

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2461

Heard in Montreal, Wednesday, 9 March 1994

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Discipline assessed to Mr. A. Andrews, Work Equipment Operator, for allegedly operating a Speed Swing beyond the limits authorized on the Track Occupancy Permit in contravention of Form 836, Section 2, Paragraph 2.4. Mr. Andrews was assessed 20 demerit points.

BROTHERHOOD'S STATEMENT OF ISSUE:

On May 17, 1990, the grievor was operating a speed swing at Caramat accompanied by Extra Gang Foreman Mr. D. Scott. At the material time, Mr. Scott requested a block between Caramat East and Seagram from the Rail Traffic Controller. The latter granted a TOP from Caramat West to Seagram.

The Union contends that: **1)** Foreman Scott requested the Main Track between Caramat East and Seagram which would have given the protection required. **2)** He received an answer from the RTC dispatcher that was reasonably interpreted as granting the protection requested. **3)** Responsibility for this incident properly rests with the RTC and not Mr. Andrews. **4)** The discipline assessed to Mr. Andrews was excessive and unwarranted.

The Union requests that the 20 demerits issued to Mr. Andrews be removed from his record.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) R. A. BOWDEN

GENERAL CHAIRMAN

There appeared on behalf of the Company:

C. J. McDonnell	– Counsel, Toronto
M. Hughes	– System Labour Relations Officer, Montreal
J. Blanchet	– Track Supervisor, Toronto
D. C. St-Cyr	– Manager, Labour Relations, St. Lawrence Region, Montreal
N. Tessier	– Observer

And on behalf of the Brotherhood:

R. A. Bowden	– System Federation General Chairman, CN Eastern Lines, Ottawa
R. Phillips	– General Chairman, Toronto
A. Trudel	– General Chairman, Montreal
L. Regis	– General Chairman, Ottawa

AWARD OF THE ARBITRATOR

The record discloses that on May 17, 1990, the grievor, Work Equipment Operator A. Andrews, was operating a Speed Swing at Caramat under the direction of Extra Gang Foreman D. Scott. Mr. Scott requested and obtained a Track Occupancy Permit. However the permit which he obtained was not as broad in scope as the permit he requested. While Mr. Scott requested track occupancy between Caramat East and Seagram, the rail traffic controller granted occupancy only from Caramat West to Seagram. In the result the speed swing operated by Mr. Andrews, under the direction of Mr. Scott, proceeded several miles over the main line without any track occupancy permit. On the material before the Arbitrator there can be little doubt that the two employees involved knew, or reasonably should have known, that their movement was outside the limits of their track occupancy permit and constituted a violation of Form 836, Section 2, Paragraph 2.4. That provision reads as follows:

No employee in charge of a heavy track unit shall permit it to foul or occupy the main track except:

- (a) under flag protection as prescribed by UCOR Rules 40 to 42;
- (b) in accordance with UCOR Rules 321 to 323;
- (c) under the authority of and in accordance with a TOP; or
- (d) in accordance with UCOR Rule 93 on a subdivision designated in the time table.

In the course of its presentation at the arbitration, the Company submitted that Mr. Andrews violated the provisions of paragraph 4.11 of the Company's Form 836 (Railway Protection of Track Units and Maintenance Work Regulations) which provides:

4.11 An employee who is made aware of the contents of a TOP shall, if the Foreman fails to comply with the TOP, immediately remind him of its contents.

The Brotherhood submits that the grievor was not susceptible of discipline under the terms of section 2, paragraph 2.4 of Form 836. Specifically, its representative argues that the provisions of that article apply to the individual "in charge" of the movement of the track unit in question. He maintains that in that circumstance that person was Extra Gang Foreman Scott, and not the operator of the unit, Mr. Andrews. Stressing that the notice of discipline directed to the grievor dated July 5, 1990 cites only a violation of paragraph 2.4 of section 2 of Form 836, he submits that the discipline assessed against Mr. Andrews cannot stand.

Upon a close review of the language of the Railway Protection of Track Units and Maintenance Work Regulations, the Arbitrator is persuaded that the position argued by the Brotherhood is correct. While there may well be circumstances where an employee other than a foreman, including a work equipment operator, may be said to be "in charge" of a track unit for the purposes of section 2, paragraph 2.4, regard must be had to the facts of any particular incident to determine whether that is the case.

In the case at hand, if there had been any conflict as to the movement or utilization of the speed swing operated at Caramat by Mr. Andrews, that conflict would have been resolved by the decision of Mr. Scott. He was both the foreman overseeing the movement and utilization of the speed swing, and the person in whose name the track occupancy permit was issued. Quite apart from the issue of the track occupancy permit, however, Mr. Scott was for all purposes directing the operation of the vehicle and was "in charge" of the track unit when it was being moved contrary to the requirements of section 2, paragraph 2.4 of Form 836.

It appears to the Arbitrator that the Company is correct in its assertion that Operator Andrews failed to observe the requirements of paragraph 4.11 of Form 836. There can be little doubt that he was under an obligation to remind his foreman of his failure to comply with the track occupancy permit, and that he failed to do so. Significantly, however for the purposes of this grievance, Mr. Andrews was not disciplined for a violation of paragraph 4.11. Rather, the Company assessed the twenty demerits against his record for an alleged violation of section 2, paragraph 2.4 of Form 836. For the reasons related above, the Arbitrator is satisfied that in the circumstances which obtained, that portion of the regulations was violated by Mr. Scott, who was disciplined under its terms, and not by Mr. Andrews. Given the conclusion reached it is not necessary to deal with the Brotherhood's alternative submissions.

For the foregoing reasons the grievance must be allowed. The Arbitrator finds that Mr. Andrews was not, in the circumstances disclosed, liable to be disciplined for a violation of section 2, paragraph 2.4 of Form 836. The Company is therefore directed to remove, forthwith, the twenty demerits assessed to his record.

11 March 1994

(sgd.) MICHEL G. PICHER
ARBITRATOR