

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3214

Heard in Calgary, Tuesday, 13 November 2001

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

DISPUTE:

Appeal the discipline assessed the personal record of Locomotive Engineer G.M. King of Prince George, B.C. for "your responsibility in violation of CROR 104.5, resulting in the derailment of CN 5552 at McBride Yard on 02 November 1999".

JOINT STATEMENT OF ISSUE:

On November 2, 1999, Locomotive Engineer King was engaged in turning CN 5552 on the wye at McBride, B.C., when a derailment occurred. The grievor, after a Company investigation held on November 10, 1999, was assessed twenty (20) demerits for a violation of CROR Rule 104.5.

The Brotherhood progressed the matter on the basis that Locomotive Engineer King did not receive a fair and impartial hearing, as contemplated under the provisions of article 86, when the grievor was not afforded the opportunity to be present at Conductor E. Spencer's investigation. In the alternative, the Brotherhood submits that the discipline imposed in respect to the instant case is excessive under the circumstances.

The Brotherhood has requested that the discipline imposed in the instant matter must be expunged.

The Company has declined the appeal.

FOR THE COUNCIL:

(SGD.) D. E. BRUMMUND
FOR: GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) R. RENY
FOR: VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

R. Reny	– Human Resources Associate, Vancouver
J. Torchia	– Director, Labour Relations, Edmonton
S. Zeimer	– Human Resources Associate, Vancouver
S. Blackmore	– Labour Relations Associate, Edmonton
R. Eisenman	– Transportation Supervisor, Vancouver

And on behalf of the Council:

D. E. Brummund	– Vice-General Chairman, Edmonton
D. J. Shewchuk	– General Chairman, Edmonton
R. J. Ermet	– Local Chairman, Jasper
R. R. Shack	– Local Chairman, Edson

AWARD OF THE ARBITRATOR

The sole issue of substance in this grievance is whether the Company violated article 86 of the collective agreement. It is common ground that the grievor was involved in the derailment of his locomotive unit by its negligent operation over an engaged derail. It is also agreed, however, that the Company separately interviewed the grievor's workmate, Conductor E. Spencer, with respect to the events which transpired. Unfortunately the Company did not notify the Council or the grievor of that investigation interview, and did not afford them the opportunity to be present during the examination of the conductor.

Article 86 of the collective agreement provides, in part, as follows:

86.1 A locomotive engineer will not be disciplined or dismissed without having had a fair and impartial hearing and his responsibility established and shall be advised in writing of the decision within 28 calendar days from the date the locomotive engineer's statement unless as otherwise mutually agreed.

86.4 A locomotive engineer and his accredited representative shall have the right to be present during the examination of any witness whose evidence may have a bearing on the locomotive engineer's responsibility to offer rebuttal through the presiding officer by the accredited representative. The Local Chairman and/or the General Chairman to be given a copy of statements of such witness on request.

In the result, the Company assessed twenty demerits against the grievor. As is apparent, the grievor and the Council are without any knowledge of the nature of the statements made with respect to the grievor's actions by Conductor Spencer. I am satisfied that Conductor Spencer's statement was plainly in the nature of evidence which might have a bearing on the grievor's responsibility. That is true notwithstanding that the grievor may have made an initial admission of some responsibility on his own part. It is entirely possible that his workmate might have made statements casting the grievor's responsibility in a still more negative light, possibly resulting in a higher measure of discipline. These are matters which the grievor and the Council were prevented from knowing, by reason of the Company's failure to honour their contractual right to be present during Conductor Spencer's statement. Moreover, for reasons which it best appreciates, the Company thereafter apparently refused to provide the grievor and his union representative with a copy of Conductor Spencer's statement.

As well elaborated in prior jurisprudence, the Company's failure to observe the mandatory requirements of article 86.4 of the collective agreement must result in the discipline being null and void. (See, e.g., **CROA 1937** and **1819**.) In this case, it is not enough for the Company to raise in its defence that the grievor has admitted to some wrongdoing. Knowledge of the precise extent of that wrongdoing and the evidence before the Company to establish it is a matter of essential right to the grievor, as plainly intended by article 86.4 of the collective agreement. In that regard, the parties have fashioned a provision which requires not only that fairness and impartiality be done, but that they manifestly must be seen to be done. The denial of the grievor's rights in that regard vitiates the assessment of discipline against him.

The grievance is therefore allowed. The Arbitrator directs that the twenty demerits assessed against the grievor be removed from his record forthwith.

November 16 2001

(signed) MICHEL G. PICHER
ARBITRATOR