

IN THE MATTER OF AN ARBITRATION

BETWEEN:

BC RAIL

(hereinafter referred to as the "Railway")

AND:

CANADIAN UNION OF TRANSPORTATION EMPLOYEES, LOCAL #1

(hereinafter referred to as the "Union")

(Liwiski Arbitration)

Dispute:

Appeal of the 14 days suspension without pay assessed to Locomotive Engineer J.G. Liwiski, Prince George, BC, effective 0001, January 8, 2001.

Joint Statement of Issue:

On December 11, 2000, J.G. Liwiski worked as the Locomotive Engineer on the 0730 Yard Assignment at Prince George Yard. This was Locomotive Engineer Liwiski's assigned position.

At approximately 1300 the 0730Yard Assignment (engine 621) was proceeding Southward on the Class Yard Lead with 42 cars, and engine 621 was facing Southward.

The locomotive consist for train PW was attached to its train in track A-8, and the consist was foul of the Lead. When Locomotive Engineer first became aware that his route was not clear, at a distance of six to seven car lengths, he made an emergency application of the brakes on his locomotive consist. A side collision resulted and extensive damage to both consists was sustained. Engine 621 was derailed.

Following a hearing into the incident, Locomotive Engineer Liwiski was assessed a suspension of fourteen days, commencing at 0001, Monday, January 8, 2001 for being in violation of the definition of Reduced Speed.

The Union appealed the discipline on the grounds that there were mitigating circumstances that led to this incident and that the grievor was not treated in conformity with the Company's progressive discipline policy. The Union has requested a reduction in the discipline assessed and compensation for time held out of service.

The Company contends that the discipline assessed was warranted and justified, and has declined the Union's appeal.

FOR THE UNION:

Robert Samson
General Chairperson
C.U.T.E. Local 1

FOR THE RAILWAY:

D.A. Lypka
General Manager
Operations

Arbitrator:

H. Allan Hope, Q.C.

Counsel for the Railway:

Michael Keiran

Counsel for the Union:

Wayne Benedict

Place of Hearing:

Vancouver, B.C.

Date of Hearing:

November 26, 2001

I - Dispute

As indicated, this dispute involves a 14-day suspension without pay assessed against the Grievor, J.G. Liwiski, an engineer who was working the 0730 Yard in Prince George on December 11, 2000. He was proceeding South pulling 42 cars on the Class Yard Lead. Train PW was sitting on Track A-8 foul of the Lead. The locomotive operated by the Grievor sideswiped the locomotives attached to Train PW causing extensive damage and risking injury to the Grievor. The position of the Railway was that his conduct was deserving of discipline and that he had a history of "speeding" that made his offence more serious in terms of its disciplinary consequences.

The Union agreed that the conduct of the Grievor was deserving of discipline but that the penalty selected was excessive. Its position was that the Railway was not entitled to rely on any facts other than those relating to the collision itself. In particular, its position was that the Railway could not rely on facts relating to alleged "speeding" on the part of the Grievor because those incidents had not attracted any form of discipline.

The Union's position in that context was that the Railway was bound by its discipline policy as recorded in its "Guidelines for a Progressive Approach to Discipline in an Unionized Environment" (the Discipline Policy), and that it had failed to follow that Policy in this dispute. In any event, said the Union, the imposition of a 14-day suspension was an excessive response. Its submission was that the Railway should

have followed its own Discipline Policy which contemplated a written warning as the appropriate step in the imposition of discipline in this case. Hence, the issues in the dispute are confined to the question of whether the penalty imposed was excessive and, if so, what substitute penalty should be imposed.

II - Positions of the Parties

The facts indicate that the damage caused in the collision was in excess of \$200,000 and, while no injury occurred, that the Grievor and the crew members were at risk in the sense that the potential for injury was present. One or more of the crew members working with the Grievor could have been in a position to sustain serious injury or death. The circumstances relied on by the Railway in support of its decision were set out in its submission as follows:

