

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 3255

Heard in Calgary, Wednesday, 15 May 2002

concerning

### CANADIAN PACIFIC RAILWAY

and

### BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

### EX PARTE

#### **DISPUTE:**

Dispute concerning Mr. John McCarthy.

#### **BROTHERHOOD'S STATEMENT OF ISSUE:**

On July 17, 2001, the grievor committed a rule violation which he freely and immediately admitted. Notwithstanding this, the Company held him out of service for more than two months, until September 18, 2001, when he was assessed with 45 demerits. The assessment of this discipline resulted in the grievor's dismissal for accumulation of demerits. A grievance was filed.

The Union contends that: **(1.)** The discipline assessed to, and the dismissal of, the grievor was excessive and unjustified; **(2.)** By dismissing the grievor, the Company has failed in its duty to accommodate the grievor, a disabled employee; **(3.)** By holding the grievor out of service for more than two months pending investigation, the Company violated Section 18.3 of Agreement No. 41.

The Union requests that the grievor be returned to service forthwith without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

#### **FOR THE BROTHERHOOD:**

#### **(SGD.) J. J. KRUK** **SYSTEM FEDERATION GENERAL CHAIRMAN**

There appeared on behalf of the Company:

R. V. Hampel	– Labour Relations Officer, Calgary
E. J. MacIsaac	– Manager, Labour Relations, Calgary
M. G. DeGirolamo	– Assistant Vice-President, Industrial Relations, Calgary

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
J. J. Kruk	– System Federation General Chairman, Ottawa
D. Brown	– Sr. Counsel, Ottawa

### **AWARD OF THE ARBITRATOR**

The material before the Arbitrator discloses that the grievor committed a grave violation of operating rules. When working as a flagman on the Mactier Subdivision on July 17, 2001 Mr. McCarthy authorized train CP 5605 North to proceed through the limits of his rule 42 protection. Inexplicably, he then drove his hi-rail vehicle to a crossing, and proceeded, some eleven minutes later, directly into the path of the very train which he had cleared through his territory. Fortunately the train in question was operating under a ten mile per hour slow order, and when it was spotted by Mr. McCarthy he reversed the direction of his hi-rail and the train came to a stop without any collision. It appears evident that the grievor had assumed that the train had gone by, although he had no radio communication from it to that effect. The record indicates that he did ask the train crew to notify him when they were clear of signal 141 at mile 14.1, some two miles outside the limit the grievor's rule 42 protection.

Unfortunately, the record also discloses that Mr. McCarthy was involved in another cardinal rules violation on August 21, 2000. On that occasion he operated his hi-rail on a main track outside the limits of his own track occupancy permit, for approximately half a mile.

The Brotherhood suggests that the fact that Mr. McCarthy had previously been a shop employee, with limited experience in road situations, should be considered a mitigating factor. However, on a full review of the evidence, the Arbitrator is not persuaded. It does not appear disputed that Mr. McCarthy, who was placed into the position of flagman by his own choice as a means of reasonable accommodation of a physical disability, performed the responsibilities of that position for some two years. He was, I am satisfied, well familiar with the rules which it was his very responsibility to enforce. Given that the grievor had thirty demerits on his record at the time of the incident, I am satisfied that the assessment of forty-five demerits for his second cardinal rules infraction was not unreasonable in the circumstances. Even the assessment of the same amount of thirty demerits would have placed the grievor in a dismissable position.

I am also satisfied, having regard to the submissions made by the Company's representatives, that Mr. McCarthy was given the fullest benefit of employment options to accommodate his disability and that there was no violation of his collective agreement rights by the Company, either in the assignment of Mr. McCarthy or in his disciplinary treatment in light of these extremely serious incidents.

For the foregoing reasons the grievance must be dismissed.

May 21, 2002

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**