

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1200

Heard at Montreal, Thursday, February 16, 1984

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)  
(Pacific Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Machine Operator W. J. Nuss was assessed 20 Demerit Marks for failure to ascertain from Foreman O. Russo, position of north main track switch, Wessex, immediately after having been used, resulting in damage to equipment, Mile 34.9 Red Deer Subdivision, violation of Maintenance of Way Rules and Instructions, Safety Rule 12, March 23, 1983.

JOINT STATEMENT OF ISSUE:

The Union contends that all demerits be removed from his record and payment at his regular rate of pay for time out of service and any expenses incurred.

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, BMW, Ottawa  
L. DiMassimo - Federation General Chairman, BMW, Montreal  
R. Gaudreau - Vice-President, BMW, Ottawa  
E. J. Smith - General Chairman, BMW, London

AWARD OF THE ARBITRATOR

As a result of the accident on March 23, 1983, at the Wessex Station described in CROA Case 1198, the company imposed discipline of twenty demerit marks on Trackman D. Gallagher, twenty demerit marks on Machine Operator W. J. Nuss and forty demerit marks on Track Maintenance Foreman P. D. Olson. Each received discipline for their alleged responsibility in participating in the violation, Maintenance of Way Rules and Instructions, Safety Rule 12. It is common ground that each grievor at the material time of the accident was under the direct supervision of Extra Gang Foreman Russo.

The principal issue raised in these grievances was whether the grievors, because they were under the general supervision of Extra Gang Foreman Russo, ought to bear any responsibility for the accident. Or, more succinctly, is there a shared or collective responsibility for breaches of the Maintenance of Way Rules and Instructions? Each of the grievors is said to have been certified with a "D" card or would otherwise have been knowledgeable of the requirements of Rule 12. The company's underlying rationale in disciplining the grievors rests on the notion that the accident could have been avoided had they discharged their responsibility.

I am satisfied that the General Rules contained in Maintenance of Way Rules and Instructions do require and impose a shared responsibility on all employees "whose duties are connected with the movement of trains" to ensure that adherence is made to U.C.O.R. Rules and Instructions. In this particular regard the following rules apply:

"A. Employees whose duties are prescribed by these rules must have a copy of them accessible when on duty.

Employees whose duties are in any way affected by the time table must have a copy of the current time table, and supplements thereto if any, with them while on duty.

B. Employees must be conversant with and obey the rules and instructions. If in doubt as to their meaning they must apply to proper authority for an explanation.

D. Employees whose duties are connected with the movement of trains are subject to the Uniform Code of Operating Rules and Instructions Pertaining to the Movement of trains, Engines and Cars.

E. Employees must render every assistance in their power in carrying out the rules and instructions and report promptly to the proper authority any violation thereof."

The responsibility for all maintenance of way employees, as in the case described, to be attentive to the UCOR Rules and to ensure their adherence places them in a position to legitimately question any colleague (inclusive of superiors) who may be engaged in or about to engage in an apprehended violation. In the particular case of an

employee who questions his supervisor's actions that employee is deserving of an appropriate response. Once an alleged violation of a rule is brought to the supervisor's attention the employee's responsibility is thereby spent. A supervisor who proceeds to continue to carry out his actions, after being warned, obviously operates at his peril.

In the case of a co-employee who has advised another colleague of his alleged violation and is without success in deterring the continuation of that action, that employee is thereupon duty bound to report his observations to a supervisor. The supervisor is at that time responsible for taking appropriate, reasonable steps to restrain a continuation of the violation.

In Trackman Gallagher's circumstances he was placed in a situation where the accident could have been prevented. Had he questioned the prudence of Foreman Russo's decision to delay closing the switch, then the latter may have realized the seriousness of his actions. In failing to conduct himself in accordance with his responsibility under the rules, I find that Trackman Gallagher was appropriately disciplined.

In response to the trade union's submission, had Mr. Gallagher been disciplined for any alleged insubordination for his questioning of his foreman's direction, I remain confident that such discipline would have been removed from his personal record, if not during the grievance procedure, then at arbitration.

In Machine Operator Nuss's case I am satisfied that when he left the storage track he was under a positive duty to have stopped the operation of the crane. In the absence of some signal either from Foreman Russo or Trackman Gallagher that the switch had been attended to he was duty bound to have inquired. In failing to make such inquiry an important safety valve was overlooked. When Machine Operator Nuss was asked during the investigation whether the switch had been closed he answered, "I don't know". I am of the view that Mr. Nuss should have known the answer and that answer should have been "yes". And if he did not know he should have made due inquiry at the appropriate time. The imposition of twenty demerit marks on Mr. Nuss's record was therefore warranted.

In Mr. Olson's case he was supervising his own crew of five employees under Mr. Russo's overall supervision at the time of the accident. When Machine Operator Nuss left the storage track, Track Maintenance Foreman Olson was inside a car conversing with a member of the crew. I have the most difficulty in comprehending the employer's case for disciplining Mr. Olson.

As I understand the company's reasoning Foreman Olson should have been alerted to something being wrong with the switching procedure when Machine Operator Nuss failed to stop his crane. The evidence demonstrated, however, that Mr. Nuss need not have stopped the train if he were given the proper signal by Mr. Russo or Mr. Gallagher to proceed forward beyond the switch. In that regard, it was suggested that he ought to have been alerted to the fact that Trackman Gallagher would not have been able to enter a car if the crane had not stopped. Superintendent Stroick, however, suggested before me

that in the circumstances described Trackman Gallagher could have entered a car had the crane been proceeding at a slow speed. In other words, the employer has given contradictory evidence as to whether Foreman Olson would have been or indeed should have been in a position to have known or to have reasonably detected whether or not adherence to Rule 12 had been met.

On the material before me I simply have not been satisfied that the employer has met the onus of establishing awareness of the violation of Rule 12 on Mr. Olson's part, in the circumstances, to have challenged Mr. Russo's actions. He had no reason for not assuming that the switch had been properly locked. For that reason I am of the view that the employer has not shown just cause for imposing forty demerit marks. Mr. Olson's personal record should therefore be adjusted accordingly.

In summary, I am satisfied that the twenty demerit marks imposed both on Trackman Gallagher and on Machine Operator Nuss should be sustained. The forty demerit marks imposed upon Foreman Olson should be removed from his personal record.

DAVID H. KATES,  
ARBITRATOR.