CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4505 – S

Heard via Video Conference (Zoom) on July 13, 2020

Concerning

CANADIAN PACIFIC RAILWAY COMPANY (CP)

And

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

DISPUTE:

Grievance regarding the implementation of CROA Award 4505.

There appeared on behalf of the Company:

Sharney Oliver	– CP Labour Relations Manager, Calgary
Diana Zurbuchen	– CP Labour Relations Manager, Calgary
Trisha Gain	– CP Legal Counsel Litigation & Labour, Calgary

And on behalf of the Union:

Ken Stuebing	– CaleyWray Legal Counsel
Dave Fulton	– TCRC General Chairman, Calgary, AB
Doug Edward	– Senior Vice General Chairman, Medicine Hat, AB
Dave Hariniuk	– TCRC Local Chairman, Moose Jaw, SK
David Danchilla	– Grievor, Moose Jaw, SK

AWARD OF THE ARBITRATOR

Background

1. On November 4, 2016, this Office issued *CROA&DR 4505* which ordered CP to reinstate Mr. Danchilla forthwith. The arbitrator retained jurisdiction for any issues related to remedy.

2. On November 15, 2019, the TCRC advised the arbitrator that, while the parties had resolved certain issues, there remained several still outstanding, including the compensation owing to Mr. Danchilla.

3. The parties agreed to have this matter heard as an Ad Hoc on July 13, 2020 at the CROA office in Montreal. Due to the pandemic, the hearing took place by way of videoconference.

4. This award resolves most of the remaining outstanding issues. However, the arbitrator retains jurisdiction since the parties still need either to agree on a compensation amount or submit their final calculations to the arbitrator.

Issues

5. The parties' submissions require the arbitrator to answer the following questions:

1. Can and should the arbitrator award interest on any sums owing to Mr. Danchilla?

2. Should any compensation owing be reduced based on Mr. Danchilla's alleged failure to mitigate his damages?

3. Does the arbitrator have jurisdiction to award Mr. Danchilla compensation for the period starting on March 1, 2012 and ending with his dismissal on August 24, 2015?

4. Should compensation owing for the January 19, 2017 to May 1, 2017 period be reduced due to Mr. Danchilla's alleged delay in providing medical information? and

5. How should Mr. Danchilla's compensation be calculated?

1. Should the arbitrator award interest on any sums owing to Mr. Danchilla?

6. The parties did not dispute that labour arbitrators can tailor an award of interest depending on the facts of the case, as described in *CN v. IBEW (Reid)*[1] *(Reid)*. Given the length of time that Mr. Danchilla has been without compensation, interest will be payable on those amounts. The arbitrator agrees with CP that interest will not be owing on those sums it has previously paid.

2. Should any compensation owing be reduced based on Mr. Danchilla's alleged failure to mitigate his damages?

7. The parties do not dispute that Mr. Danchilla had a duty to mitigate his damages and that CP has the burden to prove a failure to abide by this duty. The relevant period for this analysis starts with the date of dismissal on August 24, 2015 and ends on November 4, 2016 when the arbitrator in *CROA&DR 4505* ordered CP to reinstate Mr. Danchilla forthwith.

8. CP has asked that the arbitrator apply, at a minimum, a 40% deduction on any sums found owing to Mr. Danchilla. In CP's view, Mr. Danchilla failed to respect his duty to mitigate his damages.

9. The TCRC provided CP with information about Mr. Danchilla's mitigation efforts. For 2015 and 2016, Mr. Danchilla earned no income beyond that received from CP (severance and vacation lump sum). In May 2019, the TCRC advised CP that Mr. Danchilla had purchased a Mortgage Associate course in July 2016, a date which CP noted was 11 months following his termination.

10. CP argued that Mr. Danchilla's hometown of Moose Jaw had one of the lowest unemployment rates in the country and is also within driving distance of the provincial

[1] Canadian National Railway Company v International Brotherhood of Electrical Workers System Council No. 11, 2018 CanLII 118327.

capital of Regina. In sum, CP stated that Mr. Danchilla's failure to take reasonable steps to offset his loss of income violated his duty to mitigate.

