

CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY

TO

CASE NO. 168

Heard at Montreal, Tuesday, January 13th, 1970

Concerning

CANADIAN NATIONAL RAILWAYS

and

UNITED TRANSPORTATION UNION (T)

There appeared on behalf of the Company: January 13th, 1970

A. J. DelTorto - Labour Relations Assistant, C.N.R. Montreal
J. R. Gilman - Senior Agreements Analyst, C.N.R. Montreal

And on behalf of the Brotherhood:

G. R. Ashman - General Chairman, U.T.U. (T), Toronto
SUPPLEMENTARY AWARD OF THE ARBITRATOR

The award in this matter, issued earlier, was in part as follows:

"The grievance of Brakeman Sawchyn is allowed to the extent that the six-months' suspension is adjudged improper; a penalty of three months' suspension (inclusive of time out of service pending investigation), would not be improper. He is entitled to compensation accordingly."

The parties have been unable to agree as to the amount of compensation actually payable to the grievor pursuant to the award in this matter. The matter has accordingly been brought before me for determination in order that the award may be completed.

It is agreed that, pursuant to the award, the grievor was entitled to return to employment on June 16, 1968. The amount which the grievor would have earned had he actually been working for the company is capable, as the parties agree, of easy determination. It is the company's contention that the grievor is entitled to this amount, subject to the deduction of his actual earnings during this period. The Union contends that there should be no deduction made from this amount. There is no dispute between the parties as to any other employment benefits to which the grievor may be entitled, and no question arises in this case with respect to unemployment insurance, since it appears that the grievor was in fact employed during the period in question.

In its brief to the employer the Union referred to certain other

losses suffered by the grievor and his family which might be said to have been caused, at least in part, by the grievor's six-month suspension and consequent loss of anticipated income. It is my view, however, that these losses are not recoverable by way of a grievance brought under a collective agreement, and involve matters beyond an arbitrator's jurisdiction. Accordingly, I make no award with respect to such matters.

The award itself made no mention of the deduction of actual earnings from the amount otherwise payable. Indeed, the award did not deal with the nature of the loss suffered by the grievor, but simply provided, in the usual way, that he was "entitled to compensation accordingly". The plain meaning of this is that he was entitled to be made whole (with respect to benefits arising under the collective agreement) for the period when he was improperly suspended. It has been held in many arbitration cases in Canada that an employee who is improperly discharged or suspended is nevertheless under a duty to mitigate his losses by seeking out and accepting other suitable employment. An example of such cases may be found in Canadian Railway Board of Adjustment No. 1, Case No. 815, a decision of Professor Laskin, as he then was.

With respect, I agree with these decisions, and have no doubt that their principle is applicable here. Because of his actual earnings during the period in question, the grievor's actual loss of earnings was not as great as it would otherwise have been. It is the actual loss which the company is required to make up. It may be added, however, as in the case above referred to, that where the grievor's earnings are brought into account so as to reduce the company's liability, he is entitled to offset these by the expenses necessarily and reasonably incurred in realizing the income of which the employer gets the benefit.

For the foregoing reasons, it is my further award that in calculating the amount of compensation actually payable to the grievor the company may take into account his actual earnings during the period in question subject to what has been said above. The purpose of the award of compensation is to put the grievor, from the point of view of earnings, in the position he would have been in had he not been suspended during that period.

J. F. W. WEATHERILL
ARBITRATOR