

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2221

Heard at Montreal, Thursday, 12 December 1991

concerning

CANADIAN PACIFIC LIMITED

and

UNITED TRANSPORTATION UNION

DISPUTE:

Reinstatement of Trainman R. Harvey.

JOINT STATEMENT OF ISSUE:

Upon arrival, on Train No. 261, in Farnham, Quebec, on January 14, 1990, Trainman Harvey became aware that Train No. 250, Extra 1837 East, was ordered for 0615 hours with a reduced crew consisting of Conductor Forget and Trainman/U.T.U. Local Chairman W.H. Gilmore. After discussion with Mr. W.H. Gilmore, Trainman Harvey advised his incoming Conductor, Mr. B. Mitchell to show his off-duty at 0615 hours, a time earlier than the eventual off-duty time of the balance of his incoming crew.

Trainman Harvey, without receiving a call for this train, subsequently went to work on Train No. 250, showing an on-duty time of 0615 hours, and completed a tour of duty to Megantic.

Subsequent to a proper investigation, Mr. Harvey was assessed 40 demerit marks ``for performing work that was unnecessary, thereby creating a wage claim for an unauthorized tour of duty on January 14, 1990 at Farnham, Quebec''.

As Mr. Harvey's discipline record stood at 45 demerit marks at this time, he was dismissed for the accumulation of demerit marks.

The Union contends that the discipline was excessive, as it was simply a clear misunderstanding of a collective agreement provision and not an attempt to create a needless unauthorized wage claim by Mr. Harvey and further contends that Mr. Harvey was agreeable to reimburse CP Rail for the trip.

The Union requested that the Company reconsider and reduce the discipline assessed to allow Mr. Harvey to be reinstated back into CP Rail service with no compensation.

The Company declined the Union's request.

FOR THE UNION:

FOR THE COMPANY:

(SGD.) J. R. AUSTIN

(SGD.) M. G. MUDIE

GENERAL CHAIRMAN

GENERAL MANAGER, OPERATION & MAINTENANCE, IFS

There appeared on behalf of the Company:

J. S. McLean

Manager, Labour Relations, Toronto

G. Chehowy

Labour Relations Officer, Montreal

R. Andrews

Labour Relations Officer, Toronto

And on behalf of the Union:

D. Warren

Vice-General Chairman, Toronto

J. R. Austin

General Chairman, Toronto

B. Marcolini

National President, Ottawa

J. Nol deTilly

Vice-General Chairman, Trois Rivieres

L. O. Schillaci

General Chairman, Calgary

B. McClafferty

Vice-General Chairman, Moose Jaw

B. Goodmanson

Vice-General Chairman, Winnipeg

S. Couture

Vice-General Chairman, Montreal

R. Harvey

Grievor

AWARD OF THE ARBITRATOR

It is common ground that Trainman Harvey did not have a right to work on Train 250, not having received a call for that train. The record reveals that he proceeded to work on Train 250 after a discussion in the yard office at Farnham at which the grievor, Union Local Chairman Trainman W.H. Gilmore and Relief Operator Ronald Therrien were all present. While accounts of what transpired differ to some degree in the varying statements compiled during the course of the Company's investigations, there appears to be little dispute that Mr. Gilmore was the moving force behind the placing of a protected employee on Train 250, which would otherwise have operated with a reduced crew. It appears that Mr. Gilmore first approached Conductor Bryan Mitchell to inquire whether he would go out on Train 250. When Mr. Mitchell advised Mr. Gilmore that he was going home, the Local Chairman then approached Trainman Harvey. There appears to be little dispute that Mr. Gilmore formed the opinion that it was appropriate for Mr. Harvey, a protected employee, to cover a brakeman's assignment on Train 250 from Farnham to Megantic. Apparently after some uncertainty, Mr. Harvey accepted the suggestion of Mr. Gilmore, and proceeded to work on Train 250. There is some divergence in the evidence as to the role of Relief Operator Therrien in the events which transpired. While the latter denies having had any conversation with Mr. Gilmore, the account rendered by the Local Chairman is that he had a conversation with Mr. Therrien advising him that Mr. Harvey was available to work the vacancy on Train 250. In Mr. Gilmore's words ``After having had the conversation with the Operator Therrien and that he did not object to my request that Roger Harvey fill in the freight pool crew no. 3, I advised Trainman Harvey that it was in order to work the position as trainman.''

Further, the report of Mr. D. Southier, the Relieving Assistant Terminal Supervisor, contains the statement that Mr. Therrien informed him that Mr. Gilmore had told him that Mr. Harvey would return to Megantic on Train 250, and that he would not require a two hour call. On the whole, it appears that Mr. Gilmore used more force than judgement in the circumstances, and both influenced Mr. Harvey and effectively discouraged anyone else, including Mr. Therrien, from challenging the idea or seeking further authorization from an appropriate Company officer.

The Arbitrator is satisfied that in the circumstances an employee of Mr. Harvey's experience should reasonably have known that he was taking an assignment in a manner inconsistent with the calling procedures. Plainly, the appropriate manner for him to proceed would have been to seek to obtain authorization from an appropriate officer, and to utilize the grievance procedure if he or his local chairman felt that a work opportunity had been denied him in a manner contrary to the collective agreement.

The Company seeks to draw to the Arbitrator's attention a similar incident in the past involving Mr. Harvey, which ultimately resulted in a ``without prejudice'' settlement. In the circumstances, the Arbitrator is in agreement with the objection made by the Union that it is inconsistent with the terms of that settlement for the facts of that incident to now be used against Mr. Harvey in these proceedings. To rule otherwise would plainly violate the ``without prejudice'' understanding which was the basis of the parties' settlement.

In the result, the record discloses that the grievor was an employee in his twelfth year of service who had forty-five demerit marks against his record at the time of the incident in question. The material indicates, however, that the demerits against him arose out of two incidents in 1987 and 1988 in relation to refusing to accept calls and, with the exception of a caution for reporting late for duty in 1980, the first nine years of the grievor's record were without blemish. While I must agree with the Company that the grievor's actions were serious, I am satisfied that in light of the overbearing influence of Local Chairman Gilmore, and the very open manner in which the events transpired, it is inappropriate to characterize Mr. Harvey's actions as a deliberate attempt at concealed dishonesty. That conclusion, coupled with the grievor's offer to compensate the Company for the wages paid to him prompts the Arbitrator to conclude that this is an appropriate case for a reduction of the penalty to something less than discharge.

For the foregoing reasons the grievor shall be reinstated into his employment, without compensation or benefits, and without loss of seniority, his reinstatement being conditional upon his payment to the Company the full amount of the wages claimed and paid to him in respect of the work performed on Train 250. Mr. Harvey must appreciate that any further incidents of this kind in the future will justify the most serious of disciplinary consequences.

December 13, 1991

(Sgd.) MICHEL G. PICHER

ARBITRATOR