

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2387

Heard at Montreal, Tuesday, 14 September 1993

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Appeal the dismissal of Locomotive Engineer S.M. McCarthy,
Toronto. JOINT

STATEMENT OF ISSUE:

On 29 October 1992, Locomotive Engineer McCarthy was employed
on

Train 903 operating between Whitby and Burlington over the GO,

Kingston and Oakville Subdivisions. The Company alleges that
while

Locomotive Engineer McCarthy was controlling the operation of
Train

903 from cab car 219, his movement passed Signal 303T1,
located at

Mileage 30.4 on the Oakville Subdivision, while the signal was

displaying a stop indication.

Following an investigation of the matter, Locomotive Engineer

McCarthy was dismissed for violation of Rule 429 of the
Canadian

Rail Operating Rules and failure to properly perform the
duties of a

locomotive engineer on 29 October 1992.

The Brotherhood contends that the Company has not
substantiated that

a violation of the Rules has occurred and seeks in resolution
that

the discipline should be removed from locomotive Engineer
McCarthy's

record and that he be compensated for all monetary losses.

The Company disagrees with the Brotherhood's contentions and has declined the Brotherhood's request.

FOR THE BROTHERHOOD:
(SGD.) C. HAMILTON
GENERAL CHAIRMAN
REGION

FOR THE COMPANY:
(SGD.) P. R. BATEMAN
for: VICE-PRESIDENT, GREAT LAKES

There appeared on behalf of the Company:

R. Bateman	- Labour Relations Officer,
Toronto	
A. E. Heft	- Manager, Labour Relations,
Toronto	
T. J. O'Shell	- Supervisor, S&C Control Centre,
Toronto	
D. Anderson	- Manager, Train Service,
Hamilton	
D. Watts	- Senior Transportation Engineer, Montreal
V. J. Vena	- Coordinator Transportation,
Montreal	

And on behalf of the Brotherhood:

C. Hamilton	- General Chairman, Kingston
D. Corefield	- Local Chairman, Toronto
S. McCarthy	- Grievor

AWARD OF THE ARBITRATOR

On a careful review of the material before me, I am satisfied that the Company has discharged the onus of establishing, on the balance of probabilities, that Locomotive Engineer McCarthy did violate Rule 429 of the CROR, and that the GO train movement which he was operating passed signal 303T1 at mileage 30.4 on the Oakville Subdivision when that signal indicated a stop. At the time of the incident in question the grievor was operating the movement in a westward direction, toward Burlington from Appleby Station, from cab car 219 which was at the westerly end of the GO train then being operated.

While there is some dispute between the parties with respect to the time of the incident, for all purposes material to this award it can be stated that at or about 0730 on the morning of October 29, 1992 the Rail Traffic Control Centre received a monitor indication that the track immediately west of signal 303T1 was occupied. As the signal was displaying a stop indication, concern arose as to whether the grievor's train had been engaged in a violation of CROR Rule 429. That concern was communicated to the transportation department at GO Operations. Consequently, at approximately 0910, following the grievor's tour of duty, he was approached by Mr. C.L. Grant, Manager of Train/Engine Service. Mr. Grant then asked Mr. McCarthy, as well as his co-engineer Mr. Rowntree, whether "anything untoward" had occurred during their shift. According to Mr. Grant the employees responded "that nothing unusual had happened." When the manager went on to explain to Mr. McCarthy and Mr. Rowntree that there were indications that their train had passed a stop at signal

303T1 they again responded that nothing unusual had happened.

According to Mr. Grant's account, Mr. McCarthy simply stated that he had brought GO 903 to a stop east of the signal, had awaited the clearance of GO 956 and had then proceeded, having received a permissive signal.

The unchallenged evidence clearly establishes that matters had not been so uneventful as Mr. McCarthy first indicated. A subsequent check of the event recorder data from the grievor's movement revealed that shortly before the time at which the irregular occupancy signal was received in the RTC Mr. McCarthy's train had been travelling westward at 65 miles per hour, and that he then engaged the train in a full emergency braking. His train travelled in excess of 1,600 feet while in emergency, before coming to a stop. By the Company's calculations the train would have travelled past the stop signal before coming to a complete stop. The evidence of the event recorder, which in this respect is unchallenged, indicates that some five minutes elapsed while the train was still, following which Mr. McCarthy backed it a distance estimated at 42 feet.

The Brotherhood challenges the accuracy of certain information derived from the event recorder, and the times ascribed by the Company to the various movements of the grievor's train. It also adduced evidence of other incidents with a view to raising questions about the reliability of the signaling system at and around the location of the incident. It submits that the account given by Mr. McCarthy is correct, and suggests that the track occupancy signal received by the Rail Traffic Controllers is the result of an unexplained malfunction.

The Arbitrator is not persuaded by the arguments of the Brotherhood when regard is had to the overall plausibility of the account of events rendered by Mr. McCarthy. Two aspects of the evidence, one of which is unchallenged, stand out in this regard. Firstly, when Mr. McCarthy was approached by Mr. Grant and was asked whether anything unusual had happened on the approach to Burlington, the response provided was such as to suggest that there was nothing unusual, and that all operations had gone according to normal expectations. The Arbitrator finds it extremely difficult to square that answer with the uncontroverted evidence that in fact Mr. McCarthy made a full emergency brake application, with his train remaining in emergency for nearly one-third of a mile before coming to a stop at the precise location which was the subject of Mr. Grant's inquiry. I find it difficult to understand how so dramatic an event would have slipped Mr. McCarthy's mind or that he would have classified it as being "nothing unusual".

A second aspect of the evidence which goes to the credibility of the account of events rendered by Mr. McCarthy is the apparent failure of the grievor to successfully broadcast an emergency call over the radio when he made the emergency brake application, as required by CROR rule 102. In addition to broadcasting the emergency, he was required by the rule to advise the RTC of the identity and location of his train. This was not done. The Arbitrator finds highly implausible Mr. McCarthy's suggestion that he might have pressed the wrong button on his radio equipment, or missed the button altogether in the heat of the moment. At a minimum, it is not unreasonable to expect that once the movement had stopped the crew would have sought

confirmation from the Rail Traffic Controller that he or she had received the emergency broadcast, and await instructions. That, however, did not occur.

At the hearing no compelling explanation was offered for either the failure to establish radio contact with the Rail Traffic Controller during or immediately following the application of the emergency brakes or, perhaps more incredibly, to relate that event to Mr. Grant when he made specific inquiries as whether anything unusual had occurred.

The "technical" evidence before the Arbitrator, including the data from the event recorder, raises a compelling inference that the grievor's train did in fact travel west of signal 303T1 contrary to CROR 429. The statements made to Company officials by the grievor are, in my opinion, more evasive than informative and only reinforce the inference to be drawn from the data. On the whole, I am satisfied that the grievor did violate the rule, as alleged.

The evidence before the Arbitrator establishes that Mr. McCarthy was the subject of a previous cardinal rules violation, which resulted in discipline being assessed against him. That aggravating factor is not counterbalanced by other mitigating factors such as long service or an otherwise positive work record. Moreover, the rehabilitative effect of a reduced penalty is obviously questionable in an employee who has been less than forthcoming with respect to the facts of the incident giving rise to his discipline. For these reasons the Arbitrator is satisfied that this is not a case for the substitution of penalty.

For the foregoing reasons the grievance is dismissed.
17 September 1993 (sgd.) MICHEL G. PICHER
ARBITRATOR