CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 59

Heard at Montreal, Monday, March 13th, 1967

Concerning

CANADIAN NATIONAL RAILWAYS

and

BROTHERHOOD OF RAILROAD TRAINMEN

DISPUTE:

Discipline assessed Trainman G. Murray for his responsibility in rear-end collision at Vernon, B.C. on August 6, 1965.

JOINT STATEMENT OF ISSUE:

While train extra 4236 north was travelling within yard limits at Vernon, B.C., on August 6, 1965, it collided with the rear of a CPR way freight train which was stopped on the main track. Following investigation, Trainman G. Murray who was headend Brakeman and riding in the cab of engine 4236 at time of collision, was suspended from service for ninety days for violation of Rule 93 of the Uniform Code of Operating Rules.

The Brotherhood requested the removal of the discipline from Trainman G. Murray's record and compensation for loss of earnings while suspended on the grounds that Trainman Murray did not violate Rule 93 of the Uniform Code of Operating Rules.

The Company declined the Brotherhood's request.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) H. C. WALSH	(SGD.) E. K. HOUSE
GENERAL CHAIRMAN	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

R. St. Pierre	– Labour Relations Assistant, Montreal
A. D. Andrew	– Senior Agreements Analyst, Montreal
A. J. DelTorto	– Labour Relations Assistant, Montreal
R. B. Ferrier	– Coordinator Passenger Service, Montreal

And on behalf of the Brotherhood:

H. C. Walsh	– General Chairman, Winnipeg

AWARD OF THE ARBITRATOR

The representative for the Brotherhood submitted on behalf of Trainman Murray that at no time prior to or during the investigation had he been advised of charges against him pertaining to alleged violation of Operating Rule 93; further, that nothing was developed in the statements taken in connection with this accident indicated a violation of Rule 93 by that employee.

It was claimed by the Brotherhood that the Company acted in violation of Article 5, Rule 47 of the collective agreement by not properly advising Trainman Murray he was charged with violation of Operating Rule 93 prior to the investigation.

A statement was taken from Trainman Murray at Kamloops on August 9, 1965, in connection with Form 3903 filed by Conductor Thacker's account of the collision of extra north 4236 with tail end of Extra CP 8674 at MP 85.8, Vernon Yard Okanagan Subdivision.

The heading on the form described read:

> For information of the Company's solicitor and his advice thereon:
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> Statement of Trainman G. Murray in connection with Form 3903 filed by Conductor Thacker on 6th August 1965 account collision of Extra North 4236 with tail end of Extra CP 8674 at MP 85.8 Vernon Yard Okanagan Sub.

Rule 47 reads:

> **DISCIPLINE:**
> No trainman will be disciplined or dismissed until the charges against him have been investigated; the investigation to be presided over by the man's superior officers. He may, however, be held off for investigation not exceeding three (3) days, and will be properly notified of the charges against him. He may select a fellow employee to appear with him at the investigation, and he and such fellow employee will have the right to hear all the evidence submitted, and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on his responsibility, questions and answers will be recorded. He will be furnished with a copy of his statement taken at the investigation. The employee will be advised in writing of the decision within twenty (20) days from the time investigation is completed except as otherwise mutually agreed. If not satisfied with the decision he will have the right to appeal within thirty (30) days from the date he is notified thereof. On request, the General Chairman will be shown all evidence in the case. In case discipline or dismissal is found to be unjust, he will be exonerated, reinstated if dismissed, and paid a minimum day for each twenty-four (24) hours for time held out of service as schedule rates for the class of service in which he was last employed. When trainmen are to be disciplined, the discipline will be put into effect within thirty (30) days from the date investigation is completed.
>
> It is understood that the investigation will be held as quickly as possible, and the layover time will be used as far as practicable. Trainmen will not be held out of service pending rendering of decision except in cases of dismissable offences.

A study of Rule 47 leaves this Arbitrator with one definite conclusion: It should be immediately redrafted. This to make clear whether its principal purpose is the "trial" of one or more involved in an incident thought to merit disciplinary consequences, as could be implied by the use of the word "charge", or whether, as in its opening statement, it contemplates a general investigation involving more than the taking of formal statements from those immediately concerned.

It is an unfortunate combination of terms, when no procedural pattern is provided to support one or the other.

It would seem quite reasonable that management should have the right to conduct an investigation of the broadest range before taking disciplinary action. This would certainly warrant, as in this case, a physical examination of the territory to ascertain sight distances, as well as examination of the tape from the speed recorder. Actually, this right need not be expressed in a written rule.

Confusion arises, however, by the bare use of the word "charge" as to whether the result of the complete investigation should be embodied in a formal statement, comparable to an indictment, charging in this case, for

example, something to the effect: "That Trainman Murray, at the time and place in question did violate Rule 93 by failing to warn the engineer that he was operating the equipment at more than a restricted speed, namely, at a speed "preventing stopping within one half of the range of vision" as that term is defined.

