

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 193

Heard at Montreal, Tuesday, December 9th, 1969

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION (T)

DISPUTE:

Claim of Brakeman J.A. Ferguson, Kamloops, for a total of 3,018 miles lost account held out of service for investigation from December 2nd, 1968 to December 23rd, 1968 and loss of General Holiday pay for December 25th, 1968, and January 1st, 1969, also removal of 10 demerit marks debited to his record for violation of Rule 105, Uniform Code of Operating Rules, Thompson, Mileage 85.6, Thompson Subdivision, November 28th, 1968.

JOINT STATEMENT OF ISSUE:

Brakeman Ferguson was head-end Brakeman on Extra 5509 West when it collided head-on with Extra 8714 East when both trains were headed into the siding at Thompson by the Train Dispatcher who controlled train movements in this area of Centralized Traffic Control.

An investigation was held and written statements were taken from Ferguson on November 29th, December 5th and December 18th at which time it was alleged that Rule 105 had been violated by the head-end crew members on both trains and that Ferguson had failed to protest the violation. At no time did Ferguson admit to contributing to a violation of Rule 105, but on December 23rd 1968, he was returned to service with 10 demerit marks debited to his record for violating Rule 105 which reads:

105. Unless otherwise provided by signal indication, trains or engines using other than a main track must proceed at restricted speed.

The Union contends that Ferguson was held off unnecessarily in connection with the investigation and that his responsibility for violation of Rule 105 was not established by the evidence produced and requests full compensation for all miles lost and removal of demerit marks account violation of Article 32, Clauses (d) and (e) of the Collective Agreement which reads:

(d) An employee will not be disciplined or dismissed until after investigation has been held and until the employee's responsibility is established by assessing the evidence produced and no employee will be required to assume this responsibility in his statement or statements. An investigation shall be held and the employee advised in writing of the decision within 15 days time from the time the report is rendered, except as otherwise mutually agreed.

(e) An employee is not to be held off unnecessarily in connection with an investigation. Layover time will be used as far as practicable. An employee who is found blameless or an employee called by the Company as a witness, will be reimbursed for time lost, in accordance with Article 27 Clause (a), paragraphs (1), (2) and (4).

The Company contends the discipline assessed Brakeman Ferguson was warranted and that he was not held off unnecessarily for investigation and decline to remove the discipline or reimburse him for miles lost.

FOR THE EMPLOYEES:

(SGD.) S. McDONALD
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) R. S. ALLISON
REGIONAL MANAGER – PACIFIC REGION

There appeared on behalf of the Company:

J. G. Benedetti – Supervisor Personnel & Labour Relations, Vancouver
 W. R. McCracken – Superintendent, Vancouver

And on behalf of the Brotherhood:

S. McDonald – General Chairman, Calgary
 R. T. O'Brien – Vice Chairman, Calgary
 J. Ferguson – Local Chairman, Kamloops

AWARD OF THE ARBITRATOR

As appears from the Joint Statement, there are two issues to be determined: (1) whether the grievor was subject to discipline; and (2) whether he was improperly held out of service in connection with the investigation.

On the first issue, it is clear that this was a situation in which Rule 105 applied, and the grievor's train was required to proceed at restricted speed. The question is whether it was in fact travelling at restricted speed at the material times. There is no doubt that train 8714 east had been moving at excessive speed and was still moving at the time of the collision. Nevertheless, train 5509 was considerably heavier, and, although no doubt moving very slowly at the point of impact (if moving at all) might well have forced train 8714 backward following the collision. Much was made of a broken rail tie found under the engine of train 5509. It was argued that the tie indicated the point of impact, and showed that train 5509 must have continued to move following the collision. The union, however, relies on the manner in which the tie was broken, which might indicate that it was broken by a vehicle headed east. I do not find this isolated piece of evidence persuasive of either view. More significant, in my opinion, is the presence, under the carriage of train 5509, of debris from the engine of train 8714. The debris was of such a nature and size that its presence could not be accounted for as having been carried forward by its own momentum following the collision. In my view, it establishes that train 5509 must have been moving at the time of the collision. The question is, however, whether it was moving at restricted speed prior to the collision.

“Restricted speed” is defined in the Uniform Code of Operating Rules as follows:

RESTRICTED SPEED – A speed that will permit stopping within one-half the range of vision.

