# CANADIAN RAILWAY OFFICE OF ARBITRATION

# SUPPLEMENTARY AWARD TO

# CASE NO. 901

Heard in Toronto, December 17, 1987

concerning

## CANADIAN PACIFIC LIMITED

and

## TRANSPORTATION COMMUNICATIONS UNION

This matter was determined on the basis of a number of written submissions, made during the period from December 17, 1987 to May, 1988.

There appeared on behalf of the Company:

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| I. J. Waddell | – Manager, Labour Relations, Montreal |
| and others | – |

And on behalf of the Union:

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| D. Deveau | – General Chairman, Calgary |
| B. P. Jasiura | – Counsel for the grievor |
| G. Craib | – Grievor |

## SUPPLEMENTARY AWARD OF THE ARBITRATOR

The matter before me arises pursuant to CROA Case No. 901, heard at Montreal on January 12, 1982. The concluding paragraph of the award in that case (the award is not dated but was issued within thirty days of the hearing), is as follows:

> For all of the foregoing reasons, it is my conclusion that there was not just cause for the discharge of the grievor. It is my award that the total demerits assessed against his record be reduced to forty-five, and that the grievor be reinstated in employment forthwith, without loss of seniority or other benefits. He shall be entitled to compensation for loss of earnings for the period from and after October 20, 1980, and his disciplinary record shall be effective as of the date of his actual reinstatement.

In March, 1982, certain payments were made to the grievor pursuant to the award in Case No. 901. Certain representations were then made as to the sufficiency of those claims. It would appear that the Company declined to make further payments in June, 1982. In September of that year, a further grievance was filed claiming compensation for lost overtime opportunities, and claiming interest on the amounts of compensation paid or claimed. Some tome following, the grievor appears to have engaged counsel to act on his behalf, and certain further claims were advanced, including a claim in respect of legal expenses, and a claim to the effect that the Company was not entitled, in calculating the compensation payable to the grievor, to deduct certain outside earnings which the Company considered should go to mitigate the grievor's loss of earnings from the Company. These latter claims were rejected by the Company in May 1983, although it was agreed that payment would be made in respect of some fourteen hours' lost overtime opportunities.

In August 1983, the grievor filed a complaint against the Union under section 136.1 of the **Canada Labour Code**. Among the grounds of complaint was the Union's alleged failure adequately to pursue the grievor's claims for compensation pursuant to the award in CROA Case No. 901 (although that case was not referred to by name in the complaint). The complaint against the Union was withdrawn in March, 1984. The grievor did take other proceedings

before the **Canada Labour Relations Board**, but those related to distinct matters, and did not involve the claims now sought to be put before me.

On December 17, 1987, the solicitor then acting for the grievor wrote to me seeking to reconvene or continue the arbitration of Case No. 901, "in order to finalize the issue of the amount of loss of earnings actually sustained by Mr. Craib". Subsequently, by letter of February 1, 1988, specifics of the claim were given. Payment was sought **1.)** in respect of the deduction alleged to have been by way of mitigation of damages; **2.)** for loss of overtime shifts (the claim being the same as that made in September, 1982); **3.)** for interest on back pay said to have been agreed to by the Company and; **4.)** for a benefit payment (under a dental plan) which it is said the grievor would have received had he not been improperly discharged.

The parties to the proceedings, the Company and the Union, were advised of the grievor's request. Although the Company has raised certain objections going to my jurisdiction, both parties have made submissions to me in that respect, and in my view I am properly seized at least with the question whether or not the matter sought to be pt before me is an arbitrable one.

The first objection raised is that the decision in Case No. 901 was a final one, and that I am accordingly *functus officio***.** The award in this matter set out the grievor's general entitlement to compensation but, as is usual in such cases, it did not make any findings or set out any precise award as to the extent of such compensation. To that extent, the award was not complete, and in my view an arbitrator retains and must if necessary exercise jurisdiction to make a final and enforceable award. See, in this respect, the **Consumer's Gas** case, 6 L.A.C. (2d) 61. The award in Case No. 901, while "final" on the question of just cause for discipline and reinstatement, did not finally dispose of the issue of compensation, and the Arbitrator does, in my view, retain jurisdiction to deal with that matter and to complete the award. The first objection is, accordingly, dismissed.

