CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD TO

CASE NO. 3161

Heard in Calgary, Tuesday, November 14, 2000

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

DISPUTE:

Failure to compensate G.B. Côté in accordance with Canadian Railway Office of Arbitration Award 3161.

COUNCIL'S STATEMENT OF ISSUE:

The incumbency of G.B. Côté was affirmed through Canadian Railway Office of Arbitration award 3161.

The Company has since informed the Union that Mr. Côté, who works in Kamloops, will have a penalty applied to that incumbency based on the position that he could be working in Terrace.

The Union contends that while penalty clauses exist in other special agreements, the agreement under which Mr. Côté became an incumbent contains no such penalty provision.

Accordingly, Mr. Côté's incumbency is protected as long as he bids the highest class of service at the station where he is employed consistent with the Special Agreement of June 16, 1996 and the Arbitrator's award.

FOR THE COUNCIL:
(SGD.) R. A. HACKL
FOR: GENERAL CHAIRMAN

On Tuesday, 13 February 2001, there appeared on behalf of the Company:

J. C. Mcdonnell	– Counsel, Montreal
J. Torchia	– Director, Labour Relations, Edmonton
S. M. Christensen	– Timekeeper – G&I
M. Moroz	– System Manager, Crew Management

And on behalf of the Council:

M. A. Church	– Counsel, Toronto
B. R. Boechler	– Vice-General Chairperson, Edmonton
J. W. Armstrong	– Vice-President, UTU, Ottawa
W. G. Scarrow	– Vice-President, UTU, Ottawa
F. Price	– Vice-General Chairman

SUPPLEMENTARY AWARD OF THE ARBITRATOR

Following the award herein, dated November 20, 2000, the parties became disagreed upon the entitlement of the grievor to maintenance of earnings protection, more specifically as to the circumstances which would justify a penalty or reduction of the grievor's incumbency. It is on that basis that the matter was returned to the Arbitrator for further clarification.

During the course of the hearing it became apparent that the parties are *ad idem* on one aspect. In any circumstance where the grievor bid onto the furlough board at Kamloops while a junior employee continued to work on the Kamloops spareboard, his reduction of incumbency was justified. The Council accepts that it was appropriate in that circumstance for the Company to make the appropriate adjustment, an adjustment entirely consistent with the provisions of the note to article 148.2 of the collective agreement which provides as follows:

> **NOTE:** Employees who voluntarily exercise seniority to the furlough board will not be entitled to any maintenance of earnings payments pursuant to any other agreement between the parties signatory hereto.

However, for the purposes of clarity, selection by default of the furlough board by the grievor for lack of any other option is not to be considered a voluntary exercise of seniority to the furlough board.

The real dispute between the parties concerns a second aspect of the grievor's reduction of incumbency. It is common ground that the Company reduced Mr. Côté's incumbency on any occasion where he either worked a position at Kamloops or remained on the furlough board when higher rated work was being performed by an employee junior to him at Terrace. From a practical standpoint the Company's concern is understandable. It suggests that it would never have been intended for an employee to move from a relatively busy terminal to one with a large furlough board where that individual's seniority would result in him or her being inactive on the furlough board while retaining a relatively high incumbency based on prior service at another, busier terminal. As understandable as that concern may be, however, the Company's position in this matter must fail for reasons arising from fundamental principles of contract.

As conceded during the initial hearing, the common practice within the industry, and between these parties, has been for employees to carry their incumbencies with them when they voluntarily move from one location to another, pursuant to the normal provisions of the collective agreement. It is not disputed that that is what Mr. Côté did. In such circumstances an employee's incumbency is reduced only where he or she fails to exercise seniority to the highest paid position for which he or she is senior and qualified. In the special agreement which is the subject of this dispute the location of the work in questions is "… at the station where he or she is employed;".

The material before the Arbitrator confirms that in other circumstances the parties have negotiated specific language which would allow the employer to have reference to work available at the terminal from which the employee transferred, and at which the incumbency was first established. Examples of such language are to be found in the Hanna and Mirror Special Agreement and the Walker Yard Agreement, pointed to by counsel for the Council. No such language is to be found in the Agreement before me.

In the case at hand I must take the Special Agreement on Extended Runs Between Smithers and Prince Rupert, the agreement governing Mr. Côté, as I find it. When regard is had to the general practice within the industry, the critical background against which such a document must be viewed as negotiated, and the language of the agreement itself, I cannot sustain the position of the Company that the grievor's incumbency is to be reduced based on the availability of higher paid work at his former terminal of Terrace.

The position of the Council is therefore sustained, and the Company is directed to adjust the payments owing to the grievor accordingly. For the purposes of clarity, in calculating any reduction of the grievor's incumbency reference may be had only to work at the terminal where he is employed, Kamloops.

February 19, 2001

(signed) MICHEL G. PICHER
ARBITRATOR