CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2647

Heard in Montreal, Thursday, 15 June 1995

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

EX PARTE

DISPUTE:

Appeal of discipline assessed Conductor/Trainperson D. Olivieri – 60-day suspension.

COUNCIL'S STATEMENT OF ISSUE:

On October 5, 1994, the Canada Labour Relations Board issued Board Order Number 725-355 which declared that certain employees home based at Hornepayne did participate in a concerted illegal activity contrary to the Canada Labour Code.

The Company, as a result of Board Order 725-355, commenced investigations of those employees who they believed participated in the illegal work stoppage.

The grievor, Mr. Olivieri, was subsequently assessed a 60-day suspension for his participation in the concerted illegal work stoppage.

The Union appealed the discipline assessed on the following basis: **1.)** That Mr. Olivieri did not receive a fair and impartial hearing. **2.)** The assessment of discipline was assessed in a discriminatory manner. **3.)** The evidence produced did not support the Company's position that Mr. Olivieri participated in a concerted illegal work stoppage. **4.)** The Company violated the provisions of article 82.3 of agreement 4.16.

It is the position of the Union that the discipline be removed from the grievor's record. Failing that position, in the alternative, the Union contends that the discipline assessed was too severe and should be reduced accordingly.

FOR THE COUNCIL:

(SGD.) M. P. GREGOTSKI
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

K. R. Peel	– General Counsel, Toronto
P. E. Marquis	– Labour Relations Officer, Toronto
R. Bateman	– Assistant Manager, Labour Relations, Toronto
J. Polley	– Acting Superintendent, Transportation, Capreol
J. Sauvé	– Manager, Crew Management Centre, Toronto
D. Randall	– Transportation Assistant, Toronto

And on behalf of the Council:

M. Church	– Counsel, Toronto

R. Beatty – Vice-General Chairman, Hornepayne
D. Olivieri – Grievor

AWARD OF THE ARBITRATOR

As reflected in the *ex parte* statement of issue filed by the Council, the Canada Labour Relations Board made a determination and declaration that certain employees at Hornepayne participated in a "... concerted activity contrary to the Code by booking rest ...". In the Arbitrator's view the above finding is tantamount to a declaration of an illegal strike. For the purposes of this grievance, therefore, this Office must find that employees at Hornepayne booked rest in a concerted fashion, with a view to disrupting or slowing the movement of trains between September 29 and October 4, 1994. As a result, over 100 employees of the two unions which comprise the Council, the United Transportation Union and the Brotherhood of Locomotive Engineers, were investigated and assessed discipline for their involvement in the unlawful strike activity. It should be stressed that there is nothing in the record which suggests any knowledge, complicity or condonation of the activity in question by the trade union or any of its officers. On the contrary, such evidence as is before the Arbitrator indicates that the Council's representatives made every effort to resolve the matter as expeditiously as possible, and were instrumental in the eventual issuing of the direction by the **Canada Labour Relations Board**.

During the course of the Council's presentation its Counsel argued that the conditions of an unlawful strike were not proved because, he submits, there was not in fact a substantial slowing or disruption of trains as a result of the action taken by the employees. Counsel stresses that the evidence discloses that delays to trains by reason of crew shortages are commonplace in Hornepayne, and that the delay caused to trains by reason of crew shortages on the days in question was not substantially out of pattern for the norm at that location. The Arbitrator cannot accept the submission made by Counsel for the Union in that regard. It is true, as he submits, that the evidence does disclose that although there was some delay in trains occasioned by a shortage of crews, the delays on the dates in question are not substantially out of pattern with delays reflected in other periods of time, as demonstrated in evidence filed by the Council in respect of traffic at Hornepayne in the period between August of 1994 and February of 1995. That fact, however, does not mean that a strike, in the sense of concerted action "... that is designed to restrict or limit output", as defined in Section 3(1) of the **Canada Labour Code** did not occur. A strike is characterized by its purpose, not by its actual results. The fact that the concerted actions of a group of employees may not have succeeded in disrupting operations is, in light of the definition of "strike" found within the **Code** itself, no answer to a charge that they have participated in an unlawful strike. As long as the actions of the employees are taken in concert and are designed reduce or impede production or operations, the conditions for a finding of an unlawful strike are made out.

