CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1789

Heard at Montreal, Tuesday, June 14, 1988

Concerning

CANADIAN NATIONAL RAILWAY

And

UNITED TRANSPORTATION UNION

DISPUTE:

Claim of Conductor E.J. Hawthorne and crew of Rainy River for payment of "tied up between terminal pay" under Article 35A.1 of Agreement 4.3.

JOINT STATEMENT OF ISSUE:

On April 8, 1983, Conductor E.J. Hawthorne and crew were called in straight away service from Rainy River to Ranier going off duty at Ranier at 0530. The crew was again ordered in straight away service from Ranier to Rainy River on duty at 1245 that same day. Conductor Hawthorne submitted a claim for 7 hours and 15 minutes which represented the time off duty between 0530 and 1245. The claim was declined by the Company.

The Union contends that Conductor Hawthorne and crew were tied up between terminals and are entitled the payment of this allowance.

The Company declined the Union's appeal.

FOR THE UNION:	FOR THE COMPANY:
(SGD) J. W. ARMSTRONG for: General Chairman	(SGD) D. C. FRALEIGH Assistant Vice-President Labour Relations

There appeared on behalf of the Company:

J. Hnatiuk	- Manager Labour Relations, Montreal
S. Grou	- Labour Relations Assistant St. Lawrence Region, Montreal
D. Lussier	- Co-ordinator, Special Projects, Transportation, Montreal

And on behalf of the Union:

J. W. Armstrong	- Vice-General Chairman, Edmonton

L. H. Olson - General Chairman, Edmonton

AWARD OF THE ARBITRATOR

The Union's claim is filed under Article 35A.1 of the Collective Agreement. It provides as follows:

> 35A.1 Trainmen, other than those in wreck, work construction, snow plow and flanger service may be tied up at any point between the initial terminal and the point for which called and the tie-up point shall be recognized as the final terminal. Trainmen so tied up shall be paid actual miles or hours to the tie-up point but not less than a minimum day of 100 miles, and from tied up until again resuming duty will be compensated hour for hour on the basis of 1/8th of the daily rate for the first 8 hours in each 24 hours so held. In the application of this paragraph to trainmen ordered for a turnaround trip, the turning point or any intermediate point will be considered as being between terminal points.

It is not disputed that on the facts of the instant case Ranier, Minnesota was the "point for which called" within the meaning of the foregoing provision. On a plain reading of the article it cannot be concluded that Conductor Hawthorne can be said to have been tied up at any point between Rainy River (the initial terminal) and Ranier (the point for which called).

The Union acknowledges that the strict language of Article 35A does not protect Conductor Hawthorne and crew in the circumstances which obtained on April 8, 1983. It submits, however, that an understanding had previously been reached with the Company in 1978 that, notwithstanding the article, General Chairman H. Burnett was given guarantees by Company officers that the agreement would cover Rainy River crews and compensate them for the time tied up at Ranier.

If the Arbitrator is satisfied that the foregoing allegation is true, the grievance should succeed. The material would then disclose that the Union renegotiated the language of Article 35A with an express undertaking from the Company that it would not apply its strict provisions to the crews at Ranier. It would, in other words, be estopped from so doing. An Arbitrator is naturally reluctant to accept extrinsic evidence of an intention apparently inconsistent with the clear language of a Collective Agreement. Where, however, sufficient evidence is adduced to satisfy the adjudicator that the parties had an intention not to apply the strict terms of the language in a given situation, and a party has relied to its detriment on that understanding, estoppel must apply.

The issue therefore becomes whether there is sufficient evidence in the instant case to establish what the Union alleges. After a careful review of the material I am satisfied that there is. It is not disputed that for a period of some five years, between 1978 and 1983, the Company consistently paid the "tied up between terminals" claims for crews at Ranier. The material discloses that on an early claim, filed prior to the effective date of the agreement which

amended the language of Article 35A, the Company's local trainmaster acknowledged that in principle the new agreement would allow the payment of the crews' claims at Ranier. While I accept that the observation of a single local member of management need not bind the Company for the purposes of the interpretation of its collective agreement, I am persuaded that the whole of the evidence does support the position advanced by the Union with respect to the mutual understanding of the parties. This does not appear to be a case of erroneous practice which the Company has a right to correct. The communication signed by Trainmaster Bekker and the sworn affidavit of Local Chairman R.C. Ewald respecting the understanding reached with the Company corroborated by the consistent five year practice of honouring the claims of crews at Ranier establishes, on the balance of probabilities, that the parties did intend that the claims which are the basis of this grievance should be paid. Any alteration of that practice is a matter for further negotiation between the parties.

For the foregoing reasons the grievance must be allowed. The claim for seven hours and fifteen minutes filed by Conductor Hawthorne and crew shall therefore be paid forthwith. I remain seized of this matter in the event of any dispute between the parties concerning the interpretation or implementation of this award.

June 16, 1988 (SGD) MICHEL G. PICHER
ARBITRATOR