

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3167

Heard in Calgary, Wednesday, November 15, 2000

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

DISPUTE:

The discipline assessed Conductor S.C. Sleightholm of Lethbridge, Alberta, and his subsequent discharge account an accumulation of demerit marks.

JOINT STATEMENT OF ISSUE:

On July 9, 1998, conductor Sleightholm's record was assessed 30 demerit marks for his failing to ensure that equipment left unattended was secure, resulting in unattended movement and derailment of CPWX 606495; a violation of CROR Rule 112 and CPR Hand Brake Policy, Item 8, District General Manager – Prairie Monthly Bulletin (Alberta), Extra 3131 South, Arrowwood, Mileage 23, Lomond Subdivision, June 7, 1998.

Since Conductor Sleightholm had 30 demerit marks on his record at the time, he was dismissed account an accumulation of demerit marks.

The Council appealed the discipline assessed Conductor Sleightholm stating that it was too severe. The Council viewed that Conductor Sleightholm's actions that day clearly demonstrated his willingness to comply with the safe course of action and his intentions to secure the cars and test the effectiveness of the brakes applied.

The Council also viewed that there were too many unanswered questions in the Company's investigation to support the discipline assessed Conductor Sleightholm. The Council believes that the Company could not substantiate that Conductor Sleightholm was responsible for the incident in question.

The Council submits that Conductor Sleightholm's record did not indicate any previous failure to apply handbrakes as is alleged against him in this situation. Further, the undisputed statement of the locomotive engineer confirmed their discussions about the amount of hand brakes to apply in this case. The Council observed that the cars did not immediately roll away which indicates that there were sufficient brakes applied by Conductor Sleightholm at the time in question.

The Council also submits that the employee did not receive a fair and impartial investigation in this case. For example, the Council noted at the earliest stages that the investigation was compromised by the fact that the Company's investigating officer filled both the role of the investigator and the officer who conducted the statement in question.

For these reasons, the Council believes that the discipline imposed should be either removed or reduced in order that the employee's discipline falls below the threshold allowed in the Brown system of discipline, so he may be returned to work without loss of seniority or benefits.

The Company has declined the Council's grievance stating that the discipline assessed was justified, warranted and reasonable, and that no mitigation of the discipline assessed is warranted given Mr. Sleightholm's past service. The Company also submits that the investigation was conducted in a fair and impartial manner.

FOR THE COUNCIL:
(SGD.) D. H. FINNISON
FOR: GENERAL CHAIRPERSON

FOR THE COMPANY:
(SGD.) C. M. GRAHAM
FOR: GENERAL MANAGER, FIELD OPERATIONS

Appearing on behalf of the Company:

C. M. Graham	– Labour Relations Officer, Calgary
J. Copping	– Manager, Labour Relations, Calgary
C. Lencucha	– Operations Coordinator, Lethbridge
G. S. Seeney	– Manager, Labour Relations, Calgary
G. Wilson	– Legal Counsel, Calgary

Appearing on behalf of the Council:

M. A. Church	– Legal Counsel, Toronto
L. O. Schillaci	– General Chairperson, Calgary
D. H. Finnson	– Vice-General Chairperson, Calgary
G. R. Crawford	– Local Chairperson, Lethbridge
R. Van Pelt	– Vice-Local Chairperson, Lethbridge
S. C. Sleightholm	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the only evidence available to the Company with respect to the derailment of improperly secured cars at Arrowwood, apart from the grievor's own statements, is the report prepared by Lethbridge Operations Co-Ordinator, C. Lencucha, following Mr. Lencucha's visit to the field. By his account, the operations co-ordinator observed that certain of the hand brakes were not fully applied, and found that he was able to turn them himself to a tighter position, both acting alone and with the help of others. These observations, and others, were placed into his report, a copy of which became a central part of the disciplinary investigation against Mr. Sleightholm.

Mr. Lencucha, who acted as the sole conduit of information for the Company in respect of the objective circumstances surrounding the derailment, also presided at the disciplinary investigation of Conductor Sleightholm. Although the record of the investigation does not contain a statement of formal objection against Mr. Lencucha acting as the investigating officer, it is common ground that the Council's Acting Local Chairman, Mr. G.R. Crawford, made it clear to Mr. Lencucha before the investigation began that he felt that it was improper for him to chair the proceedings, given that he was the sole field investigator for the Company, and that his own report was a critical piece of evidence in the proceedings. Mr. Lencucha, who in the Arbitrator's view acted throughout with the best of good faith and honesty, confirms that he and Mr. Crawford disagreed on that point, and that he decided to proceed.

During the course of the investigation Mr. Sleightholm admitted that he did not perform the appropriate test of the hand brakes of the cars which he placed on the tracks in question at Arrowwood. By his account, however, he did properly apply the sufficient number of handbrakes to the cars in question. He further relates that he and his crew then waited at the same location for some thirty minutes of time, at the end of their tour of duty, and that nothing untoward occurred with respect to the movement of the cars in question during that time. The Council submits that the movement of the cars, which was only discovered the next day, was caused by something other than a failure on the part of the grievor to properly secure the cars' handbrakes.

