

CANADIAN RAILWAY OFFICE OF ARBITRATION
SUPPLEMENTARY AWARD TO
CASE NO. 282

Heard at Montreal, Wednesday, October 13th, 1971

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

There appeared on behalf of the Company:

P. A. McDiarmid – System Labour Relations Officer, Montreal
H. Peet – Employee Relations Supervisor, St. John's

And on behalf of the Brotherhood.

E. E. Thoms – General Chairman, Freshwater, P.B.

SUPPLEMENTARY AWARD OF THE ARBITRATOR

The last paragraph of the Award in this matter, issued earlier, is as follows:

It is my conclusion that the company did not have just cause to impose a one month's suspension on the grievor. He is entitled therefore to compensation for loss of earnings. In assessing such compensation, however, it must be borne in mind that some discipline could properly have been imposed on him. In my view, a suspension of one week would not have gone beyond the range of reasonable disciplinary responses to the situation. Accordingly, I award only that the grievor be paid, forthwith, compensation for three weeks' loss of earnings.

The parties have been unable to agree as to the amount of compensation actually payable to the grievor pursuant to the Award. The union has therefore brought the matter before me for determination in order that the Award may be completed.

It was the company's position that the Award is complete and requires no further direction. With this I am unable to agree. Compensation to the extent of "three weeks loss of earnings" is not an amount payable, but is rather a formula for determining such amount. It is, I regret to say, not without ambiguity, and it may be that difficulties in the application of the formula could be resolved by reading it in the context in which it appears. Where, as here, the parties have been unable to apply the formula set out to the facts of the particular case, the question which arises is not a new grievance, but simply one of final determination of the grievance itself in the form of a more precise award. It is very common in labour arbitration cases for an award to set out a right to compensation in general terms, and in most cases the parties themselves are able to agree as to the precise amount payable. The Arbitrator's jurisdiction to complete the award by resolving difficulties which arise in this respect is implicitly and in some cases expressly reserved. It may be noted that the procedure which the union seeks to follow in this case is like that followed in **Case No. 168**.

The union raises two matters with respect to the amount of compensation. The first is as to the number of days for which compensation is payable, and the second is as to loss of overtime earnings. As to the first matter, the award was for compensation for "three weeks loss of earnings". The grievor was suspended for "one month", and in fact

was held off work for twenty-nine days. In considering the compensation to which the grievor was entitled I stated that a suspension of one week would not have been unreasonable. In the result, it was held that the grievor was entitled to partial compensation for loss of earnings, and to achieve this the formula of "three weeks' loss of earnings" was set out.

The question now arising is not whether the formula ought to have been differently stated, but rather what it means as it stands. While it is proper to suggest that the context – that is, the whole of the last paragraph of the Award – should be considered, in my view such consideration does not alter the plain meaning of the words used, nor does it reveal any necessary contradiction on the face of the Award. "Three weeks' loss of earnings" means compensation for loss of earnings for a period of twenty-one days. The company paid the grievor in respect of the period from December 8 to December 28, 1970 and in this respect the payment was in compliance with the Award.

The second matter is whether the compensation for loss of earnings should include payment in respect of lost overtime earnings. In some cases, arbitration awards set out whether or not such losses are to be the subject of compensation. In the instant case, the Award was simply for "loss of earnings". In making payment to the grievor, the company did in fact pay him an amount equivalent to the overtime earnings of another employee, presumably on the basis that the grievor would have worked at that time had he not been suspended. The determination of what might have been the situation had other events not occurred is, of course, speculative to a certain degree. It is, however, simply a matter of determining within a reasonable degree of probability what the actual loss of earnings suffered by the grievor was. Under the Award in question, it seems clear that it is the loss of what he would have earned for which the grievor is to be made whole. It may be that the grievor could not have been required to work overtime, but that consideration does not affect the conclusion (if it is otherwise proper) that he would in fact have worked overtime. There is nothing before me to suggest that the grievor had been ill, or that he consistently refused overtime work, or the like. The company's contention that the grievor was not entitled to overtime is not based on any such consideration, as it appears from the material before me. The company seeks to recover from the grievor the amount paid to him in respect of loss of overtime earnings for the period in question, but in my view it is not entitled to do so.

The Award in this matter was that the grievor be compensated for "three weeks' loss of earnings". The company correctly viewed this as requiring payment for a period of twenty-one days. It was initially correct as well in including in its calculations the loss of overtime earnings for the period. No objection is raised as to the amount of that calculation, save only as to the period of time covered. The amount paid to the grievor was \$415.37. That was the correct amount payable pursuant to the Award in this matter.

(signed) J. F. W. WEATHERILL
ARBITRATOR