That is not to say, however, that the actual consequences of concerted activity, in the sense of any adverse impact on the Employer, cannot be pleaded by the Council as a mitigating factor in respect of assessing the appropriate measure of discipline as against employees involved in a concerted slowdown or work stoppage contrary to the **Code**. As in any case of discipline, all factors, including the consequences of the employees' actions can be advanced as mitigating factors to be pleaded by the Council, just as negative consequences can always be advanced by the Employer as aggravating factors in support of its decision to assess a given severity of penalty.

Counsel for the Union also directed argument to the issue of the Company's own conduct as it pertains to the actions of the employees in question. The Company's submission suggests that the actions of the employees may have been prompted, at least in part, by an error committed by Company officers late in the day in September 29, 1994. It appears that at that time a crew requesting to stop for the purposes of eating and resting were directed to travel a further thirty miles into Hornepayne. It is not disputed that the employees were contractually entitled to their period of "eat and rest" and that the directive issued to them by the Company was contrary to the collective agreements, as reflected in a memorandum to all employees dated September 30, 1994. Counsel for the Union raises a number of other actions and circumstances, that the detail of which need not be related, which he suggests further reflect an indifference on the part of local management at Hornepayne with respect to honouring the collective agreement rights of the employees, particularly in matters of the calling and assignment of crews.

The Arbitrator does not deem it appropriate or necessary to deal extensively with this aspect of the case. It is one thing for a labour relations board, which may have a discretion to grant or withhold remedies in respect of unfair labour practices, to take into account the actions or "clean hands" of both parties as an element going to the exercise of its discretion, and quite another for a board of arbitration, charged with determining whether a party has violated

the terms of a collective agreement, to enter into a similar exercise. It is true, of course, that in any matter of discipline it is open to a trade union to argue a relatively broad picture of facts in mitigation of penalty. However, to the extent that grievance and arbitration are the statutorily mandated avenues of redress for the actions of an employer which are contrary to the terms of a collective agreement, boards of arbitration should be wary of adopting principles which could be construed as encouraging or condoning resort to unlawful forms of self-help. Absent the most egregious cases, therefore, such considerations should be left to the statutory jurisdiction and competence of labour relations boards.

The Council further objects to the discipline assessed against Mr. Olivieri, the grievor in the instant case, by reason of timeliness. It is common ground that Mr. Olivieri was investigated by the Company at an interview which occurred on October 20, 1994. Under the terms of article 82.3(a) of the collective agreement he was to be advised in writing of the Company's decision within twenty-eight days of the date his statement was completed. That article further provides, in part: "When a request for an extension in the time limit is made, concurrence will not be unreasonably withheld." It is common ground that Mr. Olivieri was not notified of his sixty day suspension until December 12, 1994, some fifty-three days after the conclusion of his statement. It is also common ground that, when requested, the Council declined to agree to an extension of time limits.

The Company submits that the Council's refusal to extend the time limits was unreasonable in the circumstances. Its Counsel submits that given the number of employees being investigated, and the complexity of the circumstances being examined, it was unreasonable to expect the Company to bring discipline to bear against the grievor within the period in question. He also stressed that the practice between the parties has been that, virtually without exception, a request for an extension of time limits made by either party within the limits is granted automatically.

In the case at hand the Arbitrator is compelled to conclude that the Council's denial of the Company's request for an extension of the time limits was unreasonably withheld. The Council has advanced no evidence to establish that its position, or the position of any employee, would be or was prejudiced, in the legal sense of that word, by a delay in communication of the discipline which would be assessed against any employee in respect of whom a request for extension was made within the period of the time limits. While it is no doubt true that the uncertainty of awaiting the Company's decision was stressful for employees in that situation, nothing in the Company's actions served to frustrate or reduce their ability to have the fullest recourse to the grievance and arbitration provisions of their collective agreement, and to marshal and prepare their defence to the fullest. In the circumstances, therefore, the Arbitrator can find no basis to conclude that the Council had justification for the withholding of its agreement in respect of the Company's request to extend the time limits. For this reason, the objection now taken on the grounds of timeliness cannot succeed, as it applies to Mr. Olivieri's grievance.

