CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1799

Heard at Montreal, Thursday, June 16, 1988

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

Time claim #169, dated September 1, 1987, in favour of Locomotive Engineer T. M. Johnston, P.I.N. 880959 of Jasper, Alberta.

BROTHERHOOD'S STATEMENT OF ISSUE:

Locomotive Engineer Johnsont missed a call on the date in question due to misinformation supplied by the crew office.

The Company contends that the Brotherhood violated the time limits outlined in Paragraph 91.1(a) of Agreement 1.2. The Brotherhood denies the Company's claim, further, the Company violated the time limits outlined in Paragraph 91.1(b), therefore, in any case, the claims should be paid as per Article 91.5 of Agreement 1.2.

FOR THE BROTHERHOOD:

(SGD.) P. SEAGRIS
GENERAL CHAIRMAN

There appeared on behalf of the Company:

L. A. Harms	– Labour Relations Officer, Montreal
J. R. Hnatiuk	– Manager, Labour Relations, Montreal
D. C. St. Cyr	– Labour Relations Officer, Montreal
K. MacDonald	– Manager, Labour Relations, Edmonton
D. Lussier	– Coordinator Transportation, Montreal

And on behalf of the Brotherhood:

P. Seagris	– General Chairman, Winnipeg

AWARD OF THE ARBITRATOR

The sole issue in these proceedings is whether the grievance was filed in a timely manner, the parties having agreed to suspend argument on the merits of the grievance pending a determination of that issue.

On or about September 6, 1987 Engineer Johnston submitted a time claim which contained the following notation:

> Claiming actual miles as per Engineman Holmon's ticket no. 177 dated September 1/87. I called the crew office this date 08:40 and made myself available, was told my turn was two times to come in. This was not true, my turn was already in for a few hours prior. Based on the info they gave me I missed a call for 17:15 taken by Engineman Holmon.

The essence of the grievor's complaint is that an error on the part of the Company's Crew Office resulted in his being deprived of a run to which he was entitled. On September 28, 1987 the Company declined the grievor's time claim, citing in part that it was an improper submission because no article of the Collective Agreement was identified as having been violated. Locomotive Engineer Johnston re-submitted the same ticket on November 6, with the additional notation that he wished to be made whole under the Collective Agreement. On November 13, the Company declined the ticket a second time, asserting that it was filed in an untimely manner contrary to the requirements of Article 91.1(a) of the Collective Agreement. The Brotherhood's position is that the time claim was timely from its inception, and that the proper steps of the grievance procedure were followed, with all time limits adhered to. The Brotherhood further asserts that the Company failed meet the time limits for the processing of a time claim, relying on the fact that a re-submission of the grievor's claim by the local chairman at Step 2 on November 22, 1987 was not declined until January 11, 1988. On that basis the Brotherhood submits that the time claim should be allowed in accordance with the terms of the Collective Agreement.

Article 69 of the Collective Agreement governs the submission of time claims and provides, in part, as follows:

> **69.1** A locomotive engineer on completion of trip will complete time return for himself and fireman/helper and submit same to the proper officer of the Company.
>
> **69.2** A locomotive engineer who commences a tour of duty on a general holiday will, provided he qualifies under the provisions of Article 79, submit the time return for the holiday with pay on the completion of such tour of duty.
>
> **69.3** A locomotive engineer who does not commence a tour of duty on a general holiday will, provided he qualifies under the provisions of Article 79, submit the time return for the holiday with pay when he reports for the first tour of duty following such general holiday.
>
> **69.4** In all other instances under this Agreement where a locomotive engineer is required to complete a time return, it will be submitted at the earliest possible date.

Article 91 governs the grievance procedure, and includes a number of mandatory time limits. It provides, among other things, that the appeal of a decision from Step 1 to Step 2 of the Grievance procedure must be made in writing within twenty-eight calendar days of the date of the decision. Article 91 of the Collective Agreement provides, in part, as follows:

> **91.4** Any grievance not progressed by the Union within the prescribed time limits shall be considered settled on the basis of the last decision and shall not be subject to further appeal. The settlement of a grievance on this basis will not constitute a precedent or waiver of the contention of the Union in that case or in respect of other similar claims.
>
> Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may, except as provided in paragraph 91.5, be progressed to the next step in the grievance procedure.
>
> **91.5** In the Application of paragraph 91.1 of this Article to a grievance concerning an alleged violation which involves a disputed time claim, if a decision is not rendered by the appropriate officer of the Company within the time limits specified, such time claim will be paid. Payment of

time claims in such circumstances will not constitute a precedent or waiver of the contentions of the Company in that case or in respect of other similar claims.