The second objection raised is that as I am no longer the Arbitrator appointed to deal with the disputes submitted to the Canadian Railway Office of Arbitration, the matter is now out of my hands. The collective agreement provided that disputes being referred to arbitration be referred to the Canadian Railway Office of Arbitration. The instant case was so referred. The grievance before me is not a new one (with respect to which I would clearly have no jurisdiction), but is said to be a continuation of Case No. 901 which was (and thus, it is argued, is) properly before me. In my view, the grievor's contention (with which the Union agrees) is correct. While it may be that were I unwilling or unable to act further in this matter the only appropriate forum would be the Canadian Railway Office of Arbitration, and while it may also be that the Office of Arbitration (through the incumbent arbitrator) or myself (as the arbitrator who heard the case) would have concurrent jurisdiction it is my view that the jurisdiction of an arbitrator seized with a case is personal, and that it remains the arbitrator's duty to complete the award in a matter before him, even although he may no longer hold the office by virtue of which he was originally seized with it. Accordingly, the second objection is dismissed.

For the foregoing reasons, I find that the matter is properly before me. There remain, however, certain preliminary objections which go to the present arbitrability of the claims rather than to my jurisdiction which the Company raised, and which must be dealt with before any consideration be given to the merits of the claims.

It is said that the grievor may not proceed individually in this matter, as only the Union is empowered, under the Collective Agreement, to process grievances. That proposition is, as a general matter, correct. In the instant case, however, the Union has – in part – associated itself with the grievor's claims, and has raised no objection to his making submissions, one at least of which it apparently considers to have merit. It is the Union, which is, of necessity, party to the proceedings, and while it may be said to have "carriage" of the case, it may (subject to such limitations as the Arbitrator may impose), make its own determination as to the extent to which an individual grievor may be heard. In the circumstances of this particular case, it is my view that it was proper that the grievor's submissions be received.

It is further said that certain of the claims made are new ones, not raised or implied in the original grievance. Others are claims which have been dealt with as between the parties. Subsequent to his solicitor's letter of February 1, 1988, the grievor has advanced a claim for legal and out-of-pocket costs. This was not a claim raised by or implicit in the original grievance, and in my view is not properly before me. The claim for interest, said, in the grievor's solicitor's letter to have been actually agreed to has not been shown to have been agreed to by the parties. The claim for loss of overtime is one which the Company appears to have agreed to in part in 1983. The claim for medical benefits is one which, according to the Union's solicitor's statement in August, 1982, had been paid. The

major item claimed in respect of which a substantial question might be said to arise (and which is said by the Union to be the only one which might properly remain outstanding in the grievor's eyes), is that of the deduction of the grievor's outside earnings, said by the Company to go to mitigation of losses. The Company's position with respect to that claim was made known to the Union and the grievor by the Company's solicitor's letter of May, 1983.

In any event, with respect to all of these claims, it is the Company's position that the claims must be dismissed on the basis of *laches*, or unreasonable delay. The Union supports this position to some extent, noting that it had been unaware, apparently for some years, that the grievor was seeking to "reopen" these claims. Following the issue of the award in this matter, the grievor would appear to have been reinstated in employment, and a payment by way of compensation made to him, with reasonable promptness. The grievor was not satisfied with the payment made, and proceeded not only against the Company but, as has been noted, against the Union. In this respect, what was said by the Union's solicitor in a letter dated August 27, 1982 to the grievor's then solicitor is of interest:

> … Generally, the Union is surprised that Mr. Craib is dissatisfied with the conclusion of this case. The Union took the matter to arbitration and was successful in winning reinstatement and a very substantial backpay award. The additional claims raised in your letter had never before been raised with the union. …

While the grievor, as noted above, took proceedings against the Union in respect of its representation of his interests, that claim was withdrawn. There is no suggestion of any action being taken to bring the award before the Arbitrator for completion until almost six years after the award was made. The claims for compensation, including the claim that the grievor's outside earnings ought not to have been deducted, were known to the parties at all material times, and the Company's final position on the matter was reiterated in May, 1983. The other proceedings which were taken might perhaps be considered to account for some delay, but even when these had been dropped the claims now sought to be made were not pressed. No significant action was taken with respect to them, although the grievor well knew their status. For some years now, there has been no reason for the Company to expect that these claims would be sought to be put before the Arbitrator. In my view, delay of this extent is quite unreasonable, and the objection to proceeding further in the matter should be allowed.

The award in this matter was that the grievor be reinstated into employment, with compensation for loss of earnings. The grievor was reinstated, and certain compensation paid. Delay in pursuing claims for further compensation has been such as, I find, to make it unreasonable to permit further proceedings in the matter. Accordingly, the award as issued stands as the final award in this matter, and these proceedings are terminated.

DATED AT TORONTO, this 13th day of June, 1988**.**

**(signed) J. F. W. WEATHERILL**
**Arbitrator**