Mr. Liwiski is a long service employee, and has demonstrated that for sustained periods of time he is able to operate his locomotives efficiently and safely. For these reasons it is particularly disturbing that he would operate his locomotive consist in the manner in which he did, and in such flagrant violation of the definition of Reduced Speed on December 11th. In addition, the information gathered for the hearing discloses that up to the time of the collision, Mr. Liwiski operated his yard locomotives on December 11 at excessive permissible speeds no less than 13 times in the four and one-half hours to the time of the collision. Equally troubling is the fact that Mr. Liwiski had been verbally admonished a scant six weeks previous by Company officers in respect of a speeding incident on

the Chetwynd Subdivision. No formal action was taken at that time as the Company viewed that verbal advise would be sufficient to reinforce the necessity to adhere to posted speed limitations in the interests of safety of both employees and the operation. Regrettably, as borne out by the events of December 11th, Mr. Liwiski appeared to either be unwilling or unable to correct his method of locomotive operation to conform with posted rules and regulations. (emphasis added)

Following is the explanation of the circumstances given by the Grievor in the investigation preceding his suspension:

We were going to pull cars out of C-1. Jim Olsen [yard helper] said he would be getting off in approx 10 car lengths. After pulling South a bit, Jim said he was off. I continued to pull southward up the drill and I looked up the lead and it looked clear. I looked back to see where my crew was, turned around again, looked South and saw the engines. I was not sure if they were foul or not so I put it into emergency when I was what I thought was six or seven cars away. (emphasis added)

The Grievor readily conceded that he had caused the accident. In making that admission, the Grievor did not attempt to excuse or mitigate his conduct. In the investigation he was recorded as having said:

I've been with BC Rail for 30 years and I've been a locomotive engineer for 27 years. I

consider myself a professional and take great pride in running a locomotive. Nobody feels worse than I do for the damage caused when I was working the 0730 yard Dec 11, 2000. I will not pass the buck on my responsibility for violating Rule 105.

In that context it is noted that Rule 105 requires that locomotives operating off the main track must operate at reduced speed, being "a speed that will permit stopping within half the range of vision of equipment". Facts developed in the investigative hearing revealed several breaches of the yard speed limit by the Grievor on the day in question. In particular, it was noted in the investigation that on December 11, 2000 the TMACS record on the Grievor's locomotive disclosed that he had "exceeded 20 mph, on 13 separate occasions, once up to 30.9 mph". The explanation the Grievor gave in the investigation was that the occasions when his speed exceeded 20 mph was when he was "running light engine from [the] North End of the "A" Yard to the South End of the Yard with a clear track in front of me".

In response to the Railway's introduction of the facts relating to speeding, the Union asserted that there had been a change in the disciplinary response of the Railway to that offence. Particular reference was made to a written statement from the Grievor filed in these proceedings by the Union with respect to an incident prior to the collision in which he was interviewed with respect to speeding infractions that occurred during a shift when he was assigned to the Mackenzie Switcher. He wrote in his statement that the Railway reviewed a series of speeding infractions which had occurred during that assignment but

did not do anything more than draw them to his attention. I will return to that issue later.

The Union, as stated, questioned the relevance of the facts relating to the incidences of speeding on the day of the collision which the Union saw as unrelated to the collision itself. The Union further challenged the Railway's reliance on the prior incidents of speeding on the Chetwynd Subdivision on the basis that the Railway had elected not to impose discipline in response to them and therefore could not rely on them to support the penalty it imposed in response to the collision.

The Union further asserted on the facts that the Railway should be seen as having agreed by implication to incorporate its Discipline Policy into the collective agreement and that in bypassing the progression set out in the policy it had changed the application of that policy to speeding infractions without notice to the Union or its members. In its submission it wrote in part, "BC Rail invoked an arbitrary, and possibly discriminatory, change to the published policy without either consulting or informing the Union, nor informing the employees affected".

The Union position on the policy was that it was "part of the collective agreement and that changes to it must be the subject of negotiation" between the parties. Based on that submission, the Union position was that "the discipline assessed ... deviates from the written policy in its severity and as such is a violation of the collective agreement". Its position with respect to the change in Discipline Policy was described in its submission as a circumstance in which, "BC Rail management has determined

that penalties (or the lack thereof) related to operational locomotive speeds have been too lax".

III - Analysis

The principles governing the arbitral review of discipline in British Columbia were defined by the Labour Relations Board in Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162, [1977] 1 C.L.R.B.R. 1 (Weiler). The test prescribed appears on p. 5. It can be summarized as follows:

- (1) Was there conduct deserving of discipline?
- (2) Was the penalty selected excessive?
- (3) If so, what substitute penalty is appropriate?

