

Canadian Railway Office of Arbitration

Case No. 2646

Heard in Montreal, Thursday, 15 June 1995

concerning

Canadian National Railway Company

and

**Canadian Council of Railway Operating Unions
(United Transportation Union)**

ex parte

Dispute:

Appeal of discipline assessed Conductor/Trainperson T. Brown - 59 demerits.

Ex Parte Statement of Issue

On October 5, 1994, the Canada Labour Relations Board issued Board Order Number 725-355 which declared that certain employees home based at Hornepayne did participate in a concerted illegal activity contrary to the Canada Labour Code.

The Company, as a result of Board Order 725-355, commenced investigations of those employees who they believed participated in the illegal work stoppage.

The grievor, Mr. Brown, was subsequently assessed 59 demerits for his participation in the concerted illegal work stoppage.

The Union appealed the discipline assessed on the following basis: **1.)** That Mr. Brown did not receive a fair and impartial hearing. **2.)** The assessment of discipline was assessed in a discriminatory manner. **3.)** The evidence produced did not support the Company's position that Mr. Brown participated in a concerted illegal work stoppage. **4.)** The Company violated the provisions of article 82.3 of agreement 4.16.

It is the position of the Union that the discipline be removed from the grievor's record. Failing that position, in the alternative, the Union contends that the discipline assessed was too severe and should be reduced accordingly.

for the Council:

(sgd.) M. P. Gregotski

General Chairperson

There appeared on behalf of the Company:

K. R. Peel – General Counsel, Toronto

P. E. Marquis – Labour Relations Officer, Toronto
R. Bateman – Assistant Manager, Labour Relations, Toronto
J. Polley – Acting Superintendent, Transportation, Capreol
J. Sauvé – Manager, Crew Management Centre, Toronto
D Randall – Transportation Assistant, Toronto
And on behalf of the Council:
M. Church – Counsel, Toronto
R. Beatty – Vice-General Chairman, Hornepayne
D. Olivieri – Observer

award of the Arbitrator

The background facts and certain procedural issues relating to this grievance are dealt with in **CROA 2647**. For the reasons related in that award, the Arbitrator rejects the Council's objection based on timeliness and the alleged violation of article 82 of the collective agreement.

The evidence in respect of Mr. Brown discloses that he had never booked rest following a tour of duty since August 4, 1994 until the events which are the subject of this grievance. Significantly, it appears and on October 1, Mr. Brown's decision to book rest upon working Train 302 into Foleyet, going off duty at 09:35 prevented him being assigned to crew back or "double out" on Train 219 which was, in fact, delayed at Foleyet by reason of employees booking rest. The time which Mr. Brown booked made him unavailable until 13:25, when in fact the crew ahead of him also became available for work. Further, the evidence with respect to the grievor's explanation of not being fit to double out on October 3rd, is equally dubious. In fact on that day he was deadheaded back to Hornepayne. As stressed by the Company, on both trips to Foleyet, October 1 and October 3, the grievor had been on duty some six and one-half hours before booking rest, and did so in circumstances which were clearly out of the norm for him.

On balance, the Arbitrator is satisfied that the Company has established that the grievor booked rest for the purpose of participating in an unlawful slowdown. As appears from the evidence, noted above, on the balance of probabilities, his decision to book rest on October 1 did, in fact, contribute to the delay of Train 219 at Foleyet. In the result, the Arbitrator is satisfied that the grievor was liable to discipline for his actions.

The next matter to be considered is the appropriate measure of discipline. The Company assessed fifty-nine demerits against Mr. Brown, whose disciplinary record was clear at the time of the incident in question. This leaves him one demerit point short of discharge. The Company seeks to justify its decision based on the fact that Mr. Brown was previously disciplined for similar conduct.

While the Arbitrator accepts that participation in an unlawful slowdown is a grave disciplinary offence, the assessment of one demerit short of discharge is unduly harsh in the circumstances of this case. It is, I think, out of keeping with the spirit of the Brown System, and principles of progressive discipline, to assess an employee with a clear record demerits that fall so close to the line at which discharge is justified. In the Arbitrator's view, when regard is had to all of the circumstances, the assessment of thirty demerits is more in keeping with the appropriate range of discipline. The Arbitrator therefore directs that the grievor's record be amended accordingly.

July 5, 1995 **(Signed) MICHEL G. PICHER**

ARBITRATOR