

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1677

Heard at Montreal, Thursday July 16, 1987

Concerning

CANADIAN NATIONAL RAILWAYS

And

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Conductor W. R. Smith, Jasper, Alberta, July 25, 1986.

JOINT STATEMENT OF ISSUE:

Conductor W. R. Smith was dismissed from Company service effective July 25, 1986 for failure to fulfill the responsibilities of a Conductor, ensuring a proper test of the train brakes was performed on Extra 5586 West prior to the accident at Mileage 173.1 Edson Subdivision on 8th February 1986, also, for failure to comply with General Operating Instructions, Form 696, Item 3.2(B), Paragraph 4, in not taking appropriate action to stop the train immediately when the crew on the engine failed to respond, resulting in the head-on collision of Extra 5586 West and Via Train #4 at Mileage 173.1 Edson Subdivision, 08 February 1986.

The Union has appealed the discipline and discharge on the basis that such was not supported by any proper assessment of the evidence, past practice or interpretation of the operating rules given the circumstances of this case and has requested that Conductor Smith be returned to service with reinstatement of all rights and payment for lost time. In the alternative, the Union argues that the discipline (dismissal) was too severe and ought to be mitigated in view of all the circumstances in this case, including the grievor's record of service.

The Company has declined the appeal.

FOR THE UNION:

(SGD) L. H. OLSON
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD) D. C. FRALEIGH
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

A. Giard	– General Counsel, Montreal
J. Glazer	– Attorney, Montreal
D. C. Fraleigh	– Assistant Vice-President, Labour Relations, Montreal
M. Delgreco	– Director Labour Relations, Montreal
J. R. Hnatiuk	– Manager Labour Relations, Montreal
K. G. MacDonald	– Manager Labour Relations, Edmonton
M. C. Darby	– Co-Ordinator Transportation, Montreal
T. N. Wilson	– Assistant Manager Rules, Montreal

And on behalf of the Union:

M. A. Church	– Counsel, Toronto
L. H. Olson	– General Chairman, Winnipeg
J. Armstrong	– Vice-General Chairman, Winnipeg

M. Becker	– Local Chairman, Jasper
R. A. Bennett	– General Chairman, Toronto
T. Hodges	– Vice-General Chairman, Toronto
W. G. Scarrow	– Vice-General Chairman, Sarnia
B. Leclerc	– General Chairman, Quebec
R. Lebel	– Vice-General Chairman, Quebec
W. R. Smith	– Grievor, Jasper

AWARD OF THE ARBITRATOR

On Saturday, February 8, 1986 the freight train on which the grievor, Wayne Smith, was conductor, Train 413, collided head-on with an eastbound passenger train, VIA Train No. 4, some 11 miles east of Hinton, Alberta. That tragic event claimed the lives of 23 people. Ninety-five persons survived, seventy-one of whom suffered physical injuries in the collision. Among the dead were seven CN employees, including the engineer and front-end trainman in the lead locomotive of the grievor's train. Conductor Smith, who had been riding alone in the caboose, was the sole surviving crew member of Train 413, which was also known as Extra 5586 West. The collision caused some 30 million dollars in damages to goods and equipment.

On July 25, 1986 the Company dismissed Conductor Smith, citing a number of alleged failings in his responsibilities. More particularly related in the joint statement of issue, these include failing to ensure a proper test of the train's brakes, operating over speed and, most critically, failing to stop the train when, shortly before the moment of impact, Conductor Smith received no response in an attempted radio communication with the head-end crew of his train.

The Hinton tragedy resulted in the appointment of a Commission of Inquiry (Commission of Inquiry, Hinton Train Collision), with the Honourable Mr. Justice Ren P. Foisy as Commissioner. The report of the Commission of Inquiry, issued in December of 1986, is an exhaustive analysis of all of the factors and elements that may have contributed to the Hinton collision. The Report analyzes with great care all the facts pertinent to the events of that day, including the geographic features of the location, the weather, the condition of the track, the nature and condition of the signal systems, the mechanical condition of both trains at relevant times as well as all available evidence with respect to the medical condition and alertness of the crew members on both trains, and their adherence to prescribed procedures. For the purposes of this arbitration, the parties are agreed that the Arbitrator may take as established those findings of fact as appear in the report of Mr. Justice Foisy. They reserved the right to argue the characterization of those facts and the legal consequences that may flow from them for labour relations purposes. Also before the Arbitrator is the transcript of the Company's separate investigation, consisting of questions and answers arising from the interrogation of the grievor and a number of other employees involved in the events surrounding the Hinton collision.

Conductor Smith lives in Jasper, Alberta, and has twelve years of service with the Company. He was frequently assigned to freight trains running between Jasper and Edmonton, generally taking a train eastward from Jasper to Edson, approximately 100 miles, and returning westward with another train from Edson to Jasper. He had been on that run on a regular basis since June 7, 1985. On February 7, 1986 the grievor was assigned as conductor on Extra 5346 East from Jasper to Edson. The balance of the crew, which was a reduced crew, consisted of Engineer J. Hudson and Trainman M. Edwards, both of whom were assigned to the head-end locomotive. The trip to Edson was uneventful, save that on three occasions Mr. Smith believed he had some difficulties with his portable radio. It is common ground that as a conductor assigned to a caboose, the grievor had two radios at his disposal. The first, a portable radio, is issued to the conductor and is generally referred to as his or her "grey radio". The second radio, permanently mounted on the cupola of the caboose, is generally referred to as the "red radio". While the grey radio issued to Conductor Smith in Jasper on February 7, 1986 made the return trip from Edson with him, the eastward and westward trips involved two different cabooses with different red radios. Conductor Smith encountered no irregularities with the red radio on the trip to Edson.

The grievor reported for duty at Jasper at 16:00 hours on February 7. His train arrived at Edson at 22:50 hours and he signed off duty at 23:20. The material establishes that there is a bunkhouse sleeping accommodation for train crews at Edson. The crew could have elected to sign off for an extended rest period at that point, but chose not to. Instead, they decided to catch a few hours' sleep while awaiting the arrival of their return train. It appears that Engineer Hudson and Trainman Edwards left the station and checked into the bunkhouse to get some sleep while

waiting for their train, which was anticipated to arrive at Edson from Edmonton at approximately 6 o'clock the following morning. Conductor Smith, however, did not spend the night in the bunkhouse. According to his evidence he remained in the station at Edson conversing with the operator and the checker then on duty. The operator indicated that she would soon be going for coffee, and Conductor Smith agreed to wait for her. The material establishes that Conductor Smith and the operator went to her apartment at approximately midnight and that he slept there overnight, until a call came for him at approximately 5:15 a.m. the next morning. Conductor Smith was instructed to report for work at 05:45 hours, which he did. By his own estimate, he had had some three and a half to four hours of sleep, and felt sufficiently rested and fit for duty. The findings of the Commission of Inquiry include determinations that Engineer Hudson returned to work on the morning of February 8, 1986 with no more than three and a half hours' sleep while Trainman Edwards, who also used the bunkhouse, would have had something less than five hours' sleep during the Edson layover.

