

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3248

Heard in Montreal, Thursday, 14 March 2002

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)**

EX PARTE

DISPUTE:

The issue in dispute involves Mr. P.F. McKenna of Schreiber, Ontario who was notified by form 104 on February 8, 2001 that he was dismissed from Company service.

COUNCIL'S STATEMENT OF ISSUE:

On January 8, 2001 Mr. McKenna was ordered in Thunder Bay as a conductor for train 308-03 at 09:00 hours. The other member of his crew was Locomotive Engineer M.V. Veneziano.

After performing all pre-departure responsibilities Mr. McKenna and his locomotive engineer ensured their train was together on Track A-1. They subsequently departed track A-1 and proceeded to mileage 126 Current River.

Upon arrival at Current River the train encountered a clear to stop signal. When about 10 cars away from the west switch, Locomotive Engineer Veneziano applied the automatic brake. At that time their train went into emergency as a result of defective braking equipment.

Subsequently, the train proceeded without incident until it reached mileage 97.193 where while descending a hill it began to exceed the speed limit. The train then initiated an emergency brake application and derailed 59 loaded grain cars.

On January 25, 2001 Mr. McKenna was summoned to a company investigation. On February 8, 2001 he was advised of his dismissal. The following was noted on the form 104 as the grounds for dismissal:

“... for failing to ensure your train was properly controlled resulting in the wilful mishandling of train 308-03 as evidenced by the failure to properly control the speed of your train at mileage 114.15, resulting in your train exceeding the maximum permissible speed during a pull by inspection and for failing to ensure the speed of your train was properly controlled (second situation), resulting in your train exceeding the maximum permissible speed between mileage 97.19 and 94.05, the derailments of train 308-03, damage to equipment, track and customer lading (\$4.5M); a violation of CROR General Notice, General Rules A(i), 7(ii) (iii) & (iv), CROR Rules, 106 & 125, Time Table Special Special Instruction, Page 15 Item 4.1 GOI Instructions Section 3 (1.3), Section 4, Items 6.1, 6.2, 6.3, Section 5, Item 15, Section 16, Items 6.1, 6.2, 6.3, train 308-03, Nipigon Subdivision, January 8, 2001.” (sic)

Upon a review of the facts, it is the Union's contention that the imposition of a dismissal is excessive and unwarranted. The evidence establishes the crew was operating with defective equipment that directly contributed to the train handling.

Furthermore, the Union asserts that Mr. McKenna is by definition a long service employee. Accordingly, the disciplinary response of a dismissal could only be viewed as excessive in light of the jurisprudence for similar infractions.

The Union respectfully requests that Mr. McKenna be reinstated back into company service with full seniority immediately. Furthermore, Mr. McKenna be compensated for all lost earnings and benefits resulting from his dismissal.

Further the Union is seeking punitive damages in the form of interest on all monetary loss.

The Company has declined the Union's request.

FOR THE COUNCIL:

(SGD.) D. A. WARREN
GENERAL CHAIRPERSON

There appeared on behalf of the Company:

- D. Freeborn – Labour Relations Officer, Calgary
- R. Wilson – General Manager, Operations, Calgary
- C. Carroll – Director, Labour Relations, Calgary
- D. Guérin – Labour Relations Officer, Calgary
- S. Cavanaugh – Manager, Road Operations
- M. Imbeault – Manager, Road Operations
- G. Condie – Track Maintenance Specialist
- M. Wierucki – Manager, Train Accident Prevention
- S. Seeney – Manager, Labour Relations, Calgary

And on behalf of the Council:

- M. Russell – Counsel, Toronto
- D. A. Warren – General Chairperson, Toronto
- D. Genereaux – Vice-General Chairperson, Montreal
- W. G. Scarrow – Sr. Vice-President, Ottawa
- J. W. Armstrong – National President, Edmonton
- T. G. Hucker – Vice-President, BLE, Ottawa
- L. O. Schillaci – General Chairperson, CCROU/UTU, Calgary
- R. S. McKenna – General Chairman, CCROU/BLE, Calgary
- D. C. Curtis – General Chairman, CCROU/BLE, Calgary
- R. Hewitt – Vice-General Chairman, CCROU/BLE, Toronto
- M. Anderson – Local Chairperson, CCROU/UTU, Schreiber
- D. Colosimone – Vice-Local Chairperson, CCROU/UTU, Sudbury
- P. F. McKenna – Grievor

AWARD OF THE ARBITRATOR

The instant grievance involves an extensive record of investigative data, statements by employees and supervisors, and submissions from the parties. They have been thoroughly reviewed by the Arbitrator. The extent of the record is commensurate with the seriousness of the incident which gives rise to the discharge of Conductor P.F. McKenna of Schreiber, Ontario. The grievor was discharged for the cumulative violation of what the Company's representative characterizes as twenty-one separate rules violations. At the heart of the charges against Mr. McKenna is the allegation that he allowed his train to travel at substantial over-speed immediately prior to a major derailment at Bowker at Mileage 93.56 of the Nipigon Subdivision at 13:22 hours on January 8, 2001.

