

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2797

Heard in Calgary, Thursday, 14 November 1996

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(BROTHERHOOD OF LOCOMOTIVE ENGINEERS)**

DISPUTE:

Appeal the assessment of 30 demerits to Locomotive Engineer M.J. Mercier for failure to comply with CROR 43, Slow Order, 10 mph on bridge, Mile Post 232.5 Redditt Subdivision on October 2, 1995.

JOINT STATEMENT OF ISSUE:

On October 2, 1995, Mr. M.J. Mercier was employed as locomotive engineer on Train 103 operating between Sioux Lookout and Winnipeg on the Redditt Subdivision. A temporary slow order was issued and acknowledged by Mr. Mercier, providing for restricted speed of 10 mph, protecting an engineering bridge maintenance crew at Mileage 232.5 on the Redditt Subdivision. The investigation revealed that Train 103 entered the 10 mph temporary slow order at approximately 20 mph.

Following an investigation into the incident, Locomotive Engineer Mercier was assessed 30 demerits.

The Brotherhood contends that the discipline is too severe in light of the action taken by Mr. Mercier to bring the train to the permissible speed prior to entering the temporary slow order. This action included the initial brake pipe reduction, a further brake pipe reduction and finally an emergency application of the brakes. As well, the Brotherhood contends that Mr. Mercier's rights under the collective agreement were violated when he was not permitted to offer rebuttal to accusations made by the bridge foreman which had a direct bearing on Mr. Mercier's responsibility in this matter. The Brotherhood appealed the discipline requesting these factors, as well as Mr. Mercier's long service of 22 years, be taken into account and the discipline reduced.

The Company maintains that the discipline assessed to Mr. Mercier was appropriate given the seriousness of the violation, and has declined the Brotherhood's request.

FOR THE COUNCIL:

(SGD.) M. S. SIMPSON
FOR: GENERAL CHAIRMAN

FOR THE COMPANY

(SGD.) J. TORCHIA
FOR: SENIOR VICE-PRESIDENT, WESTERN CANADA

There appeared on behalf of the Company:

S. Michaud	– Labour Relations Officer, Edmonton
J. Dixon	– Assistant Manager, Labour Relations, Edmonton
S. Blackmore	– Labour Relations Officer, Edmonton

And on behalf of the Council:

M. S. Simpson	– Senior Vice-Chairman, Saskatoon
W. A. Wright	– General Chairman, Saskatoon
D. J. Shewchuk	– Vice-Chairman, Vancouver
D. E. Brummund	– Local Chairman, Kamloops

AWARD OF THE ARBITRATOR

As reflected in the joint statement of issue, it is not disputed that the grievor did operate his train overspeed when he entered the restricted speed area of a bridge under repair at mileage 232.5 on the Redditt Subdivision at a speed of approximately 20 mph, where the permissible speed was 10 mph. While the parties have a different view of the conclusions to be drawn from the event recorder download taken from the locomotive of train 103, it would appear undisputed that as the grievor approached the slow order zone he attempted to bring his train under control firstly by reducing the throttle, next by making a brake application of approximately seven pounds, then by initiating a full service brake application and, finally, in the last few seconds before reaching the bridge, resorting to an emergency brake application. In the result, Locomotive Engineer Mercier's train came to a stop some seven to eight car lengths into the reduced speed area. By his own admission he entered that area at a speed considerably in excess of 10 mph. Nor does it appear disputed that the grievor knew, or reasonably should have known, that the slow order was, in part, to protect employees who were working on the bridge at the time.

The incident came to the attention of the Company's supervisors as a result of a written memorandum issued by the Bridges and Structures foreman who witnessed the incident. As a result of his complaint, the data was downloaded from the locomotive unit's event recorder and a formal disciplinary investigation was convened.

