

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3455

Heard in Calgary, Wednesday, 10 November 2004

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**TEAMSTERS CANADA RAIL CONFERENCE
(BROTHERHOOD OF LOCOMOTIVE ENGINEERS DIVISION)**

EX PARTE

DISPUTE:

The application of article 78 (bereavement leave) as it relates to the adjustment of time claims submitted by D.N. Yachyshen of Jasper, Alberta.

JOINT STATEMENT OF ISSUE:

On Wednesday, November 6, 2002, Locomotive Engineer Yachyshen's father passed away. The grievor removed himself from the working board the following day by booking unfit for duty. He booked back on late Friday, November 8, 2002. On Sunday, November 10, 2002, the grievor advised the Company that he wanted to change his status to bereavement leave, effective November 11, 2002.

Locomotive Engineer Yachyshen submitted claims for five (5) days consecutive with November 11, 2002, that entailed three (3) trips that he had missed due to bereavement leave. The Company subsequently reduced the grievor's entitlement by compensating him for November 8 and 11, 2002 instead of November 11, 13 and 15, 2002.

It is the Union's position that it is the intent of the collective agreement that Locomotive Engineer Yachyshen is entitled to bereavement leave, as originally submitted and accordingly we have asked that any shortfall be placed in line for payment.

The Company disagrees with the Union's position.

FOR THE UNION:

(SGD.) D. E. BRUMMUND
FOR: GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) S. M. BLACKMORE
FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

S. M. BBlackmore	– Manager, Labour Relations, Edmonton
R. Reny	– Sr. Manager, Labour Relations, Edmonton
B. Kalin	– Superintendent, Edmonton
G. Cronkright	– Transportation Supervisor, Jasper
B. Fernuik	– Transportation Supervisor, Biggar

And on behalf of the Union:

D. E. Brummund	– Sr. Vice-General Chairman, Edmonton
D. J. Shewchuk	– General Chairman, Edmonton

AWARD OF THE ARBITRATOR

The grievor's regular assignment as a locomotive engineer was Monday, Wednesday and Friday, with Saturday and Sunday as rest days. The grievor received news of his father's passing on Wednesday, November 6, 2002 and booked off unfit for Thursday, November 7, 2002. The grievor met with the transportation supervisor in Jasper, Greg Cronkright, on the morning of November 7, 2002 to advise him of his father's passing. Mr. Cronkright testified in these proceedings that the grievor told him that his father's funeral would take place on Saturday, November 9, 2002 in Melville, Saskatchewan. Mr. Cronkright advised the grievor that he could begin his bereavement leave that day. Mr. Cronkright recalled that he had somewhat of a heated discussion with the grievor at the time because the grievor was not in agreement that he should begin his bereavement leave that day.

The grievor then left the premises and spoke with Supervisor Dave James. He advised Mr. James that he had to travel to Saskatchewan for personal matters and Mr. James advised him to just book off and not worry about his work commitments. The grievor did not work his shift on November 8, 2002. He called in to the Crew Management Centre late on Friday November 8, 2002 and booked himself back on the working board. On Sunday, November 10, 2002 the grievor again contacted the Crew Management Centre in Jasper and advised that he would be going off on bereavement leave effective Monday, November 11, 2002.

The grievor had been scheduled to work his usual three days on November 11, 13 and 15, 2002. The grievor was away those three days and did not book back onto the working board until Saturday November 16, 2002.

The grievor submitted claims for his three missed round trips on November 11, 13 and 15. The Company claims that the grievor is only entitled to bereavement leave on the five consecutive days beginning on November 8 and ending November 12 as per article 78.1 of agreement 1.2 – Bereavement Leave which reads as follows:

78.1 An employee who has not less than three months of cumulative compensated service shall:

- (a) due to the death** of the employee's grandparent, grandchild, step-parent, mother-in-law, father-in-law, brother, sister, step-brother or step-sister, be entitled to three consecutive calendar days' bereavement leave. An employee will be compensated for actual time lost, exclusive of overtime, within such three calendar days.

- (b) **due to the death** of the employee's spouse, child, step-child or parent be entitled to five consecutive calendar days' bereavement leave. An employee will be compensated for actual time lost, exclusive of overtime, within such five calendar days.

(emphasis added)

The grievor was docked \$800.21 which the Company recovered in the following pay period. The Company, after some negotiation with the Union, later paid the grievor for "100 miles", the equivalent of \$150.00. It is the Union's position that the grievor is still owed \$650.21.

The Union submits that bereavement leave is designed to compensate an individual during a period of mourning and that, since the amendments to article 78 in 1998, more latitude is available to an individual who decides to take bereavement leave. In that regard, the Union noted that, article 78.1 (a) and (b) formerly began with the introductory words "upon the death of ..." These introductory words were substituted with the current wording set out in article 78.1 (a) and (b) "due to the death of ..." on February 13, 1998 at the time of ratification of a memorandum of agreement between the parties. It is the Union's position that the essence of the change is to now give locomotive engineers the flexibility to take bereavement leave as they see fit. In support, the Union refers to the "explanation of the changes" which accompanied the article 78.1(a) and (b) changes on February 13, 1998. The relevant excerpt from the explanation reads as follows:

... In addition, where the agreement previously provided for compensation "upon the death of", it has now been amended to reflect "due to the death of". The net effect is an employee has more flexibility to observe a period of bereavement that is more in keeping with the particular circumstances he/she is faced with when

an eligible relative passes, as opposed to a strict death of a relative. It remains the prerogative of the Company to require an employee to reasonably substantiate the grounds for electing a specific period of time to observe bereavement leave.

The Union submits that the grievor in these circumstances has the discretion to take his bereavement leave at a time that suits his purposes. This is the one occasion the Union argues that the employer must defer to the employees wishes.

The Company's position is that the changes to article 78 did not occur in order to allow employees to maximize their time off, as appears to be the case here. It is clear from the Company's viewpoint that it agreed to the change in the wording to account for specific bereavement circumstances while at the same time maintaining final control over the appropriate bereavement leave period. In that regard, the Company points to the last sentence in the explanation which clearly sets out that it is the prerogative of the Company to ask an employee to substantiate the grounds for requesting a specified period for bereavement leave. This does not mean, in the Company's view, that the employee has an unfettered right to take bereavement leave whenever they choose.

This arbitrator accepts the Union's position that the change in the language in 1998 was to allow for certain flexibility when a reasonable explanation was provided by an employee as to why the bereavement leave should be deferred. There are clearly cases where the grieving period, which normally follows the death of a family member, may not apply in certain family situations. For example, certain religious groups might follow grieving customs which do not follow the death of a family member. The

amendment addresses such situations. The last sentence of the explanation also indicates that the intention of the amendment was to allow the employer to retain the final say in determining the appropriateness of the bereavement leave request. It is therefore incumbent on the employee in the view of this arbitrator to provide a reasonable explanation for electing a certain bereavement period over one which normally follows the death of a family member.

Mr. Cronkright, who I find was the person properly authorized to grant the bereavement leave, could perhaps be criticized for acting somewhat insensitively towards the grievor when he told him the day after his father died that he had to start his bereavement leave immediately. At the same time, Mr. Cronkright testified that he was prepared to offer the grievor a leave of absence for the following week once the grievor's bereavement leave had expired.

This arbitrator finds that it was incumbent on the grievor on November 7, 2002 to provide his supervisor with reasons why he wished to postpone his bereavement leave to the following Monday, November 11, 2002. He elected not to do so. Instead, the grievor took matters into his own hands by booking himself back on duty late Friday November 8, 2004. He provided the Company with no further explanation afterwards of the basis for his request to take a different bereavement leave period. The employer, under the circumstances can hardly be blamed, in the absence of a further explanation from the grievor, for determining that the grievor should leave the workplace and begin his bereavement leave right away to grieve for the loss of his father. At the end of the day, it

is up to the person seeking flexibility from the employer in these kinds of circumstance to provide a reasonable basis for the request. The grievor has not met that onus in this case.

The grievance is therefore dismissed.

November 16, 2004

(signed) J. M. MOREAU. Q.C.
ARBITRATOR