CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 49

Heard at Montreal, Monday, January 9th, 1967

Concerning

PACIFIC GREAT EASTERN RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Request of the Brotherhood for removal of the discipline assessed Locomotive Fireman (Helper) Morgan effective February 13th, 1964, and full payment for all time lost.

JOINT STATEMENT OF ISSUE:

Locomotive Fireman (Helper) R.E. Morgan, S.R.B. 1713, submitted time-return No. 9 relative to service rendered on Train 1st and 15 out of North Vancouver on February 13th, 1964. An entry on time-return No. 9 made reference to a 40-minute delay encountered by Train 1st 15. Mr. Morgan was notified, in accordance with the provisions of Article 18(a) of the Agreement, that his Time Return No. 9 had been altered "account no provision in Collective Agreement to provide for time as claimed"

On February 21st, 1964, Mr. Morgan attended an investigation relevant to said submission, conducted by Assistant Superintendent Mr. E. L. McNamee.

On February 24th, 1964, Mr. Morgan was notified that, effective February 13th, 1964, his record had been assessed twenty (20) demerit marks:

> For submitting time return claiming time to which you were not entitled under the collective agreement.

On February 24th, 1964, Mr. Morgan was advised by letter that:

> Due to your services being unsatisfactory, account accumulation of demerit marks, you are dismissed from the service of this Railway effective February 24th, 1964.

The Company's contention is that demerit marks assessed were justified, and has declined removal of discipline and payment for time lost.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) K. G. MASON	**(SGD.) J. S. BROADBENT**
GENERAL CHAIRMAN	**VICE-PRESIDENT & GENERAL MANAGER**

There appeared on behalf of the Company:

R. E. Richmond	– Personnel Officer, Vancouver
R. Nielsen	– Personnel Supervisor, Vancouver

And on behalf of the Brotherhood:

K. G. Mason	– General Chairman, Vancouver
H. L. May	– Assistant Grand Chief Engineer, Winnipeg
R. E. Morgan	– Grievor

AWARD OF THE ARBITRATOR

As indicated in the Joint Statement of Issue, following an investigation conducted on February 21, 1964, by the Assistant Superintendent Mr. E. L. McNamee, the claimant was notified on February 24th that effective February 13, 1964, his record had been assessed twenty demerit marks "for submitting time return claiming time to which you were not entitled under the collective agreement."

On February 24, 1964, Mr. Morgan was advised by letter that "Due to your services being unsatisfactory, account accumulation of demerit marks, you are dismissed from the service of the Railway effective February 24, 1964.

During the previous twelve months Mr. Morgan had been assessed forty demerit marks in connection with one incident. Under the Brown system of discipline, used by this Company, he was thus placed at the limit of sixty demerit marks with the additional twenty demerits. The accumulation of sixty demerit marks in a one year period results in discharge.

The trip that gave rise to this claim was made by Mr. Morgan on February 13 from North Vancouver to Lillooet, and took twelve hours and forty minutes. While other delays occurred on the trip, the forty minutes above twelve hours coincided with the time spent at Garibaldi waiting on a side for Train No. 16 to pass.

On return to North Vancouver Mr. Morgan submitted Trip Ticket No 9, the one in question, covering the northward leg of the round-trip. On that ticket this appeared:

ROAD OVERTIME (X) 1 00

Garibaldi 3:25K (X) Held for meet on 4:50K #16

(X) Claimed account unnecessary lack of passing tracks

MISCELLANEOUS

PENALTY CLAIMS (X) x

The explanation offered the Arbitrator concerning the manner in which this ticket had been prepared was that the claimant desired to bring to management's attention what he claimed was a general dissatisfaction existing among crews operating on the line from which passing tracks formerly in service had been removed. They had been capable of holding trains. This had resulted, it was claimed, in crews being subjected to unwarranted delays in reaching destinations, with resultant increased time spent on duty.