Where ABS rules, interlocking rules or signal indications require movement at restricted speed, such movement must be made at a speed that will permit stopping within one-half the range of vision, also prepared to stop short of switch not properly lined, and be on the lookout for broken rail, and in no case exceeding

SLOW SPEED

Slow Speed – A speed not exceeding fifteen miles per hour;

It seems clear that train 5509 did not exceed slow speed at any material time. According to the engineman's statement, as the train entered the siding its speed was not in excess of 5 mph. The brake was applied as it proceeded through the siding and speed was reduced to 3 or 4 mph. All members of the head-end crew, including the grievor, caught a glimpse of an approaching eastward train about 15 car lengths ahead, but it was a moment or two later when they realized it was in the same siding. The brakes were at once applied in emergency. At the first investigation it was the engineman's statement that train 5509 was stopped when the collision occurred. Subsequently, however, in view of the evidence of the debris and broken tie, he came to the conclusion that the train had been moving at the time, and in a later statement acknowledged that the requirements of restricted speed were not adhered to. The fireman (who was actually operating the engine at the material times) ultimately made a similar acknowledgement. The grievor, however, is not bound by these acknowledgements, and has continued in the opinion that the train was travelling at restricted speed.

On the grievor's own account, it was determined that the approaching train was in the same siding when it was at a distance of about twelve car lengths. This, it is admitted, would mean that the train should not have been travelling faster than a speed which would enable it to stop within six car lengths. The oncoming train was observed when the

leading unit of the grievor's train was in the vicinity of the west end of the Thompson back track. At that point, however, it could not be determined that the oncoming train was on the same track. This was possible some two or three car lengths further west. This was at a distance less than three hundred feet from the point of impact, and from the evidence, it is clear that the oncoming train was less than six hundred feet away at that time. It is clear that the train could not be brought to a stop within one-half that distance.

It is my conclusion on all of the evidence that there was a violation of Rule 105. While the grievor's train was not much in excess of what was its proper speed in the circumstances, it was sufficiently so to have been a contributing factor in the accident. Some discipline was proper, and I would not disturb the assessment of 10 demerit points. The engineman and fireman were assessed 20 demerit points.

There must now be determined the second issue, namely the propriety of holding the grievor out of service pending completion of the investigation. The collision occurred on November 28, 1968, and the grievor, as well as the other employees concerned, was held out of service from and after December 2, 1968. Statements were taken from all the employees concerned on November 29, 1968. Supplementary statements were taken from members of the crew of train 8714 on December 1, 1968, and from members of the crew of train 5509 on December 5, and again on December 18, 1968. Following the hearing on December 18, the engineman and the fireman of train 5509 were assessed 20 demerits, as noted above, and returned to service. The grievor, however, was not assessed, nor was he returned to service at that time. The company, it appears, gave further consideration to his case, since he continued to deny any violation of Rule 105. As a result of this, although the grievor was assessed the least demerits of any of the persons who were disciplined, he has in fact suffered a greater present penalty, in terms of loss of work, than any of the other crew members.

Article 32 of the collective agreement, in so far as it is material, provides as follows:

32 INVESTIGATIONS AND DISCIPLINE

- a) When an investigation is to be held, each employee whose presence is denied will be notified as to the time, place and subject matter.
- b) An employee, if he so desires, may have an accredited representative of the Union assist him. The employee will sign his statement and be given a carbon copy of it.
- c) If the employee is involved with responsibility in a disciplinary offense, he shall be accorded the right on request for himself or an accredited representative of the Union or both, to be present during the examination of any witness whose evidence may have a bearing on the employee's responsibility, to offer rebuttal thereto and to receive a copy of the statement of such witness.
- d) An employee will not be discipline or dismissed until after investigation has been held and until the employee's responsibility is established by assessing the evidence produced and not employee will be required to assume this responsibility in his statement or statements. An investigation shall be held and the employee advised in writing of the decision within 15 days time from the time the report is rendered, except as otherwise mutually agreed.
- e) An employee is not to be held off unnecessarily in connection with an investigation. Layover time will be used as far as practicable. An employee who is found blameless or an employee called by the Company as a witness, will be reimbursed for time lost, in accordance with Article 27 Clause (a), paragraphs (1), (2) and (4).

It is clear that an employee who is subject to discipline may be held out of service so far as is necessary for the purpose of enquiry, and he may be required to attend an investigation in connection therewith. This is not to say that the employee may be held out of service indefinitely pending the company's deliberations as to his penalty. The whole system of assessing demerit marks is predicated upon the employees continuing at work in most cases. Here the grievor has in effect suffered a suspension of several weeks' duration. There would appear to have been no reason why he could not have worked during that time, save for his attendance at the investigation on December 1, December 5, and December 18. These investigations were necessary and in view of the position taken by the grievor as to the circumstances, not complaint can properly be made as to these.

Having regard to the circumstances of this case, and to the provisions of article 32 of the collective agreement, it is my conclusion that the grievor was held off unnecessarily in connection with the investigation, and it follows that he is entitled to compensation for miles lost. I accordingly award as follows:

- 1) The grievance relating to the assessment of demerit marks is dismissed.
- 2) The grievor is entitled to compensation for miles lost as the result of his being held out of service, save as to December 1, December 5, and December 18, 1968.

If the parties are unable to agree as to the amount of compensation actually payable to the grievor, I retain jurisdiction to deal with that matter only.

(signed) J. F. W. WEATHERILL
ARBITRATOR