

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

**SUPPLEMENTARY AWARD TO
CASE NO. 3541 & CASE NO. 3542**

Heard in Montreal, Wednesday, 9 July 2008

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

The interpretation and application of the minutes of settlement signed by the parties on February 2006 regarding the reinstatement of Mr. S.G. Thomas.

COMPANY'S STATEMENT OF ISSUE:

The parties signed an agreement to reinstate Mr. S.G. Thomas on February 15th, 2006. The minutes of settlement included Mr. Thomas' record being assessed a thirty (30) day suspension from May 03 to June 02, 2005. The period of time from June 3, 2005 to March 17, 2006 was agreed to be active cumulative compensated service for pension, vacation and all other purposes.

The Company properly administered the minutes of settlement by reinstating Mr. Thomas to active service, revised his discipline record and paid the grievor a lump sum payment of \$10,000 less statutory deductions.

The \$10,000 lump sum was applied as earnings for the period from June 3, 2005 until his return to active service (March 17, 2006).

The Company submits the lump sum payment was in part settlement for lost wages the grievor suffered from June 03, 2005 up to his return to active service and therefore properly applied as earnings for cumulative compensated service between June 03, 2005 and March 17, 2006 pursuant to item #8 in the minutes of settlement.

FOR THE COMPANY:

(SGD.) K. MORRIS
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

- K. Morris – Manager, Labour Relations, Edmonton
- J. Torchia – Sr. Manager, Labour Relations, Edmonton
- L. Quilichini – Assistant Superintendent, Transportation, Edmonton

And on behalf of the Unions:

- D. Ellickson – Counsel, Toronto
- R. A. Hackl – Vice-General Chairperson, Edmonton
- B. R. Boechler – General Chairman, Edmonton
- G. S. Thomas – Grievor

SUPPLEMENTARY AWARD

The grievance in this matter was resolved by the terms of Minutes of Settlement negotiated between the parties, signed and dated February 15, 2006. By their agreement the Arbitrator was given jurisdiction to resolve any dispute respecting the "... interpretation, application or enforcement of any term of this settlement,". As the parties have encountered disagreement with respect to certain aspects of the settlement, it has returned to this office for final and binding resolution.

The Arbitrator deems it appropriate to reproduce the thirteen substantive paragraphs of the minutes of settlement. They read as follows:

IT IS AGREED AS FOLLOWS:

1. The Form 780 dated May 23, 2000 issued to Mr. Thomas shall be amended as follows:
 - The 30 day suspension shall be rescinded & replaced with 20 demerits.
2. The Company's records & Mr. Thomas' disciplinary file shall be amended to reflect this change.
3. The Form 780 dated January 22, 2002 issued to Mr. Thomas shall be amended as follows:
 - The 30 demerits shall be rescinded & replaced with a written reprimand for "Failure to properly utilize the conflict resolution process."
4. The Company's records & Mr. Thomas' disciplinary file shall be amended to reflect this change.
5. Mr. Thomas' termination from employment with the Company effective May 3, 2005 is hereby rescinded & stricken from Mr. Thomas' record & the Form 780 dated May 2, 2005 shall be amended to reflect the imposition of a thirty (30) day suspension for "Leaving work early and displaying discourteous conduct."
6. The parties agree that the suspension was served by Mr. Thomas May 3 to June 2, 2005.
7. The Company's records & Mr. Thomas' disciplinary file shall be amended to reflect these changes.
8. The parties agree that the period of time from June 3, 2005 to Mr. Thomas' return to active duty shall be considered as active cumulative compensated service for pension, vacation & all other purposes.
9. Upon meeting with the Company's General Manager or delegate (at which meeting Mr. Thomas will acknowledge certain past deficiencies with the Company & will commit to improving on these deficiencies & being a productive employee), satisfying all medical requirements & passing any required rules, Mr. Thomas shall be returned to active duty with the Company with no loss of service or seniority, with the exception only of the thirty (30) day suspension referred to in paragraph 6, above.
10. Within 14 days of the signing of this Agreement, the Company shall pay to Mr. Thomas the sum of ten thousand dollars (\$10,000.00) less statutory deductions.
11. The parties agree that rules classes & any mentoring required will be scheduled as soon as possible.
12. The parties agree that these Minutes of Settlement are without prejudice or precedent to the position of either party in any future matter.
13. In the event of a dispute regarding the interpretation, application or enforcement of any term of this settlement, either party may refer such dispute to Arbitrator M. Picher who shall retain any necessary jurisdiction.

The Union maintains that when paragraphs 8 and 10 of the minutes of settlement are read together, the intention of the document is that the sum of \$10,000 paid to Mr. Thomas is to assist him in being able to buy-back his pension

for the period of his suspension. Its representatives indicate that the gross sum of \$10,000, less statutory deductions, would yield an approximate figure of \$6,000 which the Union estimated would be the figure necessary for him to do the pension buy-back. It was their belief that the buy-back would be available much in the same way as a pension buy-back is structured for an employee on a leave of absence, including for example union representatives on leaves of absence to work permanently as union officers. In the result, in the Union's expectation Mr. Thomas was to have the period of his suspension, from June 3, 2005 to his return to work, said to be March 17, 2006, count as a period for which he would notionally be deemed to have earned full wages, presumably based on a formula which would take into account his earnings in the previous year, thereby allowing the buy-back of unreduced pension benefits to be available upon his 55th birthday.

The Company's representatives deny that that was the intent of the minutes of settlement. Its representatives maintain that the \$10,000 payment reflected in paragraph 10 of the minutes of settlement was intended solely as compensation for the wages lost by Mr. Thomas by reason of his initial discharge, and ultimately the substitution of a suspension. According to the Company's representative involved in the settlement discussions, there was no express or explicit explanation to the Company that the monies so negotiated were intended for a pension buy-back. On the contrary, as the Company's representative relates it, the Union initially placed demands on the table for a substantially larger sum for wages lost, said to be at or in excess of \$30,000 and that after some negotiating the figure was ultimately resolved at the \$10,000 figure appearing in paragraph 10 of the minutes of settlement. The Company's representative acknowledges that the Union did indicate that the grievor wished to have his time away from work to count as cumulative compensated service for pension purposes, so that he would not lose the point in time at which he would be able to claim thirty-five years of service. He also notes that the pension plan does not contemplate a buy-back in the case of a disciplinary suspension, as it does in the case of an approved leave of absence.

The Company's representative also indicates that the employer's interpretation is not overly prejudicial to Mr. Thomas. Given that Mr. Thomas will reach his fifty-fifth birthday in 2010, the calculation of his best five years from the date of his return to work on March 17, 2006 could be done without interruption or reduction in March of 2011. That, the Company suggests, represents at most an additional period of employment of some six months for Mr. Thomas to restore his optimal pension benefits.

Turning to the merits of the dispute, the Arbitrator has some difficulty with the interpretation of the minutes of settlement put forward by the Union. In dealing with the construction of a document such as these minutes of settlement it is important to emphasize that it is not the intention of the parties independently which governs, but rather the intention of the document, particularly where it appears that the parties' respective understanding of their settlement differs substantially. There is little reason to doubt that the Union's belief as to what it was achieving for Mr. Thomas was as it now claims, apparently based on the resolution of an earlier employee reinstatement where a pension buy-back was in fact implemented. The good faith of the Union in this matter is not in question. What is in question is whether there was clear communication between the parties and a reduction into writing of a common intention in the terms which the Union now asserts.

On the whole of the evidence before me, I cannot find that the Union has demonstrated that the minutes of settlement represent the agreement which they believed they were making. There is, very simply, nothing on the face of the minutes of settlement to indicate that the grievor would buy-back any portion of his pension in relation to the period of his suspension. That concept, as noted above, would appear to be contrary to the provisions of the pension plan. While the language of paragraph 8 would indicate that the grievor was to recover the lost time for the purposes of "cumulative compensated service" for pension, vacation and other purposes, that could as easily indicate that he wished to protect the period for the purposes of the date at which he would achieve his total years of service necessary for pension eligibility. Nor is there anything in the language of paragraph 10 of the minutes of settlement to indicate that the payment being made to Mr. Thomas is in contemplation of his ability to use those funds, after statutory deductions, for the purposes of a pension buy-back. On the face of it, given that the parties had been discussing substantially larger sums as compensation for the grievor's loss of wages during the period of his suspension, it is not unreasonable to interpret paragraph 10 as providing an agreed sum of money for that purpose, and not for the repurchase of pension benefits.

Most importantly, for the purposes of the dispute before me, I cannot fairly conclude on the language of the minutes of settlement, or on the evidence of the witnesses I have heard, that the parties were agreed that a term or condition of the minutes of settlement was that Mr. Thomas would be allowed to buy-back the period of his suspension for pension purposes, thereby being restored to full pension benefits based on a notional concept of

unreduced income during the period following his discharge. Absent language which would indicate that intention, a fair interpretation of the minutes of settlement cannot sustain such an agreement or intention, whatever may have been in the mind of the Union's representatives.

For the foregoing reasons the Arbitrator finds and declares that the interpretation of the minutes of settlement advanced by the Company is correct and that the agreement made by the parties does not involve an obligation to allow Mr. Thomas to buy-back his pension so as to have unreduced pension benefits based on his best consecutive sixty months of service as at his fifty-fifth birthday. For the reasons touched upon above, it would appear that that entitlement may have to await the fulfilment of several additional months of employment.

July 14, 2008

(signed) MICHEL G. PICHER
ARBITRATOR