

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 743

Heard at Montreal, Tuesday, March 11, 1980

Concerning

CANADIAN PACIFIC LIMITED

and

UNITED TRANSPORTATION UNION (T)

DISPUTE:

Removal of discipline assessed and reinstatement into service with payment for all time lost of Yardman J.P. Sharma, Coquitlam, B.C., who was assessed 35 demerit marks as a result of an investigation into a yard movement entering the interlocking limits and damaging a dual control switch at Coquitlam, January 4, 1979, a violation of Rule 292, Uniform Code of Operating Rules, and who was also dismissed for lying during the investigation of the Rule 292 violation.

JOINT STATEMENT OF ISSUE:

An investigation was held at Coquitlam January 17 and concluded February 12, 1979, in connection with Power Switch Located West End of Coquitlam Yard about Mileage 112.3, Cascade Subdivision, being run through by 1530 Coquitlam Yard Assignment January 4, 1979. Following the investigation, Yardman Sharma was issued two Form 104's dated February 23, 1979, reading as follows:

Please be informed that your record has been debited with 35 demerit marks for failure to observe and be governed by an interlocking signal indicating STOP, resulting in a yard movement entering the interlocking limits and damaging a dual control switch at Coquitlam, January 4, 1979; a violation of Rule 292, UCOR.

please be informed that your record has been DISMISSED for lying during an investigation, which began at Coquitlam January 17, 1979, and concluded at Coquitlam February 12, 1979, into a yard mishap, in an attempt to conceal the cause for a signal indicating STOP being passed resulting in a dual control switch being run through.

The Union appealed the discipline assessed Yardman Sharma requesting the removal of the 35 demerit marks and reinstatement into service with payment for all time lost, on the grounds the Company did not establish Yardman Sharma's responsibility in respect of the charges against him. The Union further contends the Company violated Article 13, Clauses (c), (d) and (e) of the Collective Agreement.

The Company declined the appeals on the basis the discipline assessed to and dismissal of Mr. Sharma was based strictly upon the evidence produced at the investigation. The Company also contends there was no violation of Article 13, Clauses (c), (d), and (e) of the Collective Agreement.

FOR THE EMPLOYEE:

(SGD.) P. P. BURKE

GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD) J. M. PATTERSON

GENERAL MANAGER, OPERATION & MAINTENANCE

There appeared on behalf of the Company:

P. E. Timpson	– Assistant Supervisor Labour Relations, Vancouver
J. H. Bay	– Assistant Superintendent, Vancouver
J. T. Sparrow	– Manager, Labour Relations, Montreal

B. P. Scott

– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

P. P. Burke

– General Chairman, Calgary

R. T. O'Brien

– Vice-President, Ottawa

AWARD OF THE ARBITRATOR

There are two grounds of discipline put forth against the grievor.

One of these is his alleged failure to observe and be governed by an interlocking signal indicating Stop; for this the grievor was assessed thirty-five demerits. The other is that the grievor lied during the investigation of the foregoing; for that he was dismissed.

I shall deal first with the dismissal. Article 13 (d) of the collective agreement provides that an employee will not be disciplined or dismissed until after investigation has been held, and Article 13 (a) requires the employee to be notified as to the time place and subject matter of any investigation. There was an investigation held in connection with the grievor's alleged failure to comply with the interlocking signal indication. As a result of its analysis of this investigation, the Company concluded that the grievor had lied in the course of that investigation. It then discharged the grievor for that alleged offence. This was, however, a new and distinct subject matter. It was one with respect to which the grievor or others might well have wished to give evidence or to make an explanation. There was, however, no investigation made of that charge. The Company dismissed the grievor on that ground without holding an investigation. That lack was not a mere technicality, but deprived the grievor of a substantial right given him by the collective agreement. Investigation in such a case is a condition precedent to the exercise of the employer's disciplinary authority. There having been no investigation, the discharge must be set aside.

As to the failure to follow the signal indication, there is no doubt that the yard movement, some 20 cars in length, had gone beyond the western limit of the "block" in the signal system, so that that block was shown on the Operator's panel in the yard office as "occupancy cleared". Another train was prepared to enter that block, at a crossover, and the switches were lined and a slow clear indication given for that movement.

Having passed the block signal, the grievor's train could not reenter the block without specific direction from the Operator. No such direction was given, and it was plainly wrong, and extremely dangerous, for any other signal to have been given directing the grievors train to proceed back into the block it had left, past the interlocking signal.

