CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1811

Heard at Montreal, Wednesday, 13 July 1988

Concerning

CANADIAN NATIONAL RAILWAY

And

CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS

JOINT STATEMENT OF ISSUE:

The Brotherhood contends that the grievor, Mr. G. Sand, former Crew Director, Jasper, is entitled to have regular overtime payments included when calculating his incumbency under the "Maintenance of Basic Rates" provisions provided for in Article 8, paragraph 8.9, of the Employment Security and Income Maintenance Plan (The Plan) dated June 18, 1985.

The Company disagrees with the Brotherhood's contentions.

JOINT STATEMENT OF FACTS:

As a result of centralization of crew calling activities on the Mountain Region into Edmonton, the Jasper crew calling activities were centralized effective November 5, 1986.

Effective November 5, 1986, Mr. Sand's position of Crew Director, Jasper was abolished under Article 8 of The Plan due to a technological, operational or organizational change.

Subsequently, Mr. Sand exercised his seniority onto a Crew Dispatcher's position in Edmonton.

The position of Crew Director which Mr. Sand permanently held at the time of the change was paid at the "I" level, the basic weekly rate of which is $559.45 (1986). The position of Crew Dispatcher, Edmonton is paid at the "H" level, the basic weekly rate of which is $544.82 (1986). Therefore, Mr. Sand's weekly wage was reduced by $2.00 or more and he was entitled to "Maintenance of Basic Rates" as provided by Article 8, paragraph 8.9 of The Plan.

In addition to Mr. Sand's former "I" level rate of pay as a Crew Director, he was also paid four hours' wages at punitive rates, per week, "for phone call resource knowledge during his hours and days off".

It is the Brotherhood's position that this regular weekly overtime payment constitutes a standby allowance which is provided for on page 43 of The Plan. As such, the Brotherhood contends it should be included in calculating the "basic rate" of Mr. Sand's former

position and therefore be included in calculating his incumbency rate, as provided in paragraph 8.9.

The Company's position is that overtime payments are excluded in the provisions of paragraph 8.9. It is also the Company's position that the payments in dispute in the instant case were overtime payments and cannot be interpreted as a standby allowance as there is no provision in the 5.1 Collective Agreement for standby allowances. Moreover, this provision in The Plan is intended to protect the 25-hour straight time standby allowance for each four-week period, paid to employees receiving same, under the provisions of the 11.1 Collective Agreement between the Company and the Canadian Signals and Communications Union. Therefore, as overtime payments are excluded when calculating the basic weekly or hourly rate under paragraph 8.9, Mr. Sand's incumbency should not reflect these payments.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(Sgd) TOM McGRATH National Vice-President	(Sgd) J.P. GREEN for: Assistant Vice-President Labour Relations

There appeared on behalf of the Company:

S. F. McConville	- Labour Relations Officer, Montreal
M. M. Boyle	- Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

R. Storness-Bliss	- Regional Vice-President, Vancouver
T. N. Stol	- Regional Vice-President, Toronto
A. Cerilli	- Regional Vice-President, Winnipeg
H. Critchley	- Representative, Edmonton

AWARD OF THE ARBITRATOR

The material establishes beyond dispute that for some ten years the grievor, Mr. G. Sand, in his position of Crew Director at Jasper was paid a supplementary amount, totalling $83.92 per week, in compensation for remaining available for consultation by telephone during off hours. While this payment was characterized as "overtime" for administrative purposes, it is not disputed that Mr. Sand did not work overtime in the conventional sense and, indeed, continued to receive the supplementary payment while on sick leave. It would also appear that the telephone availability effectively became attached to the job as a requirement, to the extent that the supplement was also paid to persons who replaced the grievor during vacations.

At issue is the application of Article 8.9 of the Employment Security and Income Maintenance Plan to the circumstances of Mr. Sand, specifically with respect to the computing of his incumbency for the purposes of The Plan. That article provides, in part, as follows:

> 8.9 An employee whose rate of pay is reduced by $2.00 or more per week, by reason of being displaced due to a technological, operational or organizational change, will continue to be paid at the basic weekly or hourly rate applicable to the position permanently held at the time of the change providing that, in the exercise of seniority, he;

In the Arbitrator's view the essential issue is the determination of the "basic weekly rate ... applicable to the position" of Crew Director at Jasper held by Mr. Sand. Having regard to the material before me I am compelled to conclude that the substance of the arrangement between Mr. Sand and the Company, quite apart from its form, was the regular and continuous payment to him of $83.92 weekly, (characterized for payroll purposes as overtime) in addition to $559.45, which appears to be a general rate for Crew Director positions, although Mr. Sand's position at Jasper appears to have been the last of these. While I am not persuaded that the supplementary amount can be accurately described as "standby allowance", as the Union would have it, that conclusion is not fatal to the merits of the grievance. As indicated above, I am compelled to conclude that the substance of the arrangement between Mr. Sand and the Company, an arrangement which it may be added was clearly beneficial to the employer over the years and which, with the disappearance of the position, cannot now be undone, was the payment for the position of $559.45 per week plus $83.92 for a total of $643.37. That sum was paid regularly, without regard to the number, if any, of telephone calls fielded, and was paid to those who occupied Mr. Sand's position on a replacement basis. It was not, in fact, an overtime payment. In these special circumstances I am satisfied that the amount of $643.37 must be construed as the grievor's weekly rate for the purposes of establishing his incumbency entitlement under Article 8.9 of the Employment Security and Income Maintenance Plan.

For these reasons the grievance is allowed. I remain seized of the grievance in the event of any further dispute between the parties respecting the interpretation or implementation of the award.

July 15, 1988 (SGD) MICHEL G. PICHER
ARBITRATOR