

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2855

Heard in Calgary, Thursday, 15 May 1997

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

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

DISPUTE:

The discipline assessed Conductor T.A. McMahon and Trainperson A.G. Beyer of Cranbrook, British Columbia.

JOINT STATEMENT OF ISSUE:

On April 27, 1995, Conductor T.A. McMahon and Trainperson A.G. Beyer had their records debited with 40 demerit marks for proceeding into a TOP limit without permission.

On April 11, 1995, Conductor McMahon and Trainperson Beyer were crew members on train Extra 9023 East/North from Cranbrook/Fort Steele to Elkview. They were both located in the cab of the lead unit, when their movement passed the Fording River Subdivision Junction switch, entering into the TOP limits of Foreman Arola, without permission.

The Council has requested the Company reduce the discipline assessed, on account of mitigating circumstances.

The Company has declined the Council's request.

FOR THE COUNCIL:

(SGD.) L. O. SCHILLACI
GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) G. S. SEENEY
FOR: DISTRICT GENERAL MANAGER, BC DISTRICT

There appeared on behalf of the Company:

R. V. Hampel	– Labour Relations Officer, Calgary
R. E. Wilson	– Director, Labour Relations, Calgary
M. E. Keiran	– Manager, Labour Relations, Calgary
G. S. Seeney	– Manager, Labour Relations, Calgary
J. C. Copping	– Labour Relations Officer, Calgary
R. M. Smith	– Labour Relations Officer, Calgary

And on behalf of the Council:

K. Jeffries	– Vice-General Chairman, Cranbrook
B. McLafferty	– Vice-General Chairman, Moose Jaw
D. Ellickson	– Counsel, Toronto
A. McCormick	– Local Chairman, Winnipeg

AWARD OF THE ARBITRATOR

It is not disputed that the grievors were deserving of discipline for entering the Track Occupancy Permit (TOP) limits of Foreman Arola on April 11, 1995. The Council's submission is that there are mitigating circumstances which would justify a lesser penalty.

Among the factors raised by the Council is the role of Road Foreman of Engines R. Cadden. It is common ground that Mr. Cadden travelled aboard the lead unit of the grievors' train from Fort Steele to Sparwood to evaluate Trainman A.G. Beyer who was then due for his minimum qualification evaluation in the operation of locomotives. Mr. Beyer operated the locomotive to Sparwood. Once that destination was reached Road Foreman of Engines Cadden left the train and Locomotive Engineer Luscher returned to the controls. It appears that Mr. Cadden volunteered to line the junction switch at Sparwood for the train, and did so after he left the cab. After lining the switch Mr. Cadden made a hand signal to the train's crew, indicating that the switch was thrown and that the route was lined for them to proceed. The crew then moved their train forward, having forgotten an Item 8(A) restriction which required them to obtain authority to proceed northward beyond the junction switch, into the TOP limits of Foreman Arola, in accordance with Special System Instructions to CROR rule 90. Some seven and one-half car lengths into the restricted territory the locomotive engineer and Trainman Beyer both realized that no clearance had been secured, and the train was brought to an immediate stop, with the incident being duly reported.

The Council submits that the unusual routine within the locomotive engine's cab, including the change of locomotive engineers, the presence of Mr. Cadden, and the misleading impact of Mr. Cadden's hand signal, which the crew mistakenly took to be an indication to proceed forward, are all mitigating factors to be taken into account.

The Arbitrator cannot agree. While this Office has, in the past, had occasion to conclude that undue activity or distraction within the cab of a locomotive can be taken into account as a mitigating factor, such a conclusion can only be drawn on the basis of clear and compelling evidence. For example, in **CROA 2588** the presence of a Manager of Train and Engine Service who, as noted in the award, was arguably unfit for duty because of a lack of rest, and who, as recorded in a report of the **National Transportation Agency**, engaged in excessive discussion and debate with the members of the crew as they proceeded through busy and complex territory, it was found that "there was simply too much going on in the cab", a factor which in that case could be deemed mitigating. The facts in the case at hand are substantially different. There is no suggestion of any undue disorder or disturbance within the cab at or immediately prior to the time of the rule's infraction. Nor, in my view, can the lining of the switch and the hand signal provided by Mr. Cadden be pleaded as a mitigating factor in the circumstances of this case. Whether the crew were faced with a signal light or a hand signal indicating they could proceed they were, nevertheless, compelled to be aware of and to respect any TOP limits which might apply to their train's movement.

In the Arbitrator's view, the assessment of demerits was not out of the appropriate range for such a serious infraction. The material filed before the Arbitrator confirms that forty demerits was the penalty assessed in some fifteen similar occurrences, a number of which were not grieved, within the same general territory over a period of some six years prior to the incident giving rise to this grievance. On the whole, the Arbitrator is satisfied that the assessment of forty demerits to Conductor McMahon and Trainperson Beyer was justified in the circumstances, and should not be disturbed. For the foregoing reasons the grievance is dismissed.

Dated at Montreal, May 30, 1997

(signed) MICHEL G. PICHER
ARBITRATOR