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CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2487

Heard in Calgary, Tuesday, 13 June 1994

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS

[BROTHERHOOD OF LOCOMOTIVE ENGINEERS]

DISPUTE:

Appeal the dismissal of Locomotive Engineer G.A. King of Edmonton, Alberta effective November 2, 1992 for violation of Canadian Rail Operating Rule 104, paragraphs (a), (b) and (d), siding east switch Chipman, Train 850 XA-16, Extra 5112 East, October 17, 1993.

JOINT STATEMENT OF ISSUE:

Mr. King was assigned as Locomotive Engineer on Train 850 on the Vegreville Subdivision enroute to Vermilion. After performing work in the siding at Chipman, the crew obtained Clearance No. 604 enabling them to leave Chipman and work between Chipman and Mile 82 Vegreville Subdivision. The train proceeded eastward from Chipman to Vermilion and the crew neglected to restore the siding East switch Chipman to normal position. They were not relieved of the authority to do so. The open switch was discovered by an approaching Westbound train crew who advised the Rail Traffic Control Centre of the infraction.

Following an investigation into this incident, Mr. King was discharged for violation of CROR 104(a), (b) and (d).

The Brotherhood has appealed the decision of the Company to discharge Mr. King because the penalty imposed is too severe given all of the circumstances.

The Brotherhood contends that the penalty of discharge should be substituted with a lesser penalty.

The company has denied the appeal.

FOR THE BROTHERHOOD:

(SGD.) W. A. WRIGHT

GENERAL CHAIRMAN

CANADA

FOR THE COMPANY:

(SGD.) B. LAIDLAW

FOR: SENIOR VICE-PRESIDENT, WESTERN

There appeared on behalf of the Company:

G. C. Blundell	- Manager, Labour Relations, Edmonton
M. A. King	- Solicitor, Edmonton
Basil Laidlaw	- Labour Relations Officer, Edmonton
J. Reynolds	- Manager, Train & Engine Service, Edmonton
K. Turner	- Transportation Officer, Edmonton

And on behalf of the Brotherhood:

M. D. Popescul, Q.C.	- Counsel, Prince Albert
W. A. Wright	- General Chairman, Saskatoon
M. Simpson	- Sr. Vice-General Chairman, Saskatoon
G. King	- Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator discloses that the grievor was assigned as locomotive engineer in road freight service on the Vegreville Subdivision, operating Extra 5112 East on October 16, 1993. Following some road switching work the grievor and his crew were situated in a siding at Chipman when they received OCS clearance no. 604 from the dispatcher. That clearance directed the crew to await the arrival of Extra 5006 West, following which it was to proceed from Chipman to the Siding East switch at Vegreville. On the arrival of Extra 5006 West the grievor's movement opened the east siding switch and proceeded eastward. Upon departure, however, the crew did not return the Chipman East Siding switch to the normal position, pursuant to the requirement of CROR 104(a). In the result, a main line switch was left open to the siding. Fortunately, another approaching train subsequently observed that the switch was lined improperly and, following an emergency brake application, came to a stop and corrected the position of the switch for movement on the main track.

Following an investigation the grievor was discharged for the violation of CROR Rule 104(a), (b) and (d) which provide, in part, as follows:

104 (a) Except as provided in paragraph (b), main track switches must be lined and locked for the main track when not in use. A main track hand operated switch must be lined and locked for the main track when not in use. A main track hand operated switch must display a reflectorized target, or light and target ...

104 (b) When directed to GBO, clearance, train order, or special instructions, and protection has been provided against all affected trains or engines, a main track switch may be left lined and locked in the reversed position. When not so directed, it must not be left in the reversed position unless in charge of a switchtender or a crew member who must be in position to restore the switch to its normal position before it is fouled by a train or engine approaching on the main track.

104 (d) Except as provided by paragraph (b), the conductor and locomotive engineer must, when practicable, ensure that switches manually operated by their crew members are left in the normal position. Other employees are not relieved of responsibility in properly handling switches.

It is clear on the material before the Arbitrator that there was no authorization given to the grievor's crew to leave the switch at Chipman lined other than for the main track. The only reference to Rule 104 in OCS clearance no. 604 was a statement to the following effect:

"Rule 104 (b) Warning: You may encounter the following switch(es) lined and locked in a reversed position: sidings West switch Vegreville"

During the course of the disciplinary investigation the grievor explained that while he had read clearance no. 604, because his train was a caboosless operation he mistakenly assumed that the rail traffic controller would be protecting the siding east switch at Chipman.

The record discloses that the conductor, Mr. D.J. Phillips,

was assessed a thirty day suspension for his involvement in the violation of Rule 104, while Trainman D.G. Harper also received a thirty day suspension. Both the conductor and the trainperson were further required to develop an educational package with respect to the application of CROR Rule 104. The Company justifies the discharge of the grievor whose involvement was comparable to that of the other crew members, on the basis of his prior disciplinary record.

There can be little doubt that the violation of Rule 104 in the circumstances was a serious rules infraction deserving of substantial disciplinary consequences. In the case at hand, however, there are mitigating factors to be considered. Firstly, it is not disputed that Rule 104 was changed as of December, 1990, apparently in relation to the introduction of cabooseless operations. As reflected in a communiqué of the Transportation Safety Board of Canada, released on May 13, 1994, there have been a number of occurrences involving the neglect of train crews to line switches for the main track, resulting in interim safety recommendation of the Transportation Safety Board to the Department of Transport suggesting an examination of field operation practices in relation to CROR Rule 104(b). Viewed in that general context, while the grievor's error, and that of his crew, cannot be excused, it appears to fall within a greater problem of uncertainty in the understanding and practices of running crews in the industry, in light of the new rule.

The grievor has some eighteen years of service with the Company, and his record stood clear at the time of the incident giving rise to his discharge. In support of its decision the Company relies on prior rules violations by Mr. King, including a violation of UCOR Rule 104(a), for which he was assessed fifteen demerits, in February of 1986. Indeed, four rules and speed violations cited by the Company as part of Mr. King's record occurred between 1983 and 1988. When his record is viewed from the standpoint of progressive discipline, it is, at the least, arguable that he has responded positively, having purged previously acquired demerits to the point of a clear record at the time of the incident in question.

Further, the comparative treatment of the other members of the grievor's crew raises some questions. Like Mr. King, Trainperson Harper had previously been involved in what is characterized as a "cardinal rule violation", as a result of which he was assessed a ninety day suspension on August 15, 1991. In the circumstances it is less than clear on what basis distinctions could be made between the two employees, save for the fact the locomotive engineer bears a more onerous duty of care with respect to the movement of his train. By the same token, it is difficult to entirely disregard the concerns expressed by the Company in respect of Mr. King's prior rules violations, and in particular a violation of UCOR Rule 101 which resulted in a yard collision in November of 1990.

In my view it is equitable in the circumstances to exercise my discretion to reduce the penalty assessed to Mr. King, but to do so in a fashion which tends to protect the legitimate interests of the Company. In the circumstances I am not persuaded that he should be reinstated into employment as a locomotive engineer, bearing in mind that he holds seniority as conductor and trainman. In the result the Arbitrator directs that Mr. King be

reinstated into employment, without compensation and without loss of seniority. He shall, however, be reinstated into employment as a conductor and trainman, and may, in the discretion of the Company, be assigned to yard service for such time as it may deem appropriate.

5 July 1994

MICHEL G. PICHER
ARBITRATOR