

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2534

Heard in Montreal, Thursday, 13 October 1994

concerning

CANADIAN PACIFIC LIMITED

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)**

DISPUTE:

Dismissal of Yard Foreman R.S. Kullman, Regina, Saskatchewan.

JOINT STATEMENT OF ISSUE:

Following a formal investigation, Yard Foreman Kullman was assessed 20 demerits marks for:

“Failing to ensure that equipment was properly secured before a coupling was made, resulting in an uncontrolled movement of equipment causing damage to an unloading device, track end protection, track and CP 337460; a violation of CROR General Notice, CROR Rule 106(a) and (d), and Rule 113(a), 1900 Yard Assignment, H-45 team facility at Regina, near mile 94.8 Indian Head Subdivision, March 4, 1993.”

As Yard Foreman Kullman’s discipline record stood at 50 demerit marks at the time of this incident he was also issued a second Form 104 stating:

“Please be informed that you have been DISMISSED for the accumulation of demerit marks under the Brown System of Discipline, at Regina, Saskatchewan.”

The Union has requested that the Corporation reinstate Yard Foreman Kullman without loss of seniority and with payment for lost time, either by the use of deferral discipline or by a reduction of the discipline assessed to permit his reinstatement.

The Company has declined the Union’s request.

FOR THE UNION:

(SGD.) L. O. SCHILLACI
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) M. E. KEIRAN
for: GENERAL MANAGER, OPERATION & MAINTENANCE, HH-P

There appeared on behalf of the Company:

M. E. Keiran – Manager, Labour Relations, Vancouver
G. Chehowy – Manager, Labour Relations, Montreal

And on behalf of the Union:

L. O. Schillaci – General Chairperson, Calgary
R. S. Kullman – Grievor

AWARD OF THE ARBITRATOR

It is not disputed that the grievor rendered himself liable to discipline by failing to ensure that equipment was properly secured before a coupling was made during the course of his tour of duty on March 4, 1993. On that date the grievor, working as yard foreman, was involved in switching a number of cars in the H-45 compound of the Regina Yard. The following day it was discovered that damage had been done to the west end of a car which his crew had switched, as well as certain equipment in the H-45 storage track. The damage involved two broken rails, a bent bump post, damage to the table of a buck unloader and to the platform and coupling mechanism of the car in question. During the course of a disciplinary investigation the grievor admitted to having violated CROR Rule 113(a), and admitted that he had not walked to the west end of the south track prior to the coupling taking place to verify the extent of the clearance between the cars being moved and the bump post and buck unloader.

On behalf of the grievor the Union submits that the evidence does not establish that the grievor's failure to observe CROR Rule 113(a) necessarily resulted in the damage which occurred. Its representative suggests that there may have been an intervening cause, including the possibility of a contractor who was operating a bobcat in and around the cars in question on March 4, 1993. The Arbitrator has some difficulty with that assertion. Firstly, the grievor himself, during the course of the Company's disciplinary investigation, virtually accepted that, in all likelihood, the damage was caused by the switching movement of which he was in charge. Moreover, even if one accepts that Mr. Kullman's violation of the rule did not result in the damage which occurred (a conclusion which the Arbitrator rejects, on the balance of probabilities) he would nevertheless be liable to discipline for his violation of the rule. In this regard, the assessment of ten demerits, which would plainly be within the reasonable range of discipline, would still place him in a dismissable position.

The Union also submits that the grievor should be given the benefit of deferred discipline or, in the alternative, that the Arbitrator should exercise his discretion to reduce the penalty to less than discharge for the accumulation of demerits. With respect to the first submission, the Arbitrator adopts the principles expressed in **CROA 2463** with respect to the narrow scope of review of a decision by the employer to decline to extend the protection of deferred discipline to an employee. In the case at hand the grievor is of relatively short service, having nine years' seniority. He was previously reinstated on compassionate grounds following his dismissal for accumulation of demerit marks in January of 1988. His reinstatement came only in April of 1989, following a lengthy period out of service without compensation. At the time of the incident giving rise to this grievance Mr. Kullman's disciplinary record stood at fifty demerits following five separate occasions of discipline between mid 1991 and the date of his discharge. Significantly, his record discloses four infractions of CROR 113. The third of those, which occurred prior to the incident at hand, resulted in the assessment of twenty demerits.

Regrettably, what the record discloses is an employee inclined to recidivism in the violation of operating rules designed to protect safe operations. His prior discharge and the repeated incidents of discipline since his reinstatement indicate his failure to respond to the Company's efforts at progressive discipline. The culminating incident of March 4, 1993 involved an admitted violation of CROR 113(a), an infraction for which the grievor once again became liable to the assessment of discipline. For the reasons related above, the Arbitrator must conclude that the discipline assessed in the circumstances was not unreasonable, and that in light of the grievor's length and quality of service, this is not an appropriate case for a substitution of penalty. Similarly, having regard to the principles reflected in **CROA 2463**, I cannot find that the Company has violated the provisions of the agreement in respect of the request of deferred discipline.

For all of the foregoing reasons the grievance must be dismissed.

14 October 1994

(signed) MICHEL G. PICHER
ARBITRATOR