CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 715

Heard at Montreal, Tuesday, July 10th, 1979

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF RAILWAY AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

EX PARTE

DISPUTE:

Dispatcher R.G. Ference of Calgary was reduced to Operator for being a party to an improper arrangement for maintenance-of-way equipment to work within the limits previously assigned to a work train under Rule 266, Uniform Code of Operating Rules.

EMPLOYEE'S STATEMENT OF ISSUE:

The Union takes the position that the discipline was too severe as he was following past practice condoned by the Railway. The discipline, also, was an unlimited, indefinite, permanent demotion and left no provision for him to re-qualify as a Dispatcher. Furthermore, the investigation was not proper.

The Company denied the grievance.

FOR THE EMPLOYEE:
(SGD.) D. C. DUQUETTE
GENERAL CHAIRMAN

There appeared on behalf of the Company:

P. E. Timpson	– Assistant Supervisor, Labour Relations, Vancouver
M. Morrow	– Assistant Superintendent, Transportation, Vancouver

And on behalf of the Brotherhood:

D. C. Duquette	– General Chairman, Montreal

AWARD OF THE ARBITRATOR

Rule 266 of the Uniform Code of Operating Rules is as follows:

> 266 A train or engine may be given exclusive occupancy of a track or tracks within specified limits and specified times to perform switching or other work when authorized by the train dispatcher in the following manner: "(train or engine) may use (track or tracks) between ... and ... (or at ...) ...m until ...m."
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> When requesting track and time limits, employee will give his name, occupation, location, train or engine number and specify time and work limits and track or tracks to be used. When such authority is granted, the instructions must be in writing and repeated to the train dispatcher before being acted on, and no movement may be made under this rule until the engineman has been advised and understands the track and time limits granted.
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> After the train or engine has entered the limits specified, the train dispatcher must block all levers controlling signals governing movements into such limits at STOP and must not remove lever blocks nor permit any other train or engine to enter the limits until track and time limits have expired unless the train or engine is reported clear of the track or tracks specified.
>
> During the period track and time limits are authorized the train or engineman use the track or tracks specified in either direction without flag protection.
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> The train or engine must be clear of the track or tracks specified, switches restored to normal position before expiration of the time specified and train dispatcher so advised. If not clear by the time specified, protection must be provided as prescribed by Rule 99. If additional time is required, authority must be secured from train dispatcher before previously authorized time expires.

The grievor, an employee since 1951 and a dispatcher since 1972 was working in his regular position as dispatcher at Calgary on the 0800 to 1600 shift on July 25, 1978. From the console in the dispatcher's office he controlled train movements on the Laggan Subdivision, single track territory from Calgary to Field.

Before the grievor came on duty that day the dispatcher on the previous shift had given protection to Work Extra 5838 on a certain portion of the Laggan Subdivision, pursuant to Rule 266. The grievor was aware of that. Shortly after the grievor came on duty, at about 0839, Mr. Culig, foreman of a Welding gang, called the grievor and indicated that he wished to work "on the 266" issued to Work Extra 5838, and asking that that authority not be "busted" until he, Culig, called the dispatcher. The grievor concurred in this arrangement and advised Mr. Culig that he would put his name on the "tag" which it seemed he attached to the lever blocks controlling the signals. This procedure might have allowed the dispatcher to block access to the territory even after Work Extra 5838 had reported clear, or after the time limit of the protection had expired.

The procedure was quite improper. There is another procedure for protection of work gangs, and Rule 266 certainly does not contemplate that a work gang or any other operation might "shelter" under the protection it is designed to afford. Foreman Culig ought not to have requested such "protection" and it would appear that he was properly disciplined for having done so, although that matter is not now before me. The grievor, of course, ought not to have consented to the request, and ought not to have allowed the move which occurred. In fact the grievor did not do anything other than write Mr. Culig's name on the "tag". When the conductor of Work Extra 5838 called, at about 1007, to request that the grievor complete the form 266 (thus removing the protection) the grievor did not advise him that a welding gang was working under the protection (as he thought) of the rule: he had "assumed" that Mr. Culig would advise the work train conductor of that. Mr. Culig had done no such thing, and the work train conductor was, naturally, quite unaware of what had been done. The grievor, despite the "tag" seems not to have given any real thought to the situation in which he had allowed Mr. Culig to place himself.

