CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3156
Heard in Calgary, Tuesday, November 14, 2000
Concerning
CANADIAN NATIONAL RAILWAY COMPANY
And
CANADIAN COUNSEL OF RAILWAY OPERATING UNIONS
(BROTHERHOOD OF LOCOMOTIVE ENGINEERS)

DISPUTE:
Appeal the discipline assessed the record of Locomotive Engineer R.A. Saunders of Vancouver, B.C.

JOINT STATEMENT OF ISSUE:
On August 5, 1999, Locomotive Engineer Saunders missed a "boost" at 04:10 for train 202 and at 05:04 for train 412. Locomotive Engineer Saunders was subsequently ordered for his regular turn, ordered 22:15, August 6, 1999 on train 102.

On October 29, 1999 Locomotive Engineer Saunders was requested to provide an employee statement on November 3, 1999, in connection with his alleged participation in an illegal work stoppage from August 3rd to 5th, 1999 at Vancouver, B.C., including the Greater Vancouver Terminal. Locomotive Engineer Saunders was subsequently assessed thirty (30) demerits "for your participation in a concerted job action from August 3rd to August 5th, 1999, at Vancouver, B.C., including the Greater Vancouver Terminal."

The Brotherhood appealed the assessment of discipline to Locomotive Engineer Saunders on the grounds that the Company had violated article 86 of agreement 1.2. In addition, the company has not discharged the burden of proof to establish that Mr. Saunders participated in a concerted job action and in view of the evidence, the Company did not establish such proof.

The Brotherhood therefore requested that the discipline assessed Locomotive Engineer Saunders be removed from his personal record.

FOR THE COUNCIL:	**FOR THE COMPANY:**
(SGD.) D. J. SHEWCHUK	**(SGD.) R. RENY**
FOR: GENERAL CHAIRMAN	**FOR: VICE-PRESIDENT, LABOUR**

RELATIONS

Appearing on behalf of the Company:

R. Reny
S. Michaud
R. Eisenman
S. Ziemer
S. Blackmore
D. C. McDonnell

Appearing on behalf of the Council:

D. E. Brummond
D.J.Shewchuk
G. Broda
B. Shack
R. Ermet

- Human Resources Associate, Vancouver
- Business Partner, Human Resources, Vancouver
- Transportation Supervisor, Vancouver
- Human Resources Associate, Vancouver
- Human Resources Associate, Edmonton
- Legal Counsel, Montreal
- Vice-General Chairman, Kamloops
- Vice-General Chairman, Saskatoon
- General Secretary Treasurer, Yorkton
- Local Chairman, Edson
- Local Chairman, Jasper

AWARD OF THE ARBITRATOR

Upon a review of the material the Arbitrator is satisfied that the Company has established, on the balance of probabilities, that Locomotive Engineer Saunders made himself unavailable for work, deliberately, and in concert with others, as part of an illegal work stoppage on August 4 and 5, 1999.

It is common ground that Mr. Saunders booked off duty at 04:10 P.T. on August 2, 1999. Although there is some difference between the parties as to when he could contemplate his next assignment, it does not appear disputed that it would be a matter of two or three days, and that he could expect not to be called before August 5 or 6, in accordance with the normal movement of the extended run pool in which he was assigned. Article 32.8 of the collective agreement does, however,

make provision for a "boost" when someone within the pool makes himself or herself unavailable.

The evidence confirms that on August 5, 1999 the Company had need of the grievor's services on the basis of a "boost". The Company's crew dispatcher called Mr. Saunders at 03:10 P.T. on August 5, 1999, to offer him an assignment of 05:00, on a boost. The message left by the dispatcher was to the effect that since there was no answer he would have to by-pass him. A similar call re-occurred at 04:04 P.T., for a train scheduled out at 06:00 P.T. Again the crew dispatcher noted on the recording device that he would have to by-pass Mr. Saunders as there had been no answer to the telephone call.

