

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2469

Heard in Montreal, Wednesday, 13 April 1994

concerning

CANADIAN PACIFIC LIMITED

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[UNITED TRANSPORTATION UNION]**

EX PARTE

DISPUTE:

Company declined the Union's request to reinstate London Conductor B.R. Gill and reimburse him for his lost earnings.

UNION'S STATEMENT OF ISSUE

On May 28, 1992, Conductor B.R. Gill and his crew, which consisted of Engineer R.C. Lefebvre and Trainperson G. Emery, were involved in an incident while switching at Toronto Yard which resulted in the unfortunate and tragic death of Mr. Emery.

Immediately following the accident Conductor Gill and Mr. Lefebvre were held out of service pending investigations.

Following the investigation both Mr. Gill and Mr. Lefebvre were returned to service.

Approximately three weeks after Mr. Gill's return to service he was advised that he was being dismissed from CP Rail service.

The Union appealed the dismissal of Conductor Gill on the grounds that it was inappropriate and too severe and requested that he be reinstated back into service and paid his loss of earnings.

The Company declined the Union's request.

FOR THE UNION:

(SGD.) D. A. WARREN

GENERAL CHAIRPERSON

There appeared on behalf of the Company:

J. S. McLean	– Manager, Labour Relations, Toronto
H. B. Butterworth	– Labour Relations Officer, Toronto
B. M. Duffy	– Manager Training Toronto
P. Chappel	– Assistant Superintendent, IFS
M. Bertrand	– Superintendent, IFS
R. N. Hunt	– Labour Relations Officer, Montreal
M. G. DeGirolamo	– Director, Industrial Relations,

And on behalf of the Union:

D Ellickson	– Counsel, Toronto
D. A. Warren	– General Chairperson, Toronto
S. Keene	– Vice-General Chairperson, London
T. G. Hucker	– International Vice-President, BofLE, Ottawa
B. Gill	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator discloses that on May 28, 1992, Conductor Gill was assigned to Train 923-28 scheduled out of Toronto Yard at 11:00 hours. His crew was comprised of Locomotive Engineer R.C. Lefebvre and Trainperson G.W. Emery. The crew commenced their tour of duty by boarding their three locomotive units at the diesel shop. They were instructed to proceed to pick up their train on track A2 by Toronto Yard Coordinator R.P. Venn. After turning their locomotive units around on a wye in the Toronto Yard, they proceeded westward up track A4. Shortly they noticed a tank car on the A3/A4 lead ahead of them. The locomotive engineer spoke by radio to Mr. Venn. When it appeared that waiting for a yard engine to pick up the tank car would cause undue delay, the crew proposed to Mr. Venn that they could drop the tank car into the A3/A4 lead by means of a running switch. At 11:16 hours Mr. Venn gave Mr. Lefebvre permission to drop the tank car into the lead. There appears to be little doubt, from the radio transcript, that this suggestion was appreciated by Mr. Venn. He indicated in conversation with Mr. Lefebvre that he had forgotten about the tank car, which had been set off another train, and thanked Mr. Lefebvre for the offer to move it.

There is no dispute as to the method which the crew utilized to make the switch. The tank car was coupled to the lead locomotive unit. The plan was for the locomotives to pull the tank car eastward in the direction of a switch which was to be controlled by Conductor Gill. When the proper speed was reached Trainperson Emery, who was stationed on the northwest step of locomotive 4703, was to pull the uncoupling lever from the leading end of the locomotive unit. He was then to detrain, at which point the unit consist would accelerate away, with both the tank car, moving freely, and the locomotive units heading eastward on Track A4. Conductor Gill was to manipulate the switch in such a way as to send the locomotive units eastward onto track A2 and to send the tank car eastward onto the lead of track A3/A4. Having detrained the moving locomotives, Trainperson Emery was to proceed to the westward extremity of the moving tank car, climb aboard it and operate the hand brake to control its speed and ultimately bring it to a stop in the A3/A4 lead.

