CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD TO

CASE NO. 2050

Heard at Montreal, Tuesday, 8 January 1991

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS

There appeared on behalf of the Company:

M. M. Boyle	-- Manager, Labour Relations, Montreal
J. Dysart	-- System Labour Relations Officer, Montreal
D. Lanthier	-- Labour Relations Officer, Winnipeg

And on behalf of the Brotherhood:

A. Cerilli	-- Regional Vice-President, Winnipeg
D. Olshewski	-- Representative, Winnipeg

SUPPLEMENTARY AWARD OF THE ARBITRATOR

In the award herein, dated September 14, 1990, the Arbitrator found that the Company had violated Article 4.4 of the Collective Agreement by establishing a position of Senior Engineering Clerk which involved 8 hours of work per day, which was forty-five minutes more of work per day than had been assigned to that position in accordance with prior practice. The final paragraph of the award reads, in part, as follows:

> ... The Arbitrator directs that the Company pay to the affected employees adjustments, if any, owing in respect of their wages and benefits arising from this award, for the period from May 1 to September 30, 1988, and to henceforth schedule the position in question in a manner consistent with the provisions of Article 4.4 of the Collective Agreement.

It is common ground that the Company has complied with the directive to reschedule the position in conformance with the interpretation of Article 4.4 in the Arbitrator's award. The parties remain in dispute, however, in respect to the compensation payable under the award. It is not disputed that a single employee, Ms. Kettering, is the sole subject of the compensation that would be payable under this grievance.

The Company maintains that no compensation is payable because, according to its spokesperson, the terms of Article 4.4 contemplate that an employee in the position of Ms. Kettering could be required to work up to 8 hours in a day without any entitlement to overtime. He submits, in effect, that she would have earned no more nor no less if the bulletin had specified 7-1/4 hours of working time in a day, or 8 hours. He draws to the Arbitrator's attention the language of Article 4.4 which is as follows:

> 4.4 Where it has been the practice for weekly rated employees to work less than eight hours per day, that practice shall be continued unless changed on account of conditions beyond the control of the Company. Should conditions occasionally demand, employees working such reduced hours may be required to work eight hours per day and overtime will not accrue until after eight hours' service has been performed. To take care of regular requirements such employees may be required to work extra hours on certain days and overtime shall only accrue after eight hours' service has been performed.

In the Arbitrator's view the perspective advanced by the Company fails to give full effect to the bargain struck between the Company and the Brotherhood in the framing of Article 4.4. of their Collective Agreement. Under the terms of that provision the Brotherhood is entitled to expect that weekly rated employees occupying positions for which it has been the practice to work less than 8 hours per day will have the benefit of a continuation of that practice. It is contemplated that the employee will have the week's wages for work which generally is scheduled for less than 8 hours per day, subject to sometimes being required to work 8 hours per day without overtime "... should conditions occasionally demand".

That, however, is not what transpired in this case. While the Arbitrator is satisfied that the Company at all times proceeded in good faith, it is common ground that Ms. Kettering was required to work an extra forty-five minutes for each and every day of her assignment from May 1 to September 30, 1988. In the result, the Company obtained the advantage of many hours of work from the employee beyond what is contemplated in the terms of Article 4.4. In the Arbitrator's view, it would be inequitable, and amount to unjust enrichment for the Company to now assert that no compensation or other redress is available to the employee in question, on the basis that she might, in any event, have been required to work overtime. To accept that argument is to allow the Company to achieve indirectly that which it could not achieve directly, in light of the provisions of Article 4.4 of the Collective Agreement.

It should also be noted that this is not a case in which the Brotherhood did not protest the Company's action in a timely manner, allowing a case for compensation to build unbeknownst to the employer. The record reveals that the Brotherhood's local chairman, Mr. Roy L'Esperance, grieved the Company's action by way of a letter dated April 20, 1988, at the time of the bulletin and prior to the position being filled.

What principles should then govern the issue of remedy in this case? On the one hand the Arbitrator must accept, as the Company argues, that in keeping with the terms of Article 4.4 Ms. Kettering would, on occasion, have been required to work 8 hours in a day without the benefit of any further wages. On the other hand, it is clear that the Company gained the benefit of work performed by her in a quantity that substantially exceeds what was agreed to under Article 4.4. In these circumstances, acknowledging that absolute precision is possible, I am satisfied that the equities are reasonably met if the Company is given the option of either compensating Ms. Kettering at the rate of straight time for forty-five minutes per day for 75% of the days which she worked in the position of Senior Engineering Clerk between May 1 and September 30, 1988, with 25% being a reasonable allowance for unpaid work in excess of 7-1/4 hours which she might have worked in any event, or alternatively, providing her with the equivalent in paid lieu time off, to be taken at a time to be mutually agreed between the parties, and I so order.

January 11, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR