

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1588

Heard at Montreal, Tuesday, December 9, 1986

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Appeal of discipline assessed the record of Locomotive Engineer J. H. Tomas, Kamloops, B.C., December 12, 1984.

JOINT STATEMENT OF ISSUE:

On December 12, 1984, Locomotive Engineer Tomas, in charge of Work Extra 5176, was monitored by radar at Mileage 126.8, Clearwater Subdivision, to be travelling at 45.4 mph in a 30 mph speed zone.

Following an investigation into this incident, Locomotive Engineer Tomas was assessed 15 demerit marks for violating the posted speed restriction at Mileage 126.8, Clearwater Subdivision.

The Brotherhood contends that the procedure followed by the Company officer in monitoring the speed of Work Extra 5176 was not proper and, therefore, the discipline assessed was not warranted and should be removed.

The Company has declined the Brotherhood's appeal.

FOR THE BROTHERHOOD:

(SGD.) P. SEAGRIS
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) D. C. FRALEIGH
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS.

There appeared on behalf of the Company:

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| J. Glazer | – Attorney, Law Department, Montreal |
| J. R. Hnatiuk | – Manager, Labour Relations, Montreal |
| G. C. Blundell | – System Labour Relations Officer, Montreal |
| M. C. Darby | – Coordinator Transportation, Montreal |
| K. J. Knox | – Manager, Labour Relations, Winnipeg |

And on behalf of the Brotherhood:

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| P. S. Teskey | – Counsel, Winnipeg |
| P. Seagris | – General Chairman, Winnipeg |
| G. Hallé | – General Chairman, Quebec |

AWARD OF THE ARBITRATOR

It is common ground that normal procedure to be followed when a speeding violation is detected by radar is for the Company Officer to make immediate radio contact with the Locomotive Engineer. This alerts the Engineer to the fact that he is exceeding the speed limit, allowing the unit to reduce its speed to within the posted limit. The procedure so established has a two-fold advantage: on the one hand the interest of safety are immediately advanced by reducing the speed of the train to within a safe limit and, on the other hand, the Engineer is alerted to an apparent infraction and is placed in a position to assess whether it has resulted from human error, instrument failure or some other cause.

In this case the Transportation Officer who monitored the alleged speeding infraction of Engineer Tomas failed to contact him by radio at the time. It appears that Mr. Tomas was running at approximately 45 miles per hour over a .6 mile stretch of road with a posted speed limit of 30 miles per hour. This occurred on December 12, 1984. However, the charge was not brought to the Engineer's attention until considerably later when he received notice of an investigation, which was in fact conducted some thirty-two days after the event. At that time the employee was confronted with the results of the radar reading taken by the Company Officer which had been duly reported to the appropriate Company authorities. This was, effectively, the first opportunity which he had to recall a moment in time, more than a month earlier, which might, in all likelihood, have passed without any particular significance for him.

It is a fundamental principle of fairness that an accusation of wrongdoing must be brought to the attention of the person accused without undue delay. Apart from its application in law generally, that principle is frequently reflected in the language of collective agreements which, not infrequently, will provide specific mandatory notice periods or the requirement of a fair and impartial investigation prior to the imposition of discipline. Fundamental to the general requirement of prompt notice of an allegation of wrongdoing is the ability to formulate a defence where one legitimately exists. (*See, generally, Brown and Beatty, Canadian Labour Arbitration 2nd Edition (1984) at pp 335-49*).

Article 86 of the collective agreement here in issue provides in part, as follows:

86.1 A locomotive engineer will not be disciplined or dismissed without having had a fair and impartial hearing and his responsibility established and shall be advised in writing of the decision within 28 calendar days from the date of the locomotive engineer's statement unless as otherwise mutually agreed.

Can it be said that the investigation conducted on January 14, 1985, which led to the imposition of 15 demerit marks against Engineer Tomas, constituted a "fair and impartial hearing" within the meaning of the foregoing article? It is difficult to see how it can. At that proceeding the Company had at its disposal the eye-witness account of a transportation officer, bolstered by his radar reading taken December 12, 1984 whatever notes he may have had and the reports which he filed. Mr. Tomas, on the other hand, had nothing beyond his own ability to fetch back over a considerable period of time to a specific moment to recall an alleged course of conduct which was never before brought to his attention. In the instant case it was made difficult, if not impossible, for the grievor to know whether he was at fault or whether there was an error in the locomotive instruments, in the radar reading apparatus utilized, or any other explanation inconsistent with culpability. The grievor was effectively deprived of a reasonable ability to objectively assess the circumstances and determine, whether, in fact, the allegation made against him was well founded.

In the Arbitrator's view it is implicit that, in the requirement for a fair hearing, that the employees concerned receive sufficient notice of an allegation of a wrongdoing so as to provide him or her a reasonable opportunity to meet the charge. In the instant case that minimal standard was not met. This is not a case where an employee's misconduct came to the Company's attention only after a delay in time different considerations might obtain. At the hearing the Company also adduced in evidence an activity report for the train, plotting its location at various times on the day in question.

However, that material does not alter the merits of the case. Firstly, it appears to disclose that Engineer Tomas' train exceeded the posted speed limit over a distance of 10.6 miles by only 4.4 miles per hour. This is not appreciably in excess of the tolerance of 4 miles per hour above posted speeds which, according to Trainmaster C. S. White, is allowed over short distances if necessary to allow for better train handling. Secondly, and more

importantly, this data suffers from the same deficiency as the radar reading. Because of the excessive delay in notification, the grievor and his Union are effectively deprived of the ability to meaningfully analyze, test or challenge these figures.

Disregard of posted speed limits is obviously a serious infraction, with obvious potential ramifications for the safety and efficiency of the Company's operations. By the same token, when a serious charge is made, the procedural safeguards established within the collective agreement must be given commensurate meaning. It is clear from the language of article 86.1 that in the absence of a fair hearing discipline cannot stand. In the circumstances the Arbitrator must conclude that having been deprived of reasonable notice of the allegation against him Engineer Tomas was effectively denied the protection of a fair hearing. For these reasons the grievance must be allowed. The fifteen demerit marks assessed against Locomotive Engineer Tomas shall be removed from his record forthwith.

(signed) MICHEL G. PICHER
ARBITRATOR