CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD TO

CASE NO. 1867

Heard at Montreal, Wednesday, 14 March 1990

Concerning

CANADIAN PACIFIC LIMITED

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

There appeared on behalf of the Company:

M. E. Keiran - Assistant Supervisor, Labour Relations, Vancouver
D. A. Lypka - Supervisor, Labour Relations, Vancouver
B. Scott - Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

T. G. Hucker - General Chairman, Calgary

SUPPLEMENTARY AWARD OF THE ARBITRATOR

This matter has been resubmitted to the Arbitrator for a determination of the amount of compensation payable to the grievor following his reinstatement. By the decision herein, dated January 13, 1989 it was ordered that the grievor be reinstated in his employment, "with compensation for all wages and benefits lost." The issue to be determined is whether monies paid to the grievor out of a private insurance fund maintained by the Brotherhood, to compensate him for his loss of wages from the date of his discharge to his reinstatement, are to be deducted in the computation of his loss of wages payable by the Company. It is the Company's position that the insured benefits received by the grievor under the Brotherhood's plan should be deducted, while the Brotherhood forcefully asserts the contrary.

On June 3, 1988 Engineer Borgstrom was dismissed for allegedly tampering with the deadman's pedal on a locomotive. The grievance resulted in a finding that the Company failed to prove its allegation against the grievor. It is common ground that Engineer Borgstrom was returned to service on January 15, 1989. The parties are not in dispute in assessing the earnings which the grievor lost during the eight month period he was held out of service. Based on the comparable earnings of the employee immediately junior to the grievor over that period, it is accepted that he would have earned $36,676.85. From that gross sum the Company made a number of

deductions, all but one of which are not in dispute. Among them were deductions for income tax, company pension and UIC and CPP contributions. Additionally, the Company reduced the amount which it paid to the grievor by the sum of $14,460.00, being the benefit payments received by Mr. Borgstrom from the Brotherhood's Relief and Compensation Fund.

The Fund, which appears to have been in existence for over sixty years, is a form of private insurance scheme administered by the international office of the Brotherhood in Harrisburg, Pennsylvania. Its sole purpose is to provide income benefits, based on individual premium contributions and the length of membership in the Fund, to union members who are removed from Company service for disciplinary reasons. Some time prior to his dismissal Engineer Borgstrom became a member of the Fund. All premiums paid into it for his benefit were paid by him, and no contributions were made by the Company. While it appears there are some limitations as to a member's entitlement to benefits, they are not material to this dispute, as it is common ground that the monies identified above were paid to the grievor from the Fund as protection against lost income during the period he was held out of work. It is also common ground that Mr. Borgstrom is under no obligation to repay the monies to the Fund by reason of the success of his grievance and the consequent order of compensation made by the Arbitrator.

The position of the Company is that the purpose of the arbitral award of compensation is to restore the grievor into the position in which he would have found himself but for his wrongful discharge. It argues that the payment, without deduction, of the wages lost by the grievor, in addition to his retaining the benefit of the insurance proceeds paid to him out of the Brotherhood's relief compensation fund would result in a financial windfall to the grievor which should not be allowed. The Brotherhood maintains that the benefit of a private insurance fund purchased out of the grievor's own pocket, with no involvement or contribution from the Company, should have no bearing on the calculation of the compensation owing to him by his employer by reason of his dismissal without just cause.

Insofar as I am aware this appears to be a case of first impression. The parties did not refer to the Arbitrator any precedent case involving the deductibility of benefits paid to an employee for his or her loss of earnings pending the outcome of disciplinary proceedings, under the terms of a private insurance scheme purchased by the employee. Nor, after some search of the usual sources of authority, has the Arbitrator been able to find any arbitration case precisely on point. There are, however, a number of analogous authorities, including prior awards of this Office, which bear generally on the issue to be resolved.

It is well settled in the arbitral jurisprudence, including the prior awards of this Office, that an employee discharged or held out of service for disciplinary reasons is under a duty to mitigate his or her financial losses. In CROA 900 the Arbitrator acknowledged the application of that principle in the following terms:

The arbitral case law is clear that an aggrieved employee must take reasonable steps to mitigate his losses during the period he has

been deprived of employment at the instance of his employer. In the grievor's situation there is no dispute that he has met that requirement. Nonetheless, it is immaterial to the amount the employer may deduct as mitigated earnings whether the grievor as a result of the "reasonable effort" exerted earns extra monies because of the overtime he has worked. As was stated in Re Dover Corporation (Canada) Ltd. Turnbull Elevator Division and International Association of Machinists, Elevator Lodge 1257 (1980) 12 L.A.C. 8 (Brunner):

The measure of damages in the case of unjust dismissal is the amount that the employee would have earned had the employment continued according to the collective agreement, subject to the deduction in respect of any amount accruing from any other employment which he, in minimizing his damages, either had obtained or should reasonably have obtained.

