CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3283

Heard in Montreal, Wednesday, 11 September 2002

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

The imposition of 30 demerits on May 19, 2002 on Locomotive Engineer Steve Birtles (pin 858038) for an issue regarding a time claim for December 31, 2001; the imposition of 20 demerits on May 28, 2002 on Locomotive Engineer Steve Birtles for an alleged speeding incident on April 23, 2002; and the discharge of Mr. Birtles on May 28, 2002 for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

On December 31, 2001 Mr. Birtles submitted a claim for miles to Sarnia. On January 04, 2002 the Company cut his ticket and claimed miles were not paid. After discussions with representatives of the Brotherhood, Mr. Birtles was persuaded that he was not entitled to the claim. As such, he did not pursue the matter further through the grievance procedure under the collective agreement.

On April 26, 2002 the grievor was required to attend a formal investigation respecting his claim. On May 19, 2002 he was assessed 30 demerits for failure to utilize the "IP process" with respect to the claim for mileage.

On April 23, 2002 the grievor was employed as a locomotive engineer on train L53631-23 between Niagara Falls and Fort Erie. On May 24, 2002 Mr. Birtles was required to attend a formal investigation in respect of an allegation that he had been speeding on April 23, 2002. On May 28, 2002, the grievor was assessed 20 demerits for speeding and discharged for accumulation of demerits.

Both decisions to impose demerits and the decision to terminate the grievor's employment have been grieved by the

Brotherhood, and have proceeded through the grievance procedure without resolution satisfactory to either the Brotherhood or the grievor.

With respect to the first 30 demerits, it is the Brotherhood's position that since Company representatives advised the grievor to claim the miles on December 31, 2001 the Company is estopped from disciplining the grievor for doing so.

Further, since the Company cut the grievor's ticket on January 4, 2002 and that decision was not challenged by the grievor, it is not proper for the Company to take action approximately five months later.

The Company's delay in acting on the December 31 incident caused significant prejudice to the grievor in relation to the second incident, since at the time of the alleged incident he was not aware that his employment was in grave jeopardy as a result of the accumulation of demerits.

Finally, the Brotherhood contends that the Company's delay in both instances denied the grievor a fair and impartial hearing.

The Company disagrees with the Brotherhood's position on both issues. Mr. Birtles was afforded a fair and impartial hearing for his time claim on December 31, 2001 and his speeding incident on April 23, 2002. Further, that discipline imposed was reasonable and warranted in both of these cases. As a result, Mr. Birtles was discharged for accumulation of demerits in excess of 60 as per Company policy. For these reasons the grievances as submitted were declined.

FOR THE BROTHERHOOD:	**FOR THE COMPANY:**
(SGD.) RICHARD DYON	**(SGD.) J. P. KRAWEC**
GENERAL CHAIRMAN	**FOR: SR. VICE-PRESIDENT, EASTERN DIVISION**

There appeared on behalf of the Company:

J. Kramec	– Manager, Human Resources, Toronto
Wm. McMurray	– Counsel, Montreal
W. A. Glass	– District Engine Service Officer, Toronto
C. Hicks	– Crew Supervisor, Moncton
A. A. Marquis	– Superintendent, Southern Ontario Zone, Sarnia
B. L. Olson	– Director, Human Resources, Toronto
M. A. B. Brinkley	– General Superintendent, Sarnia

And on behalf of the Brotherhood:

J. C. Morrison	– Counsel, Ottawa
R. Dyon	– General Chairman, Montreal
R. Caldwell	– Vice-General Chairman, Montreal
P. Vickers	– Vice-General Chairman, Montreal
S. Birtles	– Grievor

AWARD OF THE ARBITRATOR

This arbitration concerns two items of discipline assessed against Locomotive Engineer Steve Birtles of Niagara Falls. The first is the imposition of thirty demerits for a time claim in relation to December 31, 2001. The second is the assessment of twenty demerits for an alleged speeding incident on April 23, 2002. As the Brotherhood does not substantially challenge the merits of the discipline for the speeding incident, the issue of substance is the thirty demerits assessed against Mr. Birtles for his time claim of December 31, 2001.

The facts in relation to the time claim are not in dispute. On December 31, 2001 the grievor received a call to proceed to Buffalo, New York to pick up train 331 and to operate it to Fort Erie, where it was to be left for a Sarnia crew which would then operate it to Sarnia. Locomotive Engineer Birtles was then to taxi back to Niagara Falls and go off duty, being paid on the basis of turnaround service from Niagara Falls, returning to Niagara Falls.

In his telephone conversation with the crew dispatcher Mr. Birtles took issue with the method of payment proposed. He asserted that he should be entitled to take the train through to Sarnia, and that he would be making a claim for the road miles to Sarnia. During his brief conversation with the crew dispatcher Mr. Birtles registered his objection to the type of assignment being given to him, and what he believed was his entitlement to handle the train in question through to Sarnia. He stated to the dispatcher that "… if I'm called for 331 I'm going to get paid the miles to Sarnia". Shortly thereafter in the conversation he said "… if it's 331, I'm putting the miles in to Sarnia." As the dispatcher indicated that that was not the designation of his assignment and that he would not be paid as he wished, he indicated he requested to speak to the supervisor, which he then did. The grievor then reiterated his belief to the crew supervisor that he should be entitled to take the train through to Sarnia, and to be paid accordingly. Asserting that "…

you can't order me for half a train … you can't take me off a train half way." Mr. Birtles reiterated his belief that he was entitled to be assigned through to Sarnia and would be claiming the mileage to Sarnia accordingly. The crew supervisor disagreed and finally stated "Claim them if you think, but we are showing you on a turnaround profile." A somewhat fruitless discussion and standoff continued between the grievor and Crew Supervisor Colleen Hicks. During that brief continuation of the conversation Ms. Hicks reiterated "… well claim them if you think you are, but you' re ordered turnaround." The grievor would not relent, and concluded the conversation by saying "… okay, well, I'll put in the miles to Sarnia and we'll get paid for it that way because you can't just relieve a train."