The Council submits that the Company departed from the requirements of article 86.4 of the collective agreement in that the Bridge and Structures foreman, whose note of complaint was provided to the Council at the investigation, was not examined in the presence of the Council, with an opportunity to provide direct rebuttal. In this regard it cites article 86.4 of the collective agreement which provides as follows:

86.4 A locomotive engineer and his accredited representative shall have the right to be present during the examination of any witness whose evidence may have a bearing on the locomotive engineer's responsibility to offer rebuttal through the presiding officer by the accredited representative. The Local Chairman and/or the General Chairman to be given a copy of statements of such witness on request.

The Arbitrator cannot sustain the Council's objection with respect to the application of the foregoing provision in this case. Firstly, it is clear that there was no examination of the Bridges and Structures foreman, Mr. Ron Kerr, by the Company as part of its investigation. At most, the investigating officer had in his possession the note of complaint which launched the investigation, a copy of which was duly provided to the Council. Perhaps most significantly, when the grievor and his Union representative were shown the note from Mr. Kerr they made no request to have the opportunity to examine him directly, and registered no protest with respect to the Company's possession or use of that document. It appears to the Arbitrator that if Mr. Kerr had in fact been questioned or examined by the investigating officer, there might arguably have been a violation of article 86.4. That, however, is not what occurred. At most, the note from Mr. Kerr was provided to the Council, for the purposes of completing the record, by the tabling of the initial complaint which caused the formal investigation to be held. Alternatively, even if that document could be said to be tantamount to the examination of a witness, a proposition which the Arbitrator rejects, the grievor and his Union representative plainly waived any objection to its entry into the investigation record, and made no request to be present during an examination of Mr. Kerr for the purposes of offering rebuttal. In that circumstance there can be no basis for complaint by the Council. On these grounds its objection with respect to the procedure must be rejected.

The grievor's Union representatives submit that what transpired in the case at hand was not a reckless disregard of the slow order on the part of the grievor. Rather, they argue, the event recorder substantiates that for some period of time in advance of the train's approach to the bridge at mileage 232.5, Locomotive Engineer Mercier took a number of steps to bring his movement under control and down to the appropriate speed. The Arbitrator does not reject that characterization of the events. It would appear that Mr. Mercier progressively reduced his throttle setting, made an initial brake application, followed by a full service brake application and, in the last seconds when it was clear to him that he was going to violate the slow order, made an emergency brake application.

There are, however, certain aggravating factors to be considered. Firstly, the grievor's train was neither particularly long nor excessively heavy, and should have been reasonably manageable under normal conditions. Further, there is no evidence of adverse physical or weather conditions, nor any reason for confusion in the grievor's mind as to his whereabouts, and the need to approach the slow order zone with caution. Finally, it is not without moment that the slow order zone was, as the grievor knew or should have known, a work site attended by

maintenance personnel from the Company's engineering forces. There was, in all of the circumstances, every reason to take the greatest caution in ensuring that his movement approached the bridge under full control, so as to respect the reduced speed order and minimize danger to any workers who might be in the vicinity. On balance, therefore, the Arbitrator is compelled to accept the gravity of the incident stressed by the Company, at least to the extent of concluding that there was just cause for the assessment of a serious degree of discipline.

Unfortunately, the record discloses that Locomotive Engineer Mercier was disciplined for a previous speeding infraction in February of 1994, an event which attracted the assessment of twenty demerits. The awards of this Office have consistently recognized of the seriousness of offenses involving substantial overspeed in the operation of trains (*see, e.g., CROA 1052 and 2092*). It would appear to the Arbitrator that the Company is fully justified in applying principles of progressive discipline to bring to the grievor's attention the importance of correcting his train handling habits, so as to avoid similar incidents in the future, notwithstanding his prior long service and relatively good discipline record. Given the grievor's prior speeding record, the assessment of thirty demerits does, in my view, fall within the appropriate range of discipline for an infraction of this kind. In the result, the Arbitrator is not persuaded that the decision of the Company should be disturbed, and the grievance must be dismissed.

November 16, 1996

(signed) MICHEL G. PICHER
ARBITRATOR