Such a formal charge would then be implemented in a manner providing for the opportunity for what is suggested by the expression in this rule "… and he and such fellow employee will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on his responsibility."

A comparison with Article 32 of the Collective Agreement between Canadian Pacific Railway Company (Prairie & Pacific Regions) and the Brotherhood of Railroad Trainmen under the heading "Investigations and Discipline" is perhaps, useful as emphasizing the lack of an orderly pattern in the provision under consideration. It reads:

> **(a)** When an investigation is to be held, each employee whose presence is desired will be notified as to the time, place and subject matter.
>
> **(b)** An employee, if he so desires, may have an accredited representative of the Brotherhood assist him. The employee will sign his statement and be given a carbon copy of it.
>
> **(c)** If the employee is involved with responsibility in a disciplinary offense, he shall be accorded the right on request for himself or an accredited representative of the Brotherhood, or both, to be present during the examination of any witness whose evidence may have a bearing on the employee's responsibility, to offer rebuttal thereto and to receive a copy of the statement of such witness …

The pattern now outlined in the Rule could be interpreted as providing only for the taking of formal statements from the person or persons involved and the questioning of those witnesses at that time. If that is what was contemplated by the parties in drafting the Rule, no violation of that right has been disclosed.

For that purpose the heading on the form used would be sufficient. The first question asked of Trainman Murray while testifying was:

> **Q.** Have you been properly notified of this investigation?
>
> **A.** Yes.

A close study of this Rule convinces there is nothing in it that limits the investigation to the time or period during which the employee involved is present to make his statement. There is included a protection in the provision "The General Chairman will be shown all evidence in the case." If such a request were made and the evidence then produced was found to contain statements from witnesses the employee concerned had not had the opportunity to question, a refusal by the Company to permit such a cross examination would in my opinion, create a revocable injustice.

Where this is not done and the matter proceeds to arbitration it would, in my opinion, be better practice to produce such witnesses at the hearing, when such cross-examination would be available on behalf of the employee concerned.

There was no evidence produced, however, that a request had been made by the General Chairman to be "shown all the evidence in the case", nor that he had asked that evidence gathered in the investigation apart from the statements produced before the Arbitrator be substantiated by those concerned before the employee who would then have the opportunity to question them. There was no request at the hearing by the representative of the Brotherhood that such witnesses be called to testify.

For the grievor it was further contended that Rule 93 of the Uniform Code of Operating Rules requires that other than first and second class trains, all trains and engines must move within yard limits at restricted speed unless the main track is known to be clear. Restricted speed is defined as:

> A speed that will permit stopping within one-half the range of vision.

Because this rule makes no reference to specific speeds in the sense of miles per hour, it was claimed the onus was on the Company to prove that Trainman Murray himself was of the opinion the speed of the train was in exceed of restricted speed. Otherwise there was no necessity for him to take action to have the speed reduced.

For the Company the spokesman told that the train on which the grievor was serving was travelling at the time on CPR property Between Kelowna and Armstrong it is operated under a "Joint Facility" agreement between the railways.

Statements taken from the Conductor, two trainmen, the locomotive engineer and a fireman/helper were produced. These told that on approaching Lumby Junction, at mileage 87.6 on the Okanagan Subdivision they communicated the appearance of the one-mile-to-yard-limit sign and of the yard-limit sign to one another. In addition, that before passing the junction switch, they ascertained and communicated its indication to one another as required by Rule 34 of the Uniform Code of Operating Rules. However, while the train was travelling within the yard limits, which continued to Vernon and beyond, it collided with the rear of CPR Wayfreight Extra 8674 West which was stopped on the main track.

It was established the collision occurred at 2047, one pole length west of mileage 85.8 or 140 feet north of the overpass bridge at Vernon.

The result of the collision was that diesel engine 4236 was seriously damaged; the caboose on the CPR way freight was damaged beyond repair and scrapped; box car 589290 on the CP way freight was telescoped by the caboose and the right of way required repairs. The total estimated expense was over $16,000.00. In addition, costly delays to traffic was involved.

It was stated that subsequent to the taking of statements from the five members of the crew involved "and after thorough consideration of all factors by Company officers", Conductor Thacker was assessed twenty demerit marks; Trainman DeNeef had a similar penalty; Trainman Murray was suspended for ninety days; Locomotive Engineer was discharged, but on compassionate grounds he was returned to service after a period of nine months. Fireman/ Helper was suspended for ninety days. It was stated that while Conductor Thacker and Trainman DeNeef are represented by this Brotherhood, an appeal from the penalties imposed has not been lodged.

The representative for the Company also told that on August 26, 1965, an appeal from the Local Chairman of this Brotherhood was made for Trainman Murray for a reduction in the discipline imposed on the ground that it was too severe.