The record before the Arbitrator confirms that on the morning of January 8, 2001 Conductor McKenna and Locomotive Engineer M.V. Veneziano were ordered for 09:00 hours to handle train 308-03 from Thunder Bay to Schreiber. Their train consisted of eighty-six fully loaded grain cars and a power consist of four locomotives. It had an estimated gross ton weight of in excess of 11,000 tons and was over one mile in length.

The record reveals a number of irregularities in the handling of train 308-03 by Mr. McKenna and his locomotive engineer. The train had originated in Moose Jaw and when Mr. McKenna retrieved the documentation for his train he found that the "Crew To Crew" form was missing. That document is normally transferred between crews and records the status of cars handled on the train. The crew to crew form would normally include information in respect of items such as inspections and tests performed at the initial terminal, locomotive or car defects and train brake status information. As the crew to crew form was missing, Mr. McKenna was advised by the yard operations coordinator, Mr. Troy Avis, to complete a new crew to crew form, thereby treating the train as being local out of Thunder Bay. By the grievor's own acknowledgement, that adjustment required the performance of a Number 1 or Number 1A brake test at Thunder Bay. It is common ground that no such brake test was performed by Conductor McKenna. In explanation of that deficiency he relates that upon being told by the shop planner, during a radio communication, that the eighty-six cars "... were all working. I understood this to mean that the cars had a #1 brake test and that they all passed." On the strength of that Conductor McKenna made an entry on the crew to crew form under the section reserved for train brake status which reads "86 all okay #1 at T Bay". Clearly, the grievor assumed, without properly verifying, that a proper brake test had been performed on the train. That was not in fact the case.

Prior to departure the locomotive engineer performed a Number 3 brake test to verify air continuity. As the train departed the terminal a pull-by inspection was duly performed by Car Department employees, and properly acknowledged. The initial eastward travel of the movement was without incident until the train, also referred to as Extra 6009 East, approached the west signal MacKenzie. At that location Engineer Veneziano reduced his throttle to control the speed of his train in preparation for a stop. As his train slowed, at a distance of approximately twenty cars from the signal, a spontaneous application of the train's emergency brakes took place. The grievor promptly and correctly reported the spontaneous application of the train's brakes to the rail traffic controller. That incident necessitated a pull-by inspection, which was arranged to be performed by maintenance of way forces who were performing work repairing track ahead of the grievor's train. Following a delay of approximately an hour, with track employees properly in position the grievor's train proceeded through a pull-by inspection by the maintenance of way staff. The record discloses, however, while the maximum permissible speed during a pull-by inspection is fifteen miles per hour, in fact the grievor's train reached a top speed of 27.2 mph during the inspection. Both the grievor and Locomotive Engineer Veneziano acknowledged, in their investigative statements, that they were aware that they had exceeded the permissible speed, that the pull-by inspection was thereby not valid and that they should have stopped to have it done properly.

The evidence establishes that the spontaneous application of the train's emergency brake system was prompted by a faulty car, generally referred to as a "kicker", whose braking mechanism could unpredictably cause the train to go into a full application of its emergency brakes. Because of the kicker the grievor's train could not utilize its normal air brakes, for fear of prompting another emergency brake application. Consequently, as the train proceeded eastward, the locomotive engineer was required to handle his movement by a combination of throttle modulation and the use of the locomotive's dynamic brakes. In the case of train 303-03 two of the four locomotives in the power consist had an operative dynamic brake cut-in, for an effective combined dynamic brake factor of 12.5. In addition, while normal applications of the train's air braking system could not be resorted to, it did retain its emergency brakes.

Between Loon and Bowker there is a downhill grade on the Nipigon Subdivision. The speed limit for a grain train of the tonnage being handled by the grievor and his locomotive engineer is fifty miles per hour. Data recovered from the event recorder on the lead locomotive confirms that between mileage 96.193 and mileage 94.059 the grievor and Mr. Veneziano allowed their train to exceed the limit, going from 50.9 mph to 64.1 mph. It would seem that the grievor, who at all times had the option of applying the train's emergency brakes as a last resort to slow its over-speed, apparently did nothing through the two to three minute period that followed. According to Mr. McKenna's account, at mileage 98.5 he inquired of Locomotive Engineer Veneziano whether he was going to be all right, to which the locomotive engineer responded in the affirmative. He next relates that at mileage 96.5 the locomotive engineer advised him that he was going to put ten psi of independent brake on "... to keep the engines from taking off." Shortly after that point, at a speed of 64.1 mph, train 308-03 derailed violently. The derailment was extremely serious, causing fifty-nine loaded grain cars to leave the track and become stacked perpendicular to the direction of the rail. The resulting accident occasioned damages to track, equipment and lading in excess of \$4.5 million and caused the closing of CPR's main line for three days.

