of $27,800.

In 2012 and 2013 the grievor applied for two jobs. I have no information before me about 2014.

In addition, the Union explains that the grievor went through a period of depression, frustration and anger subsequent to his discharge, that his business slumped and that he almost lost it. The grievor took out loans, sold his Company stocks, his car, dipped into his line of credit and lost his savings.

In support of the Union's position that the grievor should be compensated fully, without any deduction of wages or monies received from his business in 2012 and 2013, the Union stipulates that the grievor made reasonable efforts to mitigate his damages. It relies on the case of *Air Canada and C.U.P.E. (Re)*, (1995) 37 C.L.A.S. 372 (P.C. Picher) ("*Air Canada*"), among others provided at the hearing.

The Company submits that the grievor's lost wages should be calculated from August 28, 2012 (the date the first investigation statement was scheduled by the Company), or in the alternative as of the date in July 2012, when OHS cleared the grievor to work after his sick leave. In addition, the Company argues that since the Step 2 grievance should have been filed by March 15, 2013, but was not filed until October 1, 2013, the period of extension, which the Company agreed to on condition that it would not incur liability as a result, is properly excluded from the period for the calculation of wages lost. The Company contends that it is "conceivable" that the delay at Step 2 could have resulted in other Union grievances taking precedence when docketed by the **CROA&DR** Office, which may have delayed when the hearing on remedy was heard.

On the mitigation issue, the Company submits that the grievor's efforts to build up his coffee truck business (which the Company contends had been akin to a part-time job), his application for a mere two jobs between his discharge and reinstatement (unsupported by any documentation) and his failure to apply for Employment Insurance illustrate that the grievor did not make a reasonable attempt to mitigate his losses. Moreover, the Company says that the income the grievor did earn from his business should be deducted from any calculation of lost wages.

The Company also points to economic indicators to support its position that in 2013 and 2014 Alberta (and Calgary in particular) was undeniably an economically robust region. Employment opportunities were abundant with average weekly earnings significantly higher than the national average at $1,1447 per week. In the fourth quarter

of 2013, there were 14,300 new jobs in Calgary. Statistics Canada reports an average hourly wage rate for men the grievor's age as $29.97 in 2013 and $30.02 in 2014. In these circumstances, the Company submits that between August 28, 2012 and his return to work the grievor could reasonably have avoided the loss he suffered and that the Company should not be expected to compensate the grievor during the period of his dismissal.

Decision

The grievor was held out of service pending the Company's investigation. I do not accept that the grievor should not be fully compensated for his wages from the time that he was willing and able to return to work (and no longer in receipt of WIB benefits) and yet was prevented from doing so because of the Company's internal processes. Accordingly, any wages lost between approximately April 12, 2012 (when WIB benefits ceased) and the grievor's discharge, I direct the Company to pay.

With respect to the Company's submission that March 15, 2013 through October 1, 2013 should be excluded from the period of calculation of wages lost, I note that the request for the OHS file was made in a timely manner to advance the grievance, and with the grievor's consent for the file's release. Had OHS provided the file to the Union – a file it was entitled to receive with the grievor's consent - the delay in the processing of this grievance would have been avoided. Moreover, the Company's submission that it is "conceivable" that the delay associated with the Union's request for an extension before

filing at Step 2 could have resulted in other Union grievances taking precedence over the hearing of this matter is conjecture. March 1, 2013 through October 1, 2013 is therefore properly included in the calculation of wages lost.

This leaves the issue of mitigation. There is no dispute that the doctrine of mitigation applies to the grievor: he was obliged to make reasonable efforts to mitigate his damages. If I find that he did not do so, considering his circumstances, his compensation will be reduced to the extent that he did not make reasonable efforts to reduce his loss.

The grievor was not required to accept work of a substantially lesser type than that for which he was discharged. Moreover, leaving aside for the moment the grievor's decision to try and develop his business for the entire year and half between his discharge and reinstatement, the grievor would have been entitled to confine any job search he had undertaken - had he chosen to actually undertake a meaningful one - to a job comparable to his for a period of time.

In the circumstances of the grievor's dismissal, he was given no notice. He had worked for the Company since he was 20 years old, had 19 years service at the time of his dismissal and zero demerits on his disciplinary record. 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. In my view, considering the grievor's situation it would have taken a significant period of time to adjust to the unexpected outcome of the investigation.