The manoeuvre being executed by the crew, known as a “running switch”, is one which has been in use for years within the company’s operations, system wide. The uncontroverted evidence before the Arbitrator is that the method which the crew proposed to use to execute the running switch is the only method in which the Company’s employees, including the grievor’s crew, were ever trained. It does not appear disputed that the running switch used by Conductor Gill’s crew, involving entraining and detraining, is commonly used among three person crews. It appears that with a four person crew the manoeuvre could be performed with a second brakeperson aboard the car being switched, thereby avoiding the need for employees to climb on and off moving equipment.

The material before the Arbitrator discloses that commencing February 28, 1992, in all operations east of Thunder Bay employees were prohibited from mounting or dismounting moving equipment. This is reflected in a bulletin, Notice No. 053, dated February 28, 1992 addressed to all crews in the Toronto Division, issued by L.A. Clarke, Superintendent. The notice reads as follows:

As part of our overall objective to limit the exposure of employees to functions related to a high frequency of injuries the following will become effective immediately.

Employees are prohibited from mounting or dismounting moving equipment of any kind. All equipment must be brought to a complete stop prior to undertaking these actions.

Bulletins to the same effect were issued again on March 5, 1992 and May 1, 1992.

It is common ground that west of Thunder Bay it has remained permissible for crews to execute running switches even where it might involve entraining and detraining moving equipment. Such moves are subject to the requirements of Form 300-2, Section 1, Item 5(f) which reads as follows:

5 Rolling Stock

- f) getting on and off moving equipment must be done at speeds not exceeding 10 km. (6 miles) an hour. When equipment and/or conditions warrant this must be done at lower speeds or when equipment is stopped.

It is not disputed that the above rule, which remains in effect west of Thunder Bay, was in effect at the Toronto Yard until the bulletin of February 28, 1992.

The evidence also discloses that the issuing of the bulletin by Superintendent Clarke did not bring an immediate end to the well-established practice of employees getting on and off moving equipment during a switch. The Union submits that in fact the practice continued with the knowledge and acquiescence of supervisory staff. The Company, on the other hand, denies that it knowingly tolerated deviations from the bulletin. It is not disputed that between February 28 and the fatality of May 28, 1992, five crews were cautioned for not having observed the prohibition against getting on and off moving equipment.

It is not denied that Conductor Gill was aware of the prohibition against entraining and detraining moving equipment, and that he knew that the manoeuvre being contemplated by his crew was contrary to the local rule. It is also true, however, that neither he nor any other member of his crew had been trained in an alternative method of executing a running switch with a three person crew. The Company submits that this could have been accomplished by stationing the brakeperson on the tank car prior to the commencement of the manoeuvre, with Conductor Gill stationed on the side step of the locomotive unit. According to the Company's submission, Conductor Gill could have released the pin at the appropriate speed and remained on the locomotive until it had cleared the switch. The locomotive would then have been brought to a stop, at which point Conductor Gill could have detrained and manipulated the switch to direct the tank car, whose speed would be controlled by the brakeperson, into the destination track. As noted above, it is common ground that Conductor Gill's crew had never been trained in the execution of a running switch in that manner.

Against the foregoing background, I turn to consider the unfortunate events which unfolded as Conductor Gill's crew attempted to perform the running switch in respect of the obstructive tank car. The evidence discloses that a first attempt to perform the switch was unsuccessful. During the first attempt, Trainperson Emery was unsuccessful in uncoupling the tank car. The Q-Tron readout on the lead locomotive unit discloses that the unit attained a speed of 11.7 m.p.h. during the first attempted switch.

The consist was again moved westward and a second attempt was undertaken. As previously arranged, the crew used hand signals to communicate during the switch. Once the movement had proceeded a sufficient distance westward, Conductor Gill, who was stationed on the north side of the tracks near the switch, signaled to Locomotive Engineer Lefebvre to stop. He then crossed the tracks to the south side, stationing himself at the switch. As prearranged, Mr. Emery was to nod to the locomotive engineer to confirm that the tank car was uncoupled. Mr. Emery would do so from his position on the platform of the engine, while hanging on to the railing of the platform, having leaned around it to lift the pin by means of a lever.

