CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1911

Heard at Montreal, Wednesday, 12 April 1989

Concerning

ONTARIO NORTHLAND RAILWAY

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Discipline of 30 demerit marks assessed 13 engineers at North Bay, Ont., for booking sick August 30th and August 31st 1988.

JOINT STATEMENT OF ISSUE:

On August 30th and August 31st, 1988, thirteen Engineers booked sick resulting in the Company assessing these Engineers with 30 demerits. The Union appealed the discipline assessed. The Company contends the discipline should stand claiming it was a concerted action.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD) R. G. WHITE	(SGD) P. A. DYMENT
General Chairman	General Manager

There appeared on behalf of the Company:

M. Restoule	- Labour Relations Officer, North Bay
D. Hagar	- Superintendent, Train Operations, North Bay

And on behalf of the Brotherhood:

R. G. White	- General Chairman, Powassan

AWARD OF THE ARBITRATOR

The material establishes that on August 30 and 31, 1988 the entire complement of engineers available to the Company at North Bay booked sick. Those booking sick were thirteen in number, and a fourteenth engineer was absent due to an injury, as a result of which the Company was left without any engineers to handle its runs from that location.

The bookings began to be received by the Company within minutes of a dispute between local management and the local chairman of the Brotherhood with respect to the engineer entitled to be called to work a 16:00-24:00 shift in the North Bay yard. The Company took the view that the engineers, all of whom booked sick within the two day period in question, and none of whom were sick on the day previous or the day following, did so in concert, to protest the Company's

actions in respect of the yard assignment. As a result all of the engineers were assessed thirty demerits. As a result one of the grievors, Mr. T. Corriveau, was discharged for an accumulation of more than sixty demerits.

Following the return to work of the thirteen engineers the Company requested medical documentation to substantiate their illness on the days in question. All provided medical certificates, generally very brief in form. A substantial number of the doctors' notes simply stated that the employee was fit for work on September 1 or September 2, 1988. One takes the form of a statement by the physician to the effect that his patient "... informs me that he has been ill ...". With respect to Mr. Corriveau, a Company document indicates that his physician stated verbally to a Company officer that she could not draw a causal link between a medical condition for which she had treated him and his absence on the days in question. On the strength of all of the evidence before it, including the medical certificates, the Company refused to believe the employees' explanation to the effect that their total absence from work was merely coincidental and was in all cases justified for medical reasons.

The issue is whether the evidence and material before the Arbitrator support the Company's conclusion. Work stoppages engaged in in concert by employees are, like unfair labour practices pursued contrary to the law by unscrupulous employers, rarely admitted. Labour boards and boards of arbitration faced with such situations are frequently compelled to assess circumstantial evidence to draw the most probable inferences suggested by the facts as they appear on the whole, absent any credible explanation to the contrary. For example, when a labour board is faced with evidence of five employees who have been discharged at or about the same time for alleged misconduct, poor job performance or a downturn in business, and the evidence also discloses that the five employees have been spearheading the organization of a union in the workplace, to the knowledge of the employer which strongly opposes collective bargaining, the Board will not hesitate to draw the inference which appears most probable in the circumstances, particularly where the purported reasons for discharge are not compellingly proved. The same principles apply, in a general sense, to an unfair labour practice engaged in by employees, including an unauthorized work stoppage. A wildcat strike is seldom admitted by its participants, much less its leaders. Where, however, the sequence of events points cogently to a pattern of behaviour that tends to establish a concerted refusal to work on the part of a number of employees, coupled with such other facts as might demonstrate a cause for discontent, a labour board or a board of arbitration may well be justified in drawing such adverse inferences as are most probable based on the evidence before it.

It is true that in a case such as this the burden of proof is upon the Company, insofar as it must establish just cause for the discipline imposed. As a practical matter, however, the burden may shift during the course of the arbitration. If the evidence adduced by the Company should be sufficient to establish a prima facie case that, on the balance of probabilities, a concerted and unlawful work stoppage did occur, as a practical matter the onus may then fall to the employees concerned to give some full and credible account of

their actions which would establish the contrary.

In the instant case the Arbitrator is compelled to find that a prima facie case is established, and that the employees have failed to provide an adequate explanation in rebuttal. At or about 14:00 hours on August 30 the Company made a yard assignment that became the subject of immediate strong controversy among members of the bargaining unit and their local chairman, who protested the Company's action. When the Company refused to change its position, within a matter of minutes, scheduled locomotive engineers began to book off sick, and continued to do so without exception until each and every one of them had booked sick through August 30 and 31, 1988. For the reasons related above, the medical certificates which they subsequently provided to the employer are of dubious weight, since for the most part they provide little direct information save that the employee was fit to return to work on September 1 or 2, 1988. In the case of Mr. Corriveau the Company obtained a direct statement from his physician disclaiming any ability to link a prior medical condition which he had to his absence on the dates in question. On the whole of the evidence the Arbitrator is compelled to conclude that the explanation and dubious evidence advanced by the Brotherhood on behalf of the thirteen locomotive engineers is inadequate to rebut the case advanced by the Company.

Participation in an unlawful strike is among the most serious of disciplinary infractions. Resorting to economic sanctions and self-help to resolve a collective bargaining dispute during the term of a collective agreement strikes at the heart of the grievance and arbitration system that is an intrinsic part of the scheme of stable and orderly collective bargaining established under the Canada Labour Code. Those who knowingly violate the Code, whether employers or employees, should know to expect little sympathy from boards of arbitration whose function is to interpret and apply the terms of collective agreements which are made under it.

For the foregoing reasons I am satisfied that in the circumstances of this case the Company had just cause to impose a serious measure of discipline upon the thirteen locomotive engineers who I must conclude, on the balance of probabilities, did engage in an unlawful strike by withholding their services in concert on August 30 and 31, 1988. With one exception, I see no reason to exercise my discretion to reduce the penalties imposed. The sole exception is the impact of the discipline upon Locomotive Engineer T. Corriveau. It is true that in a technical sense the imposition of thirty demerits represents the like treatment of all of the employees concerned. Because of the precarious position of his prior record, however, that sanction resulted in the discharge of Mr. Corriveau. In the Arbitrator's view it was open to the Company to consider alternative measures of serious discipline, short of discharge, to convey a clear rehabilitative message to Mr. Corriveau. Close to seven months have expired since his discharge effective September 23, 1988. I am satisfied that a substitution of a suspension of that period is appropriate. It is therefore ordered that the grievor T. Corriveau be reinstated into his employment forthwith, without compensation or benefits for the period of time between his discharge and reinstatement and without loss of seniority, with his disciplinary record to stand with the same number of demerits as were registered

prior to the imposition of the thirty demerits on September 23, 1988. I retain jurisdiction in respect of the implementation of this remedial award.

The grievances of the remaining twelve employees are dismissed in their entirety.

April 14, 1989 (Sgd.) MICHEL G. PICHER
ARBITRATOR