CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3159

Heard in Calgary, Tuesday, November 14, 2000

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

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

DISPUTE:

Appeal of the forty-five (45) day suspension of Locomotive Engineer K.W. Biernacki of Edson, AB for deliberately altering time claim information to obtain additional pay to which not entitled on July 1 and August 3, 1998 and the Company's declination of his time claims, which were submitted in accordance with article 79 of agreement 1.2 for July 1 and August 3, 1998.

JOINT STATEMENT OF ISSUE:

On July 1, 1998, a statutory holiday, Mr. Biernacki was called as the locomotive engineer on train 790, straightaway service, Edson to Leyland. He subsequently returned on train 791 from Leyland to Edson, also in straightaway service. On August 3, 1998, also a statutory holiday, Mr. Biernacki was called as locomotive engineer on a deadhead, straightaway service, Edson to Leyland. He subsequently returned on train 791 from Leyland to Edson, also in straightaway service. Upon completion of both trips Locomotive Engineer Biernacki submitted his time claims along with a duplicate time claim, in accordance with article 79 (General Holidays), for his tour of duty from Edson to Leyland on July 1 and August 3, 1998. On November 5, 1998, Mr. Biernacki was served a notice to appear for an employee investigation for his alleged input of a wrong and inaccurate time claim for his tours of duty on July 1 and August 3, 1998.

Following the investigation process, the Company assessed Locomotive Engineer Biernacki a forty-five (45) day suspension also recovering those monies they felt had been paid incorrectly.

The Brotherhood contends that: **(1.)** Locomotive Engineer Biernacki did not receive additional pay to which he was not entitled for his statutory holiday claims of July 1 and August 3, 1998. **(2.)** The Company did not follow the procedure set out in article 69.5 of agreement 1.2 in regards to his time claims of July 1 and August 3, 1998. **(3.)** The Company did not provide any written warning to the grievor that his actions were unacceptable and/or the ramifications of his actions. **(4.)** The Company is estopped from changing its long-standing practice of compensating locomotive engineers at the Edson Terminal in the manner claimed by Locomotive Engineer Biernacki. **(5.)** Other locomotive engineers have submitted identical claims without question.

The Brotherhood therefore requested that the discipline assessed Locomotive Engineer Biernacki be removed from his personal record and that he be compensated for all wages and benefits lost including his statutory claims of July 1 and August 3, 1998.

The Company denies the Brotherhood's contentions and declines the Brotherhood's appeal.

FOR THE COUNCIL: **FOR THE COMPANY:**

(SGD.) D. J. SHEWCHUK **(SGD.) S. BLACKMORE**
FOR: GENERAL CHAIRMAN **FOR: VICE-PRESIDENT, LABOUR RELATIONS**

Appearing on behalf of the Company:

S. Blackmore	– Human Resources Associate, Edmonton
R. Reny	– Human Resources Associate, Vancouver
S. Michaud	– Business Partner, Human Resources, Vancouver
S. Ziemer	– Human Resources Associate, Vancouver
B. Cox	– Transportation Supervisor, Kamloops
I. Panesar	– Audit Officer, Edmonton
D. C. McDonnell	– Legal Counsel, Montreal

Appearing on behalf of the Council:

D. J. Shewchuk	– Vice-General Chairman, Saskatoon
D. E. Brummond	– Vice-General Chairman, Kamloops
G. Broda	– GST, Yorkton
B. Shack	– Local Chairman, Edson
R. Ermet	– Local Chairman, Jasper

AWARD OF THE ARBITRATOR

The Company assessed a forty-five day suspension against Locomotive Engineer Biernacki by reason of what it assessed to be his deliberate intent to fraudulently inflate his entitlement to statutory holiday pay on two occasions, in July and August of 1998.

Upon a review of the evidence and submissions of the parties the Arbitrator is satisfied that the grievor did claim his statutory holiday pay in a manner inconsistent with the Company's expectation, and with his obligations under the collective agreement. That, indeed, was his own admission during the course of the Company's disciplinary investigation. Mr. Biernacki apologized for his error and asked how he could compensate the Company for any overpayment which he might have received.

However, at the arbitration hearing the Council sought to qualify the grievor's admissions at the Company's investigation, relating that his union representative counselled him to admit to having done wrong purely for the purpose of "saving his job", and minimizing the discipline which would result. That strategy obviously contemplated holding back at the investigation and taking a different position months later at arbitration, arguing for the first time before the Arbitrator that an unwritten understanding and practice of long-standing had in fact been followed. That, in effect, is the substance of the Council's submission in these proceedings.

The course followed by the Council raises serious concerns. As reflected in prior awards of this Office, the expedited system of arbitration within the railway industry is substantially predicated upon the integrity of the disciplinary investigation process. It is at that stage that an employee who has a defence to his or her impugned action is expected to make their full defence to the employer, and to present any rebuttal evidence or submissions necessary for that purpose. In the instant case, however, nothing was said to the Company at the stage of the disciplinary investigation to suggest that Mr. Biernacki operated pursuant to his understanding of a specific local union-management agreement. The most that the grievor's statement contains is a reference to the fact that his claim was consistent with "a practice of several Edson employees over a period of many years." While he relates that similar time claims submitted in the past had apparently been allowed by "ticket checkers", there was no attempt on the part of the grievor or his union to place in evidence what is now argued at arbitration, namely a specific agreement between the Company and local union officials, allegedly dating back to 1984, whereby such a practice would be tolerated. In these circumstances I must conclude that the Council waived its right to plead such an agreement. To conclude otherwise would prejudice the Company by imposing a financial liability it was deprived of considering by virtue of the Council's original silence.

The real issue in these proceedings then becomes the appropriate measure of discipline. While I am not satisfied that the grievor can be said to have acted without fault, the totality of the evidence does present something less than a deliberate and calculated fraud on the part of the grievor. The Company's investigation does indicate that, rightly

or wrongly, Mr. Biernacki operated under what he believed to be a colour of right at the time he made his claim. Objective evidence tabled by the Company confirms that there is a history of similar claims by other employees, dating back to 1995. There was, it appears, some degree of confusion at Edson with respect to the principles which should govern the time claim of an employee in service to and from Leyland for the period immediately preceding a statutory holiday. While that confusion does not excuse the grievor's actions, it is a mitigating factor to be weighed in the case at hand.

Given those considerations, what would have been an appropriate measure of discipline? Firstly, I am prepared to accept that a suspension was appropriate. In assessing the length of suspension, however, careful consideration must be given to the length and quality of the grievor's prior service. It is common ground that since his date of hire, July 24, 1975, Mr. Biernacki was disciplined only once, incurring ten demerits for a minor rules infraction in July of 1981. In the Arbitrator's view, in light of such a near exemplary record, the assessment of a forty-five day suspension for a first infraction is questionable, particularly given that similar claims made by other employees had been allowed in the past. Based on what emerged at the arbitration hearing, with respect to the belief of the grievor and his union representative that a specific agreement had been in place at Edson since 1984 which allowed for the type of claim which he made, a properly pleaded colour of right defence should have mitigated the result to a fifteen day suspension. I therefore direct that his record be corrected to substitute a fifteen day suspension for the forty-five day suspension assessed.

I do not, however, consider that this is an appropriate case to order compensation for the wages and benefits which Mr. Biernacki lost. In light of the grievor's admission to the Company during the course of his disciplinary investigation that he had done wrong, and the failure on his part, and on the part of his union representative, to plead the alleged 1984 agreement, to now order compensation back, based on arguments held in reserve by the Council, would be unfair to the employer, for the reasons touched upon above.

The grievance is therefore allowed, in part. The Arbitrator directs that Mr. Biernacki's record be corrected to reflect a fifteen day suspension, but without compensation for any wages and benefits lost. For the purposes of clarity, the Arbitrator makes no finding as to the status of the alleged 1984 agreement. It is to be hoped, however, that the parties will mutually address that issue for future reference.

November 20, 2000

(signed) MICHEL G. PICHER
ARBITRATOR