CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 168

Heard at Montreal, Tuesday, September 9th, 1969

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION (T)

DISPUTE:

Discipline assessed Conductor J.E. Bagnell and Brakeman L.I. Sawchyn, effective March 16, 1968.

JOINT STATEMENT OF ISSUE:

On March 16, 1968, Trains No. 310 (Extra 3238 South) and No. 451 Extra 3874 North) collided at Pefferlaw, Ontario, mileage 55.5, Bala Subdivision.

Following investigation, Conductor J.E. Bagnell and Brakeman L.I. Sawchyn, who were employed on Train No. 451, were suspended from the service or six months, effective from March 16, 1968.

The Union requested that the discipline be removed and the employees be compensated for loss of earnings on the grounds that (1) the Company violated that portion of Article 56 reading "decision will be rendered within fifteen (15) days from the date investigation is held" and (2) the discipline was too severe.

The request was declined by the Company.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) G. R ASHMAN	**(SGD.) K. L. CRUMP**
GENERAL CHAIRMAN	**ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS**

There appeared on behalf of the Company:

A. J. Del Torto	– Labour Relations Assistant, Montreal
J. R. Gilman	– Senior Agreements Analyst, Montreal
C. F. Wilson	– Senior Agreements Analyst, Montreal
D. C. Fraleigh	– Labour Relations Officer, Toronto
D. J. Frauts	– Superintendent, Windsor

And on behalf of the Brotherhood:

G. R. Ashman	– General Chairman, Toronto
F. R. Hayter	– Secretary of Committee, Stratford
F. Oliver	– Local Chairman, Toronto

AWARD OF THE ARBITRATOR

The grievors were the conductor and rear-end brakeman, respectively of northbound Train No. 451, which was involved in a head-on collision with outbound Train No. 310 at Pefferlaw, Ontario, on March 16, 1968. The responsibility of other members of the crew of Train No. 451, or of members of the crew of Train No. 310, is not in issue in this case.

Following the company's investigation of the matter, discipline was assessed against certain members of the crews of the trains involved. The discipline assessed against the grievors was as follows:

> Suspended six months for failure to communicate on radiotelephone between Toronto Yard and Pefferlaw as required by railway radio communication instructions outlined in Form 696, General Instructions, resulting in head-on collision with Extra 3238 South (310), Mileage 55.5, Bala Sub., March 16, 1968.

It is admitted that the grievors did not in fact comply with instructions, as set out above. The grievance is based, however, on the grounds of non-compliance with the procedural requirements of the collective agreement and of the severity of the discipline imposed.

The first ground of the grievance is that the company is alleged to have violated Article 56 of the collective agreement. That article provides as follows:

> **56 Discipline**
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> No employee 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 of 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. Decision will be rendered within fifteen (15) days from the date investigation is held, and 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 at schedule rates for the class of service in which he was last employed. When employees are to be disciplined, the discipline will be put into effect within thirty (30) days from the date investigation is held.
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> It is understood that the investigation will be held as quickly as possible, and the layover time will be used as far as practicable. Employees will not be held out of service pending rendering of decision except in cases of dismissable offences.

The collision occurred on March 16, 1968, and the investigation of the matter began promptly. Two of the employees had died in or as a result of the accident, but the surviving employees (except two others who were hospitalized), gave statements on March 18, 1968. The two employees who were hospitalized were unable to give statements until May 3 and May 4, 1968. The discipline in question was issued to the grievors on May 16, 1968. The question which arises under Article 56 is whether the decision as to discipline was issued within 15 days from the date investigation is held, as that article requires.

It is the union's contention that the investigation referred to in Article 56 means only the investigation which takes place on the day the employee appears for questioning by management. It is true that Article 56 refers to the appearance of the employee and others at "the investigation", and no doubt the article contemplates the sort of interrogation which commonly takes place with respect to disciplinary matters on the railroads. While it may be that "the investigation" referred to in Article 56 means the interrogation of the employee and others (as well as interrogation of others by the employee or his representative), there is nothing, in my view, which would limit this interrogation to a single day. The extent of the investigation necessary, and the persons to be interrogated, would naturally depend upon the complexity of the particular case, and upon the availability of the persons to be interrogated. Article 56 quite clearly contemplates that evidence other than that of the employee himself might be considered at the investigation, and there may of course be cases – such as the present case – where such evidence simply is not available at the time when the employee himself is questioned. It is my conclusion, therefore, that there

was no violation of Article 56 in issuing the notice of discipline to the grievors on May 16, 1968. Quite properly, time held out of service was counted as a part of the suspension imposed on the grievors.

The second ground of the grievance is that the discipline imposed on the grievors was too severe. In this regard there are, in essence, two arguments raised: (1) that the grievors' offence was not, in itself, unusual or serious; and (2) that others have received lesser punishments for the same offence. As to the first argument, it was the grievors' own statement that it was the practice not to comply with certain instructions relative to the use of radio equipment According to the grievors' statements, they had failed to request certain signal acknowledgements from the engineman, but had received a signal from him which they had acknowledged. The material suggests that such acknowledgement was never received. It may be, then, that the grievors, riding in the rear of the train had been completely inattentive, and had failed to take any steps to ensure that the signals were properly observed, or that they had at least taken the makeshift procedure they suggest, only to be foiled by a breakdown of equipment. The latter possibility is neither proved nor disproved on the material before me. It is clear that the grievors were lax in their duties, in that they did not follow the proper procedure. It does not follow that their failure to request acknowledgement from the engineman was the cause of the collision. Indeed, the material before me does not permit any conclusion as to the cause of the collision, and a number of conclusions in this regard might be suggested. Nevertheless, it is the case that under the Uniform Code of Operating Rules, the conductor is under the first responsibility for the safety of his train and for the observance of rules, although this does not relieve other employees of their responsibility. Where a conductor has clearly failed to live up to his responsibility, and where an accident occurs which may be attributable to this failure, he is subject to discipline. There is, however, a distinction to be drawn between the conductor, who bears the prime responsibility, and the rear-end brakeman, riding with him, who, while nevertheless subject to the rules, must be regarded as in a different position from the point of view of discipline as long as the conductor remains in charge of the train. For this reason I would consider, in the circumstances of this case that a lesser degree of discipline might be imposed on the rear-end brakeman.

As to the second argument, it appears that the conductor and rear-end brakeman of train No. 310 were assessed only 10 demerit marks for what is said to be a similar offence to that of the grievors. In the case of the crew of Train No. 310 there was indeed a failure to comply with the instruction governing the use of radio equipment. In their case, however, there was in fact two-way communication between the engine and the caboose, and the incident for which they were disciplined did not relate to the collision. While differences in the penalties imposed on the two sets of employees may be said to be out of proportion to the differences in their offences, it cannot be said that the difference in penalties reveals all improper discrimination against the grievors. In my view, then, this second argument must fail as well.

In general, then, substantial penalties against the two grievor were proper. In the case of Conductor Bagnell, I am unable to say that a six-month suspension (including time out of service pending investigation), while severe, went beyond what the company had proper cause to impose. In the case of Brakeman Sawchyn however, it is my view that a penalty of six months' suspension was beyond the range of proper penalties, having regard to all of the circumstances. In my view, no more than a three months' suspension would have been proper.

Accordingly, the grievance of Conductor Bagnell is dismissed. The grievance of Brakeman Sawchyn is allowed to the extent that the six-months' suspension is adjudged improper; a penalty of three months' suspension (inclusive of time out of service pending investigation), would not be improper. He is entitled to compensation accordingly.

(signed) J. F. W. WEATHERILL
ARBITRATOR