For a time there appeared to be some arbitral debate as to whether unemployment insurance benefits were deductible from the amount of compensation payable under an arbitrator's award. In recent years any uncertainty in that regard has been resolved by amendments to the Unemployment Insurance Regulations, in consequence of which UI benefits received by an employee must be deducted from an arbitrator's award for earnings lost by the employee. (See Unemployment Insurance Regulations, C.R.C. 1978 c. 1576, s. 58(5), as amended by SOR/87-599 and see, generally, Brown and Beatty, Canadian Labour Arbitration (3d) 2:1416.)

Boards of arbitration have also had to consider the deductibility of Workers' Compensation payments from damages for unjust dismissal. The principles governing that issue were exhaustively reviewed by the majority award of a board of arbitration chaired by Arbitrator P.J. Brunner in Re Dominion Stores Ltd. and Retail, Wholesale and Department Store Union, Local 414 (1987) 30 L.A.C. (3d) 193. The majority concluded that the Workers' Compensation benefits received by the employee were not deductible from the compensation payable to him by his employer. In so doing it relied on decisions of the Courts as authority for the proposition that Workers' Compensation benefits are not deductible in respect of orders for compensation in cases of wrongful dismissal, and therefore should not be where the order for compensation is made on a finding of no just cause for termination under the terms of a collective agreement by a board of arbitration. The board rejected the suggestion that different considerations apply in arbitrations as opposed to civil actions for wrongful dismissal. At pp 204-05 the majority made the following observations:

With the greatest respect to the majority of the Divisional Court, we can see no distinction in principle between an award of damages in an action for wrongful dismissal by a court and an award by a board of arbitration constituted under a collective agreement considering whether or not an employee was unjustly dismissed. In both cases, the duty of the tribunal is to award an amount to the wronged employee that will put him in the same position, in so far as money can do it, as he would have been had his contract of employment not been broken or, in other words, as if his contract had been properly performed. In the first the inquiry is with

respect to the period for which he should have been given reasonable notice before his contract of employment could be terminated: see McKay v. Camco, Inc., supra, at p. 99 D.L.R., p. 364 O.A.C. In the second it is for the period between the unjust dismissal and the date of the award of the board of arbitration which either orders reinstatement of the employee and/or compensation for lost wages and other benefits. In the case before us it is neither appropriate nor relevant to order reinstatement as the Company no longer carries on business in the Province of Ontario and there is no position into which Dixon could be put, but in our view whether or not there is reinstatement is not significant. In both cases the principles of compensation are precisely the same, only the period for which compensation is ordered is different. With the greatest respect for the majority of the Divisional Court in Re The Queen in right of Ontario and O.P.S.E.U., supra, the fact that there is reinstatement does not undercut the rationale on which the decisions of the Court of Appeal and the Supreme Court of Canada in Peck and Jack Cewe Ltd. were based. They are with respect equally applicable to a grievance before a board of arbitration which is inquiring into whether or not the dismissal was in contravention of a collective agreement between an employer and a trade union. Both are concerned with the question whether the employee has been dismissed in contravention of the applicable contract of employment. In one case it is with the individual employee, in the other with a bargaining agent and is in the nature of a collective agreement. In our opinion, the views of the majority of the Court of Appeal in McKay v. Camco, Ltd., supra, should be applied by a board of arbitration when considering whether an employee had been discharged in contravention of a collective agreement. Payments received by the unjustly discharged employee from the Workers' Compensation Board should not be deducted from an award of damages as these payments are "collateral" in the sense that they are not paid by the person responsible for the breach of contract but rather by a third party upon the happening of an event which has been provided for by legislation.

On the above basis the board of arbitration concluded that benefits received by the grievor from the Workers' Compensation Board were not deductible from the compensation in respect of wages and benefits ordered to be paid to him by the board of arbitration.

The rationale reflected in the above award, as well as in the decisions of the Courts, flows from a recognition that individuals who suffer damages, whether by the commission of a tort or a breach of contract, should not have their entitlement to compensation reduced by virtue of their receiving collateral benefits which are intended to benefit them, and which are not meant to benefit the party which has violated a duty or obligation towards them. The general principles applicable were canvassed by the decision of the High Court of Justice of the Supreme Court of Ontario in Ratych v. Bloomer (1987) 16 C.C.E.L., 245. That case concerned the civil action of a plaintiff police officer against another driver for damages incurred in an automobile collision. Under the terms of the collective agreement governing the police force, the plaintiff was entitled to continue to receive full wages during his period of hospitalization and recovery, because his injury was sustained while on duty. The defendant argued that in the circumstances the plaintiff should not be entitled to recover any amount for his loss

of wages, as any such order by the Court would constitute double recovery.

Mr. Justice Ewaschuk rejected the defendant's position. At pp 249-250 the learned judge made the following observations:

I agree with the defendant's basic submission that damages are only compensatory and that the plaintiff is not generally entitled to double recovery.

