

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3006

Heard in Calgary, Thursday, 12 November 1998

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

DISPUTE:

Appeal of discipline, discharge of Conductor J.R. O'Neill of Calgary, Alberta effective September 11, 1997 for violation of CROR 311(b), 34(b), 43(c), 142 Special Instruction on August 17, 1997.

JOINT STATEMENT OF ISSUE:

On August 17, 1997 the grievor was working as conductor on train #556-51-17. The crew was enroute between Calgary, Alberta and Kindersley, Saskatchewan. The crew exceeded a slow order and entered Foreman MacDonald's work limits without authority. As a result, the grievor and crew were removed from service and attended investigations held on August 21 (Conductor O'Neill & Trainperson Dennis Ewald) and August 29, 1997 (Locomotive Engineer Trevor Adamson). The grievor and the locomotive engineer were discharged from service and Trainperson Ewald was assessed a ninety (90) day suspension.

The Council's position is that discharge is too severe and requests that the grievor be reinstated without loss of seniority or benefits and with full compensation.

The Company disagrees.

FOR THE COUNCIL:

(SGD.) M. G. ELDRIDGE
FOR: GENERAL CHAIRPERSON

FOR THE COMPANY:

(SGD.) S. BLACKMORE
FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

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| S. M. Blackmore | - Labour Relations Associate, Great Plains District, Edmonton |
| A. E. Heft | - Manager, Labour Relations, Toronto |
| J. Bauer | - Human Resources Business Partner, Great Plains District, Edmonton |
| L. Bronson | - District Superintendent, Transportation, Great Plains District, Edmonton |
| T. Cowieson | - Superintendent, Transportation, Edmonton |
| S. Lintick | - Assistant Superintendent, Transportation, Edmonton |

And on behalf of the Council:

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|----------------|--------------------------------------|
| D. Ellickson | - Counsel, Toronto |
| M. G. Eldridge | - Vice-General Chairperson, Edmonton |
| M. Janssen | - Vice-General Chairperson, Winnipeg |

AWARD OF THE ARBITRATOR

This matter was first scheduled for hearing in Montreal in October of 1998. At the initial hearing the Council's representatives advised the Arbitrator that they could not locate the grievor, Conductor J.R. O'Neill. They requested that the matter be adjourned to be reconvened in Calgary in November of 1998, to give them a reasonable opportunity to find the grievor to provide him with reasonable notice of these proceedings. The adjournment was granted.

Upon the resumption of hearing in November of 1998 at Calgary the Council's representatives again advised the Arbitrator that they had been unable to contact Mr. O'Neill. According to the Council representative's representations, Mr. O'Neill resides in Calgary, the location of the hearing, but has apparently declined to make himself available to the Council's representatives or to respond to any efforts to contact him, including a number of efforts to reach him in person at his residence. The Council again requested an adjournment of the hearing, this time indefinitely, until such time as the grievor might be located or make himself available to the Council. Having been already subjected to one adjournment of this matter, and being fully prepared to proceed, the Company's representatives objected to any further adjournment.

At the hearing the Arbitrator ruled and denied the request for a further, indefinite adjournment. The discipline which is the subject of this arbitration was issued in September of 1997. The matter progressed through the grievance procedure and has been docketed in this Office for a considerable period of time. The initial adjournment granted to the Council in October of 1998 was to give it a reasonable opportunity to locate the grievor, on the understanding that one month should be a reasonable time for it to do so. There is no new information offered which would now suggest that a further indefinite adjournment, the undefined duration of which could ultimately prejudice the Company, will necessarily bring greater success causing the grievor to make himself available to the Council or to exhibit any greater degree of interest in his grievance.

Needless to say, the docketing and re-docketing of cases in this Office impacts the access to hearing of other pending grievances. Consequently, while reasonable allowance may be given to accommodate the efforts of a party to locate a missing individual, the business and agenda of the Canadian Railway Office of Arbitration cannot be made to ultimately depend on the agenda or idiosyncrasies of persons who, for reasons best known to themselves, fail to make themselves available or do not maintain a responsible degree of communication with their representatives. On the foregoing basis, and absent any new information or facts provided by the Council to confirm the likelihood of any future availability of the grievor, the Council's request for a further adjournment was denied.

