

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1867

Heard at Montreal, Tuesday, 10 January 1989
Concerning

CANADIAN PACIFIC LIMITED

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Dismissal of Locomotive Engineer R. G. Borgstrom, Cranbrook, British Columbia, on June 03, 1988, for nullifying the operation of the safety control foot pedal on controlling locomotive D.E. 5823 on Train 812/87, while in motion, a violation of Item 1.13 of Section 9, Form CS44, Instruction 64 of Form 583 and Superintendent's Bulletin, Line Creek, B.C., May 19, 1988.

JOINT STATEMENT OF ISSUE:

Following an investigation conducted on May 20, 1988, in connection with Engineer Borgstrom's operation of D.E. 5823 at Line Creek coal mine, Engineer Borgstrom was dismissed from service.

The Brotherhood appealed the dismissal of Engineer Borgstrom requesting to have him reinstated on the grounds that Engineer Borgstrom had not nullified the operation of the safety control foot pedal on D.E. 5823.

The Company declined the Brotherhood's request to have Engineer Borgstrom reinstated.

FOR THE BROTHERHOOD:

(Sgd.) T. G. HUCKER
General Chairman

FOR THE COMPANY:

(Sgd.) J. M. WHITE
General Manager
Operations & Maintenance, HHS

There appeared on behalf of the Company:

D. A. Lypka	- Supervisor Labour Relations, Vancouver
B. P. Scott	- Labour Relations Officer, Montreal
D. R. Evans	- Deputy Superintendent, Cranbrook
D. M. Foster	- Locomotive Engineer, Coquitlam
M. E. Keiran	- Assistant Supervisor Labour Relations Vancouver

And on behalf of the Brotherhood:

T.G. Hucker	- General Chairman, Calgary
R.G. Borgstrom	- Grievor

AWARD OF THE ARBITRATOR

The Company alleges that Engineer Borgstrom nullified the operation of the safety control foot pedal on Diesel Engine 5823 while operating his train during loading operations at approximately 0025 on May 19, 1988. During that night Deputy Superintendent D.R. Evans, accompanied by then Road Foreman D.M. Foster, decided to perform an efficiency inspection of the grievor's train. Efficiency tests are a form of unannounced monitoring of employee performance, such as clocking the speed of trains by radar or visually monitoring train operations to ensure the observance of either general operating rules or internal train handling instructions.

Having performed two radar speed tests on other trains in the same area, Mr. Evans decided to proceed to the mine site at Line Creek to observe the operation of the train being operated by the grievor. As the two supervisors arrived at Line Creek they observed the train moving slowly through the mine's loop track at a normal loading speed of 0.3 miles per hour. Mr. Evans and Mr. Foster boarded the grievor's locomotive, which was the leading engine of the train, by the left rear steps. After crossing to the right rear catwalk they saw the grievor seated in the locomotive engineer's seat, silhouetted by the light. They formed the opinion that the seat was tilted backwards to such an extent that it was unlikely that the engineer could have his foot depressed on the deadman's pedal, as is strictly required. They then decided to approach the door of the cab immediately behind the engineer in a way so as not to be detected, open the door quickly and immediately turn a flashlight on the deadman's pedal to see whether it was engaged by the engineer's foot.

This they did, with Mr. Evans crouching down, opening the door and training his flashlight on the deadman's pedal. What happened within the next seconds remains shrouded in some confusion. Mr. Evans and Mr. Foster maintain that when they opened the door the engineer immediately sat up and placed his foot upon the pedal. According to their account, prior to that instant, for perhaps the duration of a second, they saw the pedal being held down only by an empty water can, not unlike a soft drink can, which was braced against the screws of the pedal's backing plate. The supervisors relate that the engineer's quick motion to put his foot on the pedal caused the water can to fall away. In any event, the two supervisors then entered the cab, apparently in some haste, causing the grievor's knapsack to be knocked over in the process. They then accused Locomotive Engineer Borgstrom of having nullified the operation of the deadman's pedal by the use of the water can. He immediately denied having done so, stating that he had simply placed the can on the floor after he had finished drinking it, and that he had kept the deadman's pedal depressed at all times with his foot, even though he was seated in a reclining position.

The case resolves itself into an issue of credibility. As this is a disciplinary matter, the burden of proof is upon the Company to establish, on the balance of probabilities, that Mr. Borgstrom did tamper with the operation of the deadman's pedal, an infraction which

the Union concedes would constitute a dismissable offense. The sole evidence advanced on behalf of the Company is the accounts of Mr. Foster and Mr. Evans. As noted, Mr. Borgstrom denies that he ever removed his foot from the deadman's pedal.