The claimant maintained the explanation offered on the ticket itself "Claim account unnecessary lack of passing tracks" would immediately stamp it to the accounting staff as an invalid claim; one that could not reasonably have been submitted with any expectancy of payment, because no provision is contained in the collective agreement upon which it could be based.

As Mr. Morgan expected, the Accounting Department returned the ticket in accordance with the provisions of Article 18 (a) of the agreement, advising the ticket had been altered "account no provision in collective agreement to provide for time as claimed."

With the explanation offered on the face of the ticket, Mr. Morgan stated he was astounded at the Company's judgement characterizing the ticket as "a fraudulent attempt to obtain a sum to which he was not entitled."

The claimant stated that if the matter had to be defended on that basis, which he maintained should not be required, he could well urge discrimination against him by the penalty imposed, in the limit of the manner in which "irregularities occurring in the presentation of wage tickets" had been treated by management in the past. Eleven examples were produced.

One example was Ticket No. 13:

> July 27th, 1964, Engineer L. K. Fowler – Your trip ticket number 13 dated July 16th, 1964 has been altered from 302 miles to 222 miles account 6' 20" @ M B 598. Our records indicate this was a delay only, and no work en route was involved.

In none of the eleven examples produced had disciplinary action been taken.

Reliance for the action taken by management was placed by the representative for the Company on certain questions and answers in the official investigation. This portion of the Company's brief stated:

In order that he might develop the facts behind an apparently fraudulent claim for payment, Mr. McNamee asked the following questions:

(Q) Did you submit time return claiming one hour road overtime, Train 1st 15 ex North Vancouver, B. C. February 13, 1964?
(A) YES, I DID.

(Q) Will you please advise under what clause of the collective agreement under which you work that you made this claim?
(A) THERE IS NO SUCH CLAUSE.

(Q) Do you admit that this is claiming time which you are not entitled under the collective agreement?
(A) I DO.

From this the representative for the Company claimed the basis for the investigation, as it appeared under the heading, "This appears to be a claim for time to which you were not entitled" had been clearly established; that from these answers it could be reasonably determined "that Mr. Morgan had deliberately initiated a fraudulent claim for wages."

This reasoning, of course, fails to consider that at the time of the investigation, in making these answers, Mr. Morgan had in mind that a prepared statement he had produced to Mr. McNamee would amplify the terse answers he gave to the questions asked and fully explain them.

It was stated Mr. McNamee received and read the prepared statement.

A copy of that prepared statement was produced to the Arbitrator and parts of it, as set out below, are of determining importance in considering the explanation offered by the claimant, that in fact he had no intention of requiring payment for the overtime asked; that the ticket was made out in that manner for the purpose of underlining to the Company the unrest caused by the removal of passing tracks on this line and the feeling among the employees concerned that they should not be required to supply an appreciable amount of free time to the Company.

The prepared statement commences:

> I draw your attention to the final paragraph appearing on page 4 of that portion of the current agreement pertaining to Locomotive Helpers:
>
> > Notwithstanding anything contained in this agreement any Helper may present his personal grievance to the Company at any time.
>
> The logical assumption is then, that a Helper is free, within certain and obvious limits, to present his personal grievance in any manner he may deem will be effective.
>
> This is all I have done and all I had hoped to do. It may well be that the method I chose to use is to some extent unorthodox. Yet, I submit that no more supervisory time will be consumed by this method than if I had exercised my prerogative to verbally contact a series of supervisors in an ascending scale.
>
> It has become more than obvious that protest concerning certain working conditions pursued in other manners has been largely ineffective. The fact that this is so only serves to complicate the thorny problem of labour relations …
>
> I use the word ameliorate because payment even at penalty rates cannot be considered as a solution to the problem of excessive hours on duty. The suggestion in the form of a 'claim' was made purely as a stop-gap measure to deal with a festering source of discontent. I am sure that efforts to better the relations between all sections of management and the men is our joint and constant aim …
>
> For whatever reasons the Company saw fit to remove from service a number of passing tracks, this could be considered none of my business until such removal affects my working conditions in a deleterious fashion. When that has happened, my contract provides that I may make protest …

