

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3232

Heard in Montreal, Thursday, December 13, 2001
concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

EX PARTE

DISPUTE:

Appeal of the assessment of twenty (20) demerits to the personal record Locomotive Engineer L.S. Hindle of Kamloops, B.C. for "Failure to complete your tour of duty while operating train Q10451-29 on November 29/99 and failure to follow the instructions of a company officer by not booking unfit for duty when you were aware that you would be unable to complete your assignment."

COUNCIL'S STATEMENT OF ISSUE:

On November 30, 1999, Locomotive Engineer Hindle, in a conversation with the Rail Traffic Controller, indicated that he required relief at North Bend, B.C., as he was unable to continue into Kamloops, B.C. due to fatigue. The Company relieved Locomotive Engineer Hindle at North Bend and he deadheaded to Kamloops.

A subsequent investigation was conducted and the grievor was assessed twenty (20) demerits.

The Brotherhood contends that, first, the discipline was unwarranted under the circumstances and the grievor did not received a fair and impartial hearing as contemplated in article 86 of collective agreement 1.2.

The Company has declined the Brotherhood's appeal.

FOR THE COUNCIL:

(SGD.) D. E. BRUMMUND

FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

S. MacDougald – Manager, Labour Relations, Montreal
D. Coughlin – Consultant

And on behalf of the Council:

D. E. Brummund – Sr. Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, beyond the balance of probabilities, that Locomotive Engineer Hindle considered himself to be in a physical condition of rest deficit which would not allow him to complete the extended run for which he was to be called on November 29, between Thornton Yard and Kamloops. It is clear from the content of telephone conversations between the grievor and the manager crew utilization at the Crew Management Centre that Locomotive Engineer Hindle did feel, in light of the lack of sleep which he had in the previous forty-eight hours, that he would not be able to operate through the full length of his run. In fact, as matters developed he did book off for what he described as an unsafe situation, having taken and handled his train to North Bend, at 03:48 on the morning of November 30. That circumstance occasioned a delay of the train.

The Arbitrator does not dispute the submission of the Brotherhood to the effect that a running trades employee is to be the judge of his or her own fitness to work. Moreover, this Office has confirmed the importance of employees being allowed to book off an assignment by reason of fatigue, or anticipated fatigue, without fear of reprisal (**CROA 1759, 1854, 2248 and 2791**). By the same token, it is incumbent upon an employee to make a realistic assessment of his or her condition, regard being had to their state of rest and anticipated ability to be able to be physically alert and able to complete the full assignment which they undertake. I am satisfied on the evidence before me that Locomotive Engineer Hindle was of the view, quite correctly, that the four hours' sleep which he had had in the previous forty-eight hours would be insufficient to allow him to undertake the run in question, which could involve up to twelve hours' work. It appears clear from the record, however, that he declined to book unfit, as he wished to avoid the loss of earnings which would be incurred if he was compelled to deadhead back to his home terminal. That is obviously not a valid consideration for undertaking work, which by its nature is highly safety-sensitive, when an individual knows, or reasonably should know, that he or she will almost surely become beset by fatigue and will be unable to complete the task.

I am therefore satisfied that the grievor was liable to the assessment of discipline in the circumstances disclosed. Nor can I accept the suggestion of the Council

that the delay between the incident and the Company's investigation, which was held over beyond the Christmas period, constitutes a violation of the protections of article 86 of the collective agreement, or the standards of a fair and impartial investigation. However, in view of the grievor's record and long service, which dates from July 11, 1976, the Arbitrator is satisfied that the assessment of ten demerits, in the circumstances, would have been sufficient to bring home in a corrective way the need for Locomotive Engineer Hindle to respect his obligation not to undertake an assignment when he had good reason to know that he would not be able to complete it.

The grievance is therefore allowed, in part. The Arbitrator directs that the discipline assessed against the grievor be reduced to ten demerits.

December 19, 2001

(signed) MICHEL G. PICHER
ARBITRATOR