CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1375

Heard at Montreal, Tuesday, June 11, 1985

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Claim on behalf of various unnamed employees in the Equipment Department at the Car and Motive Power Shops at the Transcona Shops in Winnipeg for *pro rata* payment for time not worked on 31 January 1984, and for overtime payment for employees who worked nine hours on 8 and 9 February 1984, and for employees who worked on 11 February 1984.

JOINT STATEMENT OF ISSUE:

On 31 January 1984 the Company received a bomb threat concerning its Transcona Shop. The Company evacuated day shift employees from the shop and did not allow afternoon shift employees to report to work because of the bomb threat. The Company subsequently met with local officers of the Brotherhood concerning the making up of time lost by affected employees.

Arrangements were put into effect to allow time lost to be made up by allowing the day shift employees to make up their one hour lost by working one hour on 8 or 9 February and to allow the eight hours lost by afternoon shift employees to be made up on 11 February 1984.

The Brotherhood contends the Company violated Article 4.5 of Agreement 5.01 by not paying time not worked by day shift and afternoon shift employees on 31 January. The Brotherhood further contends that the Company has violated Article 5.8 of Agreement 5.01 by not paying punitive overtime rates to employees who worked on 11 February 1984, and Article 5.1 of Agreement 5.01 by not paying overtime rates to employees for time worked in excess of eight hours on 8 and 9 February 1984.

The Company denies the Brotherhood contention and considers the doctrine of estoppel applies to this dispute.

FOR THE BROTHERHOOD:	**FOR THE COMPANY:**
(SGD.) TOM MCGRATH	**(SGD.) D. C. FRALEIGH**
NATIONAL VICE-PRESIDENT	**ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

S. A. MacDougald – Labour Relations Officer, Montreal
W. W. Wilson – Manager Labour Relations, Montreal
J. Cochrane – Employee Relations Officer, Winnipeg
W. Cosman – Assistant General Superintendent Equipment, Edmonton
M. Robertson – Manager Diesel Shop, Winnipeg

And on behalf of the Brotherhood:

W. H. Matthew – Regional Vice-President, Winnipeg

H. Falk	– Local Chairman, Winnipeg
D. Williams	– Member, Winnipeg
A. Kith	– Member, Winnipeg

AWARD OF THE ARBITRATOR

At the hearing of this matter I attempted to isolate the flaw in the Trade Union's position in this case. It is fair to say the Trade Union is asking "for the best of both worlds" on its members' behalf. I simply cannot accede to its claim for compensation for the reasons to follow.

There is no issue that the Employer's evacuation of the Transcona Shops at the time of the bomb threat was a reasonable response in the circumstances. Moreover, it is undisputed that the employees who were evacuated endured a loss of pay for the time not worked while a search was made of the premises for any alleged bomb.

The Trade Union has claimed its members were entitled, irrespective of the time not worked, to payment for their lost wages pursuant to Article 4.5 of the collective agreement. That provision reads as follows:

> Regularly assigned employees who report for duty on their regular assignments shall be paid eight hours at their regular rate. Employees who are permitted to leave w?rk at their own request shall be paid at the hourly rate for actual time worked, except as may be otherwise arranged locally.

It seems to me that if the Trade Union's position was clearly communicated to management with respect to its members' entitlement under Article 4.5 then there was nothing to be gained by its continued participation in the meetings of February lst and 2nd, 1984, that were convened to establish a strategy whereby the employees might recoup their alleged lost pay. As a matter of right, if I understand the Trade Union's position, they were entitled to that pay by operation of Article 4.5 of the collective agreement.

But, notwithstanding the Trade Union's alleged "objections" (as stated in the evidence of Mr. H. Falk, Local Chairman) that were made at these meetings, the Trade Union continued to participate in the deliberations with the representatives of the Shopcraft Union and appeared to go along with the "consensus" that was reached. That is to say, those employees who were affected were to be permitted to recoup their losses by working one extra hour during a regular work day (in the case of employees who lost one hour's pay) and a full shift on Saturday, February 11, 1984 (in the case of employees who lost an entire shift) "at the straight time rate".

And, indeed, the Trade Union participated in the subsequent meetings on February 2, 1984 where the designation of those work assignments were finalized. In accordance with those work assignments notices were posted inviting the affected employees to "voluntarily" work these alternative hours "at the straight time rate".

At arbitration these very employees have claimed, in addition to their entitlements under Article 4.5, payment at the appropriate punitive rate for hours worked for overtime and/or on a day of rest.

Despite its feeble objections and notwithstanding its participation in the deliberations with management, as hitherto described, the Trade Union insists its members are entitled to the premium rates provided under Articles 5.1 and 5.18 of the collective agreement. This claim is made irrespective of th clear notice contained in the posting that payment for the designated work hours would be restricted to the straight time rate.

It is my view that at some point in this scenario the Trade Union was obliged "to either fish or cut bait". The CBRT&GW either had to communicate to management its intention to pursue its claim for payment under Article 4.5 and cease its participation in those meetings or abandon such claims for the consensus that had been reached. Either the employees were entitled to payment for a full shift pursuant to Article 4.5 despite the unanticipated interruption to their shifts or they were not. If they were, the Trade Union was duty bound to have conveyed its protest in a clear, crisp definitive manner.

As I understand the evidence both Trade Unions that attended the meetings claimed entitlement to payment for the time lost under their respective collective agreements. The CBRT&GW was simply one voice with the Shopcraft Union's in that regard. Moreover, the Trade Union certainly could have avoided further misunderstanding and contributed to the validity of its protest had it discontinued its participation in the meetings thereafter.

Rather, in remaining at the meetings the Trade Union lent validity to the Employer's assumption that the CBRT&GW was a part of the consensus that eventually was reached. It makes absolutely no sense for employees to

volunteer to work at straight time rates at times when it is known they are entitled to a premium or punitive rate unless the Trade Union has endorsed by their own actions that consensus. Or, from a difference perspective, if the Employer erroneously expected these employees to work at straight time rates at the designated hours on the postings then it was incumbent upon the Trade Union at that time to tell management that the appropriate premium rate should be posted before their members "agreed" to work those hours. In short, the Trade Union acted in a manner that was inconsistent with its own protest of the Employer's efforts to find a formula for recouping its members' loss of pay. From the Trade Union's perspective there was no loss to its members and it should have conducted itself accordingly.

Although I cannot find on the evidence adduced herein that the Trade Union agreed to an "arrangement" that would allow the Employer to act at variance with the strict terms for payment under the collective agreement, I am satisfied that the doctrine of promissory estoppel should apply to prevent the Trade Union from enforcing those terms. By virtue of its own conduct in participating in the meetings the Trade Union has improperly induced the Employer into the notion that it would not rely on those rights. Rather, the Trade Union and the members it represents are bound by the agreed to consensus.

Accordingly, the claim for compensation, as alleged in the grievance, must be rejected.

(signed) DAVID H. KATES
ARBITRATOR