

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1746

Heard at Montreal, Thursday 14 January 1988

Concerning

CANADIAN PACIFIC LIMITED

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Mr. A. R. Riggins, Machine Operator, was dismissed for failure to ensure the North Main track switch was restored and spiked in normal position after being used by Burro Crane, December 2, 1986, at Mile 45.6 Aldersyde Subdivision. Extensive damage was caused by train entering back track and colliding with equipment.

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. The Company violated Sections 18.1 and 18.2 of Wage Agreement 41.
2. Mr. A.R. Riggins be reinstated without any loss in total compensation or benefits he could have earned since December 3, 1986.

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

FOR THE BROTHERHOOD:

FOR THE COMPANY:

(SGD) M. L. McINNES  
System Federation  
General Chairman

(SGD) J. M. WHITE  
General Manager  
Operation & Maintenance, West

There appeared on behalf of the Company:

J.J. Robson	Assistant Supervisor, Labour Relations, Vancouver
L.J. Guenther	Assistant Supervisor, Labour Relations, Winnipeg
R.A. Colquhoun	Labour Relations Officer, Montreal
J.W. McColgan	Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

M. Gottheil	Assistant to Vice-President, Ottawa
M.L. McGinnes	System Federation Chairman, Ottawa
J. Rioulx	Observer, Ottawa

#### AWARD OF THE ARBITRATOR

It is not disputed that the north main track switch was not properly lined, locked and spiked after the grievor's crane had passed through it to be stored on the back track. The material establishes that it was not the grievor, but Leading Track Maintainer R.K. Turner who lined the switch to permit his entry into the storage track. Mr. Turner then failed to line, lock and spike the switch, in consequence of which the subsequent collision occurred. His actions plainly violated U.C.O.R. Rule 104 which provides, in part, as follows:

104 ...

Switches must at all times be secured. Main track switches must be lined and locked for main track when not in use. Yard switches that are equipped with locks must be lined and locked for normal position after having been used.

A main track switch must not be left open unless in charge of a member of the crew or a switchtender. ...

Maintenance of Way Rules and Instructions Form 568, Rule 12 also provides:

12. All main track switches, except those under control of switchtenders, must be locked and other switches secured when not in use. Immediately upon closing and locking a main track switch the employee doing so must test the lock to see that it is secured, examine the closed switch point to be sure that it fits properly and observe the target or light to know that the switch is properly lined.

Standard Practice Circulars Form 3806, No. 6, Clause 7(e) reads:

- (e) When on-track machines are stored on sidings or yard tracks, the switches must be spiked and the machine closest to the switch must be chained and locked to the rail, as well as blocked.

It also appears that the grievor, Mr. Riggins was subject to a Superintendent's Bulletin No. 107, dated April 12, 1983, which contains the following:

#### All Maintenance of Way Employees

- 1) A Maintenance of Way employee is not permitted to manually operate any switch equipped with a lock unless that employee has passed the required examination in the Uniform Code of Operating Rules and is in possession of a valid "A" or "D" Rules Certificate Form 286.

- 2) The Maintenance of Way employee who manually operates any switch equipped with a lock must personally remain at that switch until the intended use is completed, whereupon that same employee must immediately line and lock that switch for normal position.
- 3) Foremen are responsible for the position of switches manually operated by them and members of their crews. Employees are not relieved of responsibility in properly handling switches.
- 4) Switches must at all times be secured. Main track switches must be lined and locked for main track when not in use. Other switches equipped with locks must be lined and locked for normal position after having been used.  
(emphasis added)

In the Arbitrator's view while all of the foregoing rules represent standards by which the grievor was at all times bound, as they would bind any employee with knowledge of them, they are primarily directed to the employee who operates a switch, with the exception of Standard Practice Circular No. 6 which concerns the storage of on track equipment. As noted, it was Mr. Turner who operated the switch and most directly violated these rules.

In the circumstances of this case, the grievor erroneously formed the opinion that Leading Track Maintainer Turner, who opened the switch to allow him to move his Burro Crane onto the storage track, subsequently lined, locked and spiked it as he was required to do. He did not himself observe the switch or the switch target to confirm that this had been done. The grievor was not in a position supervisory of Mr. Turner, although they were working together in the loading and movement of scrap metal and Mr. Turner was providing assistance to him, and was in some degree under the grievor's direction. However, that working relationship does not necessarily render the grievor accountable for every failure of duty on the part of Mr. Turner.

