

CANADIAN RAILWAY OFFICE OF ARBITRATION
SUPPLEMENTARY AWARD TO
CASE NO. 1943

Heard at Montreal, Wednesday, 10 January 1990
Concerning

VIA RAIL CANADA INC.

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

There appeared on behalf of the Corporation:

P. J. Thivierge – Acting Director Labour Relations, Montreal

And on behalf of the Brotherhood:

G. Hallé – General Chairman, Quebec

SUPPLEMENTARY AWARD OF THE ARBITRATOR

The Arbitrator's award herein, dated September 15, 1989, concluded with the following finding and order:

On the whole of the material before me, I am compelled to agree with the representative of the Brotherhood that the assessment of a six-month suspension in the instant case was unduly harsh, having particular regard to the treatment of other similar cases, as reviewed above. The Arbitrator therefore orders that an assessment of forty demerits be substituted for the discipline assessed against Mr. Swales, and that he be compensated in full for all wages and benefits lost.

Item 2(j) of Appendix "A" to Addendum No. 49, provides as follows:

(j) An appeal against discipline imposed may be made in accordance with the grievance procedure. Should discipline after appeal be found to be unjust, resulting in cancellation of such discipline, an employee will be paid a minimum day for each 24 hours for the time held out of service at the minimum rate for the class of service in which last employed, exclusive of any amount earned in other employment.

This matter has been returned to the Arbitrator for a determination with respect to the appropriate measure of compensation. It is common ground that the Corporation paid to Mr. Swales compensation based on the application of Item 2(j) reproduced above. The Brotherhood submits that that provision does not apply as the Arbitrator did not "cancel" the discipline imposed on Mr. Swales, but merely substituted a lesser measure of penalty. In the circumstances it submits that his compensation should be calculated on the basis of actual miles lost, and not the daily minimum provided for in Appendix "A" to Addendum No. 49.

The Arbitrator cannot sustain the position of the Brotherhood. It cannot be contested that in the instant case the Arbitrator concluded that the discipline originally imposed was unjust. In my view that finding results in a voiding of the initial discipline. The question then before the Arbitrator became what measure of discipline was appropriate in the circumstances. In answering that question I deemed it appropriate to substitute a measure of discipline comprised of the imposition of forty demerits only, without any suspension.

What occurred may be characterized linguistically in a number of ways, and could arguably be said to be a reduction of discipline rather than a cancellation. However, to argue on that basis that Appendix "A" to Addendum No. 49 has no application is in my view artificial, and ignores the overarching purpose of that provision and the clear intention of the parties.

If the position of the Brotherhood were sustained anomalous consequences would be inevitable. If two locomotive engineers were in charge of a single passenger train, and were both suspended and assessed demerits because of their involvement in a serious rules infraction, curious, and in my view unintended results could flow from the Brotherhood's interpretation. If an arbitrator were to find that the first engineman was entirely without fault and deserving of no discipline, thereby "cancelling" both the suspension and the assessment of demerits, the employee affected would fall to be compensated under the terms of Addendum No. 49. On the other hand, should the second engineman be found to have been at fault, but not deserving of a suspension, following the Brotherhood's interpretation an arbitral order reducing his penalty to demerits only would result in the compensation of the engineman who was at fault on the basis of a more generous formula than that available to the innocent engineman. Absent any clear indication to the contrary in the language of the Collective Agreement, I am not prepared to conclude that the parties would have intended such an arbitrary result. In my view the language of Item 2(j) of Appendix "A" to Addendum No. 49 must be taken implicitly to include the reduction of discipline as falling inextricably within the concept of the cancellation of the discipline originally assessed by the Corporation.

For all of the foregoing reasons the Arbitrator finds that the compensation of Mr. Swales by the Corporation is in keeping with the terms of the Collective Agreement and, by extension, of the Arbitrator's award of September 15, 1989.

January 12, 1990

(Sgd.) MICHEL G. PICHER
ARBITRATOR