CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3091
Heard in Montreal, Wednesday, 10 February 2000
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(BROTHERHOOD OF LOCOMOTIVE ENGINEERS)
EX PARTE

DISPUTE - COUNCIL:

Appeal the discharge of Locomotive Engineer W.J. Chumm of Vancouver, B.C., effective October 22, 1999 for having accumulated in excess of sixty (60) demerit marks on his current discipline record with as of October 22, 1999 stood at one hundred (100) demerit marks and one written reprimand and;

The appeal of discipline, fifteen (15) demerits, assessed Locomotive Engineer W.J. Chumm on April 29, 1999, which the Company has indicated was for late reporting for duty for transfer assignment ordered for 02:15 at Thornton Yard on Wednesday, April 21, 1999 and;

The appeal of discipline, thirty (30) demerits, assessed Locomotive Engineer W.J. Chumm on October 22, 1999, which the Company has indicated was for participation in a concerted job action from August 3 to 5, 1999 at Vancouver, B.C., including the Greater Vancouver Terminal and;

The appeal of discipline, ten (10) demerits, assessed Locomotive Engineer W.J. Chumm. on October 22, 1999, which the Company has indicated was for booking unfit at approximately 15:05 PDT on August 9, 1999 after accepting a call for the regular 15:00 Lynn Creek Yard assignment resulting in delay to the assignment and;

The appeal of discipline, ten (10) demerits, assessed locomotive engineer W.J. Chumm on October 22, 1999, which the Company has indicated was for booking unfit at approximately 00: 18 PDT, on Tuesday, September 21, 1999 after he had accepted a call for work on train A416-51-21 ordered for 01:30 at Thornton Yard.

COUNCIL'S STATEMENT OF ISSUE:

Effective October 22, 1999 Locomotive Engineer W.J. Chumni was discharged from his employment at Canadian National Railways for having accumulated in excess of sixty (60) demerit marks on his discipline record.

The Brotherhood's position is that Locomotive Engineer Chumm's personal history and facts surrounding each incident of discipline has a direct bearing upon Locomotive Engineer Chumm's state of mind and is directly related to the decisions made by Locomotive Engineer Chumm between the period of November of 1998 and November of 1999. The combination of these appeals is an unusual position but it is the Brotherhood's contention that Locomotive Engineer Chumm's actions, which are relied upon in his defence of the allegations and discipline assessed by the Company, are based upon the same factual sequence of events and are applicable for each appeal.

The Brotherhood contends that, in addition to Locomotive Engineer Chumm's personal history and facts surrounding each incident, the Company has not satisfactorily discharged their onus and responsibility to prove their allegations against Locomotive Engineer Chumm that he participated in a concerted job action for the period August 3 to August 5, 1999. The Brotherhood also contends that the Company has unjustly proceeded with the charges and penalties for the other incidents, which have attracted discipline.

The Brotherhood has requested that the sixty-five (65) demerits which have been assessed Locomotive Engineer Chumm. be removed from his record and that he be reinstated into Company service with full compensation for all

wages and benefits lost from October 22, 1999.

The Company disagrees and has declined the Brotherhood's appeal.

DISPUTE - COMPANY:

The assessment of fifteen (15) demerits to Locomotive Engineer W.J. Chumm of Vancouver, B.C. for reporting late for duty for transfer assignment on April 21, 1999.

COMPANY'S STATEMENT OF ISSUE:

On April 21, 1999, at approximately 00: 15, the grievor received a call from the Crew Management Centre informing him that he was called for 02:15 Thornton Transfer Assignment. The grievor reported for duty at 03:30 resulting in a delay to his assignment.

The Brotherhood appealed on behalf of the grievor stating that the circumstances surrounding the grievor's late arrival was valid, suggesting that there was no need to assess discipline in this situation.

The Company disagrees, and has declined the Brotherhood's appeal.

DISPUTE - COMPANY:

The assessment of thirty (30) demerits to Locomotive Engineer W. J. Chumin of Vancouver, B.C. for his participation in concerted job action from on August 3-5, 1999.

The assessment of ten (10) demerits to Locomotive Engineer W. J. Chumm of Vancouver, B.C. for booking unfit on August 9, 1999, after accepting call.

The assessment of ten (10) demerits to Locomotive Engineer W. J. Chumm. of Vancouver, B.C. for booking unfit on September 21, 1999 after accepting call.

Discharge of Locomotive Engineer W. J. Chumm of Vancouver, B.C., effective October 22, 1999, for accumulation of demerits.

COMPANY'S STATEMENT OF ISSUE:

The Brotherhood's position is that Locomotive Engineer Chumm's personal history and facts surrounding each incident of discipline has a direct bearing upon Locomotive Engineer Chumm's state of mind and is directly related to the decisions made by Locomotive Engineer Chumm between the period of November of 1998 and November of 1999.

