

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2999

Heard in Calgary, Wednesday, 11 November 1998

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(BROTHERHOOD OF LOCOMOTIVE ENGINEERS)**

DISPUTE:

Appeal the discharge of Locomotive Engineer L.W. Krahn of Calgary, AB effective July 7, 1998.

JOINT STATEMENT OF ISSUE:

Effective July 7, 1998, Locomotive Engineer L.W. Krahn was discharged for the improper submission of time claims between January 9 and April 29, 1998 due to the overlapping time for final inspection duties (article 5 of 1.2 agreement) and preparatory duties (article 4 of 1.2 agreement) resulting in unauthorized payments under article 11.2 (detention and switching at final terminals and at turnaround points).

The Brotherhood contends that: 1.) Locomotive Engineer Krahn did not receive unauthorized payments under article 11 due to the overlapping of time pursuant to article 4 and article 5 of agreement 1.2. 2.) The Company did not give the grievor proper notice as to their change in interpretation of article 4 and article 5 of agreement 1.2 in regards to the overlapping of time. 3.) The Company did not follow the procedures set out in article 69.5 of agreement 1.2 in regards to the time claims submitted between January 9, 1998 and April 29, 1998. 4.) The Company did not provide any written warning to the grievor that his actions were unacceptable.

It is the Brotherhood's position that the dismissal of Locomotive Engineer Krahn was unwarranted and unreasonable in all the circumstances and that he be reinstated and compensated for all wages and benefits lost.

The Company has denied the Council's contention and declined their request.

FOR THE COUNCIL:

(SGD.) D. J. SHEWCHUK

FOR: GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) KERRY MORRIS

FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

K. Morris	- Human Resources Associate, Great Plains District, Edmonton
A. E. Heft	- Manager, Labour Relations, Toronto
J. Bauer	- Human Resources Business Partner, Great Plains District, Edmonton
S. M. Blackmore	- Labour Relations Associate, Great Plains District, Edmonton
L. Bronson	- District Superintendent, Transportation, Great Plains District, Edmonton

And on behalf of the Council:

B. W. McHolm	- Counsel, Saskatoon
D. J. Shewchuk	- Sr. Vice-General Chairman, Saskatoon
D. Brummund	- Vice-General Chairman, Kamloops
L. W. Krahn	- Grievor

AWARD OF THE ARBITRATOR

The Company alleges that Locomotive Engineer Krahn deliberately engaged in the fraudulent submission of time claims. Specifically it asserts that Mr. Krahn claimed payment twice for the same fifteen minute period in relation to terminal time at the conclusion of his run on train 443 from Calgary to Mirror and preparation time for the commencement of his return run on train 442 from Mirror back to Calgary, on some twenty-eight separate occasions between January 9 and April 29, 1998.

On the evidence presented the position of the Company must fail. It is common ground that for decades the grievor and other locomotive engineers were in fact paid the overlapping time in a manner consistent with the claims made by Locomotive Engineer Krahn. Indeed, it appears that for a substantial period of time such claims were automatically approved by the CAT electronic payment system instituted by the Company in or about 1995. It seems that a change of administrative practice was initiated in 1997 by the introduction of a new computer system which then disallowed the automatic filing of overlapping arbitrary payments.

The record discloses that on some two occasions overlapping claims made by Locomotive Engineer Krahn were disallowed. This was apparently communicated to him electronically by the Company's computer system. This prompted Locomotive Engineer Krahn to telephone a timekeeping clerk to inquire as to why his claim was disallowed. By his account, which the Arbitrator accepts without reservation, the clerk in question was unable to provide a clear explanation. It is not disputed that he was at no time spoken to by any member of management with respect to the overlapping claims which were disallowed.

The evidence establishes that thereafter Locomotive Engineer Krahn continued to submit overlapping claims, although on some occasions such claims may not have been made. By his account the inconsistency in his claims would be explained by the different possible reporting practices of conductors with whom he had occasion to work.

