

**CANADIAN RAILWAY OFFICE OF ARBITRATION
AND DISPUTE RESOLUTION**

CASE NO. 4806 & 4807 - SUPPLEMENTARY

Heard via Videoconference on December 5, 2022

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Grievance regarding the implementation of CROA Awards **4806 & 4807**

There appeared on behalf of the Company:

L. McGinley	– Assistant Director, Labour Relations, Calgary
A. Birdsell	-- Manager of Health Services
E. Allan	-- Labour Relations Officer
R. Araya	-- Coordinator of Labour Relations

And on behalf of the Union:

D. Ellickson	– Counsel, Caley Wray, Toronto
W. Apsey	– General Chairperson, Smiths Falls
L. Hanna	-- Grievor

SUPPLEMENTARY AWARD OF THE ARBITRATOR

1. In 2020, the Grievor was discharged from her position as a Conductor. The Union grieved the discharge and, on January 24, 2022, this Office issued **CROA 4806 & 4807**

(the “Award”), ordering the Company to reinstate the Grievor and make her whole in all respects. I retained jurisdiction regarding the implementation of the Award.

2. The parties have resolved a number of remedial issues arising from the Award. The Grievor has been reinstated and the parties have agreed on the appropriate comparator. They have also agreed on the Grievor’s compensation from the date of discharge to December 31, 2021.

3. At this stage, the dispute is limited to what compensation is owed to the Grievor from January 1, 2022 to August 18, 2022 (the “Relevant Period”). More specifically, the dispute between the parties raises the following questions:

- a. Should compensation for the Relevant Period be reduced because the Grievor failed to reasonably participate in the reinstatement process?
- b. For the Relevant Period, should the Grievor be compensated based on the agreed-upon comparator? Or should compensation be at the Weekly Indemnity Benefit equivalency rate?
- c. Should the Grievor be compensated when she did not have up-to-date prescription glasses and/or the Company had not provided her with current prescription safety glasses?
- d. Should the compensation be reduced because the Grievor failed to mitigate her losses during the Relevant Period?

Did the Grievor Fail to Reasonably Participate in the Reinstatement Process?

4. The Grievor was required to undergo a medical assessment before returning to duty. The assessment involved a series of more than a dozen medical appointments and tests. The Grievor attended these appointments and generally cooperated with Health Services’ requests for information.

5. However, at times, the Company and/or Health Services were unable to reach the Grievor. According to the Company, this resulted in delays in the reinstatement process.

6. On January 27, 2022, the Union gave the Grievor's contact information to the Company. It is not clear from the record when the Company first attempted to contact the Grievor. However, it appeared to do so on or before February 2, when the Company emailed the Union, asking to confirm the Grievor's contact information because Health Services had difficulty reaching her.

7. The Company secured a medical appointment for the Grievor on February 3, 2022. That appointment was cancelled because the Grievor could not be reached.

8. On February 4, when the Company did reach the Grievor, she said she was unavailable until the week of February 15 because she was having a dental procedure. As a result, the medical assessment was rescheduled to February 15.

9. Although it would have been short notice, the Union has not suggested that the Grievor was unavailable to attend a medical appointment on February 3. Had the Company been able to reach the Grievor, I find that it would not have been necessary to cancel and reschedule the February 3 medical appointment.

10. I accept that the dental procedure is a reasonable explanation for the Grievor's unavailability. However, had the Grievor been reachable before February 3, it would not have been necessary to reschedule the appointment at all. The cancellation and rescheduling of this appointment resulted in a delay of twelve days, which I attribute to the Grievor.

11. In addition, the Grievor was not available to the Company for seventeen days and has provided no reasonable explanation for her unavailability.

12. First, Health Services was unable to reach the Grievor between February 17 and March 2, 2022 (thirteen days). Health Services tried unsuccessfully to reach the Grievor on February 17, 18, 21, and 24. The Grievor left a voicemail message on February 28 and Health Services ultimately reached her on March 2. Leaving a single voicemail message during an almost two-week period is not sufficient. I find that the Grievor was not reasonably available to the Company during this time.

13. Second, Health Services was unable to reach the Grievor between March 28 and April 1, 2022 (four days).

14. In sum, the Grievor is not entitled to compensation for twenty-nine (29) calendar days. This represents periods when she was unavailable to the Company (seventeen days). It also includes the delay in the initial medical assessment, because the Grievor could not be reached (twelve days).

Basis for Compensation

15. The Grievor's medical assessments took several months and identified three medical issues, for which the Company required follow-up. Ultimately, the assessments revealed no restrictions, and Health Services deemed the Grievor fit to return to work as of July 6, 2022.