The Brotherhood's position is that, the Company has not satisfactorily discharged their onus and responsibility to prove their allegations against Locomotive Engineer Chumm. that he participated in a concerted job action for the period of August 3 to August 5, 1999. The Brotherhood also contends that the Company has unjustly proceeded with the charges and penalties for other incidents, which have attracted discipline.

The Brotherhood has requested that the fifty (50) demerits which have been assessed Locomotive Engineer Chumm be removed from his record and that he be reinstated into Company service with full compensation for all wages and benefits lost from October 22, 1999.

The Company contends that the level of discipline assessed for each incident was justified and that the discharge for accumulation of demerits was also justified.

The company requests that the Arbitrator dismissed the grievance.

FOR THE COUNCIL: **FOR THE COMPANY:**

(SGD.) M. W. SIMPSON (SGD). **R. RENY**
GENERAL CHAIRMAN FOR: **ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

R. Reny	- Human Resources Associate - Pacific Division, Vancouver
R. K. MacDougall	- Counsel, Montreal
S. Michaud	- Business Partner - HR, Pacific Division, Edmonton
J. Vena	- Superintendent, Operations, Vancouver
R. Eisenman	- Transportation Supervisor, Vancouver
E. Storms	- Operations Manager, Crew Management Centre, Edmonton

And on behalf of the Council:

B. McHolm	- Counsel, Saskatoon
D.J.Shewchuk	- Sr. Vice-General Chairman, Saskatoon
G. Halld	- Canadian Director, BLE, Ottawa
R. E. Lee	- Local Chairman, Vancouver
W. J. Chumm	- Grievor

AWARD OF THE ARBITRATOR

This arbitration concerns four separate grievances, including the discharge of the grievor for the eventual accumulation of one hundred demerits.

The first incident concerns the grievor's failure to report to work on time on April 21, 1999. It is common ground that at 00:15 Mr. Chumm received a call from the Crew Management Centre for the 02:15 Thornton Transfer assignment. In fact Mr. Chumm only reported for duty at 03:30. By way of explanation the grievor offered that his alarm clock had been improperly set, apparently because of a power shortage.

Mr. Chumm, an employee of some seventeen years of service, has a less than enviable record with respect to timekeeping over the years. On a number of occasions he received previous discipline, or corrective interviews, for either reporting late or booking unfit after he had accepted a call. In light of that record, and accepting that the grievor must be held responsible for his own failure to attend at work on time on April 21, 1999, the Arbitrator is satisfied that the fifteen demerits assessed is within the appropriate range of discipline, and should not be disturbed. Therefore this part of the grievance must be dismissed.

I next consider the assessment of thirty demerits against Mr. Chumm for his alleged participation in an unlawful work stoppage on August 4 and 5, 1999. 1 am satisfied that a concerted work stoppage did occur. It is also not disputed that the grievor booked unfit at the conclusion of his tour of duty on August 3, and did not book on again until the late afternoon of August 5, at or about the time other locomotive engineers returned to duty following the work stoppage.

The Arbitrator has had considerable difficulty weighing the evidence in respect of the grievor's actions surrounding the dates of the work stoppage. The Council characterizes the grievor's actions as booking off sick, "... for the purpose of attending his doctor's appointment on August 4, 1999." When close regard is had to the grievor's own explanation, that characterization is arguably misleading. It would suggest that Mr. Chumm had a prior doctor's appointment which necessitated his absence on August 4. That in fact is not what occurred.

By Mr. Chumm's own account, he had no prior appointment booked for the, 4th at the time he booked sick at the conclusion of his tour of duty on August 3rd. According to his own account, he tried to contact his doctor's office late on the 3rd, but had not been successful in securing an appointment. It appears that when Mr. Chumm was called by Crew Coordinator Paul Gahun at 09:23 on the morning of August 4, and was requested to work, Mr. Chumm continued to advise that he was not available. By his own account, however, he had not at that point secured an appointment with his

doctor. It appears that he did so later in the day, and attended at his doctor's office at approximately 16:00. The note from the doctor's office is itself somewhat equivocal. Apparently signed by a nurse or receptionist, rather than the doctor himself, it simply states "Wesley Chumm was in to see Dr. MacKenzie on August 4, 1999 re an ongoing medical condition."

On the whole, there is reason to question whether Mr. Chumm's absence from work on the 4th of August was for reasons unrelated to his medical condition. The Arbitrator can readily understand the perspective of the employer, which obviously is to the effect that the grievor created a medical "appointment" for himself on the very day of his absence, for the sole purpose of obtaining a medical note to justify what in fact was his participation in a concerted work stoppage.