If the evidence of the Company were entirely limited to those two telephone calls, the Arbitrator would have some difficulty concluding that Mr. Saunders actively participated in withholding his availability for service, in concert with others. That is not, however, the totality of the evidence.

The Company adduced further evidence to establish that off duty employees, including the grievor, have developed a pattern of communicating with the Company through the "Crewtalk" or CATS systems, to remain vigilant as to their status in relation to their next assignment. The established pattern for Mr. Saunders during July and August, when he worked in the extended run pool, was to contact Crewtalk an average of two to three times between the completion of his prior tour and his next trip out. The calls which he typically made fell within the range of twenty-one to thirty-nine hours after his booking off from his previous tour of duty. In other words, if he had followed his normal pattern Mr. Saunders would have checked with the Company through Crewtalk, at a minimum, within forty hours of booking off duty at 04:10 P.T. on August 2, 1999. In fact, the evidence discloses that the grievor's next contact with the Company through Crewtalk did not come until some eighty-five hours after he booked off, at 16:18 P.T. on August 5th. Significantly, that call came only after the majority of locomotive engineers has ceased their work stoppage and had booked back on to work. It is notable that shortly following the end of the work stoppage the grievor radically altered his pattern, and registered four calls to Crewtalk before he resumed his next tour of duty, on August 6th.

What conclusions are to be drawn from that evidence? In my view, on the balance of probabilities, the Company is correct in its conclusion that Mr. Saunders did something far out of the ordinary, and deliberately kept himself unavailable for

service by avoiding any contact with the Company during the illegal strike. That, in my view, is the inference most compellingly to be drawn from the totality of the evidence adduced. There is nothing in the investigatory statement of the grievor which would explain his dramatic departure from his normal patter of communication with his employer during the course of the concerted work stoppage on August 4 and 5, 1999.

The Council further makes a preliminary objection with respect to the issue of whether the grievor was denied a fair and impartial investigation, contrary to article 86 of the collective agreement. That objection is based on the fact that, unlike most of the other employees who were investigated, the grievor did not receive notice of his own disciplinary investigation until October 29, 1999, close to three months after the event.

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notice of his own disciplinary investigation until October 29, 1999, close to three months after the event.

The submission of the Council is that the grievor was prejudiced by the delay, and was placed in a position where it would be more difficult for him to recall his own circumstances and provide an accurate statement in defence to the allegation made.

The Arbitrator understands the objection brought by the Council as a matter of principle. The undue delay of an investigation can cause prejudice to an individual, where it can be shown that records or documents have gone missing or have been discarded, or that the individual had little reason to have his or her memory drawn to the event in question, and might therefore be disadvantaged in attempting to recall events. An examination of the grievor's statement, however, reveals no such prejudice or disadvantage. As a general matter, Mr. Saunders was able to recall his activities during the time in question, and did not invoke any specific prejudice or problem beyond asserting that he might better be able to remember if he had received notice of his investigation at an earlier date. On the whole, I am satisfied that there was no material prejudice to the grievor by reason of the date of the notice of investigation which he received. Further, the two day period between the notice and the holding of the investigation gave him a reasonable time to construct his own recall of the events.

What, then, does the evidence disclose? Firstly, by the grievor's own admission, he was in attendance at the union meetings in Vancouver on August 4 and 5, 1999. There is no explanation given for the fact that his telephone was not answered at home at approximately 3:00 and 4:00 a.m. in the morning of August 5, 1999. Nor is there any explanation as to why he did not return calls to the Company when he retrieved the

messages left on his telephone or, perhaps more significantly, why he failed entirely to make any contact with the employer through the Crewtalk system, in a manner consistent with his normal practice, or that his first contact in that regard came only after 85 hours, at the end of the concerted withholding of services. On the basis of all of the foregoing I am satisfied, on the balance of probabilities, that the grievor did participate in the illegal strike by deliberately avoiding contact with the Company and making himself unavailable for service.

The grievance must therefore be dismissed.

November 20, 2000

MICHEL G. PICHER
ARBITRATOR