CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2494

Heard in Calgary, Wednesday, 15 June 1994

concerning

CANADIAN PACIFIC LIMITED

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS [UNITED TRANSPORTATION UNION]

DISPUTE:

Dismissal of Trainperson D. J. Helland, Moose Jaw, Saskatchewan.

JOINT STATEMENT OF ISSUE:

After an extensive investigation in connection with Trainperson Helland not reporting for duty as a required trainperson on Train No. 468-13, February 14, 1993 at Swift Current, his record was debited with 20 demerits for failure to so report after being properly called.

Subsequently, a further investigation was taken of Trainperson Helland on April 8, 1993, in connection with the information provided in his statements of February 16, 27 and April 7, 1993.

On April 27, 1993, Trainperson Helland was dismissed for breach of trust for providing false and misleading information during the formal investigations conducted on February 16, 17 and April 7, 1993 at Moose Jaw.

The Union contends that the Company has failed to prove, on the balance of probabilities, that Trainperson Helland did not provide correct information and that, in fact, he was truthful in his statements.

Further, the Union contends that the Company has ignored medical information presented on Trainperson Helland's behalf. They have requested that the discipline assessed to the record of Trainperson Helland be expunged and that he be reinstated into Company service without loss of seniority, and with full compensation for wages and benefits for all time subsequent to his removal from service on February 14, 1993.

The Company has declined the Union's request.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) L. O. SCHILLACI	(SGD.) M. E. KEIRAN
GENERAL CHAIRPERSON	for: GENERAL MANAGER, OPERATIONS & MAINTENANCE, HHC

There appeared on behalf of the Company:

M. E. Keiran	– Manager, Labour Relations, Vancouver
J. Adams	– Manager, Business Process, Vancouver
R. N. Hunt	– Labour Relations Officer, Vancouver

And on behalf of the Union:

L. O. Schillaci	– General Chairperson, Calgary
L. H. Olson	– National President, UTU-Canada, Ottawa
B. L. McLafferty	– Vice-General Chairperson, Moose Jaw
S. B. Keene	– Vice-General Chairperson, London
J. Tickell	– Office Manager, UTU, Calgary
A. Foltenik	– Secretary, UTU, Calgary

D. C. Curtis – General Chairman, BofLE, Calgary
D. J. Helland – Grievor

AWARD OF THE ARBITRATOR

The facts giving rise to this case are not in dispute, although the characterization of what occurred, and the issues arising are extremely unusual. It is not disputed that in the early morning hours of February 14, 1993, the grievor refused to accept a tour of duty on Train No. 468-13 at Swift Current. The Company maintains that the grievor's refusal was without justification, and assessed twenty demerits against his record for his failure to report. The Union asserts that the grievor's refusal to report, and his departure from Swift Current in an unauthorized manner, in the caboose of another train, involved an extended episode of somnambulism or sleepwalking. During the course of the disciplinary investigation into the failure to report, Mr. Helland related to the Company's officers that his only recall of the incident is that when he received the call to work at 03:30 hours he had dreamt that his family in Moose Jaw was in danger, that his wife had been killed and his child kidnapped. According to the grievor, in a combination of somniloquism (sleeptalking) and somnambulism (sleepwalking) he refused the call to work on Train 468-13 and, thereafter, proceeded to get dressed, leave the bunkhouse at Swift Current and board the caboose of Train 572-14. From that location, when the train was underway, he contacted the Assistant Terminal Supervisor, B.M. Morhart, by radio to advise him that he was on the train bound for Moose Jaw. According to the grievor's account, he then went to bed in the caboose and awoke when the train arrived in Moose Jaw. At that point he drove home and again went to bed.

Understandably, the Company had substantial difficulty with Mr. Helland's explanation of his actions. It concluded that he had engaged in a deliberate course of fabricating false information during the course of the investigations, and that there was no substance to his explanation that he had been involved in an extended episode of sleepwalking. This it did notwithstanding the filing of two medical reports, one by the grievor's personal physician, Dr. B. Glaun, dated February 23, 1993 and a second by a neurologist, Doctor C.P. Vasu Nair, dated March 11, 1993. Dr. Nair's opinion contains, in part, the following:

> On 14th of February, 1993 he went to sleep around 1:15 in the morning. Since the beginning of February when one looks at the work schedule he had irregular sleep. He sometimes had sleep time during the day and sometimes he had sleep at night. There was hardly any time for him to adjust to the changing sleep pattern. For example, on 12th of February at midnight he went to sleep, he woke up at 8:30 in the morning, worked from 8:15 in the evening and slept on the 14th morning at 15 minutes past midnight. On the 14th he was woken up around 4:00. According to him he woke up feeling that his wife had been killed and his children abducted. He obviously was sleeping. He had an argument with the person who called him back to work and then when he went to work he got onto the wrong train. He woke up at 7 o'clock in the morning in Moose Jaw and then took a cab to his house.
>
> ...
>
> ASSESSMENT: His abnormal behaviour and performance are typical of sleep deprivations. I fully agree with the opinion given by Dr. Glaun.
>
> When people are woken up, sometimes in the middle of a dream (REM stage of sleep), especially when they are sleep deprived there are certain abnormal behaviours. There is intrusion of sleep like state into early stages of wakefulness. They may believe that what they were dreaming actually happened and act out their dream and its response. Sleep deprived people become irritable to the state of even frank psychosis occasionally. Aberrant behaviour and mistaken identity of place, person, and purpose can take place.
>
> I think his behaviour, which is not usual, can be explained on the basis of not being able to adjust to the changing sleep pattern which seems to have happened on a day to day basis, sleep deprivation and waking up during the middle of a dream.
>
> ...