11. The TCRC noted that CP did not provide Mr. Danchilla with a reference letter, whether positive or otherwise, which would have assisted with mitigation efforts. Mr. Danchilla felt his chance to earn comparable income with a position in the running trades was extremely limited. As a result, he registered for the mortgage broker training program and was taking those courses when the arbitrator reinstated him back into his employment.

12. In the TCRC's view, Mr. Danchilla complied with his duty to mitigate having regard to his specialized skills specific to the railway industry.

13. In *Reid*, *supra*, the arbitrator examined the issue of mitigation following an employee's termination and later reinstatement. The seminal case in the area comes from the Supreme Court of Canada in *Red Deer College v. Michaels*[2]. In *Reid*, *supra*, the arbitrator set out the question to be answered:

> 28. The SCC in *Red Deer*, *supra*, indicated that an employee cannot stand "idly or unreasonably by" while damages accumulate. The arbitrator must answer the question the SCC suggested in *Red Deer* ie whether Mr. Reid "tried without success to obtain other employment".

14. CP satisfied the arbitrator that Mr. Danchilla did not make the reasonable mitigation efforts the case law requires. Based on the parties' evidence, it appears Mr. Danchilla made no effort to prepare a CV or apply for even one position. For the relevant period, Moose Jaw's economy appeared to be booming given the uncontested evidence regarding the unemployment rate. A discount must therefore be applied to the amounts found owing, *infra*.

15. As examined in *Reid*, *infra*, context is important when examining mitigation. It is easy to say that Mr. Danchilla could have applied for positions with other railways, but the

[2] 1975 CanLII 15 (SCC)

circumstances of his termination, and the lack of any reference letter, clearly hinders that type of search[3]. But that alone cannot justify a failure even to try.

16. In addition, Mr. Danchilla did pay for and start taking mortgage broker training courses, though he did not start this initiative until 11 months following his termination. While some delay following termination before starting mitigation can be excused[4], especially for employees who have just been terminated for cause as in *Reid*, a termination does not exempt someone from making reasonable efforts to mitigate their damages.

17. The debate should be about the reasonableness of the efforts and not whether any efforts were made at all.

18. Both parties referred to the award in *Toronto Association for Community Living v. Canadian Union of Public Employees*[5] in support of their positions. The arbitrator agrees with the following summary of some of the key principles in this area:

> 19. It has been suggested that where mitigation is in 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 to do 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, as Arbitrator Armstrong observed, grievors should be encouraged to mitigate for their own sake, if for no other reason.** (sic).
>
> (Emphasis added)

[3] *Reid* at paragraphs 35-36.
[4] CROA&DR 4294S
[5] 2006 CanLII 50487

19. In *Reid*, *supra*, the arbitrator concluded that the duty to mitigate had been satisfied, but commented on how that conclusion might apply to other cases:

> 44. Employees in future cases should not interpret the specific conclusion in this case as supporting inadequate efforts to mitigate. Arbitrator Schmidt rightly demonstrated that a failure to mitigate can have a significant financial impact on the compensation owing to a reinstated employee. It is only the overall context arising from Mr. Reid's specific situation which distinguishes the two cases.

20. The arbitrator concludes that Mr. Danchilla did not meet his duty to mitigate, at least in part. CP suggested that, at a minimum, a 40% reduction in compensation should be applied as has been done in previous cases[6]. Since neither party urged the arbitrator to apply a different analysis[7], the arbitrator, given all the circumstances, will adopt a 40% reduction amount which is in line with the other cases the parties provided.

21. The damages owing to Mr. Danchilla from August 24, 2015 to November 4, 2016 will therefore be reduced by 40% due to his insufficient efforts to mitigate his damages.

3. Does the arbitrator have jurisdiction to award Mr. Danchilla compensation for the period starting on March 1, 2012 and ending with his dismissal on August 24, 2015?

22. CP quoted from the TCRC's original 2016 Brief to argue that it never asked for compensation for the 2012-2015 period:

> 85. For all of the foregoing reasons, the Union requests that the discipline be removed in full, and that Conductor Danchilla be reinstated without loss of seniority and benefits, **and that he be made whole for all lost earnings with interest since his dismissal**.
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> 86. In addition, the Union requests that the Arbitrator order such additional terms and conditions as is deemed appropriate in the interests of fairness in the circumstances.
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> (Emphasis added)

[6] CROA&DR 4355S and CROA&DR 4294S
[7] See, for example, *Toronto Association for Community Living*, *supra*, at paragraphs 23-24.