That test is described in the context of a dismissal but it applies with equal force to any penalty. However, in the context of the arbitral review of penalties which are less than dismissal, a measure of arbitral deference applies in which arbitrators are enjoined from second guessing an employer where the issue falls within a narrow range of penalties. That aspect of the arbitral review of discipline was addressed in Simon Fraser University and Association of University & College Employees, Local 2, (1991) 17 L.A.C. (4th) 129 (Munroe). On p. 135 Arbitrator Munroe wrote:

I take it to be well settled that in a discipline case, the onus rests with the employer to show not only that just or proper

cause existed for the imposition of a disciplinary sanction, but also for the imposition of the particular penalty selected. But different arbitrators have adopted different approaches to the second branch of the onus. Some arbitrators decline to interfere except upon a finding that the employer has acted arbitrarily or patently unreasonably. (emphasis added)

Arbitrator Munroe went on to reject that approach as denying a grievor her or his right to the statutory review of discipline to which grievors are entitled under the provisions of the Code. Rather, he adopted the following reasoning appearing on p. 135:

In my view, one of the better statements of the arbitral function in a discipline case is found in Re Levi Strauss Canada and A.C.T.W.U. (1980), 26 L.A.C. (2d) 91 (Arthurs) at p. 93:

I believe that my function is not merely to decide whether the employer acted reasonably or, as company counsel suggested, whether its judgment concerning a proper penalty fell "within the ballpark". I have to make an independent determination as to whether the penalty was indeed "just". At the same time, my own view of what is "just" has, to be frank, certain "ballpark" characteristics. One cannot say, to a moral certainty, that two days' suspension is just while a one or three-day suspension is not. The fact of the matter is that when an arbitrator selects a penalty different from that selected by an employer, he is

really saying that the employer has ignored some relevant consideration, proceeded on some misunderstanding, acted from some illicit motive, or otherwise affronted the arbitrator's sense of what is "just". The opposite is true when the arbitrator reaches the same conclusion as the employer. In other words, the arbitrator is not judging the grievor, he is judging the employer as well. (emphasis added)

As stated, the Union acknowledged in this dispute that the conduct of the Grievor in the circumstances surrounding the collision constituted conduct deserving of discipline. Its position was that the discipline imposed was excessive and that the circumstances mitigated in favour of the imposition of a written warning. Again as stated, its basic position was that the Railway was acting inconsistent with its prior approach to offences of the kind that gave rise to the collision and its own Discipline Policy.

The Union made two points with respect to the Railway's selection of a 14-day suspension. The first was that moving from a verbal caution to a lengthy suspension was inconsistent with the principles of progressive discipline contemplated in the arbitral authorities. The second was that the move was inconsistent with the Railway's Discipline Policy. Its submission in that context was that the Policy was an implied term of the collective agreement and that changes in its application could only be made through negotiation. The Union noted that the discipline

progression contemplated in the Railway's written policy involves the following steps:

- 1) Letter of Reprimand/warning letter.
- (1) Suspensions without pay for varying periods depending on the circumstances, applied in the following progression:
 - A. two-day suspension
 - B. five-day suspension
 - C. ten-day suspension

On the basis of that ranking of penalties, the Union urged that the Railway had departed from its own Policy in selecting a 14-day suspension for what amounted to a first incident of misconduct and should be seen as confined to a warning letter. The Railway bore the onus of proving that it had just cause to discipline the Grievor, and, as I will note shortly, just cause to impose a 14-day suspension. In the final analysis the question was whether the penalty selected met the arbitral criteria of just cause.

IV - Decision

In my view, the facts do not support the conclusion that there was a mutual intention in the parties to incorporate the Discipline Policy as a term of the collective agreement. The significance of a discipline policy unilaterally introduced by an employer and its implications in terms of a review of discipline was considered in Alcan Smelters & Chemicals Ltd. and Canadian Association of Smelters & Allied Workers, Local 1, (1992) 23

L.A.C. (4th) 257. On p. 263 the Arbitrator cited an extract from Canadian General Electric Co. and U.E.W., Loc. 524, (1951) 2 L.A.C. 688, in which Bora Laskin, the former Chief Justice of the Supreme Court of Canada, sitting as an arbitrator, addressed the significance of discipline guides in the following terms:

The Company has, however, unilaterally set out a number of plant rules with indicated penalties for infractions, and these are posted throughout the plant. In doing this the Company has given its interpretation of the scope of its disciplinary powers. It is unnecessary in this case to determine how far the Company, by publishing certain rules, is estopped from relying on other grounds for discipline. While the published rules may be controlling for the company in what they cover, they are not, of course, controlling under the Agreement except as they may be found to square with "reasonable cause".