Nor can the Arbitrator sustain the suggestion made several times during his presentation by Counsel for the Union that the investigation itself was outside the standard of a fair and impartial investigation as contemplated under the provisions of article 82 of the collective agreement. Essentially, Counsel argues that the Company was under an obligation to place before Mr. Olivieri the prior record as regards his previous practice of booking rest, as well as certain train schedules, as the Company seeks to rely on the departure from the prior pattern as a basis for the assessment of discipline against him, at the arbitration hearing. With respect, the Arbitrator cannot agree. The purpose of the investigation was to determine why Mr. Olivieri booked rest at a time when other employees were booking rest in concert, contrary to the **Code**, and to give him an opportunity to rebut any adverse inference which might be drawn. His own prior habits or practice in respect of booking rest should have been known to him, and cannot be characterized as evidence in the possession of the Company which was outside his knowledge. Nor is there anything in the language of article 82 of the collective agreement which would prevent the Company, or the Council for that matter, from adducing evidence at arbitration of facts or data which were not necessarily dealt with at the disciplinary stage. The mere fact that the Company may have looked at the grievor's prior timekeeping records to draw conclusions as to the credibility of his explanation at the investigation does not, of itself, constitute a violation of minimal standards of due process contemplated under the provisions of article 82. Reference to the grievor's prior timekeeping record, like his prior discipline record, can clearly be made by the Company, without necessarily being specifically adduced in evidence at the investigation. For these reasons the Arbitrator rejects the submission of the Council with respect to the alleged irregularity of the disciplinary investigation.

With respect to the merits of the assessment of discipline against Mr. Olivieri, the evidence gives cause for some concern. The evidence discloses that Mr. Olivieri is not regularly employed at Hornepayne, and that he had

transferred to Hornepayne from Montreal at the time in question for the purposes of gaining additional earnings. This is reflected in his response during the course of his investigation which is, in part, as follows:

> **A. 7.** I am not regularly assigned to the Hornepayne Terminal but I am assigned to Montreal. I bid Hornepayne on a shortage bulletin so that I could make money. My work record will reflect that I am one of the hardest workers presently in this terminal. My booking rest was done for one reason and one reason only, I was tired. It is unfortunate that my booking rest was taken at the same time as there was an illegal strike by certain employees but I assure you that I did not participate in such unacceptable behaviour. My work record, I believe is presently at 40 demerits. I would not jeopardize my employment or my future by conducting myself in a manner which is both illegal and unethical. I do my job and I do it with pride and I would hope that the Company would recognize my contributions to the organization. ...

The Company submits that the fact that Mr. Olivieri booked rest on September 29, October 1 and October 3 in a manner different from his past pattern confirms that he intended to support the illegal strike being engaged in by other employees. Upon a closer review of the evidence, however, the Arbitrator has some difficulty with that suggestion. The evidence indicates that when the grievor did book rest it was consistent with needing a substantial period of rest after a long tour of duty. For example, when Mr. Olivieri booked rest upon returning to Hornepayne at 23:45 on October 1, he had been on duty for some seventeen hours and twenty minutes, without rest. It may also be noted that he did not book rest that day at Jellicoe, although he was entitled to, and his doing so would in all probability have disrupted operations. Further, on October 3, when Mr. Olivieri booked rest upon returning to Hornepayne at 22:30 hours, it was after a period of some twenty hours on duty, following a call at 02:30 that morning. The Arbitrator finds it difficult to conclude that the booking of rest in those circumstances by Mr. Olivieri, having regard to the lengthy periods of service which preceded them, can be said to be conclusive, on the balance of probabilities, that he sought to encourage or participate in a concerted slowdown in which other employees were involved. While it is true that his booking off for twenty-four hours' rest during the period in question is more pronounced as had been the case in the past, the length of the tours of duty which he was concluding, particularly on October 1 and October 3, give a substantial basis for viewing his actions as consistent with the motives which he expressed during the course of his investigation.

On the whole, the Arbitrator must conclude that the Company has not discharged the burden of proof which it bears, to show, on the balance of probabilities that Mr. Olivieri booked rest in furtherance of the unlawful slowdown which was then taking place. His grievance must therefore be allowed.

The Arbitrator directs that the assessment of the 60 day suspension be removed from Mr. Olivieri's record, and that he be compensated for all wages and benefits lost.

July 5, 1995

(signed) MICHEL G. PICHER
ARBITRATOR