

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2834

Heard in Montreal, Wednesday, 12 March 1997

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND
GENERAL WORKERS UNION OF CANADA (CAW-CANADA)**

DISPUTE:

Whether the letter of settlement of March 15, 1989 granted Mr. Cuthbert Miller retroactive cumulative compensated service for the period between September 21, 1986 and March 15, 1989.

JOINT STATEMENT OF ISSUE:

Cuthbert Miller was hired by CN on July 10, 1986. On September 21, 1986 he was terminated after having his name removed from the seniority list for failing to exhaust his seniority after being displaced.

Mr. Miller filed an unfair representation complaint against the Union with the CLRB. The CLRB found on behalf of Mr. Miller and ordered the time limits of the collective agreement be waived so that Mr. Miller could file a grievance regarding his loss of seniority and termination.

A grievance was then filed and was referred to the CROA for adjudication. On March 15, 1989, the Company and the Union reached an amicable settlement of the dispute which was committed to writing on that day.

The Union alleges that the settlement reinstated Mr. Miller with full retroactive effect with full seniority and including cumulative compensated service (C.C.S.).

The Union asks that Mr. Miller be granted credit for six (6) months of C.C.S. for 1986, twelve (12) months for 1987 and twelve (12) months for 1988.

The Company rejected the grievance and argues that the settlement did not contemplate any retroactive C.C.S.

FOR THE UNION:

(SGD.) A. S. WEPRUK
NATIONAL COORDINATOR

FOR THE COMPANY:

(SGD.) D. S. FISHER
DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

D. S. Fisher – Director, Labour Relations, Montreal

And on behalf of the Union:

A. S. Wepruk – National Coordinator, Montreal
D. Olshewski – National Representative, Winnipeg
R. Doherty – Local Chairperson, Winnipeg

AWARD OF THE ARBITRATOR

The settlement negotiated with respect to the return to work of Mr. Miller, in the form of a letter dated March 15, 1989 reads, in part, as follows:

This letter concerns the dispute filed on behalf of Mr. C. Miller, regarding the forfeiture of Mr. Miller's seniority and his subsequent termination of employment in September 1986.

1. Without prejudice and as full and final settlement of all outstanding issues, the following was agreed to by the parties:
2. Lump sum payment of \$10,000 will be paid to Mr. C. Miller, the cost to be divided equally by the Company and the Brotherhood.
3. The grievor will be reinstated with full seniority.
4. Upon presentation to the Brotherhood of an accounting of the grievor's legal costs, the Brotherhood will reimburse the grievor's lawyer an amount not exceeding \$3,500.00.

The parties agree that the execution of paragraphs 1 and 2 of this agreement will take place on or before March 31, 1989.

The sole issue to be resolved is whether the grievor is entitled, by reason of the above-noted reinstatement, to the benefit of full cumulative compensated service (C.C.S.), which has a critical bearing on his entitlement to employment security and related benefits under the Employment Security and Income Maintenance Agreement. The position of the Company is that he is not entitled to retroactive C.C.S., as a result of which he has been denied employment security and related training benefits following an article 8 notice issued in January of 1996, by reason of which he was displaced from his employment. The position of the Union is that the intention of the settlement of March 15, 1989 was to place the grievor into the same position as he would have been in but for his termination by the Company in September of 1986.

The Arbitrator is satisfied that the position advanced by the Union is to be preferred. The Company's representative concedes that as a general rule when settlements of this kind are negotiated, the payment of monetary compensation is generally in recognition of the wages and benefits to which an employee may have been deprived. Where such payments are made part of a return to work settlement, the employee is credited accordingly for his or her cumulative compensated service.

In the Arbitrator's view, therefore, to properly understand the intent of the settlement of March 15, 1989, it is important to give meaning to the payment of the sum of \$10,000.00 in compensation to Mr. Miller at the time of his reinstatement. The evidence of Mr. Miller, which the Arbitrator accepts, is that the figure so expressed was arrived at by agreement, as a form of compensation for wages and benefits lost, when regard was had to the earnings which he made elsewhere between September of 1986 and his return to work, as a factor in mitigation. While the Arbitrator has no reason to doubt the normal procedure followed by the Company in dealing with the crediting of C.C.S. upon the reinstatement of an employee, even when its own approach is applied to the agreement at hand, it is difficult to conclude, on the balance of probabilities, that the settlement did not intend compensation for the employee's loss of wages and, by extension, commensurate protection for his C.C.S.

Nor can the Arbitrator ascribe substantial weight to the alternative argument of the Company to the effect that the grievor's accepting of a shorter vacation period following his reinstatement, based on reduced C.C.S., can be taken as a waiver of his rights or acquiescence in the Company's interpretation. I am satisfied that at most, what that reflects is a misunderstanding on the part of Mr. Miller with respect to his rights in regard to the accumulation of vacation credits. In sum, therefore, when regard is had to the totality of the settlement, even in light of the Company's normal practice, the Arbitrator is persuaded that the intention of the parties was to return the grievor to the position that he would have been in, as regards wages and benefits, but for the termination of his employment in September of 1986. In the result, I am satisfied that the overriding intention was that Mr. Miller suffer no loss of cumulative compensated service.

The grievance is therefore allowed. The Arbitrator directs that the grievor be credited forthwith with cumulative compensated service in accordance with the claim advanced by the Union, and that the grievor be made whole in respect of his entitlement to employment security and all related wages and benefits.

March 14, 1997

(signed) MICHEL G. PICHER
ARBITRATOR