After completing Form 266 the grievor then lined the switches and signals which allowed Extra 5682 East on to the track in question. Eventually, as he observed the progress of Extra 5682 East, the grievor "realized the probability of the welding gang not being clear of the track". Shortly after that foreman Culig telephoned to advise "that the train had wiped out all of his machines". There was some personal injury as well but, fortunately, no fatality.

There is no doubt that the grievor was subject to discipline for the rule violation. Not only was the violation of the rule an offence but, having undertaken the procedure he did, the grievor was careless (to say the least) in what he did, and did not take the obvious and elementary step of verifying the situation of Mr. Culig with the work train conductor. This was so obviously contrary to the principles of track control with which the grievor ought to have been imbued, and so contrary even to common sense, that it raises a question as to the grievor's competence to work as a dispatcher.

While it is acknowledged that some discipline was proper, the Union contends that the discipline imposed was excessive and inappropriate. A number of points are raised by the Union. One, of a preliminary nature, is that the grievor was not given twenty-four hours' notice of the investigation. In fact the grievor himself was only given sixteen hours' notice, although his Local Chairman had some thirty-two hours' notice. At the investigation the Local Chairman and the Vice General Chairman of the Union were present along with the grievor. Asked if he had been properly notified, the grievor replied "yes". There is nothing to indicate that the grievor was in any way prejudiced by the investigation's proceeding at that time. That was the time for any objection of that nature to be raised.

A second matter raised, also of a procedural nature, is that the Union was, at the investigation of the grievor, given copies of the statements taken from other employees including Mr. Culig and members of the train crews, a day or two previously. In my view, this was sufficient compliance with the requirements of Article 38.02.

As to the penalty, it was said to be too severe by comparison with that imposed on Mr. Culig, who was assessed forty demerits. That was, in itself a serious penalty. There is no intrinsic reason why the penalty imposed on the grievor should be the same. His job is a different one, and involving a greater degree of responsibility for the lives and safety of others. A more severe penalty would be justified on that account alone. As well, of course, it is to be noted that the grievor not only participated in the rule violation, but then carelessly neglected to verify that Mr. Culig no longer needed the protection, when the work train conductor called.

It is alleged, as well, that the practice of "sharing" Rule 266 protection is a common one and is encouraged by local officers. There is no evidence to support this, and while it may be so to some extent (the grievor's own statement, which was no doubt an honest one, suggests that the procedure was not unknown), it was certainly not condoned by Company officers of any standing. The grievor could have no reason for believing it was "approved" in any way. Even if he had, it would have been his duty to protest it and refuse to follow it, since it is obviously unsafe.

The most weighty Union argument, in my view, is that an indefinite demotion, as was imposed by way of discipline in this case, went too far and was not an appropriate form of discipline. Generally, as has been noted in several cases, demotion is not an appropriate disciplinary measure unless the offence itself indicates a lack of competence to perform the job involved. In this case, as I have noted, the grievor's actions do raise a doubt as to his competence.

For the reasons given in the **Chatfield case** (December 7, 1970; involving the same parties), I consider that this was a proper case for demotion. In that case the demotion was said to be "permanent" and in the award care was taken to indicate that no particular binding effect was given to that term. What was approved, in effect, was the simple fact of the grievor's demotion to a lower-rated category. The case of the grievor's possible application for a dispatcher's job in the future was not dealt with.

A somewhat similar situation was dealt with in **CROA Case No. 558**, also involving these parties. There I indicated that it was not clear as it had been in **Chatfield**, "that the grievor's conduct indicated that he could not be relied on to perform his job in the proper manner". The grievor's error, in **Case No. 558**, was one of "oversight". In this case, as in **Chatfield**. it was rather more than that.

In the instant case it is my view that the grievor's misconduct was an indication that he could not be relied upon to perform his job in the proper manner. I would not conclude that he would be barred forever from appointment as a Dispatcher. In order to avoid the uncertainties and problems that might otherwise arise, it would be my view that, at least in some cases, where demotion (as opposed, say, to suspension, which would have been justified in this case and which might raise fewer problems) is justified, it would be best to specify some period of time during which the demotion is to be effective. That would not necessarily mean that at the end of the period the employee would be promoted, but that he would at least be eligible for promotion. I do not here purport to deal with any of the problems which might arise in these cases.

As for the disposition of the instant case, it is my view that the "indefinite" demotion should be clarified, and stated to be for a period of one year. Thus, as of August 12, 1979, the grievor will then, subject to compliance with the usual qualifications of the job and to the seniority rights of others be entitled to appointment as Dispatcher.

(signed) J. F. W. WEATHERILL
ARBITRATOR