

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 2505

Heard in Montreal, Tuesday, 12 July 1994

concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS  
(BROTHERHOOD OF LOCOMOTIVE ENGINEERS)**

### **DISPUTE:**

Claim of Locomotive Engineer G.L. Kitsch for 290 miles lost when not called as locomotive engineer on Train 215, April 15, 1989.

### **JOINT STATEMENT OF ISSUE:**

On April 15, 1989, train 215 was ordered for 0640. The first turn in the Watrous locomotive engineers' pool was spare. Mr. Tank, an engine service brakeman, was called to fill the vacancy. Locomotive Engineer Kitsch, who was assigned to the Watrous locomotive engineers' pool, should have been called in accordance with article 32.8 of agreement 1.2.

Locomotive Engineer Kitsch was called to deadhead on train 201 at 10:25, April 15, 1989 and earned for this trip \$302.38. Mr. Tank earned \$321.48 working train 215 at 0640, April 15, 1989.

The Company compensated Mr. Kitsch \$19.10 for the difference between what he actually earned and what he should have earned. Mr. Kitsch was placed in the same position to that which he would have been had he been properly called.

The Brotherhood contends the Company used Engine Service Brakeman Tank, a UTU Employee, outside the Brotherhood of Locomotive Engineers bargaining unit, thus depriving the Brotherhood of Locomotive Engineers of their work entitlement. Therefore, Mr. Kitsch is entitled to compensation for the entire trip lost.

### **FOR THE BROTHERHOOD:**

**(SGD.) W. A. WRIGHT**  
**GENERAL CHAIRMAN**

### **FOR THE COMPANY:**

**(SGD.) M. HEALEY**  
**for: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

J. B. Dixon	– System Labour Relations Officer, Montreal
J. T. Torchia	– Manager, Labour Relations, Montreal
V. J. Vena	– Coordinator, Transportation, Montreal

And on behalf of the Brotherhood:

W. A. Wright	– General Chairman, Saskatoon
M. Simpson	– Vice-General Chairman, Saskatoon

### **AWARD OF THE ARBITRATOR**

Before the Arbitrator the Brotherhood does not dispute that the compensation paid to Locomotive Engineer Kitsch would have been appropriate had the work in question been assigned to another member of the locomotive

engineers' bargaining unit. Its claim for compensation for the entire trip lost, however, is based solely on the fact that the work in question was assigned to an engine service brakeman, who is a member of another trade union.

The Arbitrator can find nothing in the collective agreement, nor in the jurisprudence, which would justify the claim for the remedy sought. The principles governing make whole remedies have been the subject of prior discussion in the awards of this Office, and need not be repeated here (e.g., **CROA 960, 1327 and 2015**). Collective agreements governing the payment of locomotive engineers commonly contain provisions for the penalty payment of constructive miles. Penalty payments are, however, exceptional, and cannot be ordered by an arbitrator as a matter of compensation to make an employee whole absent express language in the collective agreement to allow such an outcome. Where it can be established, as appears to be the case in **CROA 2120**, that an employee has truly been deprived of an opportunity for work, a make whole order may well involve compensating him or her for the entire trip missed. That is not the case in the grievance at hand, however. It is clear on the material before the Arbitrator that Locomotive Engineer Kitsch was paid the difference between the earnings which he made operating a train some four hours after the missed turn, and the assignment which was in fact wrongfully given to the engine service brakeman. In the circumstances the grievor has been made whole, and the grievance must be dismissed.

15 July 1994

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**