

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 510

Heard at Montreal, Tuesday, September 9, 1975

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Discipline assessed record of Locomotive Engineer C.L. Van de Voord, July 20, 1974.

JOINT STATEMENT OF ISSUE:

On July 19, 1974 Locomotive Engineer Van de Voord was called for passenger train No. 95, which was ordered for 0040 hours July 20, 1974. Upon reporting for duty he was instructed to work the assignment for which called as the operating engineer. He refused to do so which resulted in serious delay to passenger train No. 95.

After conducting an investigation, the record of Locomotive Engineer Van de Voord was assessed with 20 demerit marks, for refusing duty.

The Brotherhood requested the removal of this discipline. The Company declined the request.

FOR THE EMPLOYEE:

(SGD.) A. J. SPEARE
GENERAL CHAIRMAN

FOR THE COMPANY

(SGD.) S. T. COOKE
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company..

A. J. DelTorto	– System Labour Relations Officer, Montreal
M. DelGreco	– Labour Relations Assistant, Montreal
J. A. Clark	– General Superintendent Transportation, Winnipeg
J. A. Cameron	– Regional Labour Relations Officer, Winnipeg
R. W. Evans	– Superintendent, The Pas
W. Arychuk	– Trainmaster, Winnipeg

And on behalf of the Brotherhood:

A. J. Speare	– General Chairman, Edmonton
E. J. Davies	– Vice-President, Montreal

AWARD OF THE ARBITRATOR

The grievor's regular assignment was as a "second engineer" on a passenger train. On the night in question he was called for what would have been his normal assignment. He does not appear to have questioned the fact of his being called, and he did report for duty. He was then assigned to act as "in charge" engineer, and was given, as the second man in the cab an inexperienced brakeman, for whom it was to be the first pay trip. He then refused to carry out his assignment.

The issue in this case is not whether the grievor was properly assigned to work as first engineer on Train No. 95. He had responded to a call thinking that he was to be second engineer. It must be concluded that he was ready for the trip, but that he rejected the responsibility of being first Engineer, although there seems to be no question of his own qualifications.

In his answers at the investigations held about this matter, the grievor made it clear that he was prepared to take the trip, and that he would even have taken it as first engineer, if there had been an experienced trainman assigned as second man in the cab. Thus, while much of the argument in this matter related to the necessity of the grievor's being called at that time, and to the propriety of his assignment as first engineer, the grievor's own statements made it clear that, finally, he refused the assignment because of the inexperience of the trainman.

It is well established in arbitration cases that where an employee questions the propriety of an assignment given him, the proper course is for him to carry out the assignment, and to file a grievance with respect to his complaint. In this case, it is not clear what sort of grievance the grievor or any other employee affected in any way by this matter might have had, but there is no doubt as to the proper method of resolving what seems to have been a complex question of the assignment procedure.

There are exceptions to this general rule, as for example where an assignment is unlawful, or unsafe. The onus is, however, on the employee who refuses an assignment to establish that he was justified in doing so. Here the grievor's statement includes the following. "I did not refuse to take No. 95 out of Gillam as First Engineer. I refused to take a Trainman that had not made even a pay trip as I believed there was a calculated risk to myself and the train should any emergency arise where I would need assistance." He then made reference to the availability of other engineers, at the time of his refusal. In a subsequent statement he indicated that he would not have time "to teach him the rules of the road or his position on the left side of the engine", and in a further statement the grievor repeated his objection on the ground that "he (the Trainman) had not established himself as a working trainman at this point".

While it appears that this was indeed the Trainman's first pay trip as second man in the cab, it does not follow from that that it was unsafe for him to make it. He had undergone certain training, and it would be necessary for him to make a first pay trip sometime. He did in fact, take the trip with another engineer to whom he was, it seems, acceptable. While considerations of safety, and allegations of unsafe practice must always be taken seriously, they ought not to be raised lightly, or where they are without reasonable foundation. In the instant case, it has not been shown that it would have been unsafe for the grievor to carry out the assignment he was given. He was not, I find, justified in refusing it. Accordingly, he was subject to discipline.

The next question which arises is whether the discipline imposed was proper, having regard to the circumstances. Under the system of discipline involved here, discipline is assessed in terms of demerit points for each offence, with certain reductions in accumulated demerits where there are periods of good conduct. Applying such a system rigorously, one would not have regard to anything but the actual incident, in assessing the number of demerit appropriate for any given offence. If it should happen that the assessment of any particular discipline, even for a minor offence, results in a cumulative total of demerits beyond a certain level, then the discharge of the employee is called for. If the system is not to be applied as rigorously as that, then it would be proper, as in most industrial relations situations, to consider the employee's record as a relevant factor in considering the severity of the penalty imposed.

In the instant case, if we apply the system rigorously, it was acknowledged that, for an offence of this nature – unjustified refusal to perform an assignment – the assessment of 20 demerits was not excessive. On that approach then, the grievance would be dismissed. If, on the other hand, we ask whether the discharge of the grievor (for that was the ultimate result) was justified, we must consider his disciplinary record. This was objected to by the Union, although at the same time the Union sought a reassessment of the penalty. It must be said, however, that except where our concern is simply with the rigorous application of a particular system of discipline where particular

offences always lead to precise penalties, it is both proper and desirable – from the employee’s as well as the employer’s point of view – to consider the disciplinary record.

In the instant case, the grievor’s record shows that he had been disciplined on five occasions during the period of approximately two years preceding this incident. He had, however, been discipline free for the period ending October 14, 1973, and his record was cleared of 20 demerits, leaving a total then of 35. He was assessed 5 demerits on each of two occasions in March, 1974, and in May of that year his superintendent wrote to him noting that his employment was in jeopardy.

In **Case No. 483**, an employee was assessed 30 demerits for refusal to accept a call, an offence not unlike the grievor’s. As is noted in the award, dismissing the grievance, no representations were made as to the extent of the penalty imposed. Even if the penalty imposed in this case were to be reduced slightly, and if I were to substitute a penalty of 15 demerits (which, in my view, would be a lenient penalty for a serious matter such as that which is involved here), the result would be of no service to the grievor, who even then would have accumulated 60 demerits. Thus, whether it be on consideration of his record, as well as on a consideration of the particular incident, or whether it be in strict accordance with the system of discipline, it must be concluded that the grievor was subject to discipline, and that the penalty imposed was not excessive.

For the foregoing reasons, the grievance must be dismissed.

(signed) J. F. W. WEATHERHILL
ARBITRATOR