23. CP argued that the TCRC's request has expanded the scope of this grievance from that which was before the arbitrator originally.

24. The TCRC asked the arbitrator to consider the entire context of this matter and hold that Mr. Danchilla is entitled to compensation both for CP's failure to accommodate him and for the closing of his file.

25. The arbitrator agrees with the TCRC's position for several reasons.

26. First, CP is correct that the TCRC used the phrase "since his dismissal" in paragraph 85 of its original Brief. The TCRC suggested at the hearing that this was simply an erroneous reference.

27. A single reference in a Brief does not change the overall scope of this case. The TCRC clearly pleaded in its Step 2 grievance[8] that CP had failed to accommodate Mr. Danchilla, including by closing his file when he was scheduled for surgery. CP did not respond to this Step 2 grievance to contest its scope.

28. Second, the TCRC's *ex parte* statement[9] is not limited to compensation for the period following Mr. Danchilla's termination. It instead requests multiple findings and relief:

> The Union seeks an order that the Company has violated the above-cited Collective Agreement, policies and legislation. The Union **further** seeks an order that the Company cease and desist from these violations and that it be directed to comply with these provisions as described.
>
> The Union seeks a determination that the Company has not to this point demonstrated undue hardship. The Union **further** seeks an order that Mr. Danchilla be reinstated to Company service, provided with

[8] January 17, 2016 (Tab 28 of TCRC's 2016 Materials)
[9] That ex parte statement is reproduced at the beginning of *CROA&DR 4505*.

> suitable accommodation and made whole for all loss incurred, including wages and benefits with interest.
>
> (Emphasis added)

29. The matter the TCRC placed before this Office was a duty to accommodate grievance which included CP's closing of Mr. Danchilla's employment file.

30. CP never filed an *ex parte* statement of its own in which it could have contested the scope of the TCRC's claims. There is a wealth of case law in this area, including on the concept of continuous breaches and damages. It is CP's responsibility to raise issues such as timeliness and scope in its own *ex parte* statement. It is too late to do it at the remedial stage of an arbitration[10]:

> 27. In order to protect the integrity of the parties' expedited arbitration regime, railway industry arbitrators have refused to hear new issues which were not raised during the grievance procedure. As this case illustrates, railway arbitrations take just a matter of hours. That expedited system cannot accommodate the raising of new issues on the eve of arbitration, no matter how innocently, without potential prejudice arising.

31. Third, just like in civil litigation, there is a difference between the parties' pleadings and their written argument. The pleadings in these matters, whether by way of Joint Statement of Issue or *ex parte* statements, identify the matters in dispute, provided they were also discussed during the grievance procedure. The written briefs later used at the arbitration hearing cannot expand or contract the issues the parties have placed before the arbitrator.

32. Fourth, these parties have contested the duty to accommodate on multiple occasions before the arbitrator. Those cases have examined events transpiring over multiple years and required the arbitrator to consider whether the duty to accommodate had been met and, if not, in which specific situations.

[10] Canadian National Railway Company (CN) v International Brotherhood of Electrical Workers System Council No. 11, 2019 CanLII 123925

33. For example, in *Rubino*[11], which did not involve the closing of the employee's employment file, the arbitrator noted:

> 30. CP's evidence, while showing it respected its duty during part of the Period, did not satisfy this burden for the entire Period. Duty to accommodate cases are about evidence. As CP previously demonstrated in *CROA&DR 4609*, *supra*, that evidence can include the efforts made to find accommodated positions and attempted accommodations, even for limited periods. There is no absolute obligation to find a position. If that obligation existed, the analysis for these cases would be quite simple.

34. For Mr. Danchilla's case, the arbitrator came to similar conclusions about CP's efforts:

> 19. CP has clearly tried to accommodate Mr. Danchilla. This is not a case of an employer simply concluding undue hardship exists, but without offering any evidence to support that conclusion.
>
> 20. For employees like Mr. Danchilla requesting accommodation, it is clearly in their interest to provide up to date medical information on a timely basis as part of the process. Their efforts in facilitating the accommodation process allow them to maintain their employment relationship with their employer, despite providing no services. Both sides have important obligations in this process, as does the TCRC.
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> …
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> 22. In this case, CP has not demonstrated why it concluded it could not accommodate Mr. Danchilla. Why were other positions deemed unsuitable? What possible modifications to positions were contemplated to evaluate if Mr. Danchilla could perform them? Was any consideration given to bundling duties, which was one of the efforts made in *CROA&DR 4313*, in order to provide an opportunity for accommodated employment?
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> 23. The analytical process followed when exploring accommodation is just as important as the conclusion of undue hardship.
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> 24. While Mr. Danchilla did not assist his situation at times by being slow to provide updated medical information, it does not seem unreasonable for an employer to wait an additional evaluation period when an employee is scheduled for surgery. While the overall length of an absence is clearly relevant, so are pending surgeries.
>
> 25. CP has not demonstrated, despite its multiple *bona fide* efforts, that it had reached the point of undue hardship. The record contains

[11] *CROA&DR 4648*

> conclusions, but not enough explanation of why CP could not accommodate Mr. Danchilla.

35. The arbitrator concludes that the original submission to arbitration clearly raised the issue of Mr. Danchilla's termination *and* whether CP generally had satisfied its duty to accommodate.

36. Just as in *Rubino*, *supra*, the arbitrator concludes that Mr. Danchilla is entitled to compensation for the period from August 14, 2014 to August 24, 2015. The TCRC, as part of the remedial phase of this arbitration, suggested that this compensation be based on the position of a yardmaster in which a more junior employee (Chad McPherson) was accommodated. The arbitrator agrees with this comparator.

37. The arbitrator is not prepared to order compensation for the earlier period from May 8, 2012 to February 12, 2013. As noted, Mr. Danchilla did not always assist in providing CP with the medical information it required. That makes it difficult to fault CP's efforts during the initial accommodation period.

4. Should compensation owing for the January 19, 2017 to May 1, 2017 period be reduced due to Mr. Danchilla's alleged delay in providing medical information?

38. On November 4, 2016, the arbitrator ordered CP to reinstate Mr. Danchilla "forthwith". The parties have agreed themselves that compensation will be owing to Mr. Danchilla for the period November 4, 2016 to January 19, 2017.

39. They dispute however whether Mr. Danchilla should also be compensated from the period starting January 20, 2017 to May 2, 2017. CP asks that this entire period be excluded from any compensation calculations. The TCRC argued that any delay in providing CP with the medical information it requested was not Mr. Danchilla's fault.

40. The arbitrator understands CP's position that delays seem to occur with Mr. Danchilla. For example, he delayed in providing CP with medical information to assist it with accommodation. He also delayed in attempting to mitigate his damages.

41. However, the TCRC satisfied the arbitrator that Mr. Danchilla should be compensated for the period in 2017 when CP required certain medical testing prior to reinstating him. While there were slight delays, CP did not satisfy the arbitrator that they were solely caused by Mr. Danchilla.

42. The TCRC noted that had CP never closed Mr. Danchilla's employment file in violation of the collective agreement, then he would have been working, and compensated, when asked to undergo the two tests in question.

43. Similarly for reinstatement situations, it appears that the time it takes to comply with medical requests is generally compensated, subject to unreasonable delays attributable to the employee[12].

44. One will never know what might have happened had CP made its medical requests right after learning of the arbitrator's decision to reinstate Mr. Danchilla forthwith. CP accepted responsibility for its initial delay. CP did not satisfy the arbitrator that Mr. Danchilla's conduct was such that he should be denied compensation for the period during which he sought to provide CP with its requested medical information.

5. How should Mr. Danchilla's compensation be calculated?

45. To the parties' credit, they succeeded in identifying two comparator employees to assist with determining the compensation owing to Mr. Danchilla.

46. Unfortunately, they could not resolve how to extrapolate proper compensation from the comparator employees.

[12] See *Reid*, *supra*, at paragraph 23, *CROA&DR 4355S* and *CROA&DR 4400S*

47. CP included a mitigation deduction. This award has now resolved that specific issue. But other issues still divide the parties.

48. As the arbitrator understands the parties' positions[13], CP used the comparator employees' 2017 wages and then applied an adjustment factor. TCRC objected to the use of an adjustment factor. The parties also considered a short period of work for Mr. Danchilla in 2017 but disputed how many of those days to use. CP wanted to use 61 working days which would include days when CP paid Mr. Danchilla at a familiarization rate which was lower than his regular rate.

