CANADIAN RAILWAY OFFICE OF ARBITRATION

SUPPLEMENTARY AWARD TO

CASE NO. 3400

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

SUPPLEMENTARY AWARD OF THE ARBITRATOR

The parties made submissions to the Arbitrator with respect to the Union's allegation that the Company has not properly implemented the direction of the Arbitrator of the award herein dated January 19, 2004. The final paragraph of the award reads as follows:

> The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority, with compensation in full for all wages and benefits lost, and with the substitution of an assessment of ten demerits for his failure to make proper inquiries in the face of a computer message about which he was uncertain.

Three issues are raised. Firstly, the Union submits that the grievor should be compensated for all days held out of service at the rate of 100 miles per day. In the calculation of days it would count seven days in each week. The Union maintains that

its position is sustained on the language of the collective agreement. It refers the Arbitrator to the wording of article 117.4 of collective agreement 4.3 which provides as follows:

> **117.4** In case discipline or dismissal is found to be unjust, the employee will be exonerated, reinstated if dismissed, and paid a minimum day for each 24 hours for time held out of service at schedule rates for the class of service in which last employed.

The Union maintains that as an employee in spare service, subject to be called at any time, the grievor should be compensated at the rate of a day's pay for each day held out of service, calculated on the basis of seven days per week.

The Arbitrator cannot agree. As is well established in the practice of this Office, and settlements which have been placed before the Arbitrator on a number of occasions, when an employee is to be made whole the parties acknowledge that he or she is to be given the wage and benefit compensation which, but for the violation of the collective agreement, would have been received by that employee. Compensation upon reinstatement is not to be a windfall. It is on that basis that it is not uncommon for parties, by agreement, to examine the work opportunities of the next most senior employee to reach an approximation of the work which was effectively denied to the person who was reinstated. While a literal reading of the provisions of article 117.4 of collective agreement 4.3, said to be identical to like provisions of found in article 30 of collective agreement 4.2 and article 82.4 of collective agreement 4.16, would arguably support the Union, the long-standing practice and understanding of the parties is

consistent with the approach to compensation argued by the Company in the case at hand. The position of the Union with respect to the application of the collective agreement provision in question must therefore be rejected.

A further issue arises with respect to the treatment of the grievor at the hands of the BC Medical Services Plan. It appears that as a result of a failure on the part of the Company to make the appropriate deductions and remittances, the grievor has been in receipt of an overdue notice for medical and dental services, charged to himself. It emerged from the representations made to the Arbitrator at the hearing that there may well have been a clerical error on the part of the Company. Having regard to the undertaking given by the Company's representatives, therefore, the Arbitrator directs that the Company take all steps necessary to do whatever is required to correct the standing of Mr. Brunn in respect of the British Columbia Medical Services Plan.

Thirdly the grievor seeks a payment of interest from the Company calculated on the wages and benefits which the Union maintains were not paid in a timely fashion. The Arbitrator has some difficulty with that submission in the case at hand. Firstly, there was no request for interest made during the principal presentation of the grievance. While the Union's statement of issue indicated that the grievor should be "made whole" and the conclusion in its brief was that by the Arbitrator's remedial order Mr. Brunn should be "made whole in every way", there was no specific reference to interest at any point during the proceedings. Given that fact, coupled with the fact that it appears to the Arbitrator that a certain degree of delay in the calculation of the grievor's compensation

was occasioned by his own failure to provide the Company with clear figures with respect to monies which he received, including monies from Employment Insurance, this is not an appropriate case for an award of interest. The Union's request in that regard is therefore denied.

It appears that there may be some difference between the parties with respect to the mechanics by which Human Resources and Development Canada (EI) will be reimbursed for monies received by Mr. Brunn. It would appear to the Arbitrator that that should be done in a manner consistent with the applicable law and regulations. In any event, the Arbitrator retains jurisdiction with respect to that issue, as well as with respect to any further dispute which may arise in this matter.

On the foregoing basis the matter is remitted to the parties.

June 14, 2004

(signed) MICHEL G. PICHER
ARBITRATOR