On that reasoning, I conclude that the Railway's Discipline Policy, while it cannot be seen as an implied term of the collective agreement, binds the Railway to the extent that departures from it must not be inconsistent with its terms and must be seen as reasonable. The extent to which an employer can depart from a discipline guide was addressed extensively in Alcan Smelters on pp. 264-69. On p. 267 the arbitrator adopted the following reasoning from a prior award between the parties:

The existence of the guide does not prevent the employer from fashioning a unique response to particular facts, including an application of escalating penalties, provided the response is reasonable and is in harmony with the discipline guide and the arbitral

principles governing the imposition of discipline.

It is convenient to note that the arbitral authorities require that discipline guides meet the criteria set out in K.V.P. Co. Ltd. vs. Lumber and Sawmill Workers Union, (1965) 16 L.A.C. 73 (Robinson). The onus on an employer in the selection of a penalty for disciplinary offences was addressed by Arbitrator Robinson on p. 96 where he wrote:

There has been a difference of opinion upon this matter but the prevailing rule now appears to be established that where the question arises whether or not the penalty is for just cause, the company must establish just cause not only for the imposition of a penalty but for the imposition of the particular penalty imposed.

He went on to consider at length the obligation imposed on an employer in the application of a discipline code which incorporates rules of conduct. On p. 85-6 he wrote:

A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the

rule is used as a foundation for discharge.

6. Such rule should have been consistently enforced by the company from the time it was introduced.

Those principles apply to rules of discipline and can be seen as providing a guideline with respect to the selection of a penalty for a particular offence. Here the issue is not whether the rule seen by the Railway as being breached failed to meet the test prescribed. It is whether the penalty selected met the just cause criteria. The submission of the Union, in effect, was that the penalty was inconsistent with the Policy; that it was unreasonable; that the change in policy had not been brought to the attention of the Grievor, and that there was no consistency in the discipline imposed by the Railway for breaches of the rule.

In considering whether the Railway acted within the confines of the Policy, it is important to consider whether the misconduct in question represented a departure from an established approach with respect to prior discipline. In making that submission, the Union presumed that the discipline in question was in response to the Grievor's breach of Rule 105. However, it is self-evident that breaches of that rule can vary widely and can only be measured on the basis of the particular facts. That breach falls within Part 12 of the Discipline Policy and is subject to the following test:

- (a) The extent to which the safety rule is widely known by employees.
- (b) The effect of the violation of the safety rule (e.g. was injury or damage caused?).

- (c) The employee's overall service record.
- (d) Any extenuating circumstances.

Applying that test to the facts established in this dispute, the breach of the rule by the Grievor was extremely serious in the sense that it involved significant damage to equipment; by implication it delayed operations while the after effects of the accident were resolved; and it carried a real potential for injury to one or more employees. The arbitral authorities recognize that the requirement for consistency in the imposition of discipline must be measured in terms of the particular facts. That issue was addressed in Phillips Cables Ltd. and Int'l Union of Electrical, Radio & Machine Workers, Local 510, (1974) 6 L.A.C. (2d) 35(Adams). Arbitrator Adams wrote on p. 48 as follows:

[T]he board wishes to respond to Mr. Goudge's claim that management must discipline its employees in a consistent manner and that past incidences at Phillips render the discipline in this case inconsistent. While there is strong arbitral authority for the proposition of equality of treatment, these cases make it clear that the equal treatment is only required in similar circumstances.

That principle has been adopted by arbitrators generally. See Wire Rope Industries Ltd. and United Steelworkers, Local 3910, (1984) 13 L.A.C. (3d) 261 at 267. An additional fact relating to the selection of the penalty in this dispute arises from the Railway's desire to deter similar breaches by other engineers. The factor of deterrence was addressed in Texport Division of Oxford Warehousing Ltd. and Teamsters Union, Local

938, (1980) 25 L.A.C. (2d) 111 (Burkett). Arbitrator Burkett cited an unreported decision of Arbitrator Adams in E.B. Eddy Forest Products Ltd. and Lumber & Sawmill Workers' Union, February 24, 1978 for the following description of deterrence as a factor in the selection of a penalty:

On the other hand, some forms of conduct are so serious and so fundamentally opposed to the requirements of a productive work-force that an overriding concern for general deterrence may well be justified. In these situations boards of arbitration have had to decide whether the concept of progressive or corrective discipline must give way to an approach that will impress upon members of the work-force the seriousness of the misconduct. In these cases then, and this grievance is one of them, the issue is one of determining the general extent to which the employer's interest in general deterrence should properly override the aforementioned principle that discipline should be corrective.