The material before the Arbitrator confirms that Conductor O'Neill did violate CROR rule 311(b), 34(b), 43(c), and section 142 Special Instructions. On August 17, 1997 he was involved in two separate incidents, the substance of which are not disputed by the Council. The movement for which he was responsible, train L566-51-17, enroute from Hanna, Alberta to Kindersley, Saskatchewan over the Oyen Subdivision was subject to a slow order which required the train to reduce its speed to ten miles per hour at mileage 119.3 due to bridge conditions. The crew should have been vigilant to see a yellow flag on the roadway in advance of that location, as an indication that they should commence to slow their speed to comply with the ten mile per hour limit at mileage 119.3. In fact the grievor and Locomotive Engineer Adamson, who were located on the lead locomotive, apparently forgot about the speed restriction, did not see the yellow flag and were not alerted to their error until Locomotive Engineer Adamson first saw the green flag at the commencement of the restricted location, some four hundred feet distant. They were then unable to slow their train in time to respect the restriction, and proceeded through the slow order territory at a speed of thirty-six miles per hour.

In examining this aspect of the grievor's actions it is significant to note a discrepancy between his own account of what transpired as related in the Company's investigation and that provided in the statement of Locomotive Engineer Adamson. Mr. O'Neill stated that as the movement approached the anticipatory yellow flag Locomotive Engineer Adamson called it and he acknowledge the flag. He suggests that somehow both of them thereafter became distracted until they reached the green flag. However Locomotive Engineer Adamson provides an entirely different account. He admits that he did not see the yellow flag, and did not realize his error until he saw the green flag some four hundred feet away. In reviewing this aspect of the evidence the Arbitrator is inclined to prefer to account given by Locomotive Engineer Adamson, which is plainly less self-serving than that provided by Mr. O'Neill. The grievor's rather different statement raises concerns about his candour in this matter, and his willingness to take responsibility for his own inattention.

The second aspect of the incident is more serious. The authority under which the grievor's train operated required protection for a maintenance crew under Foreman MacDonald between Scotfield and mileage 102 of the Oyen Subdivision. His train was not to proceed past Scotfield, at mileage 108.3 absent specific authority from the foreman. In fact Conductor O'Neill entirely forgot or overlooked the track occupancy permit held by Foreman MacDonald. At approximately 14:50 his train entered the foreman's TOP limits and proceeded almost entirely through the six mile restricted area before he and the locomotive engineer saw Foreman MacDonald on a side track at mileage 102.3. While the grievor's first reaction was apparently to question Locomotive Engineer Adamson as to why a track maintenance crew would be at that location on a Sunday, the locomotive engineer quickly realized that they had overlooked OCS Clearance 418 which required them to stop or obtain the foreman's authorization before proceeding into the protected territory. Upon that realization he brought his train to an immediate stop.

The grievor's record discloses that he was previously discharged for a similar incident in April of 1993, although he was subsequently reinstated following an effective suspension of six months. Needless to say, disregard of a track occupancy permit is among the most serious of rules infractions, risking as it does grave injury to employees who occupy the protected territory, as well as possible damage their equipment. Given the serious degree of discipline assessed against him in 1993 for a similar incident, it was obviously incumbent upon Conductor O'Neill to be particularly vigilant in respect of track occupancy permits of which he was bound to be aware, on the day in question. Unfortunately, his initial disregard of his train's approach to the restricted speed area and, shortly thereafter, his equal disregard of the OCS clearance protecting Foreman MacDonald suggest that the grievor gave little meaningful consideration to the safe and vigilant operation of his train. It is only by good fortune that no injury or property damage resulted, as his movement travelled through virtually all of the restricted area under the control of Foreman MacDonald until it finally encountered him, out of harm's way on a side track. Within a space of thirty-four miles, encompassing one-quarter of his crew's scheduled tour of duty, Conductor O'Neill was responsible for the violation of four operating rules, including a cardinal operating rule.

While it is true that the grievor has relatively long service, having first hired on with the Company as a trainman in 1974, he knows, or reasonably should know, that repeated violations of operating rules, particularly cardinal rules, must have the most serious of disciplinary consequences. Unfortunately, the grievor's prior record does include a very similar infraction, for which serious discipline was assessed, apparently without the desired rehabilitative effect. In these circumstances the Arbitrator is satisfied that the Company was justified in discharging the grievor, and that this is not an appropriate case for a substitution of penalty. For these reasons the grievance must be dismissed.

November 17, 1998

(signed) MICHEL G. PICHER
ARBITRATOR

SUMMARY – CROA 3006

Conductor O'Neill – discharge – violation CROR 311(b), 34(b), 43(c), speeding, track occupancy permit – arbitrator discusses (1) union's request for adjournment due to absence of grievor (2) employee's disregard for safety & failure to accept responsibility – prior record and length of service – locomotive engineer subsequently reinstated by company – GRIEVANCE DISMISSED

KEYWORDS – 3006

Discipline discharge adjournment speeding track occupancy permit major rule severity record length of service responsibility dismissed

CNR – UTU – November 12 1998 – award dated November 17 1998