That issue is not without some doubt in the Arbitrator's mind as well. On the whole, however, there are reasons to give the grievor the benefit of the doubt on this aspect of the evidence. It is common ground that Mr. Chumm has suffered a serious medical condition, twice requiring surgery in the recent past. That condition persisted through the time of the concerted work stoppage. In that circumstance, Mr. Chumm's attendance at his doctor's office on the afternoon of the 4th is not an entirely implausible event. Bearing in mind that the Company bears the burden of proof in this matter, the Arbitrator is inclined to find that that burden is not discharged. While there is a basis for lingering doubt, I am prepared conclude, on the balance of probabilities, that the grievor did absent himself during the course of the work stoppage for reasons related to an ongoing medical condition, for which he did apparently attend at his doctor's office. The grievance must therefore be allowed, and the Arbitrator directs that the thirty demerits assessed against Mr. Chumm for his alleged participation in the work stoppage be removed from his record.

The grievor was next disciplined by the assessment of ten demerits for failing to appear for work when called for the 15:00 Lynn Creek yard assignment on August 9, 1999.

It is common ground that Mr. Chumm accepted the call for the assignment at approximately 13:07 on August 9. His scheduled on duty time was 14:50. However, at 15:05 he called the crew office and reported unfit for duty. The grievor relates that his inability to come to work arose as he was driving to his assignment. He explains that he had an emotional breakdown and a bout of crying, while driving in his car, prompted chiefly by the recent death of his brother-in-law, and the difficult circumstances of his sister, left with the sole care of three small children. As another of his sisters had deceased two years prior, and the grievor himself was dealing with an ongoing medical problem, he relates that he felt emotionally overwhelmed by the circumstances. Having reached the park across the street from the yard office, he became concerned that he would not be able to work without breaking down in tears, and therefore decided to book unfit and return home.

It is common ground that the following day Mr. Chumm saw his family physician for his condition of stress. His doctor confirmed that he was feeling the effects of his recent family crisis, and placed him on an authorized medical leave of absence for two weeks. That is confirmed by a doctor's note filed in evidence.

On the whole, the Arbitrator is inclined the accept the grievor's explanation for his failure to appear at work as scheduled on August 9, 1999. In coming to that conclusion I place substantial weight on the fact that the grievor did seek medical assistance for his emotional condition, and that his physician viewed the matter as sufficiently serious as to authorize a medical leave of absence from work. The grievance in relation to the events of August 9, 1999 is 'therefore allowed. The Arbitrator directs that the ten demerits assessed against the grievor's record be removed.

The final discipline against Mr. Chumm arose out of his booking unfit for duty after first accepting a call for work on September 21, 1999. The record discloses that at approximately 23:47 on September 20 Mr. Chumm accepted a call for train A416-51-21, ordered for 01:30 on the 21st. Shortly thereafter, at 00: 18, Mr. Chumm called the crew office and booked unfit.

The grievor explains that he decided to book unfit because he had become mentally preoccupied with family problems relating to his sister and his mother, arising out of his telephone conversation with his sister which occurred at or about the same time he initially accepted the call to work. The Arbitrator has some difficulty with the grievor's actions in that regard. As a general matter, it is implicit within the contract of employment between an individual and an employer that, absent the most extraordinary circumstances, difficulties within the personal life of the employee, or his or her parents and siblings, are not of themselves a justification to book off work without adequate notice. Unfortunately, the grievor's prior record shows a prior patter of discipline for having either reported late or booking unfit after he had accepted a call for work. By way of example, on November 18, 1998 Mr. Chumm was assessed fifteen demerits for booking unfit after he had received a call, a disciplinary sanction which was not grieved. However difficult his family circumstances may have appeared to him as he contemplated going to work in the early morning of September 21, 1999 they were not, in the Arbitrator's judgement, so extraordinary or beyond the burden that an employee can be expected to reasonably handle, so as to justify his booking unfit, particularly after he had already accepted the call.

The issue then becomes the appropriate measure of discipline. As a general matter, the assessment of ten demerits would be entirely appropriate for the grievor's failure to honour the call which he had accepted on September 20, 1999. The assessment of ten demerits would bring the grievor to a total of sixty demerits, and place him in a dismissable position. While his overall work record, and a questionable penchant for emotional self indulgence, might justify that result, the Arbitrator is inclined to ascribe some mitigating value to the fact that Mr. Chumm is an employee of some seventeen years' service, and that on that ground alone he might be deserving of a last chance. On that basis, the Arbitrator is satisfied that it is appropriate to, reduce the ten demerits to five, in the expectation that the grievor will realize the importance of providing faithful attendance at work as a condition of his continued employment.

The Arbitrator therefore directs that the grievor be reinstated into his employment forthwith, without compensation for his wages and benefits lost, and without loss of seniority, with his disciplinary record to stand at fifty-five demerits.

February 12, 2000

MICHEL G. PICHER
ARBITRATOR