

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1283

Heard at Montreal, Wednesday, October 10, 1984

Concerning

CANADIAN NATIONAL RAILWAY COMPANY
(CN Rail Division)

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Appeal of discipline issued to and subsequent dismissal of Locomotive Engineer G. D. McCance, Vancouver, B.C.

JOINT STATEMENT OF ISSUE:

On October 25, 1983, Mr. G. D. McCance was the Locomotive Engineer in charge of Extra 5304 West, operating in a westward direction on the Yale subdivision. Based on information contained in the train activity report, Mr. McCance was investigated in connection with the train handling and train speed control during tour of duty on Extra 5304 West, October 25, 1983.

As a result of this investigation, the record of Locomotive Engineer McCance was assessed with 20 demerit marks effective October 25, 1983:

"For responsibility while employed as Locomotive Engineer on Extra 5304 West, October 25, 1983, to properly control the speed of train within the maximum allowable speed limits."

A further form 780 was issued assessing the record of Locomotive Engineer McCance with discharge, effective November 21, 1983 for accumulation of demerit marks.

The Brotherhood appealed the discipline and the subsequent discharge on the grounds that it was unwarranted and requested compensation for Locomotive Engineer McCance for the time out of service.

The Company has declined the appeal.

FOR THE BROTHERHOOD:

(SGD.) J. W. KONKIN
General Chairman

FOR THE COMPANY:

(SGD.) D. C. FRALEIGH
Assistant Vice-President,
Labour Relations.

There appeared on behalf of the Company:

M. Healey - Manager Labour Relations, CNR, Montreal
G. Blundell - Labour Relations Officer, CNR, Montreal

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| J. A. Sebesta | - Coordinator Transportation, CNR, Montreal |
| G. J. Pichette | - Superintendent, CNR, Kamloops, B.C. |
| R. I. Richardson | - Assistant Superintendent, CNR, Thornton Yard, B.C. |
| J. R. Hastie | - Master Mechanic, CNR, Thornton Yard, B.C. |
| C. N. Rolin | - Trainmaster, CNR, Thornton Yard, B.C. |
| W. J. Rupert | - System Manager, Rules, CNR, Montreal |
| K. P. Dejean | - Senior Transportation Engineer, CNR, Montreal |
| M. Boyle | - Labour Relations Officer, CNR, Edmonton |
| B. Ballingall | - Labour Relations Assistant, CNR, Edmonton |

And on behalf of the Brotherhood:

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| J. W. Konkin | - General Chairman, BLE, Winnipeg |
| G. D. McCance | - Grievor |
| Gilles Thibodeau | - General Chairman, BLE, Quebec, Observer |

AWARD OF THE ARBITRATOR

Three grievances were referred to CROA on behalf of Locomotive Engineer G. D. McCance. The last incident that resulted in the imposition of discipline precipitated the grievor's discharge. The trade union has contested the propriety of the employer's cause for disciplinary action with respect to the three incidents. Moreover, irrespective of the merits of the incidents that resulted in discipline the trade union disputes the appropriateness of the discharge penalty.

(i) THE INCIDENT OF AUGUST 17, 1983:

The grievor was assessed 15 demerit marks for his alleged failure on August 17, 1983 to operate his train (CN Extra 5245 west) in accordance with "the slow order" contained in B.C. Hydro Operating Notice No. 89. The notice required the grievor to operate his train at 24 Km/h. It is common ground that the grievor operated the train at the regular speed in excess of Notice No. 89.

The grievor's explanation for the alleged infraction was attributable to his failure to observe the "posting" of the notice in the appropriate Locomotive Engineer's bulletin book.

The company's evidence appeared to indicate that the B.C. Hydro bulletin No. 89 was received by W. A. Thomas, Agent-Operator at the Thornton Yard and was inserted at approximately 1430 hours on August 16, 1983 in both the Trainman's and Engineer's Bulletin Books. Mr. J. R. Hestie, Master Mechanic, Yard Division, testified that as of August 19, 1983, he personally saw Bulletin 89 in both books and verified Mr. Thomas' statement that they were inserted as early as August 16, 1983.

As has already been indicated the grievor's sole explanation for his alleged violation of the slow order is because Bulletin No. 89 was not inserted into the Engineer's book. Accordingly, he simply did not notice "the slow order" directing the restricted speed of the operation of his train.

This is a pure case of a conflict in evidence that must be resolved on the basis of the credibility of the two diametrically opposed

statements of the grievor and the company's representatives. If I am to prefer the grievor's version then I am compelled to the conclusion that the company's representatives deliberately misled me on the important question as to whether the bulletin had been inserted into the Engineer's book. What possible purpose would be served by such misrepresentation? Not only would the false assertion with respect to the notice result in the improper charge of the grievor's breach of the slow order but would have repercussions affecting the safety and well being of the individuals in the area protected by the slow order. In other words, I can discern no useful purpose being served by the company in not inserting Notice 89 into the Engineer's book.

On the other hand, the grievor evidently has much to gain in falsifying his statement. That is to say, the grievor's explanation represents a convenient way of avoiding acceptance of any responsibility for a serious breach of procedure. In this regard I note his colleagues who were also disciplined for a like violation would have the same excuse as the grievor, but did not grieve their penalty.

In sum, in resolving the said conflict I am satisfied on the preponderance of the evidence that the grievor violated "the slow order" contained in B.C. Hydro Bulletin 89 because of his failure to follow the procedures required of him in checking the Engineer's Bullet Book on August 17, 1983. Accordingly, in view of his failure to admit his misadventure, I am not disposed to alter the penalty that was imposed.

The grievance is denied.

(ii) THE INCIDENT OF OCTOBER 4, 1983:

In this case the grievor was assessed 15 demerit marks for his reporting for work while in an unfit condition to fulfil his duties.

The grievor apparently accepted a call to fill in for a fellow employee who had booked off sick. At the time of accepting the call the grievor indicated that he had felt sufficiently alert to perform his duties. Upon reporting for work however, he signed the usual statement asserting his fitness.

During the course of his shift however the grievor had fallen asleep and could not complete the assignment for which he had accepted responsibility. Another employee had to book the grievor off as being sick in the middle of his shift.

There is nothing contained in the material before me that indicated that the grievor had not, as alleged, fallen asleep on the job. The grievor was present during the hearing and did not attempt to contradict the company's evidence.

The sole excuse that was advanced suggested that the grievor, albeit in a fit condition when he accepted the assignment, had worked on his house all day and therefore became tired. Even if that were to be true then the appropriate time to have advised the company of that

predicament was before he started his shift. Contrary to the trade union's assertion that the grievor is being punished for taking himself off the job in order to avoid an unsafe situation, the grievor in my view, deliberately created an unsafe work environment by undertaking responsibilities he was in no condition to discharge.

Again, given the seriousness of the grievor's infraction and his reluctance to admit his responsibility for creating a safety risk I am reluctant to interfere with the employer's decision to impose 15 demerit marks. The grievance is therefore rejected.

(iii) THE INCIDENT OF OCTOBER 25, 1983:

In this case the grievor was assessed 20 demerit marks for exceeding the speed limit in the operation of Extra 5304 West. In this particular situation the train activity report established that the grievor on October 25, 1983 operated his train over several areas of trackage 5 to 10 miles in excess of the allowable speed limit.

Again, nothing contained in the trade union's brief appeared to suggest an explanation for the grievor's failure to adhere to the proper speed limit. Nor was there any effort made to contest the accuracy of the company's evidence. Mr. McCance, who attended the hearing, did not contradict the company's charge that he exceeded on several occasions the permissible speed limits.

In addition to the twenty demerit marks assessed for this particular infraction the company also adduced evidence of two other infractions for which he had been assessed 10 demerit marks for causing unnecessary delay to Train 746 (August 20, 1983) and 15 demerit marks for violation of UCOR No. 104, resulting in a derailment (October 23, 1983) These two incidents resulting in discipline were not grieved.

In total the grievor, within a period of less than four months has accumulated 75 demerit marks for five serious infractions.

The trade union representative appealed to my sense of compassion in requesting that I reinstate the grievor despite the series of infractions that have been described. I asked the trade union representative to provide me with some explanation for the grievor's abysmal record over such a short period of time. No explanation was forthcoming. In sum, I simply cannot, without some basis for holding that there may be a likely improvement in the grievor's performance, be dictated by compassion alone in exercising my discretion to interfere with the employer's decision to discharge.

Accordingly, the grievor's grievance, in this regard, must be rejected.

DAVID H. KATES,
ARBITRATOR.