CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1270

Heard at Montreal, Thursday, July 12, 1984

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Pacific Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Mr. W. H. Gay, B&B Foreman Calgary Division was assessed 40 demerits and held out of service for investigation June 17-26, 1983, inclusive, account failure to properly handle the dual control switch, mileage 131.85, Laggan Subdivision, on June 16, 1983.

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. That Mr. Gay be paid his scheduled wages for the period June 17-26, 1983 inclusive and any expense incurred during this period.

2. That the Company violated Sections 18.1, 18.3 and 18.4 of Wage Agreement No. 41.

The Company denies the Union's contentions and declines payment.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) H. J. THIESSEN	(SGD.) L. A. HILL
System Federation	General Manager,
General Chairman	Operation and Maintenance

There appeared on behalf of the Company:

D. N. McFarlane	- Asst. Supervisor, Labour Relations, CPR, Vancouver
F. R. Shreenan	- Supervisor, Labour Relations, CPR, Vancouver
R. A. Colquhoun	- Labour Relations Officer, CPR, Montreal
J. C. Gaw	- Manager of Rules, 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. Y. Gaudreau	- Vice-President, BMWE, Ottawa

AWARD OF THE ARBITRATOR

As the Joint Statement of Issue indicates, both Mr. W. H. Gay B&B Foreman, Calgary Division, and Mr. N. S. Hotchen, Machine Operator, were assessed 40 demerit marks and taken out of service for several days pending investigation for their violation of Rule 3 (c) and Rule 9 (2) relating to the Special Regulations for the Protection of Heavy Track Units.

On June 16, 1983, Mr. Gay, as Foreman, was in charge of a crew doing repairs on a bridge at Mileage 131.7 Laggan Subdivision. At all material times the area of the track for which repair work was performed was protected under Rule 42, Example 2, Train Order. Foreman Gay instructed Mr. Hotchen, who was operating an American Hoist Crane, to proceed to Cathedral "to put his crane into clear" on the back track which ran off the siding at Cathedral. This would permit a westbound train and an eastbound train to pass through the protected area on the siding track and the main track respectively.

Mr. Hotchen proceeded through the dual control switch at Cathedral, Mileage 131.85 and parked his crane as instructed on the back track. As he proceeded through the dual control switch Mr. Hotchen neither contacted the dispatcher for permission to manually unlock the dual control switch nor for permission from the dispatcher to enter the side track in accordance with T.0.P. Rules. It also appears clear that once the switch was opened neither Mr. Gay nor Mr. Hotchen closed it. There is no dispute that the description of these events almost precipitated a head-on collision between the eastward and westward bound trains. Apparently, Mr. Gay gave clearance to both trains to enter the protected area while the switch remained open.

There is no issue that the relevant rules that related to the Protection of Heavy Track Units were violated. Moreover both Messrs Gay and Hotchen were trained and qualified with a "D" licence thereby evidencing their knowledge of the UCOR Rules. Quite clearly, the violation of the rules as alleged merited the imposition of discipline for the catastrophe that might potentially have ensued.

The trade union does not dispute the 40 demerit marks that were imposed upon B&B Foreman Gay. It does, however, challenge the propriety of the 40 demerit marks assessed Mr. Hotchen. In both instances the trade union submits that the company violated Sections 18.1, 18.3 and 18.4 of Wage Agreement No. 41 in taking the grievors out of service pending their investigation.

In dealing firstly with the assessment of 40 demerit marks against Mr. Hotchen, his qualifications in holding a "D" Licence must weigh heavily in the conclusion I have reached with respect to the propriety of the disciplinary penalty assessed against him. Mr. Hotchen is entrusted with the responsibility,in the operation of the company's vehicles, in making certain that all operating rules are adhered to. He has no right as a qualified employee to make "assumptions" that they may have been complied with. There can be no

reason for doubt. There can be no excuses as to blame. Mr. Hotchen's first responsibility in the performance of his duties and responsibilities is to assure himself that he is operating safely and in accordance with all relevant operating rules.

Accordingly, when Mr. Gay instructed Mr. Hotchen to carry out his direction to park the American Hoist Crane, Mr. Hotchen should have contacted the dispatcher in order to have complied with the rules as aforesaid. He should not have assumed that Mr. Gay did that on his behalf. Or, if that was his assumption, he should have removed any doubt by asking Mr. Gay if he had done so. The only assumption an employee in Mr. Hotchen's circumstance is permitted to make is that, unless otherwise told to the contrary, compliance has not been made with the required rules. That assumption therefore should trigger im?ediate action on his part to ensure compliance.In this light I quite agree with the company's submission that any direction that emanates from a Foreman encompasses the requirement to ensure that the relevant operating rules are strictly adhered to. Any less stringent requirement of a qualified employee might very well result in a disaster. In short, there is no room for erroneous assumptions in the discharge of his duties. Accordingly, I am quite satisfied, despite the trade union's attempts to foist the entire blame for the incident on Foreman Gay, that the infractions coxm itted by Mr. Hotchen merited 40 demerit marks.

The second issue raised herein is whether, pursuant to Section 18.3 of the collective agreement, the grievors'(i.e. both Messrs Gay and Hotchen) offences were sufficiently "serious" to warrant their being held out of service pending their investigation. The trade union in this regard has asked me to give the "narrowest" interpretation to the Section 18.3 of Agreement 41 which reads as follows:

> "18.3 An employee will not be held out of service pending the rendering of a decision, unless the offence is considered sufficiently serious to warrant such action. The decision will be rendered within twenty-eight calendar days from the date the investigation is completed unless mutually arranged."

The guideline suggested by the trade union in determining this issue is set out in its brief at page 2:

> "The union argues that the only time such supervision pending an investigation can be used by the company is when the alleged offence is of such a nature that it would be detrimental to the normal operation of the company's business to permit an employee to perform his regular duties, while an investigation to establish guilt, is being carried out by the company".

The types of "apprehended danger" described by the trade union

warranting an employee's suspension pending an investigation are situations involving theft, insubordination to a company's officer or drunkeness on the job.

Without necessarily binding myself, in future cases to the trade union's submissions, I cannot discern, for the sole purpose of this case, why the grievors' situation would not fall squarely within the guideline that it has expressed. In my view the grievors have violated provisions of the operating rules relating to the protection of heavy track units that might have caused a major accident. It appeared apparent in the parties' briefs and in the discussion at the hearing that two concern were raised that would warrant their removal pending their investigation. The first and obvious concern pertained to whether the grievors were familiar with the relevant operating rules and the manner in which those rules were to be applied. And the second and less obvious concern was whether the grievors appreciated their respective responsibilities in ensuring that the rules are complied with irrespective of their relationship as between a supervisor and a mea?er of a crew who is being supervised. Unless and until the employer was satisfied that the grievors understood and appreciated their respective responsibilities the company had every reason, owing to the seriousness of their offences, to remove them from their respective positions pending their investigation. In short, the seriousness of their infractions were equal, if not more so, than the examples of misconduct that were suggested by the trade union. The employer was not in violation, as alleged, of Article 18.3 of the collective agreement.

Accordingly it is my conclusion that the assessment of 40 demerit marks against Mr. Hotchen and the time both grievors were held out of service pending their investigation of their alleged misconduct was justified. As a result both grievances are denied.

DAVID H. KATES,
ARBITRATOR.