When all the relevant factors are taken into account, I conclude that the Railway was justified in departing from a strict application of the Discipline Policy. First, the Policy cannot be read as setting out a strict approach to discipline upon which the Union can rely as binding in all circumstances. The general nature of the Policy, as indicated by the Railway, is emphasized specifically in the context of a suspension in Part 6 in which the "Discipline System" is addressed. In particular, the Railway reserved to itself the right to fix the length of a suspension as between two days and ten days on the basis of "gravity of the offence and the extenuating circumstances involved" and, a

discretion to exceed a ten-day suspension "in certain situations". That passage of the Policy cannot be read as consistent with the submission that it is a code that defines and limits the disciplinary discretion of the Railway.

I accept the submission of the Railway that the gravity of the consequences and potential consequences of the safety infraction at issue here justified departing from a strict application of the progression set out in the Policy. In that context, I accept the submission of the Railway that it was entitled to take into account the speeding violations that occurred on the day of the collision because they are facts relevant to the incident in question. But the Union is correct in its assertion that the prior rule infractions which were not made the subject of discipline cannot be relied on by the Railway. I also agree with the Union that the facts do not support the imposition of a 14-day suspension as a first response.

That being said, it was clear on the facts that the Grievor knew of the rule and, at least by implication, knew that breaches of the rule could have extreme and perhaps catastrophic consequences. In an incident which created damages in excess of \$200,000 and which had the potential for serious injury or death, the bypassing of the progression set out in the Discipline Policy was well justified. The Policy does not prohibit bypassing the progression in particular circumstances. In any event, imposition of a written warning would trivialize the conduct in a manner inconsistent with the goals of corrective discipline.

The question arising in all reviews of discipline imposed under the Policy is that prescribed in Wm. Scott. That is, is the penalty selected excessive in all of the circumstances, one of which is the existence of the Discipline Policy? The other factors relating to whether a particular penalty is excessive are those set out by the Board in Wm. Scott on p. 4 where the Board adopted the reasoning in Steel Equipment Co. Ltd. and the other factors identified by the Board. The Wm. Scott factors are expressed in the context of the review of a dismissal, but, as stated, they apply equally to lesser penalties. It is convenient to set out those factors, commencing with the extract from Steel Equipment Co. Ltd. and followed by the adaptation of those principles by the Board:

1. The previous good record of the grievor.
2. The long service of the grievor.
3. Whether or not the offence was an isolated incident in the employment history of the grievor.
4. Provocation.
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances.
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination.
8. Circumstances negating intent, e.g. likelihood that the grievor misunderstood the nature or intent of an

- order given to him, and as a result disobeyed it.
9. The seriousness of the offence in terms of company policy and company obligations.
 10. Any other circumstances which the board should properly take into consideration, e.g., (a) failure of the grievor to apologize and settle the matter after being given an opportunity to do so ...
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- (i) How serious is the immediate offence of the employee which precipitated the [discipline] (for example, the contrast between theft and absenteeism)?
 - (ii) Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?
 - (iii) Does the employee have a record of long service with the employer in which he proved an able worker and enjoyed a relatively free disciplinary history?
 - (iv) Has the employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?
 - (v) Is the discharge of this individual employee in accord with the consistent policies of the employer ...

Applying those factors to this dispute, commencing with those identified by the Board, the "immediate offence" was extremely serious. I do not agree with the Union that it was a "speeding" offence. It was a failure to obey a safety rule in

circumstances in which the Grievor took a calculated risk that resulted in heavy damage and a potential for serious injury. It cannot be said that the conduct was premeditated in the sense contemplated in Wm. Scott but it was repetitive in the sense that it had occurred on a number of occasions during the same shift.