On a careful review of the statements of all three individuals, as well as the statement of Trainman D. McLauchlin, the front end brakeman who was present in the cab of the locomotive, the Arbitrator must conclude that the Company's case is less than compelling. In my view the material discloses on the part of Mr. Evans or Mr. Foster no intention to falsely accuse the grievor of any wrongdoing. It is important to appreciate the circumstances at the time, however. By their own account, the supervisors were operating in the dark. They pulled open the door of the locomotive's cab while in a crouched position, and had to wait until the door was some two-thirds open before they could train the beam of a flashlight on the deadman's pedal. When they did so, for no more than a second, they believe that they saw the deadman's pedal and a silver water can. During this time the grievor was in motion, attempting to stand up in response to the supervisors who were entering the locomotive. In the words of Mr. Evans' own report, at this point, "The locomotive engineer then sat up and placed his foot on the pedal, causing the water can to fall away." However, the same report relates that moments later, when he was standing inside the cab and confronting the grievor with the accusation that he had used the can to wedge the pedal in place he relates "I looked down and the water can was upright standing a few inches to the left of the pedal." It is noteworthy that during his examination Trainman McLauchlin relates the following:

"I saw the locomotive engineer half get out of his seat or rise from his chair, you (Mr. Evans) pushed up against the back of the seat trying to get in. You and Mr. Foster then squeezed past the seat while the locomotive engineer was standing up. You then crouched down and looked at the deadman's pedal with a flashlight.

"You accused of Mr. Borgstrom of having had a can jamming the deadman. Mr. Borgstrom flatly denied it. You asked him why the empty water can was on the floor. I can't recall what his response was. I don't recall the sound of a can rolling around on the floor. I don't recall the locomotive engineer bending over when you entered the rear door."

It is common ground that from his position on the other side of the console in the locomotive cab, Mr. McLauchlin could not see the deadman's pedal.

When all of the foregoing evidence is examined, substantial doubt is cast upon the Company's case. By their own admission, before they opened the cab door, both Mr. Evans and Mr. Foster had formed the opinion that the engineer was reclining in such a way that his foot could not be upon the deadman's pedal. The Union has tendered

photographic evidence of the grievor sitting in precisely the same position, showing his foot resting upon the pedal. His posture was not, therefore, inconsistent with his foot being on the deadman's pedal. When the door was opened, amid a certain degree of confusion and movement, for a fleeting second by the light of a flashlight Mr. Evans and Mr. Foster believed that they saw the deadman's pedal being depressed by a silver-coloured water can. They assert that the can was wedged over the pedal, and that it fell away when the grievor immediately placed his foot down.

That, however, is not sustained by the evidence, which is not in dispute, of what was next observed. Once the supervisors had entered the cab, by Mr. Evans' own admission, when they inspected the floor area with a flashlight, the empty can which appears to be made of aluminum and to be quite light, was seen standing erect a few inches to the left of the deadman's pedal. While the matter is not without some doubt, it appears to the Arbitrator, bearing in mind the darkness and hurried circumstances in which the supervisors made their observations, that on the balance of probabilities the fact that the can was standing erect is more consistent with the grievor's account that he had placed it there after drinking it, because the waste bin was full, than with the assertion of Mr. Evans and Mr. Foster that it had been wedged over the deadman's pedal and had fallen away when the grievor quickly moved his foot onto the pedal. It is, in the Arbitrator's view, more probable that the can would have been knocked onto its side, and might indeed have rolled some distance from the pedal if, as the supervisors allege, it had been quickly dislodged by an abrupt movement of the grievor's foot within the space of one second.

The allegation made against Mr. Borgstrom is serious, and would clearly, if proved, result in his discharge. It is trite to say that accusations that are extremely serious in their consequences should be supported by evidence that is commensurately probative. In the instant case the Arbitrator is not satisfied that the company has discharged the burden of proof which is upon it to establish, on the balance of probabilities, that the grievor's foot was not on the deadman's pedal at the time in question.

For these reasons the grievance must be allowed. The grievor shall be reinstated forthwith in his employment, with compensation for all wages and benefits lost.

The disposition of the grievance on its merits makes it unnecessary for the Arbitrator to deal with the assertion of the Brotherhood that the disciplinary investigation, subsequently conducted under Article 19 of the Collective Agreement by Deputy Superintendent Evans, was not in compliance with the obligation in Article 19(d) to conduct "a fair and impartial investigation" because the investigating officer was himself a witness against the grievor. In the Arbitrator's view that position would have had some difficulty in succeeding in light of the express language of sub-paragraph (d) which provides, in part: "It is understood that in complying with the provisions of this clause the Company is not limited or restricted in the designation of the officer who is to conduct the investigation."

The Arbitrator remains seized of this matter in the event of any dispute between the parties respecting the interpretation or implementation of the award.

January 13, 1989

(Sgd.) MICHEL G. PICHER
ARBITRATOR