

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 797

Heard at Montreal, Tuesday, December 9, 1980

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION (T)

EX PARTE

DISPUTE:

Assessment of 30 demerit marks to Conductor S. Wasylenko for violation of Rule 42, UCOR.

EMPLOYEE'S STATEMENT OF ISSUE:

On July 20, 1979, Train Order Form "Y" . Example 2 in accordance with Rule 42, UCOR was in effect from 0400 to 1330 between mileage 60 and mileage 70, Koshabowie Subdivision.

An investigation was held on November 1, 1979 to determine if Conductor Wasylenko was in violation of Rule 42, UCOR and he was assessed 30 demerit marks.

The Union requested the Company to expunge the demerit marks from his record.

The Company has declined the Union's request.

FOR THE EMPLOYEE:

(SGD.) L. H. MANCHESTER

GENERAL CHAIRMAN

There appeared on behalf of the Company:

H. J. Koberinski	– Labour Relations Assistant, Montreal
D. D. Brown	– Witness, Sioux Lookout
W. J. Rupert	– System Manager - Rules, Montreal
J. A. Cameron	– Regional Labour Relations Officer, Winnipeg
P. L. Ross	– Coordinator Transportation - Special Projects, Montreal
D. F. Doig	– Assistant Superintendent, Thunder Bay
L. M. Tonn	– Trainmaster, Thunder Bay

And on behalf of the Brotherhood:

L. H. Manchester	– General Chairman, Winnipeg
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AWARD OF THE ARBITRATOR

At the material time the grievor and his crew were en route from Neebing to Atikokan in straight-away service. They were in possession of a set of train orders governing the movement of their train, and among these orders was Order No. 735, being an order in form "Y" for protection of track work. In the case of a westbound movement such as the grievor's, the order required that between 0400 and 1300 hours the train approach the red signal at mileage 60 prepared to stop, and that it not pass the signal until instructions were received from foreman Brown. Foreman Brown was in charge of a track crew working in the area protected by the train order.

There is no doubt as to the vital importance of compliance with orders such as these. It is the Union's position that the order was complied with.

Foreman Brown, knowing that the grievor's train would have to clear the work limits before he could begin work, stayed in the clear waiting for the train. His evidence is that shortly after 0400 he noticed that the train had entered the Form "Y" limits. There had been no permission sought or given. If the train had entered the limits before 0400, then it would not have been necessary for permission to have been given. The protected limits appear to have extended over some ten miles, and if there was any doubt as to whether or not the order was in effect (that is, as to whether or not it was 0400 or after), the safe course – obviously – was to consider the order as in effect and contact the track crew foreman.

Seeing the train within the work limits, Foreman Brown called the grievor asking why he had not been contacted or permission sought. The grievor replied that his engine had been into the limits before 0400. That was also his evidence at the investigation. Other evidence is to the contrary. The dispatching office Pengraph records the arrival of the train at mileage 59.5 (east switch at Annex), 0359, and at mileage 60.9 (west switch at Annex) at 0403. From this, it would appear that the train must have entered the Form "Y" limits at 0400 or indeed later. While it has not been shown that the times recorded on the Pengraph are shown with absolute accuracy, the same is true as to the grievor's own observations as to the time. In any event, the grievor and his crew understood that if they were within the limits when the order came into effect, they must stop and not proceed until instructions had been received from the foreman.

From all of the material before me, I find that this was a case in which the train order was in effect, and in which the crew required the instructions of foreman Brown before proceeding. It is the Union's contention that such instructions were given. Indeed, it is claimed that the instructions were received before 0400. This, it is said, was in conversation with foreman Brown, who is said to have advised that the men and machinery were clear of the right-of-way track. In his statement, the grievor says that "Prior to 0400 Foreman Brown said that men and machinery were clear of the right-of-way".

Now I would agree with Mr. Manchester for the Union that a statement that "men and machinery are clear of the right-of-way" could, in appropriate circumstances, be taken as permission to proceed. It would not be necessary for any particular precise verbal formulation to be required, although an "OK to proceed" or the like might be better. Had the grievor called up the foreman before entering the limits, and received such a reply to his request or enquiry, then he would, I think, have been justified in considering he had authority to proceed. It might have been a better practice for him to verify this in more precise terms, but certainly he would not have committed an infraction justifying thirty demerits.

