CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1400

Heard at Montreal, Tuesday, September 10, 1985

Concerning

CANADIAN NATIONAL RAILWAYS

and

UNITED TRANSPORTATION UNION

DISPUTE:

Appeal of discipline issued to, and subsequent dismissal of, Yardman G. A. Larson, of Vancouver, B.C.

JOINT STATEMENT OF ISSUE:

On April 24, 1984, Mr. G. A. Larson was employed as Yard Helper on the 2300 hours Extra Transfer which was ordered to move 85 loaded cars and 1 caboose from Thornton Yard to Lynn Creek for unloading at Neptune Terminals. As it entered Lynn Creek Yard, this movement went through a crossover and collided with another train.

Following an investigation into the accident, the record of Yardman Larson was assessed with 20 demerits effective April 25, 1984: "For your responsibility in the violation of Rule 104, paragraph 6, UCOR revision of 1962, resulting in severe damage and derailment, April 25, 1984."

A further Form 780 was issued assessing the record of Yardman Larson with a discharge, effective May 18, 1984, for accumulation of demerit marks.

The Union has appealed the discipline on the grounds that it was unwarranted, but in any event the resultant discharge was too severe given the circumstances.

The Company has declined the appeal.

FOR THE UNION:

(SGD.) D. J. MORGAN
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) M. DELGRECO
FOR: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS.

There appeared on behalf of the Company:

G. C. Blundell	– Labour Relations Officer, Montreal
M. Healey	– Manager Labour Relations, Montreal
M. Boyle	– Labour Relations Officer, Edmonton
J. A. Sebesta	– Coordinator Special Projects, Montreal
J. R. Hastie	– Master Mechanic, Vancouver
L. Finnerty	– System Master Mechanic, Montreal
K. P. DeJean	– Senior Transportation Engineer, Montreal

And on behalf of the Union:

D. J. Morgan	– General Chairman, Winnipeg
L. H. Olson	– Vice General Chairman, Winnipeg
C. S. Lewis	– Secretary, Winnipeg
R. Proulx	– Vice-President, Ottawa

B. LeClerc – General Chairman, Quebec
R. A. Bennett – General Chairman, Toronto
W. G. Scarrow – General Chairman, Sarnia
P. Brideau – Secretary,

AWARD OF THE ARBITRATOR

Rule 104, paragraph 6, UCOR rules reads as follows:

> A train or engine must not foul a track until switches connected with the movement are properly lined, or in the case of automatic or spring switches the conflicting route is seen or known to be clear.

The grievor was assessed 20 demerit marks (and thereby in light of his record was discharged) for violation of Rule 104, paragraph 6 for his omission of duty in failing to alert Locomotive Engineer Newton of a crossover switch that had been targeted yellow. Had the grievor been more attentive it is alleged that he could have warned the locomotive engineer to apply the brakes of his train well in advance of the switch. The grievor eventually did notice the yellow target some 200 feet away from the switch. At that point, despite his best efforts to avoid the accident, the train collided with another coal train and derailed.

The Trade Union has conceded that the grievor, in his capacity as Head End Trainman, was under a positive duty to ensure his train's compliance with Rule 104, paragraph 6. Nonetheless, numerous mitigating circumstances were recited as to why the grievor should have been exonerated from blame or to otherwise have had the discharge penalty mitigated. The primary reason advanced by Mr. Larson as to why "it was too late" to prevent the accident was because he was momentarily blinded by the glare of a coal train on the adjacent track. In light of his temporary incapacity there was insufficient time available to properly alert the engineer to stop. At best, when he noticed the yellow target he could only tell the Engineer Newton "to soak it" and to detrain in order to attempt to connect the switch.

The Company claims the grievor, once his train passed the glare of the adjacent coal train's lights, he had approximately 1493 feet to advise the engineer of the approaching yellow target. At best, even if one were to allow for a recovery period of 300 feet (i.e., 5 cars) the grievor admitted that he could see the trackage from that vantage point, (i.e. approximately 1000 feet).

> Q. How far were you past the unit on the adjacent track before you could clearly see the trackage in front of you?
>
> A. Approximately 5 car lengths.

I am not satisfied that the glaring lights of the adjacent coal train ought to have so affected the grievor's capacity to notice the yellow target so as to prevent him from alerting the engineer to stop in time. Moreover, the remaining mitigating circumstances recited in the Trade Union's brief such as the grievor's inexperience, his unfamiliarity with the terrain, the darkness, the confusion caused by other switches in the area, etc., are surely grounds for arguing that Mr. Larson should have been more attentive to his responsibilities than was exhibited. And, of greater importance, he obviously had no basis for assuming that Engineer Newton, despite his experience, was exercising the necessary attentiveness, given his responsibility for the train's operation, as an excuse for his carelessness. Surely, the grievor is under the obligation to comply with Rule 104, paragraph 6, in order to provide insurance for the train's safety in the event the engineer should fail to discharge his duty.

In short, I am satisfied that the grievor violated Rule 104, paragraph 6 and was properly disciplined for his misconduct. But should he have been fired?

The Employer conceded that due to a breached time limit Engineer Newton escaped discipline. The Employer claimed that it would have otherwise assessed him 30 demerit marks. Of course, the Employer might well have said it might have fired the engineer for his delinquency.

The record indicates that Engineer Newton, who was primarily responsible for the operation of the train involved in the incident and who thereby owed a higher standard of duty for compliance with Rule 104, paragraph 2 "went scott free", while the grievor, owing in part to his abysmal record, was discharged as a result of the culminating incident.

It would be a patent injustice for this situation to remain intact. I say this even though it arose, as the Employer argued, on account of a technicality. But, as pointed out at the hearing such technicalities work to the prejudice of all parties who suffer from non compliance of the time limits contained in the collective agreement. The grievor also cannot rely on the technicality of a breached time limit for his Trade Union's omission to forward a grievance contesting any of his past disciplinary incidents.. They remain on the record and to his prejudice. As a result, this Arbitrator has concluded that it would be intolerable for the situation described herein to remain unaltered where I have a discretion to remedy the situation. Fairness dictates some adjustment.

Because of my conclusion that the grievor violation Rule 104, paragraph 6, and having regard to his truly abysmal record during the short period of his active employment, I have resolved to direct his suspension for the period between the date of his discharge and the date of the receipt of this decision without compensation or other benefits. Needless to say the 20 demerit marks are to be removed from his personal record. Accordingly the Employer is directed to reinstate the grievor on the terms herein described. I shall remain seized for the purpose of implementation of this award.

(signed) DAVID H. KATES
ARBITRATOR