16. The dispute between the parties concerns the rate at which the Grievor should be compensated while she was held out of service, pending her fitness to return to work. As with all questions of compensation following reinstatement, this issue must be determined in light of the overarching remedial principle: the Grievor is to be placed, as nearly as possible, in the position she would have been in, but for the wrongful termination.

17. Had the Grievor not been discharged, she would have undergone a periodic medical assessment in approximately December 2020. The Company submits that the same three medical issues would have been identified in December 2020 and the same testing and medical assessments would have been required.

18. Importantly, the parties agree that, had the Grievor been an active employee at the time of the assessment, she would not have been held out of service because of medical issues 1 and 3. Issue 3 took the most time to resolve, with clearance to return to unrestricted duties on July 6, 2022.

19. The Company submits that the Grievor would have been held out of service in respect of medical issue 2, regardless of whether she was an active employee in December 2020 or an employee awaiting reinstatement in February 2022. In my view, this requires some degree of speculation as to the Grievor's medical circumstances in December 2020. There is nothing on the record in this regard. In any event, medical issue 2 was not the source of any significant delay in the Grievor's return to work: it was resolved relatively quickly, with no restrictions or fitness to work concerns.

20. Subject to my findings in paragraph 14, above, the Grievor is entitled to her regular compensation, based on the agreed-upon comparator, for the period of February 15 to July 6, 2022. This places the Grievor, as much as possible, in the position she would have been in but for the wrongful termination.

Return to Active Duty

21. As noted, the Grievor was cleared to return to work on July 6, 2022. In July, she attended and was paid for rules training and familiarization trips. The Union takes the position that the Grievor could not reasonably return to active duty until August 18, 2022, because the Company had not provided prescription safety glasses.

22. There are two reasons the Grievor did not return to active duty between July 6 and August 18:

- a. As of March 21, 2022, the Grievor required new prescription glasses. As of July 6, she did not have glasses with the current prescription.

- b. The Company waited until the Grievor was medically cleared to return to work before taking steps to obtain safety glasses with her new prescription. As a result, the glasses were not available until approximately August 18.

23. In my view, the Company and the Grievor have shared responsibility for delayed return to work from July 7 to August 18, 2022, a period of approximately six weeks. I find that the Grievor is entitled to compensation for only three of those six weeks.

24. I note that the Grievor asked to take vacation beginning approximately August 18, 2022. When that request was denied, the Grievor submitted her retirement application on August 20, 2022.

Did the Grievor Fail to Mitigate her Damages?

25. The Grievor must make reasonable efforts to mitigate her losses. Where it alleges the Grievor failed to mitigate, the employer has the onus of showing that she did not make reasonable efforts to find alternative employment.

26. In this case, the issue of mitigation concerns a limited period of time, from January 1, 2022, to January 24, 2022, the date of the Award. There was no obligation for the Grievor to continue to look for alternate employment after January 24, 2022, when she was awarded reinstatement.

27. Because the parties have agreed on the Grievor's compensation up to December 31, 2021, the only issue is whether the Grievor failed to take reasonable steps to mitigate her damages between January 1 and January 24, 2022.

28. The Grievor provided four pages of handwritten notes, listing the employers she attempted to contact as well as the responses received.

29. The Company submits that notes are insufficient. It says that, to demonstrate mitigation efforts, the Grievor is required to provide copies of applications as well as any written responses. The Company also submits that the Grievor resided in a city with relatively low unemployment, she applied only for "minimum wage jobs," and she failed to expand her search to positions in the railway industry.

30. In the decisions relied upon by the Company, the grievors took no steps or provided no evidence to show that they applied for other work: **CROA 4355S, CROA 4505S**. In the circumstances of this case, including the short period of time at issue, I am not persuaded that the Grievor failed to take steps to mitigate her losses between January 1 and January 24, 2022. Accordingly, there is no basis to reduce her compensation for the Relevant Period for failing to mitigate.

Conclusion

31. The Grievor is entitled to be compensated at the agreed-upon comparator rate from January 1, 2022 to August 18, 2022, with the following reductions:

- a. Less twenty-nine (29) calendar days, because the Grievor could not be reached and/or her unavailability resulted in delays; and
- b. Less three weeks because the Grievor did not have current prescription glasses.

32. I remain seized to deal with the implementation and interpretation of this award. I also remain seized of any additional remedial issues arising from the original Award.

December 14, 2022



MICHELLE FLAHERTY

ARBITRATOR