

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1238

Heard at Montreal, Tuesday, May 8, 1984

Concerning

ALGOMA CENTRAL RAILWAY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Claim of the Organization with respect to discipline assessed to Trainman Patrick J. Rivard for incident that occurred on November 18, 1983.

JOINT STATEMENT OF ISSUE:

Trainman Patrick J. Rivard, employed as a Brakeman in Roadswitcher Service, was assessed discipline of 15 demerit marks for failure to comply with the instructions of his Conductor, resulting in placarded tank car DOCX 7620, containing Hydrogen Peroxide, being inadvertently overturned with subsequent damage to equipment during tour of duty at Hawk Junction, Ontario, on November 18, 1983. The Organization requested the Company to remove the discipline from Trainman Rivard's record.

The Company declined the request of the Organization.

FOR THE UNION:

(SGD.) GLEN WITTY
General Chairman

FOR THE COMPANY:

(SGD.) V. E. HUPKA
FOR: Vice-President - Rail

There appeared on behalf of the Company:

Victor E. Hupka	- Manager Industrial Relations, ACR, Sault Ste. Marie
Newell L. Mills	- Superintendent, Transportation, ACR, Sault Ste. Marie

And on behalf of the Union:

Glen Witty	- General Chairman, UTU, Sault Ste. Marie
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AWARD OF THE ARBITRATOR

In this case two disciplinary grievances were referred to arbitration arising out of the same accident. On November 18, 1983 a southbound train at Hawk Junction Terminal, placarded tank car DOCX 7620, was involved in a side collision with an empty AC gon and was subsequently overturned on its side causing the release of hazardous material (hydrogen peroxide) to the environment.

At that time Trainman W. J. Bain was roadswitching freight services and was specifically charged with the responsibility of "switching" the placarded tank car and making certain that the brakes had been applied. Because Trainman Bain noted some difficulty in the operation of the hand brake that caused him considerable concern he distinctly recalled applying the air brake. It is common ground that the cause of the collision is attributed to the improper or absence of application of the car's air brakes.

Both parties were satisfied that the air brakes were in proper working order at the time of the incident. Moreover, it is agreed that the hand brake was not in a proper mechanical condition. Nonetheless, because Trainman Bain was responsible for applying the brakes in question at the time the accident arose the company held him accountable for his violation of Uniform Code of Operating Rule 112:

"A sufficient number of hand brakes must
be applied on cars left at any point to
prevent them from moving."

Just prior to the impact, Trainman Patrick Rivard signalled to the Train Engineer to back up his train in order to avoid the collision. Mr. Rivard did this in a desperate attempt to prevent the accident from occurring. Unfortunately in directing this back-up signal Trainman Rivard countermanded a direction given to the same Engineer by his Supervisor to stop the train. Mr. Rivard was aware of this stop signal. The train Engineer following Mr. Rivard's direction. It is common ground that the collision at that point was inevitable. The company has submitted, however, that Trainman Rivard's unwarranted intervention may have aggravated the severity of the accident.

For their alleged acts of misconduct Trainman Bain was assessed 10 demerit marks and Trainman Rivard was assessed 15.

Although the company went to great lengths to satisfy itself that because the air brakes were in proper order its argument that the grievor must be assumed to have omitted to apply them cannot be accepted. The grievor distinctly recalled that a defect existed in the hand brake that would logically have prompted him to apply the air brakes. Moreover, I have not had adduced before me any evidence that would tend to demonstrate that the grievor would have been mechanically inept in applying those brakes.

Notwithstanding the fact that I am satisfied the grievor applied the air brakes his conduct was not without fault. He admitted concern with respect to a defect in the application of the hand brake. Once he appreciated that shortcoming I hold he was duty-bound to have taken proper steps to arrange for their immediate repair. Indeed, had the brake been attended to, as suggested, most likely the accident might have been avoided. For his lapse in not taking appropriate precaution I am satisfied that Mr. Bain should have been assessed 5 demerit marks.

At first glance in reviewing the infraction committed by Mr. Rivard

in countermanding his Supervisor's order, I cannot appreciate why the company would assess him 15 demerit marks when the individual alleged to have precipitated the incident was only assessed 10 demerit marks. It appears that Mr. Rivard, with the best of possible intention, spontaneously sought to prevent an accident that all interested parties agreed was inevitable in any event. His insubordination towards his superior was unintentional and was clearly without malice. It seems to me that an appropriate penalty of a written reprimand should have sufficed.

With respect to the procedural objections raised by the trade union allegedly committed by the company during the course of the investigation I make these remarks; firstly, any defect in procedure because of the absence of charges in advance of the first interview was corrected by granting the grievors proper notice of a second interview. Secondly, had the grievors refused to proceed with the second interview, in Mr. Witty's absence, I would have been satisfied of a deprivation of their rights to proper trade union representation. The record of that interview shows however that those rights were waived when the grievors agreed to proceed with the interview without Mr. Witty.

As a result the grievors have been in part successful. Mr. Bain's disciplinary record is to be reduced to 5 demerit marks for his misconduct, and Mr. Rivard's record is to show a written reprimand for his infraction in lieu of 15 demerit marks.

DAVID H. KATES,
ARBITRATOR.