In these circumstances the Arbitrator is inclined to accept the submission of the Union that any failure on the part of Mr. Riggins did not involve a direct violation by him of U.C.O.R. Rule 104 or Rule 12 of the Maintenance of Way Rules and Instructions, nor the Superintendent's Bulletin No. 107, as these are primarily directed to the employee who is required to handle a switch. I find it unnecessary to deal with the issue of whether the grievor violated Rule 74(a) of the Maintenance of Way Rules and Instructions. Even if that provision should be construed as requiring Mr. Riggins to have insured that the switch to the back track was left properly set and locked after he had passed through it, a matter upon which I make no finding, his duty in that regard could be no higher than his obligation under Standard Practice Circular No. 6, Clause 7(e) which required him to ensure the safe storage of his on-track machine.

The Union concedes that Machine Operator Riggins did violate Standard Practice Circular No. 6, although it maintains that the circumstances are mitigated by his reliance on Mr. Turner. Counsel

for the Union argues that the error of Mr. Riggins in this regard is comparable to that committed by another machine operator who was assessed twenty demerit marks for his failure to ascertain the position of a main track switch (C.R.O.A. Case No. 1200). On that basis he submits that the discharge of the grievor was an excessive measure of discipline and that the imposition of a comparable number of demerits would have been appropriate. He stresses that this is not a circumstance in which the grievor should be reinstated without compensation, as that result would cause the grievor to be unfairly penalized by the vagaries and delays of the grievance and arbitration system and would, as a general practice, give the Company an incentive to resort to discharge as a disciplinary penalty in numbers of cases, in the belief that if its judgement is later found to be incorrect the Company would run no financial risk.

The Arbitrator is in agreement with the general proposition advanced by counsel for the Union with respect to the utilization of reinstatement without compensation. When an employee's error or misconduct is plainly not a dismissable offence, and should have been dealt with from the outset on the basis of a lesser measure of discipline, it is inappropriate for an arbitrator to "split the baby" by subsequently reinstating the employee without monetary compensation. To pursue such a course would plainly not make the employee whole, in the sense that he or she is not returned to the position the employee would have been in had the just cause provision of the Collective Agreement been correctly applied. By the same token, where an employee's error or misconduct is grievous, and on its face would arguably justify resort to discharge, an arbitrator may, nonetheless, having regard to mitigating circumstances, exercise his or her statutory discretion under the Canada Labour Code to substitute a lesser penalty, including reinstatement without compensation. That approach recognizes that the employee's conduct is so serious as to give the employer some basis to believe that discharge was justified. If, in the end, the reinstatement of the employee without compensation has the effect of imposing a lengthy suspension, it is implicit in the judgement of the board of arbitration that that penalty is justified.

Applying the foregoing principles to the instant case, I am compelled to conclude that Mr. Riggins was responsible for a very serious violation of a critical rule. He was charged under Standard Practice Circular No. 6 with full responsibility for the safe storage of his on track machine, including insuring that the main line to siding switch was spiked. That clear and simple obligation was the grievor's, and not Mr. Turner's. In these circumstances I do not see how his general reliance on Mr. Turner to have lined and spiked the switch can be pleaded in mitigation. Mr. Riggins did not ask Mr. Turner if he had properly discharged that task, nor was he misled by anything Mr. Turner said. By his own account he failed to make the most cursory check of the switch target, which he could have done from a position on the ground next to his crane, if only to satisfy himself that the switch was lined. On the whole, therefore, while the Arbitrator accepts the submission of the Union with respect to the primary responsibility of Mr. Turner respecting a number of rules whose violation the Company seeks to fasten on the grievor, his own independent dereliction of duty remains, nevertheless, extremely serious. But for Mr. Riggins' failure to do what he alone was

responsible for doing, namely seeing that his machine was safely stored by ensuring that the main track switch was spiked, the collision and derailment would not have occurred.

There are, however, mitigating circumstances in the instant case. While the facts of this case are not identical to those appearing in C.R.O.A. Case No. 1200 and C.R.O.A. Case No. 1198, both of which concern another single incident, there are some significant parallels. In the latter case an Extra Gang Foreman was dismissed for failing to ensure that a main track switch was properly lined, as a result of which there was a collision involving several fatalities. He was reinstated, without compensation, having regard to the factor of shared responsibility and his own prior good record.

In the instant case the grievor's record is without blemish, albeit he is a relatively junior employee. I am nevertheless satisfied that although his error was extremely serious, it was not as grievous as that of Mr. Turner who was charged with actually handling the switch. In all the circumstances I deem it appropriate to exercise my discretion to substitute a penalty less than discharge. The grievor shall, therefore, be reinstated into his employment, without compensation or benefits and without loss of seniority. I retain jurisdiction in the event of any dispute between the parties regarding the interpretation or implementation of this award.

MICHEL G. PICHER  
ARBITRATOR