CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD TO

CASE NO. 525

Heard at Montreal, Wednesday, September 10th, 1975

Concerning

CANADIAN PACIFIC TRANSPORT COMPANY LIMITED (C.P. TRANSPORT)

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

SUPPLEMENTARY AWARD OF THE ARBITRATOR

In the award in this matter it was held that the permanent suspension from driving duties which had been imposed on the grievor was not justified, and a lesser restriction was substituted. The grievor was held to be entitled to exercise his seniority with respect to any other position, including a driver's position. It was further held that the grievor was entitled to compensation for loss of earnings for the period following his restriction, calculated with reference to the position with respect to which he could have exercised seniority.

The parties disagree as to the amount of compensation to which the grievor is entitled under the award. Each of the parties has made representations on the matter, and the parties agree that I should dispose of the question without a further hearing.

It appears that the parties have agreed that the grievor could indeed have displaced a City Tractor Driver, and there appears to be agreement on the amount the grievor would have earned in such position during the period in question. It appears further that the grievor did in fact work as a warehouse employee during this period, and his actual earnings are known. In its claim, the Union has made its calculation of the difference payable to the grievor on a weekly basis, except for the period April 11 – June 15, 1975, for which an estimate is made. This estimate appears to have been accepted by the Company. For each of these periods there is a difference in the grievor's favour between the amount, including overtime, he would have earned as a City Tractor Driver and the amount he did earn as a Warehouseman. By my calculations this difference, for the period from April 11, 1975 to September 15, 1975, amounts to $358.23.

It is the Union's position that there should be added to the amount just shown **a)** an amount equal to one day's pay for September 16, 1975; **b)** an amount to make up the difference to the overtime rate when the grievor worked on a rest day to make up that loss, and **c)** the amount of $78.40 representing the total of the shift differential paid to the grievor during the period he worked in the warehouse. The Company contends that the above amounts should not be paid, and sought to deduct from the payment to the grievor an amount of $284.70, said to be an overpayment of vacation pay.

As to claims (a) and (b) referred to above, it appears that, as the grievor was working on a night shift until September 15, he was unable to begin work as a City Tractor Driver on September 16. If the grievor had been allowed to work as a City Tractor Driver as of April 11, then the probability is that he would have worked on that day. His claim for payment for that day appears therefore to be proper. In fact, however, he made up that amount by working on another day, and this would appear to come within the scope of his duty to mitigate his losses. But this other day was a rest day, and his duty to mitigate does not involve the surrender of overtime entitlement. In the

result, it is my conclusion in the circumstances of this particular case that the claim (a) must fail whereas claim (b) succeeds. This adds $20.27 to the amount payable to the grievor.

As to claim (c), the grievor is under a duty to mitigate his losses by finding the best employment he can. The calculation of compensation payable is made by deducting the amount he in fact earned from the amount he would have earned. Here, the amount the grievor in fact earned included a shift premium. That is properly included in earnings, and cannot be added to the claim. Thus, claim (c) must fail.

As to the deduction of any amount which might be owing to the Company by the grievor in respect of an overpayment of vacation pay, the question of any such debt is not before me. If the debt does not exist, then it may be that it could properly be set off against the payment to be made pursuant to this award, but that raises distinct and different questions from those dealt with in this case, and I pass no opinion on them now. If the Company does make the proposed deduction, the propriety of that will have to be tested in a separate case.

In the result, it is my award that the Company pay to the grievor the amount of $378.50 as the compensation due to him in this case.

Supplementary issued Tuesday, March 9, 1976

(sgd.) J. F. W. WEATHERILL
ARBITRATOR