I have no doubt, from all of the material before me, that such a signal was given. The grievor's train began a reverse movement into the block at the same time as the other train, with proper clearance, was approaching the crossover. The crew of the other train saw the danger, stopped, and attempted to warn the grievor's train. Stop signals were given by the grievor and by others. The train did not, however, Stop in time to avoid running through the switch at the crossover, which had been lined for the other movement.

The allegation against the grievor is that he gave a backup signal to the engineman. Such signal, for the reasons described above, would have been a very serious violation of the Uniform Code of Operating Rules. No doubt the grievor subsequently gave stop signals. The question is, however, whether or not he gave a backup signal before that.

The engineman states that, once the train had come to a Stop having gone about ten cars further west than desired, he received a backup signal. The engineman himself, it seems, would not have known what the indication of the interlocking signal was, although that matter is not in issue here. After receiving a backup signal, the engineman received a Stop signal. He states that he had gone about three car lengths before the Stop signal was received, and that it then took slightly over one car length to stop.

The engineman stated that he could see the grievor at all times once he was several car lengths west of the bridge (that is, at all times material to the particular question in issue), and that watching him was his main concern. It was dusk and signals were given by lamp. He saw a series of Stop signals given by the grievor with respect to the westward movement. When the movement had stopped, the engineman "could not distinguish from whom I was receiving the signals" due, he states, to the time of day. He saw a backup signal, although he could not recall if it was given before or after the movement came to a stop. The backup signal came from the same area that the other signals had come from. The other crew members were, at that time, some considerable distance to the east of the grievor, who was the person then best positioned to give any signals to the engineman.

While the engineman did not directly identify the grievor as the person who gave the backup signal, it is my view from a consideration of all of the circumstances that the most probable conclusion to be drawn is that it was indeed the grievor who gave the signal. The others who might have signalled (but were unlikely to) were at a much greater distance. The signal came from a person at a point where the grievor was reasonably expected to be and it is not suggested there was anyone else there. The evidence is such that, if the engineman is to be believed, it can properly be concluded that the grievor gave the backup signal. The yard foreman could not observe the grievor at the material time. The other yardman stated, however, that he saw the grievor giving "car signals and stop signals only". He was not, however, watching the grievor continuously.

The conductor of the other train stated that in a conversation with the grievor immediately after the incident the grievor stated that he had given a signal to backup, but that he then had to give a signal to Stop. The conductor said that he thought one of the trainmen from his crew was present for that conversation, and he positively identified the grievor as having made the statement. That other trainman stated that he was in fact witness to the conversation. Further, the assistant superintendent stated that in a telephone conversation the following day, the grievor told him that he had given a backup signal.

The grievor denies giving a backup signal and denies having said that he did so. There is some suggestion in the other trainman's statement that the conductor of the other train might have confused him with the grievor – but the other trainman certainly did not make the statements the conductor attributed to the grievor. The grievor did not know the conductor or trainman of the other train and did not remember seeing the other trainman.

From all of the material, it is my conclusion that it has been established, on the balance of probabilities, that the grievor did give an improper and dangerous backup signal, in violation of the Uniform Code of Operating Rules. For this he was properly subject to discipline.

It was contended that the Company had not conducted a proper investigation of the matter, in that certain persons thought by the union to have knowledge of the matter were not called to give statements, and that full cross-examination was not permitted. The provisions of Article 13 of the collective agreement are quite precise as to what procedure must be followed where discipline is imposed. I have indicated, in dealing with the other charge against the grievor, that the procedure there set out is a condition precedent to the imposition of discipline. There is no basis, however, for the imposition on the Company of any higher standards in this connection than those which are set out in the collective agreement. The remarks made by the arbitrator in the **Zawoyski case**, which arose under a different collective agreement, must, in my view, be applied with caution. In the instant case the grievor or a representative was present at all examinations, and he had full opportunity to offer rebuttal. The procedure is not a trial, but is rather the Company's investigation of a matter which might lead to discipline which would, if challenged, then have to be justified. In the instant case, it is my view that there was no violation of Article 13 with respect to the alleged violation of the Uniform Code of Operating Rules.

As to the discipline imposed, it is my view, having regard to the seriousness of the offence, that it was not excessive. The grievance with respect to the assessment of 35 demerits is accordingly dismissed. The grievance with respect to the dismissal is, for the reasons given above, allowed.

(signed) J. F. W. WEATHERILL
ARBITRATOR