

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3047

Heard in Calgary, Tuesday, 11 May 1999

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Mr. T. Tinordi.

EX PARTE STATEMENT OF ISSUE:

On September 22, 1997, the grievor received a Form 104 advising him that his record had been debited 20 demerits on account of his alleged failure to ensure that the track unit he was responsible for "was operating at a speed that would permit stopping within one-half the range of vision of OTM Loader "4019-02". The Brotherhood grieved the assessment of this discipline.

The Union contends that: 1.) The track unit in question was not being operated by the grievor but rather was being operated by a new, untrained employee; 2.) The discipline assessed the grievor was unwarranted and too severe in the circumstances.

The Union requests that the discipline assessed be removed from the grievor's record.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

J. Dragani	– Labour Relations Officer, Calgary
R. M. Andrews	– Manager, Labour Relations, Calgary
D. E. Freeborn	– Labour Relations Officer, Calgary
E. J. MacIsaac	– Labour Relations Officer, Calgary
D. McIntyre	– Track Maintenance Supervisor, Lethbridge
H. Roberts	– Track Maintenance Foreman, Lethbridge

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
D. W. Brown	– Sr. Counsel, Ottawa
K. Deptuck	– Vice-President, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. McCracken	– Federation General Chairman, Ottawa
W. Brehl	– General Chairman – Pacific Region, Revelstoke
R. Terry	– Local Chairman, Lethbridge

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor was the Extra Gang Foreman on the Pacific Steel Gang No. 1 on May 26, 1997. During the course of that tour of duty he and a number of employees were being transported aboard a track unit which was following a loader machine proceeding approximately some two hundred feet ahead of them on a tangent track at Mile 66.2 of the Thompson Subdivision, when a collision resulted. It appears that the loader stopped on the track, apparently without giving any appropriate signal, and the employee operating the track unit failed to stop in time to avoid colliding with the loader.

The employee in question was disciplined, and has grieved. Following an investigation the Company also assessed twenty demerits against Mr. Tinordi, largely on the basis of the fact that the employee operating the track unit was relatively inexperienced, and that the grievor should have been more vigilant in the circumstances.

Upon a close review of the facts the Arbitrator cannot sustain the position of the Company in this case. It does not appear disputed that the track unit in question required a driver capable of utilizing a manual transmission. The employee assigned to that task by Mr. Tinordi was the only one in his crew so qualified. Secondly, the unchallenged evidence of the Brotherhood is that on the day immediately following the incident the brakes of the track unit were entirely replaced. In the circumstances the Arbitrator has some difficulty with the submission of the Company that the grievor was himself responsible for what transpired. As a passenger located behind the operator of the track unit, a machine whose brakes were in questionable condition, he was not in a position to substantially influence the events which unfolded. At most, it would appear to the Arbitrator that Mr. Tinordi may have failed in such responsibility as he might have had to ensure, before any movement took place, that the brakes of the track unit were in fact properly operational. However, it is less than clear to the Arbitrator that he can be faulted for assigning the operation of the track unit to the only qualified employee supplied to him by his own supervisors.

In the result, I am satisfied that the assessment of five demerits is more appropriate in the circumstances of this case. The grievance is therefore allowed in part, and Mr. Tinordi's record is to be adjusted accordingly. It should be added, however, that the conclusions in this matter also bear on the Arbitrator's determination of **CROA 3048**, and the decision to substitute a suspension for the grievor's eventual discharge following the incident considered in that case. While I might otherwise have assessed ten demerits for the instant infraction, for reasons relating to the grievor's prior length of service, and the comments in respect of demotion dealt with in **CROA 3048**, I am satisfied that the assessment of five demerits by the exercise of the Arbitrator's discretion is appropriate in the circumstances.

May 14, 1999

(signed) MICHEL G. PICHER
ARBITRATOR