49. TCRC argued only 23 days should be used when Mr. Danchilla worked those days at his regular rate. TCRC also provided other spreadsheets with different calculations depending on the underlying assumptions.

50. During argument on July 13, 2020, CP produced a new spreadsheet which seemingly used the comparator employees' incomes from 2015, 2016 and 2017. TCRC strenuously objected to the late introduction of this material. CP countered that the numbers it had provided originally were only relevant if the parties applied an adjustment factor.

51. This lack of consensus is not surprising. Evidently, the issue of mitigation can prevent an agreement. That issue has now been resolved. However, the parties' respective calculations do not appear to apply the method this Office has used to determine what a reinstated employee would have earned during the absence.

52. What is this Office's method?

[13] The arbitrator is not clear on the relevance of payments CP made to Mr. Danchilla on 2018/12/14 and 2019/01/24 to the compensation owing for the 2015-2017 period (CP Final Position Spreadsheet and July 7, 2020 Brief at paragraph 52)

53. This Office compares the reinstated employee with a close peer over the period in question. This comparison includes an inherent contingency factor based on experience, such as if a pandemic had impacted the comparator employee's remuneration.

54. In CROA&DR 525-S, the parties agreed that the calculation should focus on the employee who could have been replaced by the reinstated employee. In CROA&DR 1867-S, the parties again agreed that the calculations should focus on "the comparable earnings of the employee immediately junior to the grievor over that period". CROA 4294-S noted a similar agreement by the parties for compensation purposes.

55. CROA&DR 4400-S expressed a preference for the comparator employee approach over one involving a control or adjustment factor:

> The parties are unable to agree on how to calculate the Grievor's average daily rate; the rate they would then apply to the time out of work. **The Union says that the manner in which to do this is to determine what the next more senior employees to the Grievor earned in the period he was out of work. The Company wants to introduce a control factor for the Grievor's pre-dismissal work history.** It refers to Brown and Beatty, Canadian Labour Arbitration at 2:1522 for the approach used in the calculation of lost incentives and overtime opportunities. The Union's comparators are two junior employees in the Grievor's work location. **The jurisprudence of this Office supports the proposition that the appropriate comparator is an employee who has approximately the same seniority as the Grievor with the same qualifications** (See CROA&DR 4294 Supplementary and CROA&DR 525 Supplementary). I am not persuaded to depart from that method in the calculation in this case. Accordingly, the Union's earnings figures are to be used in the calculations.
>
> (Emphasis added)

56. The benefit of the comparator employee approach is that it is relatively easy for the parties to identify this person from the seniority list. While there may be special situations which require the parties to choose someone other than the closest employee, most of the time this method will work as a good approximator.

57. Mr. Danchilla had not worked since 2012. CP did not reinstate him in his employment until May 2017. Trying to recreate what might have happened to Mr. Danchilla, based in part on his pre-2012 experience, seems far more speculative compared to choosing a comparator employee who worked throughout the period. An adjustment factor, given all the possible permutations, almost guarantees the parties will not agree on the amount of compensation.

58. While CP referred to a practice applicable to lost incentives and overtime, they did not refer to any authority which suggested using the same method for terminated employees who had been reinstated. The two situations are quite different, hence this Office's method of using a comparator employee.

59. In Mr. Danchilla's case, as the arbitrator understands it, neither party applied the method this Office had endorsed over the years. Their agreement on two comparator employees is admirable, but then each appears to depart from this Office's method. The parties are encouraged to negotiate their own resolution, but in the event of a dispute, the analysis must start with this Office's longstanding method.

60. While it would have been more expedient to choose one of the parties' calculations, the arbitrator concludes that the parties must first apply the method endorsed by this Office to arrive at a compensation amount. If they still cannot agree, then the arbitrator will choose between their calculations in a type of final offer selection process. Should this be needed, the parties will have the obligation to provide their calculations together with a full explanation of how they arrived at them.

61. As a result, the arbitrator remains seized, if needed, to resolve any remaining issues.

July 17, 2020

GRAHAM J. CLARKE
ARBITRATOR