> To imagine for a moment that there was any intention of my accepting the penalty pay 'claimed' is to fly in the face of reason. Firstly, there is no provision in the contract to allow such payment …
>
> In conclusion, my record in the payroll office will disclose no indication of dispute over time paid. There is therefore no reason to conclude that I intended to pursue this "claim" to the point of it becoming a 'demand' as a matter of generally adopted procedure. If anyone is under the impression that I would have accepted the payment 'claimed' they are quite incorrect. To do so would have found me in double trouble – with the Company and with the B. of L. E."

With this document in the hands of the investigating official, it is difficult to comprehend how a conclusion could have been reached that would support the reasoning expressed in the Company's brief:

For an employee to improperly claim time on his 'time return' is a most serious offence. It is actually equivalent to attempted theft. Detection of a fraudulent claim is not easy, and, unless detected, such fraudulent claim will be paid as wages.

It was disclosed that the claimant had for at least ten months held the office of General Chairman of this branch of the Brotherhood. This added to the Company's conclusion that he was aware of the serious view taken of "fraudulent time tickets". It also warrants a conclusion, as mentioned in the Company's brief:

In taking the approach that he was merely presenting a personal "grievance", surely Mr. Morgan must have known that he could not succeed. His choice of method was ill-conceived. In the first place, he may have been better advised to process his 'grievance' through the Officers of his Brotherhood who, in all probability would have advised him that his complaint could not be defined as a 'grievance'. Indeed the Company's records indicate that Mr. Morgan himself has been active in union affairs and there can be no excuse for misunderstanding.

In summary the Company urged, in part:

> In simple terms, the Company submits that the case under consideration is 'open and shut'; the claimant has freely admitted his guilt as pointed out earlier, which is tantamount to admission of attempted theft from the Company; the twenty demerit marks which he received for this infraction was undeniably amply justified.

The Arbitrator places no stamp of approval on the method taken by Mr. Morgan to place management upon notice as to what he and, as he claimed, others believed, namely, that the removal of the passing tracks had resulted in an unwarranted burden being placed upon their employment.

This was not a matter, as he well knew, that could be corrected by the individual grievance of an employee when the pattern for payment for his time had been negotiated by his authorized bargaining agents – a pattern that would continue to apply to him and others until possibly changed by negotiation at the appropriate time. There was, of course, nothing in the collective agreement restricting the right of the Company, in the interest of what they considered greater efficiency, to eliminate passing tracks.

Understandably managerial officials could well look upon this effort by the claimant as a presumptuous invasion of their area of control. But as a fraudulent attempt to obtain more money than coming to him, how could that conclusion be reached in the circumstances outlined? Here was no deceitful pretence. There was an ill-conceived method to correct what was considered improper working conditions, as was plainly disclosed in the prepared statement presented and accepted at the official investigation. The ticket itself bore the banner of protest in the explanation noted upon it. It was patently not a claim that could be taken seriously and was therefore far removed from what I am convinced was the wholly improper assessment made, namely, an attempt to defraud.

I do not know what action the Company could or would have taken had the obvious conclusion been reached, that this was an improper method for filing a personal grievance. I have no hesitation, however, in finding that the penalty of twenty demerit marks was improperly imposed because of the complete lack of the factors that ordinarily justify the imposition of a penalty for a fraudulent time ticket.

I therefore find that the imposition of twenty demerit marks made on February 13, 1964, should be removed from the claimant's work record; that he should be forthwith returned to his former occupation with the Company with no loss in seniority; that he should be paid what he would have earned in that employment in the interval from February 24, 1964, less any sum received from other employment during that period. If required, an affidavit from the claimant setting forth his earnings in that period will suffice.

(signed) J. A. HANRAHAN
ARBITRATOR