In mitigation of those factors, the Grievor did have long-service during which he was discipline free and proved to be an able worker. In further mitigation, it cannot be said that the Railway had attempted corrective discipline prior to the incident. The Grievor was spoken to on a prior occasion but it could not be characterized as corrective discipline. In terms of the last factor, being the consistency of the disciplinary response, I disagree with the submission of the Union that the penalty imposed reflected a change in policy. There was no indication of a pattern of discipline imposed on engineers whose breaches of safety rules resulted in a collision causing heavy damage to equipment with a risk of injury.

On the facts presented in the hearing, including photographs and other documented facts related to the scene of the collision, it was apparent that the Grievor's excessive speed was undertaken with the risk of collision readily apparent in the form of the PW consist and the Grievor failed to slacken speed until he had an opportunity to ascertain whether it was safe to proceed. That assumption of risk can be compared to the circumstances identified by the Grievor himself where he had a clear track in front of him with an unimpeded opportunity to ascertain the safety implications of excessive speed.

The Union pointed out that the Grievor was not exceeding 20 mph at the material time, but that fact is irrelevant in considering whether he assumed an apparent risk of collision. Hence, in terms of the last factor identified in Wm. Scott, the facts did not disclose in this hearing that the response of the Railway to similar breaches of safety rules with similar results was treated differently. Presumably, and hopefully, the collision caused by the Grievor was an isolated incident and the disciplinary response of the Railway is to be measured in that light.

However, moving to a 14-day suspension for what amounted to the first recorded disciplinary infraction in a 30-year record is difficult to reconcile with the governing principles and the facts, extreme as they were. I conclude from the facts that the 14-day suspension (10 working days) was an excessive response in the context of established arbitral principles that govern the exercise of discipline.

The mitigating factors adopted by the Board in Wm. Scott from Steel Equipment Co. Ltd. are binding in an arbitral review of discipline and mitigate in favour of a lesser penalty. In particular, the Grievor is a long-service employee with a previous good record and the incident in question was isolated in the sense there was no indication of a similar incident in the Grievor's lengthy history of employment. In terms of the economic impact of the discipline, it must be accepted that the pay loss associated with a 14-day suspension is significant and, while it may nor may not have constituted an extreme hardship, it is a significant loss of pay for an incident that lacked any component of deliberation.

The implication in the facts was that the Grievor's conduct constituted recklessness arising from an error in judgment with respect to what should have been seen as an apparent risk. However, in terms of the last of the Steel Equipment Co. Ltd. factors, it is noteworthy that the Grievor accepted full responsibility for his conduct and expressed extreme remorse at what amounted to a bizarre departure from his usual standard of performance. To paraphrase the submission of the Railway, the Grievor "is a long-service employee, and has demonstrated for sustained periods of time that he is able to operate his locomotive efficiently and safely".

In summary, the facts reveal an isolated incident of recklessness by a long-service employee whose actions do not indicate any form of mala fides and who demonstrated and expressed remorse for his misconduct. Those facts, read in the context of the principles outlined in Wm. Scott, mitigate in favour of a reduction of the 14-day suspension. In addressing the third question raised in the Wm. Scott test with respect to a substitute penalty, there is no magic guideline. Certainly arbitrators should not tinker. Here, the only guidelines that assists in fashioning a substitute penalty are those to be gleaned from the Discipline Policy.

As stated previously, I disagree with the submission of the Union that the Railway should be required to commence at the initial step in the discipline progression. The seriousness of the offence is a primary factor and requires that a suspension of some duration be imposed, both as a means of reinforcing the

Grievor's commitment to following safety rules and as a message to other engineers with respect to similar acts of misconduct. In my view, the substitution of a five-day suspension meets the remedial objective of industrial discipline in the sense of putting the Grievor on notice with respect to the Railway's view of speeding infractions and serves to put other engineers on notice in the same sense.

In the result, the grievance is granted in part, the Grievor's personnel record should be amended to reflect a five-day suspension for the infraction in question and the Grievor is entitled to be compensated for his pay loss. I caution that the Grievor should not take comfort from the reduction in penalty. He can be expected to realize that his conduct in the circumstances that gave rise to the collision render him vulnerable in any future misconduct. In short, it can be expected that he will have learned from his experience and will abide by the rules in future.

DATED at the City of Prince George, in the Province of British Columbia, this 5th day of December, 2001.

"H. Allan Hope, Q.C."

H. ALLAN HOPE, Q.C. - Arbitrator