

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3233

Heard in Montreal, Thursday, December 13, 2001

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

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

EX PARTE

DISPUTE:

Appeal the assessment of twenty (20) demerits to the personal record of Locomotive Engineer W.J. Flack of Kamloops, B.C. for failure to comply with posted allowable zone speed as per Pacific District Timetable 7, Clearwater Subdivision, footnote item 3.1 while working as locomotive engineer on train G81541-14 during a tour of duty on August 15th, 1999.

COUNCIL'S STATEMENT OF ISSUE:

On August 15, 1999, Locomotive Engineer Flack was employed on train G81541-14, called in straight-away from Blue River, B.C. to Kamloops, B.C. At a point approximately eleven miles west of Blue River a derailment occurred due to a broken wheel on the train. An internal company investigation took place after the incident and locomotive event recorder download data indicated as overspeed discrepancy prior to the derailment occurring.

Locomotive Engineer Flack was subsequently required to provide an employee statement in connection with the circumstances surrounding the derailment of Train G81541-14 during his tour of duty on August 15, 2000. Following the investigation, Mr. Flack was assessed twenty (20) demerits for failure to comply with the posted speed limit.

The Brotherhood contends that the discipline was excessive under the circumstances and, moreover, Locomotive Engineer Flack's rights were violated under the provisions of article 86 when he was not notified and given the opportunity to attend the conductor's employee statement.

The Brotherhood requested that the discipline be expunged.

The Company has declined the Brotherhood's appeal.

FOR THE COUNCIL:

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

There appeared on behalf of the Company:

S. MacDougald – Manager, Labour Relations, Montreal
D. Coughlin – Consultant

And on behalf of the Council:

D. E. Brummund – Sr. Vice-General Chairman, Edmonton

AWARD OF THE ARBITRATOR

At the outset of the hearing it was agreed between the parties that the Arbitrator should first rule on whether the Company properly disciplined the grievor, in keeping with the requirements of article 86 of the collective agreement. Should the Company not be successful in that regard it was understood that the matter would be extended to allow the Brotherhood to deal with possible additional evidence arising from the examination on Conductor J. Dirkson. In light of the ruling herein, however, that eventuality is obviated.

The material establishes that Locomotive Engineer Flack did engage in overspeed in the operation of train G81541-14 during the course of his tour of duty on August 15, 1999. The train derailed some eleven miles west of Blue River, while en route from Blue River to Kamloops in straight-away service. It is common ground that the derailment was caused by a broken wheel on the train. The Company does not take the position that the grievor's violation of speed limits had a causal impact on the derailment. The twenty demerits assessed against Locomotive Engineer Flack, therefore, are strictly for his violation of the speed limits immediately prior to the incident, a fact which became evident on the basis of the download of the locomotive's event recorder.

Following the incident, which occurred on August 15, 1999, the grievor underwent a disciplinary investigation held on August 31, 1999. Discipline of twenty demerits was assessed against Mr. Flack on September 17, 1999, as duly communicated to him by the serving of a CN Form 780.

Following the assessment of discipline against Locomotive Engineer Flack, the Company undertook a separate investigation of Conductor Dirkson. His statement was provided to the Company on September 29, 1999. It is common ground that neither the Brotherhood nor the grievor received notice of the investigation of Conductor Dirkson. In that regard it alleges a violation of article 86.4 of the collective agreement, which reads as follows:

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 witnesses on request.

The Brotherhood's position is that the Company was under an obligation to provide the Brotherhood notice of the investigation of Conductor Dirkson, and to give the grievor and his Brotherhood representative the right to be present during Mr. Dirkson's examination. The Brotherhood submits that any evidence given by Conductor Dirkson could have a bearing on the responsibility of the grievor. On that basis it submits that there was a violation of the mandatory provisions of article 86.4, a denial of the necessary standard of a fair and impartial hearing required by article 86.1, and that the discipline assessed against Locomotive Engineer Flack must therefore be found to be null and void.

The Company's representative takes a different view. He maintains that there was no violation of the spirit, intent or letter of article 86.4. He stresses that the Company made its decision as to the appropriate measure of discipline to be assessed against Locomotive Engineer Flack solely on the basis of the evidence which was at hand during the course of Mr. Flack's investigation. That, he emphasizes is clearly evidenced by the fact that Mr. Flack's notice of discipline was delivered to him fully twelve days prior to the disciplinary interview of Conductor Dirkson. The Company submits that in that circumstance nothing in the investigation of Conductor Dirkson could have a bearing on Mr. Flack's responsibility for the purposes of the discipline which resulted from his own investigation.

After careful consideration of these submissions, the Arbitrator is satisfied that the position of the Company is correct. Article 86.4 must be interpreted within the context, and in a manner harmonious with, the entire framework of article 86. That framework is set by the provisions of article 86.1 which read 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 of the locomotive engineer's statement unless as otherwise mutually agreed.

As is evident from the foregoing, the purpose of the disciplinary investigation is to gather such information as the Company deems appropriate before making its decision to assess discipline. The requirements of article 86.4 are fashioned to ensure that prior to the decision as to discipline the Company provides the employee and his Brotherhood representative the opportunity to be present during the examination of any witness whose evidence may have a bearing on the discipline which is about to be assessed. It is in that sense that the concept of "the locomotive engineer's responsibility" must be understood. In the circumstances at hand the Company was fully entitled, if it wished, to make its decision solely on the basis of the evidence available to it at the conclusion of the grievor's own investigation. There was nothing requiring the Company, as the Brotherhood suggests, to seek an extension of time limits to examine the conductor before assessing discipline against the locomotive engineer. Moreover, it was open to the Brotherhood or the grievor to seek to have the conductor's evidence brought into the investigation, but they do not appear to have made any attempt to do so. Whatever the evidence of the conductor may have been in the investigation which was conducted after discipline issued to Locomotive Engineer Flack, it cannot have had any bearing on his responsibility for the purposes of the investigation and discipline contemplated under article 86 of the collective agreement.

It should be stressed that there is no suggestion in the case at hand that there was any deliberate gerrymandering of the investigations on the part of the Company, for example to deliberately exclude evidence which might otherwise have been favourable to the grievor. As should be obvious, if a pattern of conduct on the part of the investigating officer, or any other evidence, should suggest in a given situation that the Company deliberately sequenced a series of investigations so as to avoid the application of article 86.4 to the prejudice of the employees involved, it would be arguable that the overall standard of a fair and impartial investigation was not met. As noted above, there is no suggestion of any such abuse in the case at hand.

For these reasons the Arbitrator is satisfied that the Company did not violate the requirements of article 86 in the course it followed in the investigation and discipline of Locomotive Engineer Flack.

I therefore turn to consider the merits of the discipline assessed. As noted above, it would appear clear that the grievor did render himself liable to discipline by reason of having permitted his train to exceed the speed limits, by as much as five miles per hour. As the Company's representative stresses, overspeed is a serious infraction deserving of a meaningful degree of discipline. While as a general rule it may be that twenty demerits would be appropriate for an infraction of this kind, there are compelling mitigating factors to be considered in the case at hand.

Locomotive Engineer Flack entered the service of the Company on May 21, 1972. Prior to the incident at hand, over the course of twenty-seven years of service, Mr. Flack was disciplined only once, incurring the assessment of ten demerits in 1984 for the violation of System Special Instructions. By any reckoning, his is a remarkable record of discipline-free service. In these circumstances I am satisfied that it is appropriate to reduce the penalty for the incident of August 15, 1999 to ten demerits, and it is so ordered.

December 19, 2001

(signed) MICHEL G. PICHER
ARBITRATOR