

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1846

Heard at Montreal, Wednesday, 9 November 1988

Concerning

CANADIAN PACIFIC LIMITED

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Demotion of Mr. L. Ricci from February 16, 1987 until February 16, 1989, as well as payment for time held out of service, February 2 until February 20, 1987.

JOINT STATEMENT OF ISSUE:

The grievor, Mr. L. Ricci, is restricted to the position of Track Maintainer for a period of two years for a violation of Maintenance of Way Rules and Instructions, Rules 4, 5, 6, 17, 170 and 190 and Safety and Accident Prevention Code, Form 300-1 items 1(A), 1(B), 1(E), 1(K), 4(A), 4(I), 5(H) and 9(C) at Mileage 198.1 Belleville Subdivision on January 24, 1987. The Trade Union contends that:

1. Mr. Ricci did not violate Maintenance of Way Rules and Instructions, Rules 4, 5, 6, 17, 170 and 190.
2. The Safety and Accident Prevention Code is not known as a job instruction manual and not intended for the purpose (of) assessing discipline.
3. The employer violated Section 18.1 and 18.3 in suspending Mr. Ricci subsequent to his investigation for an offence that his responsibility was not sufficiently serious nor established.
4. The two (2) year restriction to a Track Maintainer classification is excessive.
5. Mr. Ricci be reinstated to his position of Track Maintenance Foreman, with full seniority and compensated for all lost wages as a result.

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

FOR THE BROTHERHOOD:

FOR THE COMPANY:

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

(Sgd) J. A. LINN
General Manager

There appeared on behalf of the Company:

H. B. Butterworth	- Assistant Supervisor, Labour Relations Toronto
G. W. McBurney	- Supervisor, Labour Relations, Toronto
L. G. Winslow	- Labour Relations Officer, Montreal
M. K. Couse	- Assistant Supervisor, Labour Relations Toronto
J. G. Smith	- Observer

And on behalf of the Brotherhood:

L. DiMassimo	- Federation General Chairman, Ottawa
R. Della Serra	- General Chairman, Montreal
R. Achmin	- Local Chairman, Montreal
R. Wegrzyn	- General Chairman, Toronto

AWARD OF THE ARBITRATOR

The material establishes that on the Saturday morning of January 24, 1987 the grievor and fellow employee A. Coscia proceeded, of their own initiative, to perform work cleaning and checking switches in a section of the Toronto Yard near McCowan Road. It is common ground that that is a busy section through which trains move frequently and occasionally at high rates of speed. The material establishes that Mr. Ricci, who as Track Maintenance Foreman was responsible for himself and Trackman Coscia, did not call a dispatcher or any other Company officer to advise that the two employees were working in the area, or to inquire about the train movements to be expected during the period they would be working.

At some point shortly after 9:00 a.m. the two employees were clearing snow on a switch, with Mr. Ricci standing facing west and Mr. Coscia on his knees, working with a pusher. While there is some dispute as to which way Mr. Coscia was facing, the tragic reality of what ensued is not in doubt. Unbeknownst to the employees a yard train, referred to as the Agincourt Industrial Switcher assignment, approached them from the east, travelling at twenty-three to twenty-five miles per hour. The Yard Foreman on the caboose of the train did not see the maintenance employees until they were about eight car lengths away. When he saw the trackman in the kneeling position he pulled the emergency cord and shouted to alert the men of the approaching train. The grievor reacted by turning his head and, when he saw the approaching caboose, he immediately jumped clear to the south side of the track. Trackman Coscia continued to work in the kneeling position, apparently oblivious to the approaching train. He was struck and killed.

Following an investigation the Company disciplined the grievor by

demoting him to the position of Track Maintainer for a period of two years. The issue is whether that measure of discipline is justified in the circumstances.

Mr. Ricci is a long-service employee with a positive disciplinary record. Against those mitigating factors, however, the gravity of the incident and his responsibility must be weighed. While at the hearing the parties submitted considerable argument about the obligations of the grievor in respect of safety, his own testimony in the course of the investigation appears to leave little doubt about what he considered his obligation to be. In answer to a question put, he agreed that he makes it a practice to check with the train dispatcher before undertaking work at a dual control switch. Conceding that he did not notify the dispatcher of his whereabouts, he stated that he did not know why he didn't talk to the train dispatcher regarding his intent to proceed with cleaning of the switch. When further asked whether he understood that there is a high frequency of train movements in that area of the Toronto yard, in consequence of which he is responsible for checking with the train dispatcher for an update of train movements to protect his safety and the safety of the men under him he responded "Yes, I know this. I've been advised to protect myself and my men in this area by communicating with the train dispatcher. Mr. Leyne and Mr. O'Reilly have talked to me about this before this date at safety meetings."

In the Arbitrator's view the grievor's own words are the best evidence of the standard of safety which he should have observed on that fateful morning. While it does not appear disputed that in emergency conditions it may be the prerogative of the Track Maintenance Foreman to proceed of his own initiative to perform maintenance work, such as snow removal, it is not normal for such work to proceed without some communication with either a supervisory officer or a dispatcher. Apart from becoming available to receive particular instructions, the foremen following that procedure ensures that the persons in control of train movements are aware of the presence of maintenance employees in areas of hazard while they themselves gain an opportunity to become familiarized with local train movements.

On a careful review of the material I am satisfied that it was within the grievor's own understanding of his obligations, at a minimum, to check with the dispatcher with respect to train movements in the area where he and Mr. Coscia were working. This obligation should have been all the more present to his mind since, as the grievor knew, no supervisor or person responsible for train movements knew, or had reason to know, of their presence in that heavily travelled portion of the Toronto Yard on that day. A dispatcher telephone was available within approximately one hundred and fifty feet of where the two employees were working. The record establishes that it was a clear, sunny day, and although there was some blowing and drifting snow, conditions were not what would generally be described as an emergency that would cause train crews to be on the lookout for maintenance gangs, particularly on a Saturday morning. Rule 6 of the Maintenance of Way rules and Instructions which applies to the grievor is as follows:

6 Employees in charge of men working on or about the track must see that their men are alert to keep out of danger, that all receive warning of approaching trains in time to reach a place of safety.

The Arbitrator must conclude that the grievor did fail in his obligation to maintain a safe practice, consistent with general rules and specific instructions to protect himself and the employee under his supervision during the course of maintenance operations on that day. If he had taken the precaution of communicating with the dispatcher, as he admits he should have, the tragic consequences of this incident might have been avoided.

Although the fatal accident that befell Mr. Coscia was plainly not something which the grievor would have wished or intended, the grievor's contribution to the circumstances which allowed it to happen did, in my opinion, constitute a degree of negligence that is just cause for the assessment of a serious measure of discipline. In all of the circumstances I am satisfied that the grievor's demotion, and his being held out of service pending a final disposition of his case were appropriate. For the foregoing reasons the grievance must be dismissed.

November 10, 1988

(Sgd.) MICHEL G. PICHER
ARBITRATOR