In fairness, as acknowledged by both parties, the precise cause of the derailment has not been clearly identified. The evidence of the Company, which the Arbitrator accepts, would indicate that there were no irregularities in the

track which would have contributed to the derailment. The nineteenth car from the locomotive consist appears to have been the first to leave the tracks. It is not clear whether a mechanical defect in that car, or any other car, might have prompted the emergency brake application and the derailment of the train. As the Company submits, however, it is a fair inference that the train's over-speed may, in all probability, have been a contributing factor to what occurred. To put it differently, there is reason to believe that the derailment might not have occurred if Conductor McKenna and his locomotive engineer had maintained their train within the speed limit of fifty miles per hour on the downgrade at Bowker. It does not appear disputed that they could have done so by making use of the train's emergency brakes to keep its speed under control. While the Arbitrator well appreciates that the crew of a train might hesitate to make use of the emergency brake system at high speed, an alternative which may have its own risks, it is not clear that recourse to the train's emergency brakes might not have been resorted to well before the movement reached its ultimate speed of 64.1 miles per hour. Indeed, in their investigative statements, both the grievor and Locomotive Engineer Veneziano admitted that they had made a serious error of judgement in not regulating the speed of their train in that manner.

There can be no doubt that the grievor was liable to a substantial degree of discipline for his violation of a number of operating rules during the course of his tour of duty on January 8, 2001. Arguably, Mr. McKenna was more of a passenger than a conductor on train 308-03. There was, as the Company asserts, an unfortunate pattern of carelessness and inattention exhibited by Conductor McKenna in the discharge of his duties. That pattern commenced with the failure to ensure a proper brake test of his train, allowing a pull-by inspection to take place improperly by reason of excessive speed and, most seriously, taking no defensive action in the face of the handling of the train by the locomotive engineer, who clearly allowed the movement to gain progressive over-speed over a period of two to three minutes on the downgrade approaching Bowker. The real issue in dispute becomes the appropriate measure of discipline to be assessed Conductor McKenna in the circumstances.

Some guidance can be gained from the prior awards of this Office. While not identical, the facts in **CROA 690** are somewhat instructive. That case, which involved the same parties, concerned the assessment of forty demerits against a conductor for failing to monitor and override braking deficiencies in the handling of his train by the locomotive engineer, resulting in a major derailment on the Mountain Subdivision, resulting in damages estimated in excess of \$5 million in 1977. In dealing with that case Arbitrator Weatherill commented, in part, as follows:

The extent of the damage is not in itself an element to be considered in assessing the grievors' conduct – just as, in **Case No. 494**, the fact that a fatality occurred was not such a factor. Rather, it is a question of the employees' compliance or otherwise with the rules and the general seriousness, or degree of risk, of their conduct.

With respect to deference to the locomotive engineer by other members of the crew Arbitrator Weatherill further commented:

It is understandable, and proper, that the train crew should hesitate, in most circumstances, to resort to an emergency brake application. Such a procedure should certainly not be used unnecessarily. It is also understandable that the members of a train crew might defer, to some extent, to the particular skills of the Engineman in matters of engine operation. Further it must be borne in mind that the events in question occurred rather suddenly; there was not much time for reflection before it was too late.

The Company draws a number of cases to the Arbitrator's attention, including **CROA 2791**, in which this Office confirmed the dismissal of Locomotive Engineer J.T. Taverna for his inattention resulting in a head-on collision on the Company's Mountain Subdivision on October 1, 1995. In the Arbitrator's view, while that case is to some degree instructive, it must also be borne in mind that Locomotive Engineer Taverna took no responsibility for what occurred and did not have the seniority of the grievor in the case at hand, being an employee of some sixteen years' service.

Mr. McKenna has been employed by the Company since June of 1974. His disciplinary record, while not exemplary, reflects only two rules infraction over his nearly twenty-seven years of service. From 1987 to the date of the incident resulting in his discharge Mr. McKenna was disciplined only once, receiving ten demerits for a minor incident relating to his conduct towards a fellow employee. In the Arbitrator's view the length and general quality of the grievor's prior service do come to bear as significant mitigating factors in the instant case. While I am satisfied that the Company is correct in viewing the grievor's errors during the course of his duty on January 2001 as extremely grave, I am satisfied that there is latitude to fashion a penalty in the case at hand which will protect the

Company's interest while giving the grievor another chance to demonstrate that he can resume his long-term career in a manner consistent with the careful and safe discharge of his obligations to his employer.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without compensation for any wages or benefits lost, and without loss of seniority. Further, in the discretion of the Company, Mr. McKenna may be restricted to yard service for a period of not more than one year.

March 26, 2002

(signed) MICHEL G. PICHER
ARBITRATOR