

CANADIAN RAILWAY OFFICE OF ARBITRATION

Supplementary award to

CASE NO. 493

Heard at Montreal, Tuesday, June 10th, 1975

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL
WORKERS

There appeared on behalf of the Company:

P. A. McDiarmid – System Labour Relations Officer, Montreal

W. W. Wilson – Labour Relations Assistant, Toronto

A. J. Newman – Employee Relations Officer, Belleville

N. Herring – Equipment Foreman, Belleville

And on behalf of the Brotherhood.

P. E. Jutras – Regional Vice-President, Montreal

J. A. Pelletier – National Vice-President,

J. Thomas – Local President, Belleville

J. E. Brousseau – Grievor

SUPPLEMENTARY AWARD OF THE ARBITRATOR

Further to the award in this matter, the grievor was reinstated in his position of chauffeur on January 22, 1975. The award, in addition to requiring the reinstatement of the grievor, allowed him compensation for loss of earnings from April 29, 1974. Since, as was set out in the award, it appeared that there had been no step taken toward mitigation of the loss of earnings (as to the duty of mitigation, reference may be made to **Case No. 168**) it was provided in the award that compensation was to be calculated in the following manner:

... a determination should be made as to the gross amount the grievor would have made in his classification of chauffeur from April 29, 1974 until the date of his actual reinstatement; from that should be deducted an amount equal to the amount it can be shown the grievor would have earned in a job which would have become available to him in the interval, for which he was qualified (the costs of any necessary medical assessments being borne by the Company); the balance, less any deductions required by law, is to be paid over to the grievor forthwith. In the event the parties are unable to agree as to the amount payable to the grievor, I retain jurisdiction to deal with that matter and to complete the award.

The parties did not agree as to the amount payable pursuant to the award, and the Arbitrator's retained jurisdiction was invoked. In this supplementary award, the Arbitrator's task is simply to make the calculation set out in the award, making use of the evidence for that purpose. The basis of calculation was established by the award, and is not now open to reconsideration.

The parties are only slightly apart in the calculations as to the gross amount the grievor would have earned in his classification of chauffeur from April 29, 1974 to January 21, 1975. I agree with the Company's contention that the grievor would have taken vacation in December, 1974, and

cannot claim for "statutory holidays worked" during that period. The Company properly points out that the grievor would have worked 14, and not 13 days in January, 1975. It is agreed that, in respect of other benefits; the grievor would be entitled to a lump sum payment in respect of a cost-of-living award, and reimbursement of directly-paid life insurance and associated costs. By my calculation, the "gross amount" comes to \$7,331.00.

From this, according to the award, is to be deducted the amount the grievor would have earned in any job which would have become available to him in the interval, for which he was qualified. The Company takes the position that the job of janitor became open to the grievor on May 13, 1974. The grievor neither sought, nor was offered this job, which was bulletined on May 15. Under Article 12, bulletins must be posted for five days. There were no applicants for the bulletined job. There is no question as to the grievor's qualifications. The only question which arises is as to the grievor's physical ability to perform that job. If he was able to perform it, then it would constitute a job which was available to him within the meaning of the award, and it was his, or his representative's responsibility to claim it.

It was known to the Company, from previous medical examinations that the grievor suffered from a hernia, and that he was subject to a limitation as to the amount of lifting he might do. The job of janitor involves some bending and lifting. In January, 1975, on the occasion of the grievor's reinstatement the Company's doctor certified that the grievor was "fit", noting that he "should restrict lifting to nothing heavier than 25 lbs." In a certificate dated March 1, 1975, the grievor's own doctor described his condition and indicated that it would be difficult for him to lift any heavy weight, and that bending would aggravate the situation. In a further letter, dated June 4 1975, the Company's doctor, being advised that the lift requirements of the janitor's job fell below the 25-lb. limitation, gave his opinion that the grievor would be physically able to carry out the duties of that position.

There is no substantial divergence as far as the doctors' certificates are concerned. Given that the lifting requirements of the job are within the weight limitation, then it must be concluded that the grievor was physically able to perform it. Had the Company refused the grievor the right to apply on the job bulletin' or the right at least to attempt the work, then he would have satisfied his obligation to mitigate his loss. There was, however no application made for this job, which, it must be concluded, was one which was available and for which he was qualified. Had the grievor attempted the job and found he could not perform it, then a difficult question might arise as to application of article 15 (rehabilitation), in the light of Article 12.19 (which prohibits displacement of regularly assigned employees by those removed from their positions as a disciplinary measure), but that question need not be determined in this case.

I find, accordingly, that there should be deducted from the "gross amount", the amount the grievor would have earned as a janitor during the period in question. This amount should be calculated from a date five days following the bulletin; being the first day the job might conclusively be said to be "available" to him. This amount, by my calculations, comes to \$5,461.80. Subtracting this amount from the gross amount leaves a balance of \$1,8629.20. That is the amount that should be paid over to the grievor, subject to any deductions required by law.

For the foregoing reasons, and in final disposition of this matter, it is my award that the company pay to the grievor forthwith the sum of \$1,869.20.

(signed) J. F. W. WEATHERILL

ARBITRATOR