

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 537

Heard at Montreal, Tuesday, February 10th, 1976

Concerning

TORONTO, HAMILTON AND BUFFALO RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION (T)

EXPARTE

DISPUTE:

Discipline assessed Conductor E. G. Hartz and claim for actual lost wages as the result of an accident at Black Rock, New York, U.S.A. June 15th, 1975.

EMPLOYEE'S STATEMENT OF ISSUE:

The Union contends that the responsibility for rule violations was not established by evidence produced at the investigation and the Company violated Article 63 (D) (E) of the current collective agreement.

The Company contends Mr. Hartz was in violation of the specific rules he was charged with either wholly or in part and discipline was assessed on the basis of his degree of responsibility.

FOR THE EMPLOYEE:

(SGD.) K. L. MALLETT  
GENERAL CHAIRMAN

There appeared on behalf of the Company:

F. N. Foster	Trainmaster & Road Foreman of Engines, TH&B. Rly., Hamilton
J. G. Beldham	Superintendent, T.H.&B. Rly., Hamilton

And on behalf of the Brotherhood:

K. L. Mallett	General Chairman, U.T.U.(T), Caledonia, Ont.
G. W. McDevitt	Vice President, U.T.U., Ottawa

AWARD OF THE ARBITRATOR

The Company has raised a preliminary objection to the jurisdiction of the Arbitrator in this matter, and contends that the matter should not be before the Canadian Railway Office of Arbitration, since the incident over which the grievor was disciplined occurred in the United States, while the grievor was acting under the direction of Penn Central, an American railroad. The matter was investigated by Penn Central, and involved violation of its Rules for Conducting

Transportation. Discipline was assessed by Penn Central, and the grievor was advised thereof by the Superintendent of the T.H.&B. Railway.

Although, pursuant to an agreement between the T.H.&B. Railway and Penn Central, T.H.&B. employees who operate certain trains on Penn Central track are considered to be employees of Penn Central, they are so considered only for operational purposes, in that they are required to take direction from Penn Central employees, and must comply with Penn Central operating rules. It is, in fact, by virtue of the direction of their own employer, the T.H.&B. Railway, that employees are thus required to accept the direction and control of Penn Central, while they are operating in its area. The agreement referred to is one between the two railroads, it does not bind the trade union, and it does not affect the fundamental employment relationship. The employees are paid by T.H.&B., remain members of the bargaining unit, and are subject to the terms and conditions of the collective agreement, which contemplates that employees may perform service for foreign lines.

In the instant case, while discipline was recommended by Penn Central, it was actually imposed by T.H.&B., and was indeed a lesser penalty than that recommended. The grievance is, quite properly, against T.H.&B., and like other grievances involving these parties, is subject to arbitration in the usual way. As between these parties, that involves submission of the dispute to the Canadian Railway Office of Arbitration. It was not suggested that any other tribunal might have jurisdiction to hear the matter.

It is my conclusion that this grievance involving discipline imposed on the grievor by the T.H.&B. Railroad, his employer, is properly before me, and that I have jurisdiction in this matter. I therefore proceed to deal with the case on its merits, the parties have agreed that I reserve jurisdiction on the objection while receiving their submissions as to the merits.

It is the Company's contention that the grievor was in violation of a number of the Penn Central "Rules for Conducting Transportation" which were binding on him at the material times. The incident in question involved a collision between Train No. 371, the grievor's train, and Amtrack Train No. 63, at Black Rock Station, New York, on June 15, 1975.

The grievor was conductor of Train No. 371, which was a return movement from Buffalo to Hamilton. The train consisted of two RDC cars, and the crew consisted of one engineman (a Mr. Beebe), a conductor (the grievor) and a baggageman. The matter in issue is the grievor's responsibility for the collision which occurred, and I agree with the Company, that in assessing that responsibility the grievor's whole course of conduct with respect to the run may be considered. The train left Buffalo Central Terminal at 5:43 p.m. on June 15, following Amtrack Train No. 63 which had left at 5:41 p.m. Approaching Black Rock Station, which is 6.9 miles from Buffalo Central Terminal, the grievor's train struck the rear of Train No. 63, which was standing at Black Rock Station. There were injuries to all members of the crew of the grievor's train, and to passengers of both trains, as well as extensive damage to the equipment.

The Company has alleged that the grievor was in violation of a number of rules with respect to this run, and these will be considered in turn.

Rule 74 of the Penn Central Rules for Conducting Transportation is as follows:

"74. At locations specified in the timetable, employes reporting for duty must sign the Employee Register. They must re-register after having been off duty one or more hours."

In the instant case, it appears that the grievor did not register the arrival of train 376 (which departed on the return trip as train 371), although that failure would come under some other rule. He was off duty for 5 hours and 10 minutes, and was clearly required to register when coming on duty for train 371. He should have registered personally, but improperly permitted the baggageman to register for him. He would, in my view, be subject to some discipline, as the rule is not a mere formality. It appears, however, that there had developed a practice, at that terminal, of allowing one member of a crew to register for himself and for others. In the light of such practice it would be difficult to justify any substantial penalty for this particular offence. The grievor's failure to register personally does not appear to be related to any possibility of his being aware of the engineman's condition, and I cannot regard it as having any significant relation to the collision.

Paragraphs 2 and 3 of Rule 400 N-1 are as follows:

"Conductors have general charge of the train to which assigned and all persons employed thereon are subject to their instructions. They are responsible for the prompt movement, safety and care of their respective trains and the passengers and commodities carried, for the vigilance and conduct of the men employed thereon and for the prompt reporting to the Superintendent of conditions that interfere with the prompt and safe movement of trains.

They must know that members of crew providing protection as required by Rule 99 are familiar with their duties and that their trains are properly equipped and inspected; also that Air Brake Rules have been complied with and that the prescribed signals are displayed."

The grievor was the conductor of train 371 and as such bore the responsibility described in the article. As to the first of the above paragraphs, it was the grievor's testimony at the investigation that he did not realize that engineman Beebe was under the influence of alcohol. He had, he said, spoken to the engineman before the train left, but noticed nothing unusual in his speech or movements. This is strange, in view of the breathalyzer results, which would suggest that the engineman was quite intoxicated. Even if his speech and movements did not reveal any serious impairment at the time the grievor spoke to him, one would expect there must have been something to arouse the grievor's suspicions.

As to the second of the paragraphs quoted from Rule 400 N-1, it was the grievor's responsibility to know that the appropriate air brake tests had been made. It would appear that no such test was made by car inspectors, and certainly there was no report made to the grievor that such test had been made. The engineman testified at the investigation that he carried out a brake test, and advised the grievor that everything was OK. From the grievor's own statement, it seems that he had arranged with the engineman that if there were anything amiss, he would not respond to a communicating signal to leave. Thus when the grievor gave the signal to leave, and the train did leave, he would conclude that all was well. This loose sort of procedure would avoid the protections made possible by a proper system of inspection and reporting. It increased the likelihood that a conductor might not be aware of the real situation with respect to the train for which he was responsible. In the circumstances here, I think it must be said that the conductor did not meet the requirements of Rule 400 N-1.

Rule 105 of the Uniform Code of Operating Rules is as follows:

"105. Unless otherwise provided by signal indication, trains or engines using other than a main track must proceed at restricted speed."

When the grievor's train left the terminal, the grievor concerned himself with collecting tickets from passengers. The passengers had all been boarded onto one of the two cars, the other having some air-conditioning problem. The baggageman was in the other car. The grievor did not observe any signal indications, and his testimony was that the baggageman was not in a position to observe signal indications. In any event the grievor was aware of speed restrictions on the trackage involved. In his statement at the investigation he acknowledged that the train, after moving through the interlocking at "F", (a short distance before entering CN trackage and approaching the station at Black Rock), the train was exceeding the restricted speed. The grievor had the impression that the train should be nearing Black Rock, and that it should be slowing down. It dawned on him, as he put it, that it was not slowing down as it normally did, and so he looked out the window to verify his location. He was proceeding forward to speak to the engineman when, looking out the window again, he saw Amtrack Train No. 63 ahead, and realized there would be a collision. He then pulled the emergency brake.

The fact is, the grievor did not keep a lookout for any signal indications, nor did he arrange for the baggageman to do so. The engineman was alone at the controls. The grievor did nothing to ensure that the speed restrictions, which were known to him, were observed. The time involved was not great, and there seems to be no reason why the grievor would have had difficulty in following the train's progress. He must have been aware that Amtrack Train No. 63 had departed only two minutes ahead, on the same track. By the point at which the grievor put on the emergency brake, the train had passed through a 10 M.P.H. limit area, and was in one of 15 M.P.H., entering the CN trackage. In these circumstances, it is my view that the grievor must bear a part of the responsibility for the fact that the

train was proceeding in violation of speed limitations, although it seems clear that it was the engineman who was most immediately at fault.

Rule 106 of the Penn Central Rules for Conducting Transportation is as follows:

"106. The conductor, enginemen, and pilot are responsible for the safety of the train and the observance of the rules, and under conditions not provided for by the rules, must take every precaution for protection."

This rule is simply a restatement of the conductor's responsibility. While the grievor, in view of the foregoing, may be considered to have been in violation of it, it does not increase the actual number of infractions he may be thought to have committed. The same applies with respect to Penn Central Rule "B", which also deals with employees' responsibility.

In all of the circumstances, I think it must be concluded that the grievor did fail in certain of his responsibilities as conductor of the train. Leaving aside his failure to register, it must be said that he was inattentive to the condition of the engineman, did not in fact know whether or not a brake test had been made, and, most importantly, paid no attention to the progress of the train through restricted speed areas until it was too late. While his conduct was not a direct cause of the accident, his failure to meet his responsibilities completely meant that significant chances of avoiding it were missed. It is my conclusion that the grievor was subject to discipline on this account.

There remains to be considered the question of the severity of the penalty imposed. In this respect it is proper to consider the grievor's record. He has some twenty-two years' seniority, and while he has been disciplined on several occasions on matters relating to job performance and observance of operating rules, there had been no discipline imposed for over ten years prior to this instance. He may be regarded, in my view, as though he had a clear record. In that light, a suspension of forty-five days may be thought to be excessive. In my view, in the case of a long-term employee having a clear record, a suspension of twenty days would have been warranted. Such a suspension constitutes a severe penalty, and the substitution of that for the one imposed does not, in my view, affect the seriousness of the offence.

It is accordingly my award that the grievor's record be amended to show a twenty-day suspension for the offence in question. Time out of service following the incident shall count as part of the period of suspension. The grievor is entitled to compensation for any loss of earnings following the period of the suspension, but would not be entitled to payment in respect of any period for which he received compensation while unable to work.

J.F.W. WEATHERILL  
ARBITRATOR