I find, however, that the Courts have created an exception to the rule against double recovery where the recovery concerns what has been characterized as "collateral benefits". Where the damages in question concern collateral benefits, the injured plaintiff realizes double recovery to the detriment of the defendant tortfeasor.
...

I am, however, of the view that considered obiter dicta binds a lower Court: see Sellers v. R, [1980] 1 S.C.R. 527, 20 C.R. (3d) 381, 52 C.C.C. (2d) 345, 110 D.L.R. (3d) 629, 32 N.R. 70 (sub nom R. v. Sellers) (S.C.C.). In that regard, Mr. Justice Dubin did specifically refer to the situation before me. At p. 79, ([1973] 3 O.R.) the learned Justice of Appeal states:

Therefore, with respect to collateral benefits obtained, pursuant to collective bargaining agreements or private contracts of employment, I would not view such benefits as part of the wage package and the benefits received as having been paid for by the employee, and I do not think that they should be treated any differently than a benefit received from a private insurance plan [which is not deducted] ... It is well known that in the determination of a remuneration to be paid to employees `fringe benefits' are considered in arriving at a total wage benefit package, and the amount of the weekly salary or wage is dependant upon the cost of the totality of the benefits.

I cannot conclude that there is any equitable principle which should permit a tortfeasor to obtain the advantage of benefits earned by the person who has been injured. It is for the contracting parties to determine whether such benefits are to be subrogated and it is of no concern of the party otherwise liable in damages.

(emphasis added)

(See also Guy Ross Guy v. Trizec Equities Ltd., Fundy Construction Co. Ltd. and Maritime Formwork Ltd., [1979] 2 S.C.R. 756; Jack Cewe Ltd. v. Gary William Jorgenson [1980] 1 S.C.R. 812.)

I turn to apply the general principles reflected in the above authorities to the facts of the instant case. In my view the private arrangement between the grievor and the insurance fund sponsored by his union is manifestly in the nature of a third party contract giving rise to a collateral benefit. In the Arbitrator's view the fact that the grievor exercised the prudence to obtain, at his own expense, insurance protection against the risk of being without earnings during the period he was held out of service pending the resolution of a discipline grievance is neither here nor there in

assessing the compensation payable in respect of his loss of wages for the period in question. Mr. Borgstrom did not receive wages from the Brotherhood Relief and Compensation Fund. What he received were insurance benefit payments which were entirely a function of a private contract between himself and the Fund in contemplation of a certain defined risk. In my view the Company can be no more entitled to deduct the amount of that payment to him than it would be to claim subrogation against the Fund in the event that the monies had not been paid to Mr. Borgstrom. While the circumstances may not be strictly analogous to gratuitous payments of support from an employee's family, or a lottery winning, there is, nevertheless, a degree of remoteness between the grievor's arrangement with the Fund and the interest of the Company which falls well short of establishing any linkage between the payments received by Mr. Borgstrom from the Fund and his entitlement to be made whole by his employer against the violation of his rights under the Collective Agreement.

Apart from the doctrine of collateral benefits abstracted from the general law of contract and tort, there are, additionally, compelling industrial relations considerations underlying this case. The grievor was without work or wages for some eight months by reason of his wrongful termination. While the period required to obtain redress through grievance and arbitration in this case may not appear excessive by general standards, the fact remains that trade unions have an understandable concern for the hardship visited on employees who are thrust into unemployment, or into lower paying part-time work, pending the outcome of their discharge grievance. Indeed, the avoidance of unnecessary periods of unemployment or idleness, albeit for shorter periods of suspension, is part of the rationale for the Brown System of discipline adopted within the railway industry. In my view, apart from the persuasiveness of the analogous treatment of collateral benefits, including Workers' Compensation, reflected in the authorities reviewed above, the issue viewed from a collective bargaining perspective militates against the Company's position. It appears to me highly doubtful that the parties to the instant collective agreement would have contemplated that the Company should have the financial benefit of an insurance scheme respecting lost earnings operated by and for employees to protect themselves against the impact of unjust discipline at the hand of their employer. While the Arbitrator recognizes that the purpose of an order of compensation is compensatory, and not punitive, it must also be acknowledged that if the Company's position were to obtain it would, in the end, find itself paying substantially less to the grievor by way of wages than it would if he had not been unjustly discharged. As it contributed nothing towards the insurance, I see no reason in principle why the Company should have the benefit of any such windfall.

For the foregoing reasons the Arbitrator sustains the position advanced by the Brotherhood. The Company shall pay to the grievor, forthwith, the amount of $14,460.00 which it wrongfully deducted from the calculation of wages which were lost to him by virtue of his discharge. I continue to remain seized of this matter in the event of any further dispute respecting the implementation of the award.

March 16, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR