CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1802

Heard at Montreal, Thursday, June 16, 1988

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

Time claims #302 - 351, dated June 7 through August 9, 1987 in favour of Locomotive Engineer M. J> Sikkes, P.I.N. 693620, of Jasper, Alberta.

BROTHERHOOD'S STATEMENT OF ISSUE:

The Brotherhood of Locomotive Engineers is the certified bargaining agent who holds the contract to operate locomotives. As Locomotive Engineer Sikkes was available and not used, contrary to Article 32 of Agreement 1.2, the Company thereby violated the Collective Agreement by using supervisory officers to operate these trains. Further, the Company is obligated to pay to the Brotherhood an amount in the sum of that amount reflected in the union dues which are deducted from the members working in Jasper for each supervisor who operated a train during this period of time.

The Company contends that the grievor violated the time limits specified in Paragraph 91.1(a) and refused to accept the grievance.

The Brotherhood contends that the Company refused to make the information required to submit these claims available, as requested by the Local Chairman. In any case, a late submission of a time-claim is not in itself a violation of Article 91.1(a). A time claim does not become a grievance until it is declined for payment by the Company.

FOR THE BROTHERHOOD:

(SGD) P. SEAGRIS
General Chairman

There appeared on behalf of the Company:

L. A. Harms	- Labour Relations Officer, Montreal
J. R. Hnatiuk	- Manager, Labour Relations, Montreal
D. C. St. Cyr	- LabourRelations Officer, Montreal
K. MacDonald	- Manager, Labour Relations, Edmonton
D. Lussier	- Coordinator Transportation, Montreal

And on behalf of the Brotherhood:

P. Seagris - General Chairman, Winnipeg

At the request of the parties, the Arbitrator adjourned the hearing.

On September 13, 1988,

There appeared on behalf of the Company:

L. A. Harms	- Labour Relations Officer, Montreal
D. C. St. Cyr	- Labour Relations Officer, Montreal
B. Ballingall	- Manager, Labour Relations, Edmonton
D. Lussier	- Coordinator Transportation, Montreal
J. W. Dear	- Superintendent, Kamloops
B. Cromp	- Trainmaster, Kamloops
A. J. Wagner	- Assistant Superintendent, Edmonton

And on behalf of the Brotherhood:

P. Seagris	- General Chairman, Winnipeg
P. Klippenstein	- Local Chairman, Jasper
D. Kipp	- Senior Vice-General Chairman, Kamloops
F. Zimmerman	- Observer
G. Hall	- Observer

AWARD OF THE ARBITRATOR

It is common ground that the Company did make use of supervisory personnel to operate locomotives for a period in June and July of 1987 when, it maintains, it had insufficient manpower to fill its needs in that regard at Jasper, Alberta. The first issue is the timeliness of the Brotherhood's grievance.

Article 91 of the Collective Agreement states in part:

> 91.1(a) Step I - Presentation of Grievance to Immediate Supervisor
>
> Within 28 calendar days from the date of cause of grievance the employee or the local chairman may present the grievance in writing to the immediate supervisor. The grievance shall include a written statement of grievance as it concerns the interpretation or alleged violation of the agreement and identify the

> Article and paragraph(s) of the Article involved. The supervisor will give his decision in writing within 28 calendar days of receipt of the grievance. In case of declination the supervisor will state his reason(s) for the decision in relation to the statement of grievance submitted.

It is agreed that the time limits in Article 91.1(a) are mandatory and that in the instant case the grievance was not filed within the 28 day period described. While the actions complained of are alleged to have occurred in June and July of 1987, the time returns of Locomotive Engineer Sikkes were not submitted until January 7, 1988. The first issue to be determined is whether the claim is therefore time barred within the terms of Article 91 of the Collective Agreement.

The Brotherhood submits that the provisions of Article 91 have no application, firstly because Mr. Sikkes' complaint took the form of time claims which, the Brotherhood argues, are not subject to the time bar provided for the filing of grievances. In the circumstances of this case the Arbitrator cannot accept the argument of the Brotherhood that the time limit provided in Article 91 could begin to run only after the time claims were declined by the Company. In some circumstances it might be unduly technical to limit an employee's access to the grievance procedure merely because he or she chooses to file a time claim as the form of document protesting a given action by the Company. As a general principle, however, substance, and not form, should prevail. In this case, for the reasons elaborated below, Mr. Sikkes knew, or had reason to know, all of the facts pertinent to his claim during the summer of 1987. Apart from the general question of whether Locomotive Engineer Sikkes would be entitled to file time returns within the terms of Article 69 of the Collective Agreement in the particular circumstances of this case, the Arbitrator must accept the position of the Company that he is not entitled to circumvent the substantive provisions of Article 91 by purporting to file time returns some five months after the events of which he complains.

The Brotherhood further submitted that the delay in this case was in fact caused by the deliberate refusal of the Company to provide the necessary information in respect of crew assignments to the Brotherhood, thereby frustrating its ability to file a timely grievance. In the Arbitrator's view that claim is not sustained on the evidence or the material filed. It appears that on August 12, 1987 Local Chairman P. Klippenstein wrote to Assistant Superintendent A.J. Wagner, requesting "... a list of all officers who have manned trains, the dates, the train number and the time called." In a terse response dated September 1, 1987 Mr. Wagner advised Mr. Klippenstein "We are not prepared to provide the information requested."

In the Arbitrator's view these bare facts fall substantially short of establishing that the Company violated any right of the Union or improperly impeded its access to information which would normally be available to it. It is common ground that the Train Register is a document normally filled by the conductor of a crew on both arrival

and departure at a given location. It remains open and accessible to all employees, and in the instant case the train register at Jasper would have provided the Brotherhood's Local Chairman with whatever information he required at the time in question. There is no evidence before the Arbitrator to establish that the Train Register for Jasper was misplaced or unavailable to the grievor or his Local Chairman within the 28 day period of each alleged infraction. There is, moreover, no evidence before the Arbitrator to establish that the grievor was unaware, or did not have reasonable grounds to be aware, of the Company's utilization of supervisory personnel in the operation of locomotives during the months of June and July of 1987. Nor does the Collective Agreement require that the Company provide the information which Mr. Klippenstein requested, or otherwise assist the Brotherhood to make its case.

For all of the foregoing reasons the Arbitrator cannot conclude that the delay in the filing of this grievance is attributable to the Company. I find that the grievance is untimely, and it is hereby dismissed.

September 16, 1988 (SGD) MICHEL G. PICHER
ARBITRATOR