

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1176

Heard at Montreal, Wednesday, January 11, 1984

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)  
(Prairie Region)

and

UNITED TRANSPORTATION UNION

DISPUTE:

Discipline case of Trainman G. D. Kindrachuk, Moose Jaw, who was assessed 15 demerit marks for failure to protest when maximum speed was exceeded at Mile 36.6, Assiniboia Subdivision, violation of Time Table Footnotes, Work Extra 8647, January 10, 1983.

JOINT STATEMENT OF ISSUE:

Trainman G. D. Kindrachuk was working as the tail-end Trainman on Work Extra 8647 and at 1840, January 10, at Mileage 36.6 on the Assiniboia Subdivision, when their train was tested by radar to be travelling at a speed of 38 miles per hour. An investigation was held and Trainman G. D. Kindrachuk was assessed 15 demerit marks for failure to protest when maximum speed being exceeded at Mileage 36.6, Assiniboia Subdivision, violation of Time Table footnotes, Work Extra 8647, January 10, 1983.

The Union contends the discipline was not Warranted and the Company was, therefore, in violation of Article 32, Clause (d) of the Collective Agreement.

The Company contends discipline was properly assessed.

FOR THE UNION:

(SGD.) PHILIP P. BURKE  
General Chairman

FOR THE COMPANY:

(SGD.) R. J. SHEPP  
General Manager,  
Operation & Maintenance

There appeared on behalf of the Company:

F. B. Reynolds - Supervisor, Labour Relations, CPR, Winnipeg  
B. P. Scott - Labour Relations Officer, CPR, Montreal  
R. D. Falzarano - Asst. Supervisor, Labour Relations, CPR,  
Winnipeg

And on behalf of the Union:

P. P. Burke - Vice-President, UTU, Calgary  
J. H. McLeod - General Chairman, UTU, Calgary

#### AWARD OF THE ARBITRATOR

The issue in this case is whether the employer properly assessed the grievor, Trainman G. D. Kindrachuk, with 15 demerit marks for his failure to protest when maximum speed was exceeded at mileage 36.6 Assiniboia Subdivision on January 10, 1983.

The evidence established the grievor's colleagues in his crew were also assessed demerit marks for their failure to protest the alleged violation of the speed limit. The Locomotive Engineer, D. L. Gibson, who admitted he had exceeded the speed limit was assessed 30 demerit marks. The grievor was assessed 15 demerit marks for a previous infraction.

In light of the Locomotive Engineer's admission that the train had exceeded the speed limit I find no merit in the union's submission that the radar gun used to measure the speed of the train was defective or that the breach of the speed limit might have been attributed to a faulty speedometer or the poor braking system of the train. I am satisfied that the employer accurately gauged the train to be travelling at 38 mph and therefore had exceeded the 30 mph speed limit.

The principal issue in these circumstances is whether Trainman Kindrachuk was in a position to have been made aware of the excess speed limit in order to have made a protest. At all material times the grievor was located in the caboose area where there is no speedometer. The weather was inclement. Snow was falling quite heavily and the wind was blowing. Where the speeding infraction occurred the terrain was described as a "decreased grade". Accordingly, brake action would have been necessary to control the speed. In these circumstances, the Company submitted, owing to the grievor's experience, that he should have been attentive to the train's speed and have lodged a protest with the conductor.

I am satisfied that members of a train crew, particularly its conductor, have a positive duty to exercise reasonable care in being attentive to the speed at which the train they have been assigned is travelling. Moreover, I am of the view that the standard of care that ought to be applied in measuring the crew's attentiveness is a reasonable standard applicable to a professional and experienced train employee. For obvious safety reasons, it is a standard that ought to exceed that which might be expected of an ordinary lay person.

I do not find that any of the reasons advanced by the trade union to excuse the grievor's lack of attentiveness are sufficiently persuasive to convince me to exonerate Trainman Kindrachuk of his misconduct. I am however convinced that the extraordinary weather conditions may have adversely affected his judgment to the extent that the relatively harsh penalty imposed by the company ought to be mitigated. I therefore direct that the penalty of fifteen demerit marks ought to be reduced by five (5). In this respect the grievor, despite his past infraction, will have received the same penalty as was given Head End Trainman J. S. Gudmundson. The grievor's disciplinary record will be adjusted accordingly.

Except to that extent the grievance is denied.

DAVID H. KATES,  
ARBITRATOR.