The principal issue in this case is the Council's claim that the Company failed to provide to Mr. Sleightholm a fair and impartial investigation, as stipulated within article 32 of the collective agreement. It provides, in part, as follows:

32 (d) An employee will not be disciplined or dismissed until after a fair and impartial investigation has been held and until the employee's responsibility is established by assessing the

evidence produced and no employee will be required to assume this responsibility in his statement or statements. The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed, i.e., the date the last statement in connection with the investigation is taken except as otherwise mutually agreed.

In the Arbitrator's view the instant case is virtually indistinguishable from the decision of this Office in **CROA 3061**. That case likewise concerned allegations that an employee had failed to properly apply hand brakes. The chief witness for the Company who observed the unsecured handbrakes was the Assistant Superintendent, who also conducted the disciplinary investigation. The Arbitrator concluded that the proceedings in that circumstance fell outside the requirements of a fair and impartial investigation. The award contains the following observations in that regard:

This Office has had a number of occasions to deal with circumstances in which a company officer conducting a disciplinary investigation is also a material witness against an employee being investigated. Absent extraordinary circumstances or justification, such a situation has been found to violate the right to a fair and impartial investigation. In **CROA 1720**, which concerned an alleged violation of Rule G, the trainmaster who formed the judgement that the grievor was impaired and pulled him out of service also conducted the disciplinary investigation, to the extent of examining other witnesses who gave opinions contrary to his own. In that context the arbitrator commented as follows:

Apart from the merits of the case, the Arbitrator must also express concern with the manner with which the investigation was conducted. The investigatory hearing consisted of the examination of the grievor as well as a number of other employees. The chief, and indeed only, evidence against Engineer Primeau was in the form of a narrative report submitted by Trainmaster Iley. The record reveals, however, that the examination of all of the employees, with the exception of the grievor, was conducted by Mr. Iley himself. I have substantial difficulty appreciating how Mr. Iley could cast himself in the role of a person charged with impartially evaluating the statements of the employees, given that the validity of his own personal report was the very subject of the investigation. It is difficult for the Arbitrator to understand how that manner of proceeding can be seen to be consistent with the requirement for "a fair and impartial hearing" as a condition precedent to the discipline of a locomotive engineer mandated by article 86.1 of the collective agreement. If it was necessary to so conclude, the grievance would succeed on this ground alone.

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As noted in prior awards of this Office, in discipline cases the form of expedited arbitration which has been used with success for decades within the railway industry in Canada depends, to a substantial degree, on the reliability of the record of proceedings taken prior to the arbitration hearing at the stage of the Company's disciplinary investigation. As a result, any significant flaw in the procedures which substantially compromises the integrity of the record which emerges from that process goes to the integrity of the grievance and arbitration process itself. Consequently, in keeping with general jurisprudence in this area, it is well established that a failure to respect the mandatory procedures of disciplinary investigations results in any ensuing discipline being ruled void *ab initio*.

That, in my respectful opinion, is the only ruling possible in the instant case. Not only did Mr. Rennie assume the position of chief witness against the grievor, over whose investigation he then presided, he also clearly denied to Mr. Gower and his union representative the opportunity to ask questions of the only witness involved, the investigating officer himself. In a circumstance such as this it is not sufficient for the Company to ask the Council and the Arbitrator to accept that the grievor received a fair and impartial investigation because Mr. Rennie's honesty is beyond reproach. That argument fails to appreciate that in such matters it is not only critical that justice be done, but that it manifestly be seen to be done. That, in my view, could only happen in this case if the investigation had been conducted by a person other than Mr. Rennie, and if the Council had

been provided the fair opportunity contemplated within article 82.2 to ask questions of him which might bear on the grievor's responsibility.

While it may be stressed that in the instant case there is no suggestion that Mr. Lencucha acted other than in good faith, the inescapable conclusion is that by assuming the role of both witness of the scene, albeit after the fact, and investigating officer he stepped outside the well-established requirements for a fair and impartial investigation. Nor is the Arbitrator persuaded that the circumstances at Lethbridge made it impossible to substitute another Company officer to perform the investigation. For these reasons the Arbitrator is compelled to sustain the preliminary objection of the Council, and conclude that the discipline registered against the grievor must be declared null and void.

The grievance is therefore allowed. The Arbitrator declares that the discipline registered against Mr. Sleightholm is null and void, and directs that it be stricken from his record, and that he be reinstated into his employment without loss of seniority. As the Council advised at the hearing that it seeks no order of compensation, no remedy in that regard is directed.

November 20, 2000

(signed) MICHEL G. PICHER
ARBITRATOR