

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3084

Heard in Montreal, Wednesday, 12 January 2000

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

EX PARTE

DISPUTE:

The Company's refusal to remove twenty (20) demerits from the work record of Locomotive Engineer Alain Lacroix and the Company's violation of article 73.1(B) of Agreement 1.1.

EX PARTE STATEMENT OF ISSUE:

On September 23, 1998 the grievor was working as locomotive engineer on train M36921-23. During the grievor's tour of duty the in-charge yard coordinator instructed the grievor and his crew to place ten (10) cars in track MW05 which resulted in the derailment of several cars and light damage to other adjacent tracks.

On October 5, 1998 the grievor was required to provide a formal employee statement concerning the derailment. The Company subsequently issued twenty (20) to the grievor for not following the instructions of the in charge yard coordinator.

The Brotherhood submitted the required grievance to the Company on behalf of the grievor. The Company has declined the Brotherhood's grievance.

FOR THE COUNCIL:

(SGD.) B. E. WOOD

GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. Laurendeau – Labour Relations Associate, Montreal
D. Parent – Assistant Superintendent – RDP

And on behalf of the Council:

B. E. Wood – General Chairman, Halifax
A. Picard – Local Chairman

AWARD OF THE ARBITRATOR

The issue at hand is whether the grievor was instructed by the traffic coordinator to push a cut of cars from his incoming train into track MW05 of Taschereau Yard on September 23, 1998. It is common ground that the track in question had sufficient space for the ten cars to be simply dropped and coupled, without being pushed. They were in fact pushed by the grievor, on direction from his conductor, resulting in the derailment of a number of cars located on the track, as well as some damage to adjacent tracks.

It is rare for a grievance to be resolved on the basis of the burden of proof, but this is such a case. The Arbitrator is confronted with two categorically different accounts of what transpired. Locomotive Engineer Lacroix and his conductor have both provided statements that they were expressly directed by Traffic Coordinator Lanthier to both couple and push their cars into track MW05. The traffic coordinator denies that version of events, and is apparently supported in his recollection of his statements by two employees who are said to have been present in the vicinity when he gave his radio instructions to the grievor and crew. He maintains that he merely instructed the crew to drop the cars, and not to push them.

The account of Mr. Lacroix is that after coupling the cars in track MW05, his conductor asked him by radio to communicate to the traffic coordinator to see if it would be necessary to put air in the cars. According to Mr. Lacroix the traffic coordinator responded in the affirmative. The grievor was then advised by his conductor that the air hoses were not connected and that he should accordingly advise the traffic coordinator. Mr. Lacroix states that when he relayed that communication the response of the traffic coordinator was "*Pousse ça comme ça*", which he took to be a direction to push forward. He proceeded to do so until the derailment resulted.

In this matter the Company bears the burden of proof. If the evidence in support of the Company's case is equally balanced by the evidence to the contrary, the doubt must be resolved against the party with the burden of proof. I am satisfied that in the instant case that must be the outcome. If it were necessary to so rule, I would in any event prefer the recollection of the two crew members, rather than the traffic controller, as they had greater reason to advert to the instructions given to them.

The grievance is therefore allowed. The Arbitrator directs that the twenty demerits assessed against Locomotive Engineer Lacroix be struck from his record.

January 14, 2000

(signed) MICHEL G. PICHER
ARBITRATOR