Canadian Railway Office of Arbitration

Case No. 2545

Heard in Montreal, Tuesday, 13 December 1994

concerning

Canadian National Railway Company

and

Canadian Council of Railway Operating Unions (United Transportation Union)

ex parte

Dispute:

Appeal of discipline assessed the record of J. Czumak of Toronto.

Ex Parte Statement of Issue:

On 3 June 1993, after completion of his assignment GO 14, J. Czumak booked personal rest which continued on into 4 June 1993. Because of his personal rest, he was not available to work his assignment on 4 June 1993.

Subsequently, the Company appealed to the Canada Labour Board which resulted in an order "requiring certain employees of the United Transportation Union, who were engaged in an unlawful strike at Toronto, to cease and desist their unlawful actions."

On 19 June 1993, J. Czumak was required to provide a formal employee statement in connection with his booking personal rest on completion of his assignment 3 June 1994. On 12 July 1994, J. Czumak was assessed 30 demerits for "Withdrawal of services and participation in an illegal strike resulting in disruption of GO service Friday, 4 June 1993."

The Union appealed the assessment of discipline to J. Czumak on the grounds that the burden of proof was on the Company to establish that J. Czumak participated in an illegal strike against the Company and in view of evidence, the Company did not establish such proof.

The Union therefore requested that the discipline assessed J. Czumak be removed from his personal record.

The Company declined the Union's appeal.

for the Union:

(sgd.) M. P. Gregotski

General Chairperson

There appeared on behalf of the Company:

K. Peel– Counsel, Toronto

A. E. Heft – Manager, Labour Relations, Toronto

J. P. Krawec– System Labour Relations Officer, Montreal

D. J. Nunns – Superintendent, GO Operations, Toronto

B. J. Hogan – Manager, CMC, Toronto

And on behalf of the Union:

R. A. Beatty– Vice-General Chairperson, Hornepayne

M. K. Hayes – President, Local 483, Toronto

G. S. Ethier– Vice-Local Chairperson, Hornepayne

award of the Arbitrator

It is common ground that employees of the Company engaged in a concerted refusal to work, contrary to the Canada Labour Code, by booking rest on June 3 and 4, 1993. As a result of this action a cease and desist order was issued by the Canada Labour Relations Board on June 5, 1993. The work stoppage occasioned a 50% reduction in GO train service in and out of Toronto on Friday,

June 4, 1993, resulting in a substantial disruption in regular commuter passenger service on that day. Subsequently the Company disciplined some 48 employees for their participation in the unlawful strike. The discipline issued to the employees investigated included the assessment of 30 demerits to thirty-six employees, 10 demerits to eight employees, 30-day suspensions to two employees and 60-day suspensions to two others. Mr. Czumak, the grievor in the instant case, was assessed thirty demerits.

The evidence discloses that Mr. Czumak booked 24 hours' rest at 20:10 hours on June 3, 1993, following the second of his two split shifts that day. It is not disputed that he had not previously booked rest in 1993, and the Company submits that this departure from the norm indicated that the grievor intended to participate in the illegal work stoppage. During the course of his investigation, Mr. Czumak explained that he needed time off June 4th to meet with his real estate agent as he was selling his house. He tendered in evidence an agreement of purchase and sale negotiated on June 4th, and which he said was first tendered as an offer at 08:00 hours on June 4th, and concluded at 17:00 hours.

This Office has had previous occasion to consider the principles which apply in respect of evidence relating to allegations of an illegal work stoppage. In CROA 1911 the following comments appear:

... 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.

(See also CROA 2084)

Needless to say the credibility of an employee's account of his or her actions may depend, to some extent, on how compelling the explanation is, and in this regard independent corroboration and the support of objective evidence in the form of documentation may be important.

What does the evidence disclose as regards Mr. Czumak? The document which he provided to his employer clearly reveals that he was engaged in the sale of his house on June 4, 1993. As evidenced from the alterations made by hand on the face of the offer, there were protracted negotiations of the price and conditions of sale, resulting in several offers and counter offers. The Arbitrator is satisfied that the account given by Mr. Czumak with respect to the negotiations is supported by the documentation, and should be believed.

Does the evidence rule out the possibility that Mr. Czumak contemplated being involved with his real estate agent at the time he booked rest on June 3rd? I think not. The Company, which controls the investigation process, chose not to ask the grievor when he was first made aware that there would be an offer forthcoming on the sale of his house. It may well have been communicated to him during the course of June 3rd. Bearing in mind that the Company bears the ultimate burden of proof, I am satisfied that any uncertainty in respect of this aspect of the evidence should be resolved on a basis which gives the benefit of the doubt to the grievor.

For the foregoing reason the grievance is allowed. The 30 demerits assessed against Mr. Czumak shall be rescinded forthwith.

16 December 1994 (sgd.) MICHEL G. PICHER
ARBITRATOR