

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 1095

Heard at Montreal, Wednesday, May 11, 1983

Concerning

### CANADIAN NATIONAL RAILWAYS

and

### UNITED TRANSPORTATION UNION

#### **DISPUTE:**

Appeal of discipline assessed the record of Conductor G. C. Selesnic, Toronto, April 9, 1979.

#### **JOINT STATEMENT OF ISSUE:**

On April 9, 1979, Mr. G. C. Selesnic was called for 0700 hours as Pilot Conductor to accompany a switch tamper machine No. 65513 from Danforth to Oshawa, a distance of approximately 27 miles.

Conductor Selesnic did not accompany the switch tamper machine to Oshawa because the working conditions were unacceptable to him.

Following an investigation, the record of Conductor Selesnic was assessed 20 demerit marks for failure to properly perform his duties as a Conductor Pilot.

The Union appealed the assessment of 20 demerit marks on the grounds that it was unjustified.

The Company declined the appeal.

#### **FOR THE EMPLOYEE:**

**(SGD.) R. T. O'BRIEN**  
FOR: GENERAL CHAIRMAN

#### **FOR THE COMPANY:**

**(SGD.) M. DELGRECO**  
FOR: ASST. VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

G. C. Blundell – System Labour Relations Officer, Montreal  
H. J. Koberinski – Manager Labour Relations, Montreal  
J. A. Sebesta – Coordinator – Special Projects, Transportation, Montreal

And on behalf of the Union:

T. G. Hodges – Secretary, General Committee, Toronto  
R. A. Bennett – General Chairman, Toronto  
M. J. Hone – Vice General Chairman, Toronto

## **AWARD OF THE ARBITRATOR**

The grievor refused to perform his duties as Pilot Conductor of the switch tamper, considering the working conditions to be unacceptable because, in his view, they were unsafe. This opinion was based on the fact that the tamper was an "open cab" model, without any substantial protection from the elements apart from a canopy and such windbreak as was provided by the console and other panels in front of the operator, combined with the fact that the temperature was close to zero degrees centigrade, a light snow was falling and it was windy. There is no doubt that the tour of duty would be uncomfortable, although the grievor was dressed for outside work. That was the nature of the assignment.

There was clearly some basis for the grievor's hesitation. The Company would apparently have assigned a motor car to accompany the tamper, had one been available. One was not available, however, and the grievor was instructed to travel with the tamper, it being made clear to him that he would be subject to discipline if he did not do so. The grievor did not proceed with the movement, which subsequently left with a tamper operator, a section foreman and another Conductor Pilot.

In my view the movement was not unsafe in the conditions revealed by the material before me, although it would certainly have been uncomfortable. It is an employee's obligation to carry out his assigned duties, subject to the general exception that he is not required to perform work that is unsafe or illegal. It is up to the employee to show that such exceptions arise in a particular case. In the instant case, while I do not consider that the operation is unsafe (and so conclude that the grievor was subject to discipline for his refusal to carry out the assignment), I do consider that there were grounds for the grievor to raise the safety issue. His position was not entirely unreasonable, and that consideration is to be borne in mind in assessing the penalty imposed.

Twenty demerits is a substantial penalty. In many cases, refusal to perform assigned work amounts to insubordination, and would call for a penalty of that order or in some cases a greater one. Here, however, the job involved considerable discomfort, and the circumstances were such as to raise *bona fide* doubts as to the safety of the operation. In such a case, where no significant element of insubordination is involved, a lesser penalty is appropriate. In my view, the assessment of 20 demerits went beyond the range of reasonable disciplinary responses to the situation, although the assessment of 10 demerits would not have been excessive.

For the foregoing reasons it is my award that the penalty imposed on the grievor be reduced to one of 10 demerits.

**(signed) J. F. W. WEATHERILL**  
ARBITRATOR