

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2675

Heard in Montreal, Tuesday, 12 December 1995

concerning

VIA RAIL CANADA INC.

and

UNITED TRANSPORTATION UNION

DISPUTE:

Assessment of 45 demerits and subsequent discharge for accumulation of demerits assessed K. Lihou effective November 4, 1994.

JOINT STATEMENT OF ISSUE:

On November 4, 1994 the grievor was the Assistant Conductor on Train 84 operating between London and Silver on the Guelph Subdivision. The train operated outside the limits of their OCS clearance.

The grievor was assessed 45 demerits for his responsibility in the rule violation. As a result thereof, the grievor was dismissed for accumulation of demerit marks.

The Union appealed the discharge of the grievor arguing that the level of his discipline be reduced due to the fact that he was the Assistant Conductor on Train 84.

The Union further argued that the penalty of discharge was too severe in the circumstances of this case. The Union proposed that a period of suspension would ensure that the remedial needs of the Corporation were met and that as such a suspension would be a more appropriate form of discipline in this particular case.

The Corporation has declined all of the Union's appeals.

FOR THE UNION:

(SGD.) M. P. GREGOTSKI
GENERAL CHAIRPERSON

FOR THE CORPORATION:

(SGD.) K. TAYLOR
FOR: DEPARTMENT DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

K. Taylor – Senior Advisor and Negotiator, Labour Relations, Montreal
J. Ouellet – Senior Labour Relations Officer, Montreal

And on behalf of the Union:

G. F. Binsfeld – Secretary/Treasurer, GCA, Fort Erie
M. P. Gregotski – General Chairman, Fort Erie
R. Skelton – Local Chairperson, Toronto
G. Bird – Vice-General Chairman, Montreal

AWARD OF THE ARBITRATOR

It is not disputed that the grievor committed an error when Train 84 operated outside of its OCS clearance limits on November 4, 1994. The sole issue is whether the assessment of 45 demerits, resulting in the discharge of Mr. Lihou, was appropriate in the circumstances.

A close review of the facts discloses that the grievor's actions involved something less than merely forgetting to call the headend of his train as it approached the limits of its operating authority, at mile 83 of the Guelph Subdivision. It is common ground that OCS Clearance 618, which enabled Train No. 84 to travel from London Junction eastward to mile 83 of the Guelph Subdivision was communicated to Assistant Conductor Lihou by the train's conductor, J. Boland, just prior to the train entering the Guelph Subdivision, after it had left London. At that time the grievor initialed the clearance, as required.

The unchallenged evidence before the Arbitrator is that Mr. Lihou went about his business, which included collecting tickets, fully aware of the fact that the train was approaching its clearance limits at mile 83. It also appears that the conductor incorrectly read mileage 83 to mean mileage 63, an erroneous reading which he verbally communicated to the locomotive engineer. That error on the part of his fellow crew members was not known to by Mr. Lihou.

The evidence discloses that the territory through which the train was operating is known for problems in radio communication. It is not uncommon for crews to revert to cellular phones to communicate with the RTC at times, as radio contact frequently becomes impossible. General radio communications among the crew of a train are normally conducted on channel 1 of the radio system. Channel 3 is utilized for communicating with the RTC. The grievor's evidence, which is unrebutted and which the Arbitrator accepts, is that he did call the headend crew of his train as it approached mileage 83, in accordance with Rule 90, to notify the crew of the approaching clearance point. He made his call on channel 1. As he was doing so the engine crew replied to the effect that they were "going over to channel 3". It is not disputed that the exchange between the grievor and the headend was not in compliance with rule 90, as it did not involve a proper calling of the limits and a repeat of the call by the headend crew. However, in the circumstances the grievor assumed that the response of the headend crew that they were going over to channel 3 was an indication that they were aware of the clearance limit approaching, and were going onto channel 3 to communicate with the RTC to obtain further clearance. The evidence establishes, however, that the grievor was required to keep his radio on channel 1, as it was part of his duty to monitor hot box detectors which, it is agreed, relay signals on that channel. In the result, when the grievor's train proceeded past mile 83, he assumed that the conductor and locomotive engineer had received the proper clearance from the RTC to proceed beyond that point. That state of mind on the part of the grievor is further confirmed by the fact that it was only when he entered the club coach, shortly thereafter, and asked Conductor Boland for the clearance form that the conductor realized that his train had travelled beyond its operating limits. The conductor immediately contacted the RTC on a cellular telephone and the train was brought to a stop.

The Corporation assessed forty-five demerits against each of the three members of the crew. As a result, by reason of the accumulation of demerits, Mr. Lihou was discharged. The Corporation asserts that by reason of his relatively short service, commencing in May of 1987, and his prior disciplinary record, his termination for the accumulation of demerits was appropriate, and should not be disturbed.

The Arbitrator accepts, as a general rule, that discipline for a cardinal rules infraction should not lightly be disturbed, particularly as it might involve an employee whose years of service are limited, and whose disciplinary record is not impressive. However, it is incumbent upon an arbitrator to carefully weigh all mitigating factors, in any case of termination. In the instant case there are factors which do suggest that a long term suspension might be an appropriate form of discipline, rather than discharge. Firstly, with respect to the incident itself, without diminishing the importance of the obligations which befall an assistant conductor, it is not unreasonable to conclude that a somewhat greater burden of immediate responsibility rests on the conductor and the locomotive engineer. That distinction has previously been considered in this Office (*see, generally*, **CROA 168, 482, 1125, 1479, 1887, 2469, 2470, 2543 and 2556**).

Secondly, as the evidence discloses, this is not a situation where the grievor neglected to obtain information about his train's clearance limits, nor did he ignore or forget them. As indicated above, he did call his fellow crew members as mile 83 was approached. He then incorrectly allowed himself to make assumptions as to his crew's

reading his call, and the actions which he believed they were taking. In so doing he clearly erred by failing to apply the proper procedures. However, his degree of culpability is somewhat less than that of the conductor who failed to read the clearance form correctly, or of the locomotive engineer who did not read it at all, and accepted verbal misinformation from the conductor as to the clearance limits.

Lastly, care must be taken in ascribing negative weight to the grievor's record in the case at hand. It is true that his record stood at fifty-five demerits. The un rebutted submissions of the Union, however, establish that those demerits were largely accumulated through a series of incidents involving poor attendance and timekeeping. That failing, it is agreed, was a function of a problem which the grievor previously had with alcohol abuse. In 1993, with the Corporation's leave, he entered a lengthy treatment program which resulted in his rehabilitation from that condition. The material before the Arbitrator suggests that he was successful in that endeavour and has regained control of his personal life.

In the circumstances, when all of these mitigating factors are taken into account, the Arbitrator is satisfied that the position advanced by the Union, urging that a penalty short of discharge be considered, is compelling. While in the Arbitrator's view the Corporation cannot be faulted for having followed principles of progressive discipline as it did, just cause for discharge is not made out and the whole of the picture before the Arbitrator, involving both the details of the incident itself and the previous facts underlying Mr. Lihou's extensive disciplinary record, suggest that this is an appropriate case for a substitution of penalty, albeit a severe one.

For the foregoing reasons the grievance is allowed, in part. The Arbitrator directs that the grievor be reinstated into his position without compensation or benefits and without loss of seniority. His disciplinary record shall stand at fifty-five demerits, with the period of time from his termination to his reinstatement being recorded as a suspension.

December 15, 1994

(signed) MICHEL G. PICHER
ARBITRATOR