

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1636

Heard at Montreal, Tuesday, April 14, 1987

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

RAIL CANADA TRAFFIC CONTROLLERS

DISPUTE:

Appeal the discipline of a discharge assessed the record of Transportation Operator G.L. Trainor of Kamloops, B.C.

JOINT STATEMENT OF ISSUE:

On January 3, 1986 at approximately 2230 hours, 26 cars derailed off Train No. 413XA02 at Mileage 98.8 of the Yale Subdivision. The cause of the derailment was the failure of a roller bearing.

Mr. Trainor was the Transportation Operator in charge of monitoring the Hot Box Detector on the 1600 - 2400 hour shift on January 3, 1986 in the Dispatching Office at Kamloops. The Hot Box Detector print out for Train No. 413 showed a high deflection which had not been reported. As well, an alteration had been made to the printout.

Following an investigation into the incident, the Company assessed a discharge to the record of Mr. Trainor.

The Union contends the discipline assessed was too severe and Mr. Trainor should be returned to the service of the Company without any loss of earnings, seniority or benefits.

The Company has declined the Union's request.

FOR THE UNION:

(SGD.) PETER P. TAVES
SYSTEM CHAIRMAN

FOR THE COMPANY:

(SGD.) JUNE P. GREEN
FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

M. M. Boyle	– System Labour Relations Officer, Montreal
W. W. Wilson	– Manager Labour Relations, Montreal
S. F. McConville	– System Labour Relations Officer, Montreal
T. N. Wilson	– Assistant Manager Rules, Montreal
D. A. Stewart	– Relief Trainmaster, Kamloops

And on behalf of the Union:

P. Taves	– System General Chairman, Winnipeg
R. Leclerc	– System General Vice-Chairman, Montreal
D. Dougherty	– Accredited Representative, Belleville

AWARD OF THE ARBITRATOR

It is not disputed that Transportation Operator Trainor was responsible for monitoring the hot box detector in the period immediately prior to the derailment of Train #413XA02 at Mileage 98.8 of the Yale Subdivision. It is also agreed that because of his prior detection of an abnormal deflection reading communicated by a detector at Mileage 58.2 of the Subdivision, as a result of which the train was stopped and inspected with no visible problem being found, the grievor should have been particularly vigilant to closely scrutinize the hot box reading at the next detector, located at Mileage 84.9. By his own admission he failed to do an adequate follow-up and missed a second reading of the hot box, which ultimately lead to the derailment of 26 cars off the train. The evidence establishes that the print out tape, which registered the heat deflection readings provided by the monitor at Mileage 84.9 was in fact defaced in an apparent attempt to conceal the high heat deflection reading at that location. Another employee had access to the tape in the period immediately following the derailment, and the attempted erasure was clearly made within the 34 minute period between when the monitoring tape was initially printed and when the Assistant Chief Train Dispatcher requested Mr. Trainor to provide him with a copy of it. The Company concluded that the grievor, who had the sole responsibility for monitoring the tapes, tampered with it in an attempt to alter its apparent reading to protect himself. Both the grievor and the other employee then present in the office deny any knowledge of the circumstances surrounding the attempted erasure. Overall, the Company concluded that the grievor's failure to detect the abnormally high reading, his alleged attempt to falsify the documentary record and his prior history of discipline justified the termination of his employment in the circumstances.

The thrust of the Union's submission is two-fold. Firstly, it argues the line of arbitral jurisprudence establishing that although the standard of proof may be on the balance of probabilities the quality of proof must vary in relation to the severity of the misconduct alleged. With that proposition the Arbitrator has no difficulty. It is also true, however, that in some cases conclusions of fact can be made based upon inference, although in keeping with the above principle inferences should be reasonably and persuasively grounded in facts that are well proven. The second branch of the Union's argument is the principle of comparative discipline. It puts before the Arbitrator some nine prior instances of discipline in which the failure to detect a hot box, in some cases involving derailment, resulted in discipline substantially short of discharge.

It is trite to say that each case must turn on its own merits. In the Arbitrator's view, the conclusion drawn by the Company with respect to the alteration of the hot box detector tape is understandable. No employee apart from the grievor would have any apparent reason to tamper with the pengraph printout. Mr. Trainor had been solely responsible for monitoring the tape, and for his fellow employee to attempt to alter it, leaving evidence of a crude falsification, would not help him and would be clearly prejudicial to Mr. Trainor. It is true that in the instant case the burden of proof is upon the Company. However, the evidence establishes that the tapes were monitored by Mr. Trainor, remained under his primary custody in a relatively small room in which he worked with one other employee and that the tape was clearly tampered with during the relatively short period between the derailment and management's request that the grievor produce the tape. In these circumstances an onus of explanation naturally shifts to the grievor. However, he could offer no explanation for the condition of the tape, although he readily admitted to having 'blown it' by failing in his obligation to monitor the abnormally high reading which was registered. In the circumstances, the Arbitrator concludes, on the balance of probabilities, that the grievor either tampered with the tape or was aware of the circumstances of the attempted falsification of that record.

In the Arbitrator's view the grievor's record is also not without significance. While he had no demerits on his record at the time of the events in question, he was disciplined previously, on August 29, 1984, for an identical violation of the operating guidelines. On that date, he failed to monitor a hot box detector tape reading for Train 314 at Mileage 107.4 of the Clearwater subdivision, which also resulted in a derailment. It should be noted that the Union's review of comparative disciplinary history does not appear to include an account of any employee who has had a causal involvement in two derailments because of an admitted failure to carry out his or her responsibilities to monitor hot box detector print outs.

In this case, the Arbitrator is compelled to conclude that the repeated failure of Mr. Trainor to properly carry out his monitoring function as a Transportation Operator, coupled with his subsequent attempt to falsify the documentary record gave the Company just cause for terminating his services. In view of the grievor's relatively short period of service and the gravity of the offense, the Arbitrator can see no grounds for mitigating the sanction imposed by the employer. For the foregoing reasons the grievance must be dismissed.

(signed) MICHEL G. PICHER
ARBITRATOR