The Company relies in substantial part on a notice issued to running trades employees on September 10, 1997 which reads as follows:

INSPECTION TIME, ARTICLE 5 OF AGREEMENT 1.2

There has been much confusion lately with respect to the proper method of claiming the inspection time referred to in article 5 of agreement 1.2. The following is therefore provided to ensure all locomotive engineers are made aware of how this time is to be claimed.

The time claimed under this provision is to be claimed prior to booking off duty, not in addition to the off duty time, with the appropriate remarks entered with respect to the actual time the inspection was performed. Please note that such claims must not be made using any miscellaneous claim code.

In those situations where a train is tied up en route and the locomotive engineer does not qualify for payment of final terminal time any final inspection performed by the locomotive engineer can be claimed by entering the particulars in the remarks and force routing the time return to the timekeepers by enter the letter "Y" in the field "REMARKS FOR TIMEKEEPER".

With respect, the Arbitrator is not satisfied that the above notice is sufficiently clear to inform employees that overlapping claims for terminal time, claims previously made and approved without incident for decades, were no longer to be acceptable or payable. In my view there is an inherent ambiguity that flows from the reference to times to be claimed "prior to booking off duty" as applied to the circumstances of Locomotive Engineer Krahn in his service on trains 443 and 442 where, it is common ground, he never went off duty. He proceeded directly from one train assignment to another. In the Arbitrator's view, given that the overlapping arbitrary payments had been in place for a substantial number of years, and without commenting on whether the Company's interpretation is correct, any change in payroll practice so substantial must be communicated in clear and unequivocal language to the employees affected. With respect, that is not achieved by the above quoted notice.

What, then, does the evidence disclose? Locomotive Engineer Krahn has been in the service of the Company for twenty-nine years, twenty-three years of which he was employed as a locomotive engineer. During the entire twenty-nine year period he has never once been disciplined for any infraction or misconduct whatsoever. In 1998, as a result of a change in computer systems, without any direct explanation by a supervisor, he continued to submit overlapping time claims for arbitrary terminal time, as he had quite properly done for years. Based on the fact that two of his previous claims had been disallowed, and that on some occasions he did not make the claims, the

Company concluded that when he again made overlapping claims Mr. Krahn was engaging in theft, for which he was dismissed.

I am satisfied that the Company has failed utterly to prove that there was any fraudulent intent on the part of Locomotive Engineer Krahn. It is obviously true that running trades employees are responsible for understanding the procedures for reporting their time worked and claiming their wages, and for applying those procedures with precision and integrity. However, there is also a degree of responsibility on the Company to communicate clearly to the employees affected any changes in long-standing practices or rules. (See, **Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.** (1965), 16 L.A.C. 73 (Robinson)) In the instant case there was no adequate communication of such a change to Locomotive Engineer Krahn. When his two overlapping time claims were disallowed there was no explanation given to him by a Company officer as contemplated under article 69.5 of the collective agreement, which expressly governs the disallowance of time returns. For the reasons touched upon above, the cryptic notice of September 10, 1997 was, in my view, entirely inadequate to place the grievor on notice. Further, the Arbitrator cannot agree with the Company's characterization of the grievor's pattern of time claims. That fact that he may not have claimed the overlapping time on certain occasions is, by his own evidence, entirely consistent with the possibility that different conductors may have had differing practices and applied differing interpretations following the Company's notice of September 10, 1997. Most importantly, for the purposes of this grievance, the Arbitrator is satisfied, well beyond the balance of probabilities, that there was no fraudulent intent on the part of Locomotive Engineer Krahn and that the Company has failed to discharge its burden in this matter.

For the foregoing reasons the grievance is allowed. The Arbitrator directs that the grievor be reinstated into his employment with full compensation for wages and benefits lost, without loss of seniority and with no disciplinary notation.

November 17, 1998

(signed) MICHEL G. PICHER
ARBITRATOR