CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2691

Heard in Montreal, Tuesday, 9 January 1996

concerning

VIA RAIL CANADA INC.

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

M. Ken McNay was held out of service and discharged by VIA Rail Canada Inc. for "Failure to follow instructions of a superior". A grievance was filed that he was improperly held out of service and that his dismissal was not for just cause and that he ought to be reinstated and fully compensated.

BROTHERHOOD'S STATEMENT OF ISSUE:

On or about July 26, 1995, Mr. Ken McNay attempted to book off for miles, was initially advised he could not do so and in any event exercised his right to book off for miles which resulted in no repercussions for exercising such rights.

On or about August 17, 1995, Mr. McNay again attempted to book off for miles, was advised he could not do so and maintained his right to do so. On August 18, 1995 at 8:15 a.m., he was held out of service by VIA. This was in advance of the run of 4:55 p.m. that day.

On September 7, 1995 Mr. McNay was discharged and he grieved that he was unjustly discharged and that he ought to be reinstated and made whole.

The Union also filed an application and complaint to the Canada Labour Relations Board in files 745-5181 and 725-373 upon which it intends to rely.

The Union asserts a violation of article 71 and relies upon article 65 and relies on any other relevant article of the collective agreement in seeking the reinstatement with full compensation for Mr. McNay or such other remedy as may be ordered by the Arbitrator.

VIA asserts that Mr. McNay was discharged for cause and the grievance ought to be dismissed.

FOR THE BROTHERHOOD:

(SGD.) C. HAMILTON
GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

J. Ouellette	– Senior Labour Relations Officer, Montreal
K. W. Taylor	– Senior Advisor & Negotiator, Montreal
R. W. Radcliffe	– Transportation Officer, Toronto

And on behalf of the Brotherhood:

M. A. Church	– Counsel, Toronto
C. Hamilton	– General Chairman, Toronto

G. Howe	– Vice-General Chairman, Toronto
J. Tofflemire	– Local Chairman, Toronto
K. J. McNay	– Grievor

AWARD OF THE ARBITRATOR

The evidence before the Arbitrator discloses that in the summer of 1995 the Corporation was encountering substantial problems because of an increase in the rate at which employees were booking off for miles and booking rest. It is common ground that this development caused serious problems for the Corporation, particularly in the areas serviced by locomotive engineers based in Toronto, where the Company has experienced a shortage of manpower. It appears that the Corporation formed the opinion that the booking of rest and the booking off for miles was part of a concerted effort by employees, apparently as a protest against the award of the Mediation-Arbitration Commission chaired by Mr. Justice MacKenzie, released on June 14, 1995.

During the relevant period tension developed between the Corporation and the Brotherhood with respect to the application of article 65 of the collective agreement, which governs the booking off of employees for miles. Article 65.1 provides, in part, as follows:

> **65.1** A sufficient number of locomotive engineers will be assigned to keep the mileage or equivalent thereof, within the following limitations, wherever it is practicable to do so.
>
> **(a)** Assigned passenger service – 4,000 to 4,800 miles per month.
>
> ...
>
> **65.4** When locomotive engineers have made the maximum mileage for their working month, they will advise the appropriate officer of the Company, in order that relief may be arranged.

The evidence establishes that on August 17, 1995, Mr. McNay indicated to the Corporation that he was booking off for miles. It is not disputed that at that point he had exceeded the maximum of 4,800 miles for his mileage month. It is also not disputed that a part of the grievor's reason for booking off for miles at that point was to spend the weekend with his daughter. Mr. McNay is divorced and his daughter resides with his wife, save that he occasionally has weekend custody. It was to take advantage of such a weekend, already arranged, that he sought to exercise the right to book off for miles.

Some weeks previous, in July of 1995, the Brotherhood gave the Corporation notice that it wished to see the provisions of article 65, with respect to booking off for miles, strictly enforced. It is not disputed that for some years the mileage limitations had not been strictly enforced, and employees at Toronto had regularly worked beyond the limits of their mileage months. The strict enforcement of the booking off provisions would clearly have caused substantial disruption to the Corporation's ability to operate in areas serviced by the Toronto terminal. It would appear that the position stated by the Brotherhood, and the action of many employees in booking off both for rest and for miles, were causing the Corporation substantial difficulty, requiring it to resort to the cancelling of some trains, using supervisors as locomotive engineers and operating trains with a single locomotive engineer, with the assistance of a conductor or assistant conductor in the locomotive cab.

In response to the Brotherhood's initiative, on July 14, 1995, the Corporation issued a notice which effectively advised locomotive engineers that they would be limited in their ability to book off for miles. That notice reads as follows:

> On July 13, 1995 the Corporation received notice from the Brotherhood of Locomotive Engineers (Division 70) that they wished to have the mileage provisions of Agreement 1.1 implemented effective July 17, 1995.
>
> This notice is to inform you that we are unable to accede to this request at this time, due to a shortage of locomotive engineers. We have informed the Brotherhood of this on July 14, 1995.
>
> Prior to mileage provisions being implemented we will inform you sufficient time in advance in order that all can be governed accordingly.

The Brotherhood has placed further evidence before the Arbitrator to confirm that the Corporation adopted a hard line against employees booking off for miles. The evidence is in the form of an internal memo issued by the Corporation to crew controllers which reads, in part, as follows:

> Subject: Toronto employees attempting to book off for miles or rest at the away-from home terminal.
>
> As per instructions from Management whenever an employee in Toronto tries to book off for miles they are to be told that we do not allow them. for Trainman as per article 14.4 (shortage of employees), for Engineers letter from W. Radcliffe dated July 14, 1995 (see copy on tables). If they argue that they consider themselves off for miles you are to instruct them that they are considered available and if they do not show up for their next assignment they will be Held out of Service pending an Investigation for refusing to follow instructions from an "Officer". ...

Such was the state of affairs when the grievor, Mr. McNay, indicated his intention to book off for miles by calling the Crew Management Centre on August 17, 1995. In keeping with the above stated policy, the controller refused to allow the grievor to book off. Upon Mr. McNay discussing the matter further with a management officer in Toronto, he was advised to contact the Manager, Customer Services, Mr. B. Abbott. He did so the following day. During the discussion with Mr. Abbott, during which the grievor related the need to be with his daughter, he was informed that he would be held out of service if he booked off for mileage. Mr. McNay nevertheless took the view that he was entitled to book off and did so. As a result Mr. McNay was held out of service and, following a disciplinary investigation held on September 6, 1995, he was discharged, after twenty-two years' service, for failing to follow a supervisor's instructions and rendering himself unavailable for work, effective September 7, 1995.

It appears to the Arbitrator that the grievor became an unfortunate and unwitting target in an industrial relations cross-fire between the Brotherhood and the Corporation during the summer of 1995. It is not disputed that for some time the employer contemplated taking action by way of a complaint before the **Canada Labour Relations Board**, presumably to seek a declaration that employees were engaged in an unlawful strike by booking off for miles and booking rest in concert. It did not proceed with such a complaint. However, following the discharge of the grievor, and the removal from service of certain other employees, the Brotherhood filed its own complaint with the **Canada Labour Relations Board**, a complaint which is still outstanding. That complaint appears to allege, in part, that the Corporation threatened an unlawful lock out of employees by adopting a blanket policy to decline employees the right to book off for miles, or to book rest at away from home terminals.

Before this Arbitrator the Corporation submits that the instant grievance should be adjourned, pending disposition of the Brotherhood's complaint before the **Canada Labour Relations Board**. The Arbitrator cannot agree. Whatever may be the characterization of the actions of the Corporation for the purposes of the **Canada Labour Code**, the grievor is entitled, under the terms of the collective agreement, not to be discharged save for just cause. That is the issue before this Office. It can and should be resolved expeditiously. There would, in the Arbitrator's view, be no conflict if the grievance should succeed and the application before the **Canada Labour Relations Board** should be rejected, or *vice versa*. The fact that the grievor may or may not have been locked out within the meaning of the **Canada Labour Code** is neither here nor for the purposes of the very different issue of whether he was discharged for just cause. The Arbitrator therefore does not accede to the request of the Corporation to postpone this matter, pending the outcome of the complaint before the **Canada Labour Relations Board**.

A resolution of this grievance requires some examination of the operation of article 65 of the collective agreement. As is evident from the language of article 65.1, the purpose of the provision is to place an obligation upon the Corporation to maintain a sufficient complement of locomotive engineers so that, in normal circumstances, employees are not compelled to work beyond a range of maximum miles in a one month period. The Corporation's obligation is not, however, absolute. As the article indicates, the Corporation is to organize its assignment of locomotive engineers so as to respect the mileage limitations "wherever it is practicable to do so". The Corporation does not dispute that the provision places some obligation upon it, an obligation which presumably can be invoked by and for the benefit of employees as a normal matter. In its submission, however, it was entitled to impose the restriction on booking off for miles which it did, because of the crisis which it encountered in the summer of 1995. It's spokesperson submits that because there was a general shortage of locomotive engineers at Toronto, aggravated by the frequency of employees booking off for miles and booking rest at away from home terminals, it was no longer practicable to allow any employees whatsoever to book off for miles as contemplated in article 65.1(a).

With respect, the Arbitrator has substantial difficulty with the interpretation of the practicability proviso found within article 65.1 adopted by the Corporation. Clearly, that provision must be read in a purposive sense, with a regard to the right of employees, as a general rule, to be protected against the obligation to work miles beyond the maximum guidelines reflected within article 65.1. Having regard to the language of the article, I am satisfied that for the employer the question to be resolved is whether it is practicable for the Corporation to allow an employee to book off for miles, within the provided guidelines, regard being had to whether a sufficient number of locomotive engineers are available to protect the service which he or she would otherwise render. On a close examination of the evidence, however, it becomes clear that in the instant case the Corporation made no attempt to assess the practicability of acceding to Mr. McNay's request.

Several compelling facts are revealed in the evidence. Firstly, the grievor has regularly booked off for miles in the past, and there was nothing unusual or suspicious about his request to do so in August of 1995. Moreover, in the previous month, July of 1995, the grievor in fact worked well in excess of the maximum mileage, logging in excess of 6,600 miles, a record which would not suggest that he was part of a conspiracy to withhold service. When he made his request to book off for miles on August 17, 1995 he had worked some 4,993 miles. The Arbitrator is satisfied that at that time the grievor made it clear to the Corporation, and in particular to Mr. Abbott, that the need to have time with his daughter was a principal part of the motivation for his request. It appears clear that that explanation fell on deaf ears, and that the treatment of the grievor was not resolved on the basis of his individual circumstances, or the ability of the employer to replace him, but rather on the blanket prohibition of booking off unilaterally imposed by the Corporation effective July 14, 1995, as confirmed by the internal memo of August 10, 1995.

As noted above, the Arbitrator is satisfied that the Corporation had an individual obligation to Mr. McNay, under the terms of article 65.1. It was compelled to consider whether his booking off for miles could be practicably accommodated, in light of its operational needs. Significantly, there is no evidence before the Arbitrator that the grievor's decision to book off in fact caused any hardship or disruption to the Corporation. The Brotherhood stresses that the run which the grievor would have been assigned, a Toronto-Ottawa train, was covered without difficulty by an employee from the spareboard. There is no evidence before me that the grievor's action caused any untoward hardship to the Corporation, or that it was impracticable to allow his request. In the Arbitrator's view, by failing to address its mind to the practicability of accommodating Mr. McNay, the Corporation plainly stepped outside the sprit, letter and intent of article 65.1 of the collective agreement. In some circumstances it might well have been open to the Corporation to deny his request for valid business reasons, based on practicability. That would be so, for example, where there would be an immediate shortage of employees to cover the work which would otherwise have been performed by him. However, that is not what occurred; there was no such shortage, in fact.

The grievor is an employee of twenty-two years' service who, it appears, was disciplined only once during the more than two decades of his employment. The Arbitrator is satisfied, based on the record and the grievor's own testimony at the arbitration hearing, that his reasons for seeking to book off for miles were *bona fide*, and that the Corporation made no attempt to evaluate the feasibility or practicability of accommodating his request. In the circumstances, the grievor had little option but to seek the enforcement of his right by effectively booking off for miles, notwithstanding the Corporation's position. This is not a case where the principle of "work now – grieve later" has a compelling application. Plainly, the grievor would have lost the opportunity of the weekend with his daughter in an important summer vacation period, a loss which could not thereafter be remedied through the grievance and arbitration process.

In the circumstances, the Arbitrator is satisfied that the Corporation was entirely without just cause for the termination of Mr. McNay. It has not demonstrated that it would have been impracticable to accommodate his request to book off for miles and, as elaborated above, the employer plainly made no attempt to consider the practicability of acceding to his request.

In the result, the grievance is allowed. The Arbitrator directs that the grievor be reinstated forthwith, with compensation for all wages and benefits lost, and without loss of seniority.

January 12, 1996

(signed) MICHEL G. PICHER
ARBITRATOR