CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2084

Heard at Montreal, Tuesday, 11 December 1990

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Assessment of discipline to 35 Hornepayne based employees for participation in an illegal work stoppage.

JOINT STATEMENT OF ISSUE:

On August 14, 1989, the following employees booked sick at Hornepayne:

J.I. Armstrong	D.C. Harasymiw	S.R. MacLean
J.A. Benner	D.W. Johnson	D.T. Neilson
G. Decicco	S.G. Lafleur	D.B. White
R.R. Doucette	M.E. Lewis	B.L. Wilson
J. R. Grigg	S.M. Lone	

On August 14, 1989, the following Hornepayne-based employees booked sick at the away-from-home terminal of Armstrong:

M.J. Berube	C.J. Granger	M.J. Telford
T.C. Brown	A.R. McDavid	D.X. Genereux
J.D. Sargent		

On August 15, 1989, the following employees booked sick at Hornepayne:

R.C. Brown	B.J. Kirkbride	E.S. Strisovich
L.E. Downey	M.W. Kowzlowski	M.L. Gainford
N.L. Lefever		

On August 15, 1989, the following employee did not respond to a call at Hornepayne:

M.A. Loder

On August 15, 1989, the following Hornepayne-based employees booked sick at the away-from-home terminal of Foleyet:

D.F. Griffin	D.W. Patterson

On August 15, 1989, the following Hornepayne-based employees booked sick at the away-from-home terminal of Armstrong:

T.W. Daley	W.R. Malloy	R.G. Parenteau
V.N. Luke		

On August 17, 1989, the Canada Labour Relations Board declared that certain members of the United Transportation Union engaged in an unlawful strike at Hornepayne, Armstrong and Foleyet on August 14 and 15, 1989 by ceasing in a concerted way to carry out or perform their duties in a normal fashion.

Following an investigation, the Company assessed discipline to all of the aforesaid employees for participation in an illegal work stoppage. Each employee was assessed 30 demerit marks except for S.G. Lafleur and S.R. MacLean who were each assessed a 30 day suspension.

The Union appealed the assessment of discipline on behalf of the aforesaid employees on the grounds that the Company did not establish that the employees participated in an illegal strike; that the Company did not ask for medical certificates attesting to illness; that discipline was assessed in a discriminatory fashion; and that the Company had encouraged the employees to engage in an illegal strike.

The Company denied the Union's appeal.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) T. G. HODGES	**(SGD.) M. DELGRECO**
GENERAL CHAIRPERSON	**FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

J. Luciani	– Counsel, Montreal
S. F. McConville	– System Labour Relations Officer, Montreal
J. B. Bart	– Manager, Labour Relations, Montreal
M. Hughes	– System Labour Relations Officer, Montreal
A. Heft	– Manager, Labour Relations, Toronto
M. Fisher	– Co-Ordinator Special Projects, Montreal
R. S. Bart	– Terminal Manager, Train & Engine Service, Hornepayne
J. Rousseau	– Assistant Superintendent, Hornepayne
J. Kelly	– Manager, Train Service, Hornepayne
M. Priegert	– Manager, Train Service, Hornepayne
B. Sims	– Assistant Manager, Crew Management Centre, Toronto

And on behalf of the Union:

M. Church	– Counsel, Toronto
T. H. Hodges	– General Chairperson, St. Catharines
R. Beatty	– Local Chairperson, Hornepayne

AWARD OF THE ARBITRATOR

It is not disputed that an unlawful strike occurred at Hornepayne, Armstrong and Foleyet on August 14 and 15, 1989, resulting in an unchallenged declaration, as well as a cease and desist order, issuing from the Canada Labour Relations Board on August 17, 1989. Following subsequent disciplinary investigations some thirty-five members of the Union, all of whom booked sick on the 14th and 15th, were assessed thirty demerits for their participation in the work stoppage, save for two employees, who were assessed thirty day suspensions by reason of the already precarious state of their demerit count.

In many respects the circumstances of this case parallel those disclosed in **CROA 1911**, where the assessment of thirty demerits against thirteen locomotive engineers who booked sick over a two day period in a concerted and unlawful work stoppage were found to be deserving of discipline. The observations made in that award by the arbitrator concerning the standard of proof in such cases, and the gravity of the conduct impugned need not be repeated here. I am satisfied, that as a general matter, that those principles apply in the instant case.

The material before the Arbitrator reveals, without substantial controversy, that over the course of a two day period all of the employees who are the subject of this grievance booked sick. That action, combined with the higher than normal rate of employees from the same bargaining unit booking rest, effectively deprived the Company of crews to operate trains to and from Hornepayne over a two day period.

The Union does not dispute that an unlawful strike occurred and that, as a general matter, such conduct merits discipline. It maintains, however, that the Company was discriminatory in its approach to identifying and penalizing employees. Firstly, its counsel submits that it unfairly isolated or singled out members of the Union's bargaining unit for investigation and discipline, taking no similar steps against members of the Brotherhood of Locomotive

Engineers. Additionally, he argues that the Company overlooked employees in both the trainmen's and enginemen's bargaining units who made themselves unavailable for duty by booking rest during the two days in question. Relying in part on **CROA 610**, counsel for the Union submits that the evidence relied upon by the Company is generally unreliable, and that the discipline imposed was discriminatory in the circumstances.

With respect, the Arbitrator cannot accept these submissions. Firstly, in relation to the actions of the locomotive engineers, it appears that no more than two members of that bargaining unit booked sick during the period in question. Moreover, it is not contested that during that critical time the Company had the assurances of the officers of the Brotherhood of Locomotive Engineers that it would not support the work stoppage. That undertaking was borne out in fact, as it is not disputed that trains continued to run during the illegal strike at Hornepayne, operated in each case by a locomotive engineer assisted by management or non-scheduled personnel. In the circumstances the Arbitrator is not prepared to fault the Company for concluding that the illegal work stoppage was rooted in the actions of the members of a particular union, in consequence of which it directed its efforts at investigation and discipline towards that group.

A similar conclusion may be drawn with respect to the Union's argument that the Company failed to investigate both enginemen and trainmen who booked rest on the two days in question. The Arbitrator accepts the position of the Company that, to the extent that employees have the right to book rest, it decided to avoid the problems of proof that would arise in a gray area, and chose to investigate only those employees who booked sick, on the basis that more reliable inferences could be drawn in respect of their actions. The Arbitrator cannot find that response to be discriminatory or unreasonable in the circumstances. While I accept the principles underlying the Union's concern, and appreciate the importance of the principle that like cases should attract like discipline, I can find no significant violation of that rule in the instant case. The fact that certain employees may have escaped detection and discipline does not, of itself, demonstrate unfairness or discrimination on the part of the Company. Employees contemplating the disruption of a widespread illegal work stoppage must appreciate that, being attacked by a meat cleaver, the Company is not compelled to defend itself only with a scalpel.

The fact remains, however, that the Company must discharge the burden of proof which is upon it in respect of each of the employees disciplined. Upon a review of the material filed, the Arbitrator is satisfied that that onus is not met in respect of two employees, Ms. Julia Benner and Ms. Nancy Lefever. The record discloses that Ms. Benner was pregnant at the time of the incident in question, that she had been suffering from chronic morning sickness, and that her condition had caused her to book sick on August 5, 6, 9, 10, 11 and 13. In these circumstances I am satisfied that, on the balance of probabilities, when she booked sick on August 14, 1989 she did so for valid medical reasons, as she attested during the course of her investigatory statement.

Trainperson Lefever produced a medical certificate from her dentist establishing that she had had a difficult extraction on August 10, 1989, as a result of which she suffered considerable discomfort and swelling. In the circumstances I accept her own explanation that she was off sick on the 11th and 12th because of the tooth, and that following a single tour of duty on the 13th, she again booked sick on the 14th for the same reason. In the Arbitrator's view the Company should have given her the benefit of the doubt in those circumstances, and I am satisfied, on the balance of probabilities, that her explanation is to be believed.

One final aspect of the case raised by the Union should be touched on briefly. In its brief the Company argues that the Union's leaders have given open encouragement to illegal strikes, in support of which it cites a letter dated January 12, 1990 written by General Chairperson Tom Hodges. A careful reading of the entirety of the letter reveals that Mr. Hodges expressed himself, in a letter addressed as "personal and confidential", to the Vice-President of the Company's Great Lakes Region, stating in part that he has been on record as advocating work stoppages for bargaining leverage. Under the **Canada Labour Code** work stoppages, like Company lockouts, are a lawful activity when implemented in a timely fashion. Nowhere in the letter is there any suggestion that the General Chairperson advocates or would support untimely and unlawful strikes contrary to the provisions of the Code. There is nothing inappropriate in the comments of Mr. Hodges, although the Arbitrator can apreciate the concerns of counsel for the Union, who argues that there is much that is inappropriate and unfair in their out-of-context use in the Company's brief in the instant case. Suffice it to say that the impugned passage is unfortunately uncharacteristic of the high level of integrity normally reflected in the Company's submissions to this Office.

For all of the foregoing reasons the grievance is dismissed, save as against Employees Benner and Lefever. The thirty demerits assessed against them shall be removed from their records forthwith.

December 14, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR