

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1475

Heard at Montreal, Thursday, February 13, 1986

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Appeal of discipline assessed the records of Conductor R. E. Powell and Trainmen B. S. Jennings and R. Lever of Sarnia, effective 9 November 1984.

JOINT STATEMENT OF ISSUE:

On 9 November 1984, Conductor R. E. Powell and Trainmen B. S. Jennings and R. Lever manned Extra 4577 operating between Petrolia Junction, Mileage 46.3 Strathroy Subdivision and Watford. Among the train orders issued to Work Extra 4577 was Train Order No. 151, a Form H Example 6 train order, authorizing Work Extra 4577 to operate on both tracks between the hours of 0730 and 1700 between Blackwell and Kerwood. Work Extra 4577 continued to operate on the eastward track after the expiration of Train Order No. 151 at 1700 hours. Following an investigation, the record of Conductor R. E. Powell was assessed 50 demerit marks and the records of Trainmen R. Lever and B. S. Jennings were each assessed 35 demerit marks.

The Union appealed the discipline assessed each of the grievors on the grounds that they were not afforded a fair and impartial hearing; the discipline was not warranted and in any case, was too severe.

The Company declined the appeal.

FOR THE UNION:

(SGD.) R. A. BENNETT
General Chairman

FOR THE COMPANY:

(SGD.) M. DELGRECO
FOR: Assistant
Vice-President
Labour Relations

There appeared on behalf of the Company:

D. W. Coughlin	- Manager Labour Relations, CN, Montreal
M. C. Darby	- Coordinator Special Projects, CN, Montreal
L. G. Lisle	- Trainmaster, CN, Sarnia
W. Stevenett	- Assistant Chief Dispatcher, CN, London

And on behalf of the Union:

R. A. Bennett	- General Chairman, UTU, Toronto
Tom Hodges	- Vice-General Chairman, UTU, Toronto
Guy Scarrow	- General Chairman, UTU, Sarnia

AWARD OF THE ARBITRATOR

It is common ground that on November 9, 1985, the grievors manned a one day work train assignment, Extra 4577. The train assignment according to Train Order No. 151 was between 0730 and 1700 between Blackwell and Kerwood, Ontario, on the Strathroy Subdivision. At all material times the train crew was governed by UCOR Rule 251 which reads as follows:

"251 On portions of the railway, and on designated tracks so specified in the time table, or by special instructions, trains will run with reference to other trains in the same direction by block signals whose indications will supersede the superiority of trains, except that the movement of work extras will be governed by train orders."

At 1650 hrs. Conductor Powell contacted Train Dispatcher E. Vennes at Watford, Ontario to advise of the crew's intention to return to Sarnia. The radio conversation between Mr. Powell and Mr. Vennes was taped. The transcript indicates that both employees discussed the trackage that was to be used by the crew on its return trip. Ultimately, it was decided by Conductor Powell to "shove right back on the eastward track". He received the "okay" of Dispatcher Vennes to do so.

It is clear that Conductor Powell and crew could not have made it back from Watford, Ontario, within the ten minute period remaining on Train Order No. 151. Watford is approximately 25 miles from the terminal at Blackwell and would require the train crew approximately one hour to achieve that destination while travelling at the prescribed speed limit of 20 mph. There is no dispute that Conductor Powell and crew acted in contravention of UCOR Rule 251 in operating Extra 4577 beyond the 1700 hr. deadline in the original Train Order. Their clear obligation was to have secured the appropriate "clearance" from Train Dispatcher Vennes before embarking upon their return trip. And, as such, it appears that Conductor Powell and crew committed a serious offence for which discipline was warranted.