It is common ground that based on the conversation that she had with Mr. Birtles Ms. Hicks put an alert in place to review the time claim that he would eventually submit for train 331. In fact Mr. Birtles did submit a time claim for the mileage to Sarnia, and that claim was immediately cut by the Crew Management Centre, as reflected in a letter dated January 4, 2002, advising the grievor that his claim for constructive miles had been reversed. In the result, the monies claimed were never paid to the grievor, and he was advised in the letter from the Crew Management Centre that he should in the future utilize the "IP" process when dealing with a doubtful or contentious claim.

Some four months later, on April 23, 2002 Mr. Birtles was provided a formal notice to appear for an investigation in relation to his claim for December 31, 2001. Following a disciplinary investigation conducted on April 26, 2002 he was assessed thirty demerits for what the Company characterized, during the course of the arbitration hearing, as an attempt to defraud the Company of wages through the deliberate filing of a wage claim for constructive miles on the day in question. It does not appear disputed that after his claim had been cut Mr. Birtles consulted his union general chairman, and was eventually satisfied by the explanation that he was not in fact entitled to the mileage he had claimed. In the result, he did not file a grievance to claim the miles which were the subject of the dispute between himself and the crewing dispatch supervisor.

On a careful review of the evidence the Arbitrator cannot sustain the position of the Company that the grievor can be said to have attempted to defraud the employer in the circumstances disclosed. At most what the case reveals is that, for reasons he

best understands, Mr. Birtles had an arguably idiosyncratic understanding of his entitlement to wages for the assignment he was being given on December 31, 2001. As unfounded as his view may have been given that he was apparently not qualified to operate on the territory between Fort Erie and Sarnia, the fact remains that there was nothing surreptitious or consistent with any attempt to deceive the Company in the course of conduct followed by Mr. Birtles. As counsel for the Brotherhood stresses, if the grievor had sought simply to file a false wage claim in hopes of being paid the amounts claimed, he might have done so deceitfully by saying nothing to either the crew dispatcher, much less to the crew dispatching supervisor. On the contrary, however, he made it clear to both the dispatcher and the supervisor that he fully intended to make the claim for the constructive miles to Sarnia, as he believed that he had the right to do so under the terms of the collective agreement. It was that strong assertion which in fact caused the Company to place a watch on his claim and have it cut from the time it was submitted. I must agree with counsel for the Brotherhood that what the evidence reveals cannot be fairly characterized as an attempt to defraud or deceive the Company. There was no attempt at deception to the extent that the grievor's position was stated openly and repeatedly, and he placed both the dispatcher and the dispatcher's supervisor on notice that he intended to claim the constructive miles to which he then believed he was entitled.

Nor can the Arbitrator place great weight on the Company's suggestion that the grievor sought to hide his actions by not resorting to the "IP" process, a procedure whereby computer entries can be made by an employee who is in doubt about the merits of a particular time claim. While the Arbitrator has been referred to no provision of the collective agreement nor to any Company directive requiring employees to utilize the IP process, the evidence of the Brotherhood, supported by the comments of a representative of the United Transportation Union, is that the IP process has largely fallen into disuse by employees.

On the whole the Arbitrator is satisfied that the Company did not have just cause to conclude that the grievor attempted to submit a fraudulent or deceptive wage claim in relation to the work which he performed on December 31, 2001 on train 331. On the contrary, he was at all times open with the dispatcher and dispatch supervisor with whom he was involved, and clearly stated what he intended to do. His open and repeated comments in

that regard in fact allowed the Company to intercept his claim and cut it from the outset. In the Arbitrator's view the actions of the grievor cannot be fairly characterized as fraud, deceit, or even sharp practice.

In light of the foregoing conclusion it is unnecessary for me to make determinations with respect to collateral objections raised by the Brotherhood, including what it characterizes as the unacceptable four month delay in instituting the disciplinary investigation against the grievor, the failure to provide full documentation at the disciplinary investigation and the alleged discriminatory treatment of Mr. Birtles as compared with a similarly situated employee who did not utilize the IP process.

In the result, the Arbitrator finds and declares that the Company did not have cause to assess thirty demerits against the grievor for his actions in relation to his time claim of December 31, 2001. The Arbitrator directs that the thirty demerits assessed against him be removed from record forthwith. The removal of the thirty demerits would place the grievor's record at forty-five demerits, including the twenty demerits for the speeding violation which occurred on April 23, 2002. I am satisfied that the twenty demerits are within the range of appropriate discipline for the speeding infraction. In the result, therefore, the grievor should not have been terminated and the Arbitrator therefore directs that he be compensated for all wages and benefits lost, with his disciplinary record to stand at forty-five demerits.

September 13, 2002 **(original signed by) MICHEL G. PICHER**
ARBITRATOR