

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2740

Heard in Calgary, Thursday, 16 May 1996

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[BROTHERHOOD OF LOCOMOTIVE ENGINEERS]**

DISPUTE:

Appeal the assessment of 20 demerits assessed Locomotive Engineer T. Trzmiel of McLennan, Alberta for fraudulently booking sick on November 22, 1992.

COUNCIL'S STATEMENT OF ISSUE:

On November 22, 1992 Locomotive Engineer Trzmiel booked sick after reporting for duty for Train 591.

Following an investigation into the incident, Locomotive Engineer Trzmiel was assessed 20 demerits.

The Brotherhood contends that Mr. Trzmiel was ill when he booked sick on the morning of November 22, 1992, and submits that the Company failed to develop convincing evidence to justify the assessment of demerits.

The Brotherhood requested that the discipline be expunged.

The Company maintains that the grievor was justly dealt with, and has declined the Brotherhood's request.

FOR THE COUNCIL:

(SGD.) M. W. SIMPSON

FOR: GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) R. RENY

FOR: SENIOR VICE-PRESIDENT, CN WEST

There appeared on behalf of the Company:

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| R. Reny | – Labour Relations Officer, Edmonton |
| J. Torchia | – Manager, Labour Relations, Edmonton |
| J. Dixon | – Labour Relations Officer, Edmonton |
| S. Blackmore | – Labour Relations Assistant, Edmonton |
| B. Barber | – Labour Relations Officer, Edmonton |
| J. Raynard | – Superintendent, Transportation |

And on behalf of the Council:

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| W. A. Wright | – General Chairman, Saskatoon |
| M. W. Simpson | – Sr. Vice-General Chairman, Saskatoon |
| M. King | – Local Chairman, Prince George |
| D. Shewchuk | – Vice-General Chairman, Vancouver |

AWARD OF THE ARBITRATOR

The Company alleges that Locomotive Engineer Trzmiel fraudulently booked sick on November 22, 1992. It bears the burden of proof in respect of that allegation.

The Arbitrator can understand the Company's suspicions, given the circumstances in which the grievor booked sick. It appears that he did so immediately after his conductor, Ms. Cummings, advised the Rail Traffic Control Centre that she and the grievor were not prepared to make a side trip to Minola as part of their assignment on the day in question. It is common ground that they were not advised, at the time of their original call, that the side trip would be part of their duties. The record discloses that when the grievor booked sick the Company incurred some delay, and called another crew to handle the assignment.

It is common ground that the Company made no attempt to question the *bona fides* of the grievor's illness at the time he asserted it. Nor did any supervisor require him to obtain medical certification of his condition, which he described as acute diarrhea during the course of his disciplinary investigation. The Company bases its conclusion, in part, on the fact that the grievor was previously disciplined, some four and one-half years previous, for booking unfit on another occasion when he objected to an assignment given to him. The Company also looked to the fact that the grievor booked back on at 22:35 the same day, taking a call for 04:00 the following morning.

On balance, the Arbitrator cannot find that the Company has discharged the burden of proof in this case. That is not to say that there are not grounds to suspect that the grievor was "playing games", as the Company suggests. If he was, he will no doubt eventually play himself out of a job. The Arbitrator cannot, however, convert suspicion into a legal conclusion, on the bare evidence in this case. The fact that there was a similar prior incident is not, in my view, sufficient to bring the similar fact evidence rule to bear in this case. On a similar occurrence in the future, however, that argument may be more persuasive.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the twenty demerits assessed against Locomotive Engineer T. Trzmiel be removed from his record forthwith.

May 17, 1996

(signed) MICHEL G. PICHER
ARBITRATOR