The issue raised before me is whether the employer conducted a fair and impartial hearing prior to its imposition of discipline as required by Item 4(d) of Addendum 41 of the Agreement. Item 4(d) reads:

"(d) The employee may have an accredited representative appear with him at the investigation. At the outset of the investigation, the employee will be provided with a copy of all the written evidence as well as any oral evidence which has been recorded and has a bearing on his responsibility. The employee and his accredited representative will have the right to hear all of the evidence submitted and will be given an opportunity through the presiding officer to ask questions of the witnesses (including Company Officers where necessary) whose evidence may have a bearing on his responsibility. The questions and his accredited representative will be furnished with a copy of the statement."

It is the trade union's charge that the employer did not comply with Item 4(d) because it withheld from the trade union written evidence "as well as any oral evidence which has been recorded" and which had a bearing on the grievors' responsibility for the infraction.

In this regard, it is also common ground that Train Dispatcher E. Vennes was called to a disciplinary interview and was ultimately assessed 40 demerit marks for his alleged infraction. The company held in its possession the transcript of Mr. Vennes' interview as well as the transcript of the interview of Chief Dispatcher T. Smith. The company admitted that shortly after Conductor Powell's radio conversation with Train Dispatcher Vennes both Mr. Smith and Assistant Chief Train Dispatcher Stevenett realized the committal of the infractions by Conductor Powell and crew and took measures to advise Train Dispatcher Vennes to correct the situation.

The company noted at the hearing that had Train Dispatcher Vennes discharged his responsibility of insisting that Conductor Powell and crew secure the appropriate Train Order the whole episode could have been avoided. And, indeed, the reason Train Dispatcher Vennes did not meet his obligation was because he was not aware of the exact geographic location (i.e., Watford) where Conductor Powell and crew were located at the time of their conversation. I was advised that Train Dispatcher Vennes was under the impression that the call was made from Petrollia Junction. And, had that been the case Conductor Powell and crew could have made it back within the prescribed time limit contained in Train Order No. 151.

The uncontradicted evidence disclosed that the company did not at the outset of the disciplinary interviews conducted with respect to Conductor Powell and crew, provide their trade union representative with copies of the transcripts of Train Dispatcher Vennes' and Chief Dispatcher T. Smith's interviews. Nor would the company agree to arrange for A.C.T.D. Stevenett to appear at the investigation for the purpose of being interviewed by the trade union representative.

It is my opinion that the company acted in contravention of Item 4(d) in its failure to do so. Based on the candour and honesty of the company's own representatives at the hearing I cannot conceive why the transcripts of Train Dispatcher Vennes and Chief Dispatcher Smith would not contain information that would bear directly on the grievors' responsibility their misconduct.

The company appeared to be labouring under the impression that the conduct of Train Dispatcher Vennes would have no bearing on the grievors' wrongdoing because the independent evidence apart from those transcripts confirmed their particular responsibility for the breach of UCOR Rule 251 (as well as other UCOR Rules which is unnecessary for me to describe). Of course this was not disputed by the trade union. But for disciplinary purposes the conduct of a fair and impartial investigation is not carried out solely with respect to allocating responsibility for an infraction of the UCOR Rules but also with a view to apportioning responsibility in accordance with the appropriate degree of fault. In other words, a fair and impartial investigation is intended not only to determine responsibility but the extent to which each employee must incur a

penalty for their particular share of the responsibility.

In order to enable the trade union to participate in that process at the investigation the employer is obligated to provide and the trade union is entitled to receive at the commencement of the grievors' disciplinary interviews all relevant written and oral evidence that has been recorded that bears on their responsibility for the incident. Moreover, the trade union is also entitled to have any company official attend these interviews for the purpose of asking them questions whose evidence may have bearing on his responsibility. When the company failed to provide as aforesaid the said transcripts and refused to call Mr. Stevenett to the disciplinary investigation I am satisfied it denied the grievors a fair and impartial investigation. In so doing it contravened Item 4(d) of Addendum 41 of the Agreement.

Accordingly, the disciplinary penalties assessed against the grievors are to be removed from their personal records and the company is directed to comply with Item 4(d) in the event it elects to proceed again to discipline the grievors.

I shall remain seized for the purposes of implementation.

DAVID H. KATES,
ARBITRATOR.