

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1896

Heard at Montreal, Wednesday, 15 March 1989

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Discharge of Locomotive Engineer J.B. Speed of Edmonton, Alberta effective January 6, 1988.

JOINT STATEMENT OF ISSUE:

On December 27, 1987, during an inspection by a Company Officer, various diesel units in Clover Bar Yard were found in an unsafe condition.

Following an investigation, Locomotive Engineer J.B. Speed was discharged from the service of the Company "for nullification of the emergency foot valve of diesel unit 1219 December 27, 1987 and failure to properly secure diesel units 1261-1264 and 1219 at Clover Bar Yard, December 27, 1987."

The Brotherhood appealed the discipline stating that Locomotive Engineer Speed did not nullify the emergency foot valve of diesel unit 1219 and that he was unable to lock the doors. The Brotherhood also maintains that the Company violated paragraph 86.4 which resulted in Locomotive Engineer Speed not receiving a fair and impartial hearing and that the Company did not present substantive evidence at the investigation which establishes Locomotive Engineer Speed's responsibility for the alleged condition of the units.

The Company declined the appeal.

FOR THE BROTHERHOOD:

(SGD) P. SEAGRIS
GENERAL CHAIRMAN

FOR THE COMPANY:

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

There appeared on behalf of the Company:

L. A. Harms	– Labour Relations Officer, Montreal
J. R. Hnatiuk	– Manager, Labour Relations, Montreal
D. E. Lussier	– Co-Ordinator, Transportation, Montreal
K. G. Madonald	– Manager, Labour Relations, Edmonton
M. A. Moroz	– Labour Relations Officer, Edmonton
R. W. Casemore	– Manager, Operations & Motive Power Control, Montreal
J. C. Johnstone	– Assistant Project Manager - HYIP, Montreal
B. Cail	– General Yardmaster, Edmonton

And on behalf of the Brotherhood:

P. Seagris	– General Chairman, Winnipeg
W. G. Bennett	– Secretary/Treasurer, Edmonton

AWARD OF THE ARBITRATOR

The material establishes to the Arbitrator's satisfaction that Locomotive Engineer J.B. Speed was responsible for the nullification of the emergency foot valve of diesel unit 1219, and for failing to properly secure both that unit and units 1261-1264, on December 27, 1987 by not applying hand brakes. It is not disputed that the grievor was the last locomotive engineer to operate the units in question. He initially worked the 0730 shift using double unit consist 1264-1261, which he placed on tie-up track VF40 at the conclusion of that tour of duty. He next worked the 1430 shift, using unit 1219 for the second assignment. At or about 1800 hours, having completed his work on the second tour, he also placed unit 1219 on tie-up track VF40, leaving duty at approximately 1815 hours.

Some two hours and forty minutes later all of the locomotive units were inspected by General Yardmaster Cail. He noted a number of irregularities with respect to unit 1219, including that the hand brakes had not been applied, the door had been left unlocked, a faulty door lock had not been reported on the appropriate form and, most significantly, the emergency foot valve, or deadman pedal, was rendered inoperative by the wedging of a flag staff between the foot valve and the automatic brake valve. He also found that the hand brakes had not been applied to unit 1264 and that unit 1261 had been left not running without the proper notation being recorded on Form 538-D.

The grievor denies having left the locomotive units unsecured or having nullified the deadman's pedal on unit 1219. In his defence the Brotherhood suggests that in the time between the grievor's release from duty and Mr. Cail's inspection there was ample possibility for someone else to have utilized or tampered with the locomotives. In the Arbitrator's view the Company has discharged the burden of disproving that possibility in this case. It is common ground that the locomotive units were stationed on tie-up track VF40 at a distance of some three hundred feet from the yard office. For the entire period of two hours and forty minutes prior to the inspection of the units by Mr. Cail, the units were within the full view of Yardmaster J.V. Waddington, who worked both the 0700 and 1500 shifts on December 27, 1987. The statement of Yardmaster Waddington, which the Arbitrator accepts, is that, once placed upon the tie-up track, none of the diesel units in question was moved by any employee prior to the inspection of General Yardmaster Cail and that no vehicles or trespassers entered or left the property during that period. The photographs and documentary evidence tendered establish, beyond any substantial doubt, that from his work station in the tower Yardmaster Waddington was in an unobstructed position from which to make these observations. It is also clear that the Clover Bar Yard is in a relatively isolated location with little or no vehicle or pedestrian movement in or around it under normal circumstances.

The evidence therefore establishes, on the balance of probabilities, that Locomotive Engineer Speed was responsible for leaving the diesel units in the condition in which they were found by General Yardmaster Cail on December 27, 1987. The Arbitrator cannot accept the grievor's general denial, particularly in light of the quality of the Company's evidence, which accounts fully for the location and condition of the locomotive units from the time the grievor put them away until they were inspected by Mr. Cail.

The Arbitrator is further satisfied that the material establishes no violation of the grievor's rights under Article 86 of the Collective Agreement in respect of the investigation procedure followed by the Company. As neither the grievor nor his union representative requested a copy of a statement from Mr. Cail at the time of the investigation and, although having notice, did not attend the examination of Mr. Waddington, they cannot be heard to protest the handling of that evidence at the arbitration stage (*see CROA 1241, 1557 and 1562*).

The allegations proved against Mr. Speed are serious. The importance of securing the hand brake on diesel units that are put away is well known to all employees. It is, moreover, common ground that tampering with the deadman's pedal, an extremely important safety device, is a dismissable offense. This was the Brotherhood's own position in a prior arbitration heard in this Office (*see CROA 1867*).

What, then, is the appropriate measure of discipline in the circumstances? In the Arbitrator's view dismissal is, *prima facie*, arguably justified in the circumstances. Each case must, however, be considered fully on its own merits, having regard to such factors as the length of an employee's service and his or her prior disciplinary record.

The record in the instant case reveals that while the grievor did not have an entirely clear disciplinary record, his standing of twenty demerits at the time of the incident in question does not, of itself, disclose a pattern of disciplinary recidivism. Of perhaps greater weight in the circumstances of this case is the length of Mr. Speed's service to the Company, which is some twenty-one years. On the whole the Arbitrator is satisfied that it is reasonable in the

circumstances to substitute a demotion of the grievor for his discharge, as the record discloses that he held original seniority as a yardman.

For these reasons the grievance is allowed, but only in part. The grievor shall be reinstated into employment, subject to a demotion to a position other than locomotive engineer, without compensation or benefits and without loss of seniority. I retain jurisdiction in the event of any dispute between the parties with respect to the interpretation or implementation of this award.

March 17, 1989

(Sgd.) MICHEL G. PICHER
ARBITRATOR