It was established that Mr. Murray was an experienced employee who had performed considerable service on this particular subdivision and fully familiar with the physical characteristics of the territory where the accident occurred, as well of the requirements of the Uniform Code of Operating Rules.

Rule 93, or that portion said to be relevant to this dispute reads:

> Within yard limits the main track may be used clearing the time of first and second class trains at the next station where time is shown. Protection against third class, fourth class, extra trains and engines is not required.
>
> Third class, fourth class, extra trains and engines must move within yard limits at restricted speed unless the main track is known to be clear.

Because under this Rule within yard limits on this subdivision where no first or second class trains are operated, train order or timetable schedule authority is not required, nor is flag protection required. Thus not only a train, but equipment such as hoists, engines and pile drivers, it was asserted, may occupy the main track within yard limits unknown to the crews of trains operating within those limits. This emphasizes the necessity for crews operating movements in such an area to strictly observe the requirement for restricted speed.

Rule 106 provides:

> Conductors, enginemen, and pilots if any, are responsible for the safety of their trains and the observance of the rules and under conditions not provided for by the rules must take every precaution for protection. This does not relieve other employees of their responsibility under the rules.

It was stated that under Rule 93 the crew of the CPR way freight train was not required to afford flag protection at Vernon against Extra 4236 North or for any other movement. Therefore the onus was on the crew of Extra 4236 North to move within yard limits at restricted speed to protect against this collision or with any other equipment that could be occupying the main track at Vernon.

Trainman Murray in his statement asserted the speed of this train was 6 miles per hour when the automatic brake valve was placed in full emergency. The other members of the train and engine crew stated the train was travelling between 4 and 7 miles per hour at that time.

As the train rounded a right-hand curve approaching Vernon, the view of the Engineer, who was located on the right hand side of Engine 4236 was obscured by the framework of an overpass bridge. Photographs were produced showing the view of the track as seen from engine 4236, at a distance of 330 feet from the point of collision and at a distance of 290 feet from that point. At 330 feet the Engineer could not see as far as the point of collision; however, at 290 feet he could see that far. The caboose, as stated was located 140 feet north of the overpass bridge when the collision occurred. While the engineer could have seen the CPR caboose from a point 150 feet south of the overpass bridge, it was not until the train reached the bridge that the brakes allegedly were applied in emergency. If the train had been travelling at 6 miles per hour, it was submitted, 17 seconds elapsed during which no effort was made to apply the brake, despite the fact that the CPR caboose was in full view.

A plan showing sight-distances in connection with this collision was presented. This indicated the range of vision from the engineer's position would have permitted him to see the tail end of the CPR way freight from a point 290 feet south of the point of collision. Trainman Murray, who was seated on the left side of the engine, estimated the range of vision at 200 feet. He was asked "Do you consider a train of your consist, 17 cars, to be able to stop in 100 feet? He answered "Yes".

It was urged that had the brakes been applied in emergency at the overpass as claimed, this engine should have stopped 40 feet south of the CPR way freight. However, it did not even stop in 150 feet. It travelled 155 feet beyond the overpass before it came to a stop and the last 15 feet of that distance was travelled after the collision. From this it was argued almost three times the distance estimated by the crew as being required to bring the train to a stop was available to make the stop short of a collision. From this it was concluded by the representative for the Company that the train was travelling "far in excess of restricted speed".

In addition to this reasoning, the Company's investigation of the speed recorder tape on this engine indicated a speed of 17 MPH at the time the brakes were applied in emergency.

The culpability of this grievor was summarized by the representative for the Company that seated on the left-hand side of the cab of the locomotive, and while his view of the track ahead was limited because of the right-hand curve and the nose of the engine, he was a highly qualified trainman, who had considerable experience and was fully familiar with the physical characteristics of the territory He knew the requirement of the Uniform Code of Operating Rules. By his own admission he knew the range of vision from the engineer's position in the cab and he was well qualified to make a judgement as to whether or not the train was travelling at "restricted speed". It was claimed his primary obligation at that point was to question the engineer with respect to whether or not the speed of the train was excessive and this he failed to do.

It is only necessary to contemplate the result that could have obtained in this instance had the conductor and rear trainman of the CPR freight train not been away from the caboose at the time it was wrecked, to underline the necessity for rigid adherence to the rule governing "restricted speed" in the particular situation of restricted view existing at the scene of this accident. A loss of life could indeed have been the result. This was a territory where the crew knew a train unprotected by a flag could be standing just around this bend.

In all the circumstances I find there was a culpable failure on the part of this trainman to carry out his obligation under Rule 106 In view of the fact that his record at the time contained a twenty demerit mark notation, I can find no reason to interfere with the penalty imposed.

For these reasons this grievance is dismissed.

(signed) J. A. HANRAHAN
ARBITRATOR