91.6 Once a time claim has been declined, or altered, by an immediate Supervisor or his delegate, it will be considered as having been handled at step one of the grievance procedure.

In the Arbitrator's view the facts of the instant case do not fall within any of the provisions of Article 69 respecting the filing of time returns. Putting it at its highest, it would appear that the grievor believed that he was entitled to some form of penalty payment, analogous to what is provided within the Collective Agreement for an employee who is runaround, the claim for which is to be made by filing a time ticket. There appears to be no comparable provision, however, within the Agreement for the payment of penalty rates resulting from an alleged error on the part of the Company in crew dispatching. I cannot find, therefore, that the grievor was entitled to file a time claim under Article 69 or any other part of the Collective Agreement in the circumstances disclosed.

That does not end the matter, however. In the Arbitrator's view it would be overly technical to dispose of the grievance on that basis. The fact remains that although the complaint which he registered was written and filed on a time claim, Locomotive Engineer Johnston did take steps that reasonably informed the Company, in writing, of the nature and facts of his claim. At a minimum the document which he filed with the Company would appear to comply with the terms of Article 91.1 as constituting a grievance concerning the alleged violation of the agreement. Having regard to the general purpose of the grievance procedures I am not prepared to conclude that parties would have intended that the Company could simply disregard an employee's grievance because it was filed on the wrong form.

Nor is it clear, in these circumstances, that the Company could dismiss the grievance summarily because it did not "identify the Article and the paragraph(s) of the Article involved". There may well be circumstances in which an employee can legitimately claim that an action on the part of the Company has violated his or her rights under the Collective Agreement even though no specific article can be cited directly. This would be the case with any implied right. In the case at hand it appears that Mr. Johnston was asserting a right to be correctly advised of the availability of his run as an implicit part of his entitlement to be assigned to runs in conformance with the requirements of the Collective Agreement. Whether such a claim could succeed or not, it is far from clear to the Arbitrator that in the contemplation of the Collective Agreement Mr. Johnston's grievance could have been abruptly disallowed for the failure to identify any article within the Collective Agreement. Even assuming that there was a provision of the Collective Agreement which he could have cited in his claim, it does not appear that the Collective Agreement contemplates that a failure to identify the article at the outset is fatal to a grievance. It appears arguable that such a deficiency can be cured. In this regard it is noteworthy that while the parties have provided in Article 91.4 that a grievance not progressed within time limits is to be considered settled they have made no similar provision with respect to a grievance which is deficient in form or fails to identify a particular article of the Collective Agreement which is alleged to have been violated. This would appear to the Arbitrator to be consistent with a policy generally reflected within collective agreements that grievance procedures should be available to employees as a means of resolving the merits of their grievances without resort to undue technicality. For these reasons I am satisfied that the claim originally filed by Locomotive Engineer Johnston, while not a time claim within the meaning of Article 69, was nevertheless a valid grievance in sufficient conformity with the provisions of Article 91.

As a grievance filed under Article 91, however, Mr. Johnston's complaint is nevertheless subject to the time limits contained within that part of the Collective Agreement. It is common ground that after the Company notified Mr. Johnston, by means of a letter dated September 28, 1987, that his claim was disallowed the matter was not re-submitted to the Company until November 6, some thirty-nine days later. On this issue the Collective Agreement is categorical, and that is so whether the document is treated as a time claim for the purposes of Article 91.6 or as a grievance filed under Article 91.1. His grievance then had to be progressed within 28 calendar days of the Company's decision, failing which it would be deemed settled. As of September 28, 1987, this became a matter in the hands of the grievor and the Brotherhood. As the grievance was not progressed before the expiry of thirty-nine days it must, having regard to the mandatory provisions of Article 91.4, "be considered settled on the basis of the last decision and ... not ... subject to further appeal."

For these reasons the grievance must be dismissed.

June 28, 1988

(signed) MICHEL G. PICHER
ARBITRATOR