Locomotive Engineer Lefebvre is the only witness as to the final actions and movements of Trainperson Emery. He relates that when the crew was in position to commence the second attempt at the running switch he asked Trainperson Emery whether he was ready, to which the trainperson responded in the affirmative. He relates that he started the movement eastward, and after travelling some two or three car lengths he reduced the throttle and made a brake application with the independent brake to bunch the slack to facilitate the removal of the pin and the uncoupling of the tank car. The locomotive engineer relates that Mr. Emery nodded, indicating that the pin was successfully pulled and that the car was uncoupled. According to Mr. Lefebvre, as related in his initial investigatory statement of June 4, 1992, as Trainperson Emery stepped off the engine Mr. Lefebvre increased the throttle to full, to accelerate away from the tank car. Mr. Lefebvre relates that he continued to watch Mr. Emery, when he saw his feet slip out from under him, causing him to fall directly in front of the tank car. The locomotive engineer then called "Emergency" over the radio as he watched the car run over Mr. Emery, killing him.

In a supplementary statement taken on June 25, 1992, Locomotive Engineer Lefebvre brought greater precision to his account of the events. He then indicated that he could not specifically recall having seen Trainperson Emery either standing beside the track or detraining. As the Company submits, this suggests the possibility that Mr. Emery might have fallen directly from the steps of the locomotive platform, onto the track and into the path of the oncoming tank car when there was little or no distance between the car and the locomotive units. The Q-Tron records disclose

that at the point in time when the tank car was successfully uncoupled the speed of the locomotive units was 11.7 m.p.h., almost twice the permissible speed contemplated in Form 300-2, Section 1, Item 5(f) which, in any event, had been overruled by the bulletin of February 28, 1992.

Following a disciplinary investigation, Conductor Gill was discharged for having violated some eleven rules during the tour of duty leading up to the unfortunate accident. A number of the rules violations cited bear no relation to the running switch or the events resulting in Mr. Emery's death. For example, the Company notes that Conductor Gill condoned the violation of CROR rule 83(d) and rule 3 when Locomotive Engineer Lefebvre and Trainperson Emery did not enter the yard office to familiarize themselves with current bulletins and synchronize their watches, at the commencement of their tour of duty. It also submits that Conductor Gill himself violated rule 83(d) by failing to sign the operating bulletins prior to commencing work. Further exception is taken to a number of rules infractions which occurred during the movement of the locomotive units from the diesel shop to the point where the tank car was encountered. These include violations of rule 12.2 in respect of the proper use of radios during the course of switching at other locations and the excessive speed recorded during the movement of the locomotive units through the yard.

While the Arbitrator does not diminish the importance of the rules violations cited by the Company, counsel for the Union is correct in his submission that, with the exception of the manner in which the running switch was executed, those violations did not contribute to the fatality. In all likelihood they would not, standing alone, have resulted in the discharge of Conductor Gill, although some degree of serious discipline may well have resulted. Indeed, at the hearing, the Company's representatives indicated that the gravamen of Conductor Gill's offence, as it relates to the running switch, is his violation of CROR rule 106(d) which is as follows:

(d) The conductor and locomotive engineer, (also pilot if any) are responsible for the safe operation of the train or equipment in their charge and for the observance of the rules. Under conditions not provided for by the rules, they must take every precaution for protection. Other crew members are not relieved of their responsibility under the rules.

Both Conductor Gill and Locomotive Engineer Lefebvre were dismissed for their involvement in the events relating to the death of Trainperson Emery. However, for the purposes of the arbitration of their grievances, the relative degrees of responsibility of Conductor Gill and Locomotive Engineer Lefebvre must be examined separately and individually, having close regard to all of the circumstances. Those aspects of the facts bearing directly on the responsibility of Locomotive Engineer Lefebvre have been dealt with in a separate award (**CROA 2468**). I turn now to consider the factors bearing on the responsibility and appropriate measure of discipline for Conductor Gill.

Firstly, it must be noted that Conductor Gill has an extremely positive record. An employee of some eleven years' service at the time of the incident in question, he had never previously been disciplined.

In dealing with this grievance, the Arbitrator has substantial concerns with respect to the measures taken by the Company, or more precisely the measures not taken, to enforce the directive of February 28, 1992 prohibiting employees from entraining and detraining moving equipment during switching operations. Given that the bulletin of February 28 was effectively reissued on March 5 and May 1, 1992, there is reason to believe that the Company was aware that it was not being observed by crews working in the Toronto Yard. That appears to be further supported by the fact that at least five crews had been spoken to for violating the bulletin, prior to events of May 28, 1992. Perhaps most significantly, the evidence discloses, beyond controversy, that neither the grievor nor any member of his crew had ever been trained in the proper method of accomplishing a running switch with a three man crew without entraining or detraining moving equipment, either before or after the bulletin of February 28, 1992. In fact all of the crew members had been trained to perform a running switch precisely in the way in which it was attempted, insofar as the positioning and movement of the crew members during the course of the move is concerned. Against that background, notwithstanding that Conductor Gill was aware that the prohibitive bulletin was in effect, a person in his position could well have concluded from the radio communication with Mr. Venn, that the three-person crew was effectively being permitted to by-pass the rule and execute the running switch in accordance with the only method which they had been taught.

For reasons expressed in **CROA 2468**, the Arbitrator has substantial concerns with the manner in which Mr. Lefebvre operated the locomotive units during the two attempts at the running switch, particularly in relation to the speed of the move through throttle and brake applications. However, it is clear from the material before me that the speeds at which the locomotive units operated were not under the effective control of Mr. Gill who was positioned

on the ground some distance from the locomotive units during the entire course of the running switch. Notwithstanding the contrary suggestions of the Company, I cannot find, on the balance of probabilities, that Mr. Gill was in a position to know that Locomotive Engineer was executing the running switch at nearly twice the speed permissible under the rule of Form 300-2, Section 1, Item 5(f). Nor was he in a position to know or control such factors as Mr. Lefebvre's "plugging" of the locomotive units, stopping the locomotive by reversing the traction motors after the first attempt of the running switch. During his supplementary investigation Locomotive Engineer Lefebvre confirmed that plugging was not permissible in the circumstances, and acknowledged that the procedure could be hazardous to personnel "... because of the jerking motion that it could possibly make may cause someone to fall off.". The evidence discloses that there were grave errors of judgment and procedure for which Locomotive Engineer Lefebvre was responsible, but in respect of which Conductor Gill could neither be aware nor responsible in any practical sense. As noted above, I am satisfied, on the balance of probabilities, that he was not aware of the excessive speeds being engaged in by Locomotive Engineer Lefebvre during the attempt at the running switch.

On the whole, the principal error committed by Conductor Gill appears to be that he knowingly agreed to perform a running switch in a manner prohibited by the bulletin of February 28, 1992. It is also arguable that he should have directed the crew to use a greater length of track for the uncoupling operation. While the evidence does not clearly disclose that Mr. Venn endorsed the crew's violation of the bulletin, it is undisputed that the crew performed the moving switch in the only way they had been taught by the Company. In the result, while I am satisfied that there were grave errors committed by Conductor Gill in permitting the entraining and detraining of a crew member during the course of the move, notwithstanding what he might have believed Mr. Venn to have approved, I am not persuaded that his responsibility for the unfortunate accident can be ascribed the same degree of gravity as would attach to Locomotive Engineer Lefebvre. Further, in light of the length and exemplary quality of Conductor Gill's prior record, there is reason to believe that a disciplinary measure short of discharge will have the desired rehabilitative effect.

For the foregoing reasons the grievance is allowed in part. The Arbitrator directs that Conductor Gill be reinstated into his employment, without compensation for wages and benefits lost, and without loss of seniority.

15 April 1994

(sgd.) MICHEL G. PICHER
ARBITRATOR