Dr. Glaun's opinion states, in part:

> ... My opinion is that what occurred is the result of fatigue. On examining his call schedule for the prior week, he had had very little and irregular sleep.

Somewhat to the same effect, Dr. Nair states, in part:

> ... If there is a fault, as far as I can see, the fault lies in this work schedule ...

In further support of the theory of somnambulism, the Union refers the Arbitrator to the celebrated murder trial of Mr. Ken Parks, in Ontario in 1988. In that case Mr. Parks was acquitted of a charge of the murder of his mother-in-law and attempted murder of his father-in-law, upon an acceptance of the defense that he had committed the acts in question during a period of somnambulism. The Union referred the Arbitrator to the account of the trial and appeal related in **The Sleepwalker** by June Callwood (Toronto, 1990).

The theory advanced on behalf of the Union is that the irregular pattern of sleep experienced by Mr. Helland in the days and weeks immediately preceding the events at Swift Current resulted in an episode of somnambulism during which he refused the call to work, and influenced by the dream of danger to his family, boarded the first train bound for Moose Jaw. It submits that the two medical opinions provided confirm the plausibility of the grievor's account, and that the Company has not established that Mr. Helland deliberately fabricated a false story during the course of the disciplinary investigations into his refusal of the assignment at Swift Current.

The Arbitrator finds this case extremely difficult to resolve by the application of conventional principles relating to the burden of proof. On the one hand the Company relies on the outward actions of the grievor, including his conversations with the Company's supervisor at Swift Current, both on the telephone from the bunkhouse and on the radio from the caboose, as well as the obviously complex exercise he went through to depart the bunkhouse at Swift Current and board the train for Moose Jaw, as evidence that he could not have been sleepwalking. It should be noted that when Mr. Helland first spoke with the supervisor at Swift Current when he was called at the bunkhouse, he made no mention of any threat to his family. Rather, he complained that he was being assigned a more difficult trip than anticipated, telling the supervisor that he had previously been told that he would be able to work the train from Moose Jaw to Swift Current, go to bed for a time and then take a return freight to his home terminal of Moose Jaw. Not surprisingly, in the circumstances the Company was skeptical. It was not prepared to attach substantial weight to the medical opinions tendered on the grievor's behalf, in the form of two letters which are admittedly slim in their elaboration of the possible cause of what occurred, and are virtually devoid of any thorough explanation as to the detail which was provided to the doctors in relation to the complexity of the grievor's actions and the likelihood of his ability to function in the manner he did. On the other hand, the Union advances the admittedly novel theory of somnambulism, relying both on the two brief medical opinions, as well as the **Parks Case** to substantiate the plausibility of the employee's explanation**.**

As unusual as the case appears to be, in light of the unchallenged medical opinion tendered in evidence, the Arbitrator feels constrained to give the grievor the benefit of the doubt as to the cause of his actions on February 14, 1993 and his subsequent explanation. By the same token, I am satisfied that the Company was not unreasonable in its reaction to Mr. Helland's explanation, especially in light of the slim nature of the medical documentation he presented. In my view that is a factor to be considered in fashioning an equitable remedy in the case at hand. It is, I think, incumbent on a trade union which seeks to justify otherwise unacceptable conduct on the basis of a medical or psychiatric condition to do so by the presentation of compelling evidence. At the arbitration such evidence is generally presented in the form of the testimony of an expert witness. That is particularly so where, as in the instant case, the Union would seek to rely on a theory which is arguably at the leading edge of medical-legal knowledge. In the case at hand the Arbitrator cannot know, as the Company could not know, whether Doctors Glaun and Nair were fully aware of the extent of the activities engaged in by the grievor in his somnambulism. Moreover, both the Company and the Arbitrator have been deprived of any elaboration of the elements of this unusual condition, and the likelihood of its influence upon the grievor, through the conventional lens of oral testimony by the examination and cross-examination of an expert witness.

In the result, while I am prepared to find that the grievor did not deliberately seek to falsify information or mislead the Company during the course of its disciplinary investigation of his refusal of work at Swift Current on February 14, 1993, the equities would suggest that the remedy to Mr. Helland must be qualified in light of his failure to provide either the Company or the Arbitrator with little more than the bare outline of two physicians' letters to

substantiate an extremely unusual defense and explanation of his actions. In my view the skepticism of the Company in the face of Mr. Helland's explanation was understandable, and could reasonably have remained so up to the point of the arbitration. In these circumstances a remedial order of compensation would not, in my view, be justified.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator finds that the Company did not have just cause for the assessment of twenty demerits for the grievor's failure to report for duty at Swift Current on February 14, 1993, and that the grievor's dismissal for providing false and misleading information should not stand. The Arbitrator directs that the twenty demerits assessed against the grievor be removed from his record forthwith, and that he be reinstated into employment, without compensation for the wages and benefits lost, and without any loss of seniority. In light of the grievor's medical condition, upon his reinstatement the Company may limit his assignments to yard duty or any other class of service which involves a more regular working schedule.

June 21, 1994

(Sgd.) MICHEL G. PICHER
ARBITRATOR