

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1198

Heard at Montreal, Thursday, February 16, 1984

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Pacific Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Mr. O. Russo, Extra Gang Foreman was dismissed for failing to ensure the North Main Track Switch at Wessex lined for main track and locked when not in use, resulting in damage to equipment, Mile 34.9 Red Deer Subdivision. Violation of U.C.O.R. 104 paragraph 2 and Maintenance of Way Rules and Instructions, Safety Rule 12, March 23, 1983.

JOINT STATEMENT OF ISSUE:

The Union contends that dismissal is not warranted and reasonable demerits would have been sufficient.

The Union further contends that he be reinstated with all his seniority rights and benefits be restored.

The Company denies the Union's contentions.

FOR THE BROTHERHOOD:

(SGD.) H. J. THIESSEN
System Federation
General Chairman

FOR THE COMPANY:

(SGD.) L. A. HILL
General Manager,
Operation and Maintenance

There appeared on behalf of the Company:

F. R. Shreenan	- Supervisor Labour Relations, CPR, Vancouver
M. M. Stroick	- Superintendent, Calgary Division, CPR, Calgary
D. N. McFarlane	- Assistant Supervisor Labour Relations, CPR, Vancouver
P. E. Timpson	- Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	- System Federation General Chairman, BMWE, Ottawa
L. DiMassimo	- Federation General Chairman, BMWE, Montreal
R. Gaudreau	- Vice-President, BMWE, Ottawa
E. J. Smith	- General Chairman, BMWE, London

AWARD OF THE ARBITRATOR

On the morning of March 23, 1983, at approximately 10:50 am after the crew under Extra Gang Foreman Russo's supervision had completed loading equipment on several cars stationed on a storage track immediately adjacent to the main track at Wessex Station, Foreman Russo directed Mr. W. Nuss, Crane Operator, to proceed northwards with crew to distribute the equipment. As Crane Operator Nuss proceeded as directed Trackman D. Gallagher was about to reline the North Main Line Switch for main line use and to lock the same. At that time Foreman Russo directed Trackman Gallagher to leave the switch as they would be back in about ten minutes. Mr. Gallagher followed his foreman's direction and entered the car.

There is no dispute that at that moment Mr. Russo violated Rule 104, Paragraph 2 of the U.C.O.R. and Safety Rule 12 of the Maintenance of Way Rules of Instructions which read as follows:

"104 Switches must at all times be secured, Main Track switches must be lined and locked for main track when not in use. Yard switches that are equipped with locks, must be lined and locked for normal position after having been used.

12 All main track switches, except those under control of switchtenders, must be locked and other switches secured when not in use. Immediately upon closing and locking a main track switch, the employee doing so must test the lock to see that it is secured, examine the closed switch point to be sure that it fits properly, and observe the target or light to know that the switch is properly lined."

As Crane Operator Nuss preceeded the crew under Foreman Russo's direction began to distributethe equipment. At mileage 37.0 Conductor C. Johnson of Dayliner Train 194 requested permission to enter Foreman Russo's work area. At that point Foreman Russo was closer to the Home Oil Spur at mileage 37.1, than to Wessex so he decided to clear Train 194 at the Home Oil Spur. It was from this spur that Mr. Russo authorized Train 194 to proceed through his work limits.

Train 194 is alleged to have been travelling at 60 mph in a 30 mph zone. As it passed Mileage 37.1 Mr. Russo then realized that he had not closed the switch at Wessex. At approximately 10:59 am Train 194 lurched onto the storage track at Wessex and collided with four stationary empty tank cars on that track.

The collision resulted in the deaths of four passengers and of the Engineman of Train 194. Nine other persons were injured and considerable damage was caused to property. There is no dispute with the findings of the CTC investigation into the accident. That is to say, "the accident clearly would not have happened if the North Main Track switch at Wessex had been handled in accordance with the requirements of the Uniform Code of Operating Rules....". It was also concluded that the manner in which Train 194 was operated contributed to the severity of the accident.

Foreman Russo has admitted his direct responsibility for failing to adhere to the Uniform Code of Operating Rules. The company has dismissed Mr. O. Russo for his misconduct.

The only issue in this case is whether I am prepared to substitute a more moderate penalty for the grievor's infraction. There is no dispute that the grievor during his eight year career with the company had an unblemished record and was a valued employee.

The underlying reasons for the company's decision to dismiss is that it can no longer trust the grievor to undertake the duties of his position. He engaged in a deliberate, premeditated, calculated violation of the rules. In this regard had the violation of the rule constituted a temporary lapse such as his forgetting to adhere to the rules at the time the crew left the Wessex Station, different considerations may have applied. But because Mr. Russo consciously addressed himself to the unlocked switch and decided to leave it open until a later time his negligence was unforgiveable.

I am satisfied that the grievor's actions described herein represented a temporary lapse which Mr. Russo has admitted was inexcusable. Although the grievor consciously addressed himself to the unlocked switch at the time the crane left Wessex I cannot find that his violation of Rule 12 in so doing was calculated, deliberate and premeditated. His actions were clearly to the contrary. Mr. Russo at all material times intended to close that switch. The lapse when it occurred was delayed until after he unfortunately had given Train 194 clearance to enter his work area. At that time the mental lapse occurred that constituted the direct cause of the accident.

I am satisfied nonetheless that the employer has a legitimate cause to be distrustful of the grievor's continued employment in the position of Extra Gang Foreman. He violated his supervisory responsibilities in two significant instances. The first pertained to his direction to Trackman Gallagher to defer closing the switch; the second pertained to his clearing Train 194 through his work area. For these reasons the employer had cause to remove him from the position of Extra Gang Foreman.

I am not satisfied however that the grievor's employment should have been terminated. In light of his unblemished record and in having regard to the handling of Train 194 in contributing to the severity of the accident, the grievor should be given another chance to vindicate himself as a valued employee. I am content that his demotion to the position of trackman effective forthwith on the receipt of this award is a sufficiently just penalty in the circumstances. In that capacity the grievor will be working under the supervision of another foreman. In this regard the employer's distrust of the grievor's continued employment may be somewhat alleviated. Moreover, in due course the employer may be sufficiently persuaded to restore the grievor to a more responsible position.

The employer's decision to discharge should be varied accordingly.

DAVID H. KATES,
ARBITRATOR.