That is not, I find, what happened in this case. The grievor did not call up the foreman and did not receive permission to proceed. When the foreman stated, as he did, that men and machinery were clear of the right-of-way, that was done in the course of a call he made to the train crew seeking an explanation of their unauthorized presence and advising them, in the course of what appear to have been some understandably heated remarks, that it was lucky for them (to say nothing of the track crew) that the men and machinery were clear. That might indicate that the train might as well continue on, but it did not amount to a permission to enter the limits, as it was already too late for that.

From all of the material before me, it is clear that the grievor himself took no positive action to comply with the requirements of the Uniform Code of Operating Rules on the train order. He was already within the work limits when he heard the foreman say (among other things) that the track was clear. I find, from the material before me, that this occurred after 0400. In any event, of course, it should have been clear to the grievor that he was about to enter a work area at a time so close to the beginning of work that the only safe course was to enquire of the foreman before entering the area.

For the foregoing reasons, it is my conclusion that there was just cause for the discipline imposed. The grievance is therefore dismissed.

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 798

Heard at Montreal, Tuesday, December 9, 1980

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT
HANDLERS,
EXPRESS AND STATION EMPLOYEES

DISPUTE:

Claim of Mr. G. Fleurent for 20 1/2 hours at the pro rata rate for time lost account incident of March 4, 1980.

JOINT STATEMENT OF ISSUE:

During his shift of March 4, 1980 Electric Truck Operator Mr. G. Fleurent was instructed to unbolt racks. Mr. Fleurent refused and was sent home 4 1/2 hours prior to the termination of his regular shift.

An investigation was held and Mr. Fleurent was given a two (2) day suspension. The Union contended that the circumstances did not warrant a suspension and requested payment for all time held out of service.

The Company denied the Union's request.

FOR THE EMPLOYEE:

(SGD.) W. T. SWAIN
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) G. H. COCKBURN
MANAGER OF
MATERIALS

There appeared on behalf of the Company:

R. L. Benner - Assistant Manager of Materials, CP Rail,
Montreal
J. P. Deighan - Asst. Superintendent of Materials, Angus
Stores, CP, Mtl.
D. Cardi - Labour Relations Officer, CP Rail, Montreal

And on behalf of the Brotherhood:

W. T. Swain - General Chairman, BRAC, Montreal

AWARD OF THE ARBITRATOR -----

There is no doubt that the grievor did refuse to do certain work as directed. The work, unbolting certain racks which he was to move with his lift truck, was work the grievor could easily do, and while it may not have come explicitly within his job description was not an improper assignment.

It was certainly not an unlawful or unsafe

direction, and did not involve a violation of the collective agreement. It was clearly the grievor's duty to obey it and, if he felt it involved some violation of the collective agreement, to file

a grievance later if he wished to do so.

The grievor was, clearly, subject to some form of discipline on this account. The instruction was given clearly, and was repeated. On the grievor's persistent refusal, it was quite appropriate that he be sent home for the balance of his shift. The substantial issue in this case is whether or not some further suspension was appropriate.

The grievor did not have any previous formal disciplinary record, although he had been given a verbal caution about following instructions sometime previously. He did not have much seniority. If it appeared that this was an instance of deliberate undermining of managerial authority, I would have no hesitation in upholding the discipline imposed by the Company. In my view, however, this was not such a case. Nothing in the material before me supports the conclusion that the grievor was motivated by such a purpose. Rather, he seems simply to have stuck obstinately to the rather simplistic view that he could only be required to perform tasks coming strict within the scope of his job, narrowly considered. In this, he was supported by incorrect advice from his union representative. That does not mean the grievor must not bear responsibility for his actions, but it is one of the circumstances to be considered in assessing the penalty.

In view of the fact that the grievor had been suspended for something over half a shift, in view of his recognition, at the conclusion of the investigation, of his duty to follow instructions and in view of the fact that no formal discipline had previously been imposed, it is my view that the further suspension of the grievor for two days was not justified. Having regard to all of the circumstances, it is my award that the two-day suspension imposed on the grievor be set aside, and that a written warning be substituted therefor. The grievor is entitled to compensation for two days' loss of earnings. He is not entitled to compensation in respect of the 4 1/2 hours for which he was properly sent home.

(signed) J. F. W. WEATHERILL
ARBITRATOR