CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 661

Heard at Montreal, Tuesday, May 9th, 1978

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Claims for unpaid wages at punitive rates for Motormen N. Baldwyn, G. Coté, and W.J. Overholster, January 1977.

JOINT STATEMENT OF ISSUE:

Due to severe snow storm conditions prevailing on Friday, January 28, 1977, the above mentioned motormen became stranded, and were unable to return to the Hamilton Terminal on that day. They were instructed by the Supervisor to obtain lodging accommodation until the weather subsided, and also to obtain receipts covering living expenses for reimbursement by the Company.

Saturday and Sunday were the regular rest days of the three motormen. They were compensated for 8 hours on Friday, and 8 hours at punitive rates for Saturday and Sunday, as the case may be, or until their actual return to the Terminal. They did not receive any compensation for the hours outside their regular assigned working hours.

The Brotherhood contends that the employees were instructed to keep a vigil on their units because of heated van equipment. Since they were acting under the direction of the Company, the employees should be compensated for all the hours spent away from the terminal at punitive rates.

The Company declined the claim.

FOR THE EMPLOYEES:

(SGD.) J. A. PELLETIER
NATIONAL VICE PRESIDENT

FOR THE COMPANY:

(SGD.) S. T. COOKE
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

C. L. LaRoche – System Labour Relations Officer, Montreal
W. W. Wilson – Labour Relations Assistant, Toronto
W. S. Heil – Manager Express, Toronto
A. Wighton – Intermodal Supervisor, Hamilton

And on behalf of the Brotherhood:

J. D. Hunter – Regional Vice President, Toronto
R. Gee – Local Chairman, Hamilton
N. Baldwin – Grievor
G. Coté – Grievor
W. Overholster – Grievor

AWARD OF THE ARBITRATOR

The facts of this case are essentially as set out in the Joint Statement. These were elaborated on in the parties' briefs and (as is usually the case in proceedings in this Office) there were no very substantial conflicts in the statements of facts therein contained although there were of course differences in emphasis. The matter could, like most in this Office, be decided simply on the basis of the parties' briefs and submissions made at the hearing.

The Union, however, insisted on calling the *viva voce* evidence of the three grievors. The Company called in reply the supervisor of one of the grievors, who was present at the hearing but was unable to call the supervisor of the other grievors, who, it was said, was ill and unable to attend. Even apart from this it would be my view that in proceedings in the Canadian Railway Office of Arbitration a party would be entitled to an adjournment in order to call reply evidence except in those cases where it has notice or other reasonable cause to believe that *viva voce* evidence will be called. In the instant case, the Company did not seek to have the matter adjourned, but was content to proceed in the absence of one of the supervisors. In fact, as I have indicated, (and while I certainly accept the evidence of the grievors and of the supervisor who did testify), the *viva voce* evidence was unnecessary in this case and makes no difference to its outcome.

The grievors, who are experienced and responsible employees, found safe places to leave their vehicles, secured them properly, and found accommodation for themselves when they became stranded as a result of the snow storm on January 28. From then until the time they were able to get their vehicles out and return to their terminal, they made occasional checks of the condition of the vehicle and of the heater. They did not keep a continuous "vigil" of the units, nor would they be expected to. If that had been necessary, and if they had done so, then I would certainly consider that they should be paid for every minute so spent. Rather, to take the example of Mr. Baldwin, who found a room at the CN hostel at Fort Erie, he went down to check on the truck some six blocks away, twice on the Saturday, once on Sunday, and twice on Monday. The total time spent on these checks was considerably less than eight hours on each day. Nevertheless, in view of the circumstances, the Company acted fairly in paying the grievors on an analogy with article 18.2, "Service away from headquarters".

While it is true that the grievors were told to secure their vehicles and to find accommodation, it does not follow that they were, at every moment until they returned, subject to the "direction and control" of the Company, in the sense of being actively at work and entitled to wages. Certainly it was by reason of their jobs that they found themselves away from home when they were stranded by the storm. They remained employees, and might well be determined to have been employees for certain purposes. They would of course be entitled to wages for work performed, and beyond that, as I have noted, they would be entitled to wages simply by virtue of being "held away". The Company acknowledges that. But the grievors were not in fact at work at every moment they were away. The circumstance of their being away at all was attributable to the Company's general "direction" – and to the weather's "control" – but their activities beyond the occasional check of their vehicles were not subject to the direction and control of the Company which would be characteristic of an employee's being "at work".

In the circumstances, the grievors were not entitled to any greater payments than those which were made. One of the grievors had enquired of his supervisor as to the basis of payment while he was stranded, and was led to believe he would be paid from the time he left his terminal until the time he returned. Certainly if he had been "on duty" throughout that time and had returned to the terminal, say, very late that night or early the next morning, he would be paid on that basis. But it was not reasonable to consider he would be paid for twenty-four hours per day for three days during which he made one or two checks of his vehicle. In any event, the Company was not bound by what the supervisor said, any more than the grievor would be bound if the supervisor had said there would be no pay.

For the foregoing reasons, the grievance must be dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR