

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1050

Heard at Montreal, Tuesday, March 8th, 1983

Concerning

CANADIAN NATIONAL RAILWAYS
(CN Rail Division)

and

UNITED TRANSPORTATION UNION

DISPUTE:

Appeal of discipline assessed the record of Conductor R. G. Radford, Windsor, Ontario, February 17, 1981.

JOINT STATEMENT OF ISSUE:

On February 17, 1981, Mr. R. G. Radford was the Conductor on Extra 9644 West operating from London to Windsor, Ontario. Extra 9644 West derailed at mileage 82.4 Chatham Subdivision.

After an investigation, the record of Conductor Radford was assessed with 20 demerit marks for violation of Rule 111, paragraph 5, of the Uniform Code of Operating Rules.

The Union appealed the discipline on the grounds that:

- (1) investigation was not conducted in accordance with Memorandum of Agreement effective June 1, 1978, appearing on pages 379-385 inclusive;
- (2) in any event, the discipline issued was unwarranted.

The Company declined the Union's appeal.

FOR THE UNION:

(SGD.) R. A.. BENNETT
General Chairman

FOR THE COMPANY:

(SGD.) D. C. FRALEIGH
Assistant Vice-President
Labour Relations

There appeared on behalf of the Company:

H. J. Koberinski - Manager Labour Relations, CNR, Montreal
G. C. Blundell - System Labour Relations Officer, CNR, Montreal
J. A. Sebesta - Coordinator - Special Projects, CNR, Montreal

And on behalf of the Union:

J. M. Hone - Vice General Chairman, Road, UTU, Toronto
R. A. Bennett - General Chairman, Road, UTU, Toronto
T. G. Hodges - Secretary, GCA, Road, UTU, Toronto

G. Scarrow - General Chairman, Yard, UTU, Toronto
R. J. Proulx - General Chairman, UTU, Quebec

AWARD OF THE ARBITRATOR

There are, as set out in the Joint Statement, two grounds of appeal, namely that the proper investigation procedure was not followed, and that in any event the grievor had not violated the Uniform Code of Operating Rules.

The investigation procedure is dealt with in a Memorandum of Agreement effective June 1, 1978, as follows:

"(d) The employee may have an accredited representative appear with him at the investigation. At the outset of the investigation, the employee will be provided with a copy of all the written evidence as well as any oral evidence which has been recorded and has a bearing on his responsibility. The employee and his accredited representative will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of the witnesses (including Company Officers where necessary) whose evidence may have a bearing on his responsibility. The questions and answers will be recorded and the employee and his accredited representative will be furnished with a copy of the statement.

(h) The investigating officer will be an individual who is in the best position to develop all of the relevant facts provided he is not emotionally involved with the incident, except as mutually agreed."

It was argued that the Officer who conducted the hearing, Mr. O'Connor, was "emotionally involved with the incident" and so ought not to have conducted the investigation, as contemplated by (h) above. The basis of the emotional involvement would appear to have been that Mr. O'Connor, who was at the accident site, quickly formed the opinion that the derailment was attributable to a "hot box". Formulating a theory as to how an accident has occurred is not, of itself, "emotional involvement" in the matter. From the material before me, indeed, it would appear that Mr. O'Connor's theory was a perfectly natural and probable one. It was natural and proper for him to put questions to the grievor on that basis. There was, in my view, no violation of Clause (h) of the investigation procedure.

A more serious objection is that of violation of Clause (d). The grievor was not given the evidence bearing on his responsibility at the outset of the hearing, even although it was available. While that by itself might not vitiate the proceedings, it appears - although it is not on the record of the investigation - that Mr.

O'Connor refused to answer questions sought to be put by the grievor, although Mr. O'Connor's evidence, it seems clear, would have a bearing on the grievor's responsibility. It would appear that the agreement was violated in that respect.

However that may be, even assuming that the derailment - which occurred at Mile 82.12, where an already derailed truck struck a switch - was due to a hotbox which had developed on the third car ahead of the caboose, in which the grievor was travelling (the hotbox causing the truck to derail at Mile 81.02), it does not follow that the grievor was in violation of the Rules because he did not detect the hotbox.

Paragraph 5 of Rule 111 of the U.C.O.R. is as follows:

"When practicable, employees of a moving train must make frequent inspection of their train to ensure it is in order, and when a freight train stops a trainman will be in position to inspect the train as it pulls by."

The evidence is that the grievor did in fact make a number of inspections of his train after it left Chatham (Mile 61.6), the most recent of these being at Jeannette's Creek (Mile 75.4). There was fog and mist, and while the Engineman indicated greater visibility than did the grievor, it is not clear that their observations were made at the same point. The Brakeman checked the track behind the train (which might have revealed evidence of a truck being derailed, or of dragging equipment) about three minutes prior to the derailment. The train is said to have been travelling at about 40 m.p.h., so that the Brakeman's observations (or lack of them) are consistent with the derailment of the truck not yet having occurred.

If there was in fact a hotbox, it would, in most cases, be apparent on inspection. The Rules do not call for constant inspection, and in this case, while the Company was certainly justified in raising a question with respect to the grievor's performance, and in carrying out the investigation, it has not shown it did not carry out the "frequent inspection" required by Rule 111.

In the instant case, violation of the Rule has not been established, and just cause for discipline has not been shown. The grievance is therefore allowed, and it is my award that the 20 demerits be removed from the grievor's record.

J. F. W. WEATHERILL,
ARBITRATOR.