Moreover, considering that the grievor already had a business, though he was earning no money from it, it was not an unreasonable for the grievor to invest his energies in trying to develop his coffee-truck business – for a period of time. However, I am not satisfied that the grievor did all that he reasonably could have done, to mitigate his damages in this case through the operation of his business.

In my view, by the spring of 2013, it should have been obvious to the grievor that he should consider other, or at least additional, options to earn a living. Having regard to the economic climate in Calgary at the time, the grievor should have begun to search for alternate employment. The grievor's evidence of his attempts to find work – applying for two jobs - is clearly lacking.

The Company has persuaded me that the grievor did not make all reasonable efforts to mitigate his losses, and therefore the Company is not properly liable for all losses incurred by the grievor as a result of his dismissal in violation of the collective agreement.

The Union referred me to the *Air Canada* case. In that case the grievor was a flight attendant with a highly concentrated schedule whereby he would work only

weekends or long weekends. As a result, he was able to work in the construction industry throughout the week. Prior to his discharge in April 1988, the grievor had started his own successful construction company.

Shortly after his discharge, the real estate market in Toronto collapsed in the fall of 1988 and at the time the grievor was committed to complete work associated with the sale of 32 lots/houses in his subdivision. The commitments were completed in 1991, with no resultant profit for the grievor, after which time the grievor made significant efforts to get back into the work he had performed prior to starting up his own business.

The Arbitrator determined that the grievor had fully mitigated his losses. She found, on the evidence before her, that considering the grievor's age, linguistic factors and difficulties associated with having been discharged it would have been futile for the grievor to look for work with another airline carrier. The Arbitrator wrote at paragraphs 16 and 17:

> Mr. DeGiulio's awareness of the futility of trying to obtain work with another carrier, as testified to by Mr. Kirkness, and his resulting decision not to apply to another airline does not establish a failure to mitigate. In light of the uncontradicted evidence of Mr. Kirkness, the Arbitrator is satisfied that Mr. DiGiulio had no chance of replacing his work as a flight attendant/purser or, more generally, of replacing his concentrated flight attendant schedule. The fact that following his discharge Mr. DiGiulio put all his effort into maximizing the work of his construction company was, therefore, not a failure to mitigate, notwithstanding that he had been doing that work while he had been employed by Air Canada. It was not a failure to mitigate because he had no reasonable likelihood of replacing his concentrated work schedule, which was the single factor that had enabled him to simultaneously carry on two careers.
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> Moreover, the Arbitrator is further satisfied that Mr. DiGiulio did not breach his duty to mitigate by working full-time on the residential subdivision for three years following his discharge even though his Company made no profit whatsoever. Mr. DiGiulio had no control over the crash of the real estate market and it is fully to his credit that he fulfilled all his obligations to his buyers, notwithstanding that

> in doing so he was unable to make any profit or to draw a salary. As made clear in the jurisprudence, set out above, fulfillment of the duty to mitigate does not depend on actually obtaining a job or making money; it depends on the efforts made in that regard.
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> Accordingly, the Arbitrator finds the Mr. DiGiulio fully mitigated his losses from the point of his discharge in April 1988 to mid-1991 when he finished the work on the subdivision.

I take no issue with Arbitrator Picher's determination based on the facts before her. However, the case before me is distinguishable. In the case before me, the grievor did not have the kind of advantageous work schedule that allowed him to pursue a full time alternative career. Moreover, the grievor had not been successful in his business prior to and for a period after his discharge. Nor was the grievor required by contractual considerations to continue to pursue a non-profitable enterprise.

For these reasons, I find that in all the circumstances it is reasonable to assess the grievor's losses commencing from the date his WIB benefits ceased in or about April 12, 2012 through to the date he returned to work in or about June 17, 2014. The calculation of wages is to be based on the wages earned by Scott Clarke.

By the spring of 2013, the grievor's game plan should reasonably have changed. Having regard to the economic climate in Calgary at the time, the grievor should have then begun a search for alternate employment. Had he done so with reasonable diligence, some of his losses after that point could probably have been avoided.

Considering all of the above, from the period commencing May 1, 2013, my view is that it is appropriate to reduce the grievor's wage compensation by a rate of 40% due

to his failure to mitigate. The income from the grievor's business (including any 2014 income) is to be subtracted from the total wage calculation. Interest is awarded on the total amount of compensation.

I remit the issue of the calculation itself to the parties and remain seized for the purpose of dealing with the issue in the event that the parties are unable to resolve the calculation themselves.

January 29, 2015

CHRISTINE SCHMIDT
ARBITRATOR