As they were awaiting Train 413, the station operator relayed a request of the incoming engineer asking whether the grievor's crew would "take the train on the fly". This means that because of the heavy tonnage of the train which was then moving on an uphill grade, and to avoid the loss of momentum and time that would be occasioned if the train were brought to a dead stop in the station, the speed of the train would be reduced to an extremely slow pace, estimated to be some three or four miles per hour, permitting both the front end crew and the conductor to de-train as Train 413 entered the station, while Conductor Smith's crew boarded the train to replace them. This procedure, while not in strict compliance with operating rules, was not uncommon in crew transfers at Edson, particularly with trains of large tonnage. It appears that changing on the fly permitted Conductor Smith's crew to make only a limited form of check on the braking system of the train. While that check could satisfy the crew that the brakes were in working order, it is not disputed that prior to the train's departure from Edson it did not have a full brake check in conformity with the requirements of CN Form 696, Item 17.5. It is also accepted, however, in light of extensive tests conducted following the collision, that the brakes of the freight train were in good operating order and that its braking system in no way contributed to the accident at Hinton. On leaving Edson, Conductor Smith communicated by radio with Engineer Hudson in the head-end locomotive, confirming the check of the brakes and noting his time of departure. The train then commenced its fateful westward journey without any indication of irregularity in the state of its crew or equipment.

As Conductor of Train 413, Mr. Smith was subject to a number of regulations, two of which are of particular pertinence. Rule 106 of the Uniform Code of Operating Rules provides as follows:

Trains will run under the direction of their conductors. When a train is run without a conductor the engineman will perform the duties of the conductor. 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 is not disputed that the foregoing rule renders the conductor responsible for the observance of the rules by members of his or her crew as well as by himself or herself.

The second rule, and the rule of most critical importance for the purposes of this arbitration is Item 3.2(b) of Form 696, General Operating Instructions. It is in the nature of a Company directive which provides as follows:

3.2 CONDITIONS REQUIRING THE USE OF RADIO

(b) On Express, Freight, Mixed and Work Trains, a member of the crew at the rear of the train must, when practicable, contact a member of the crew on the engine who must communicate by name the indication displayed by the following block and interlocking signals:

- (1) Approaching the approach signal to all interlocked railway crossings at grade and interlocked drawbridges.
- (2) In single track CTC, and on subdivisions or portions thereof specified in the time table or special instructions, approaching the approach signal to all controlled locations.
- (3) Prior to entering CTC territory approaching the approach signal, or where there is no approach signal, approaching the first controlled signal.

If crew on engine fails to respond to such calls, action must be taken by a member of the crew at the rear of the train, when practicable, to stop the train immediately.

NOTE: Instructions contained in Section 3.2 also apply to movements not operating as trains.
(emphasis added)

The foregoing operating instructions require the conductor “when practicable” to contact a member of the engine crew to receive verbal communication of the indications displayed by track signals. If the engine crew fails to respond, the conductor at the rear of the train must, “when practicable”, stop the train, which he or she can do from the caboose by an application of the air braking system.

The evidence of Conductor Smith is that Engineer Hudson, with whom he had worked on a number of prior occasions, frequently radioed signal indications to him in advance of Conductor Smith’s own inquiry, as a signal came into view. When he did not, Conductor Smith would, in keeping with Item 3.2(b) of the General Operating Instructions, inquire by calling Engineer Hudson on the radio. It does not appear disputed that radio communications between Conductor Smith and Engineer Hudson, as well as between Engineer Hudson and the dispatcher, took place and indeed were overheard by crew members of other trains in the vicinity of Train 413 during the course of its trip from Edson westward to Hargwen. En route to Hargwen, the grievor’s train made a brief stop in a siding at Medicine Lodge. It is at Hargwen that Conductor Smith says he had his final radio communication to and from the head-end prior to the collision. Hargwen is at mile 161.8 on the Edson Subdivision, while the point of impact occurred at Dalehurst at mile 173.13. According to the Report of the Commission of Inquiry, the lapsed time for Train 413 to travel from Hargwen to the point of impact near Dalehurst was just under 20 minutes. It is the actions of Conductor Smith during that period that must be the principal focus of this arbitration.

The material establishes that from Hargwen to Obed Summit is a consistent uphill climb of some 3.2 miles. Obed Summit is the highest point on the Edson subdivision, immediately west of which a westbound train commences a downhill course from mile 165 to approximately mile 170. At that point another uphill incline is encountered for a further period of approximately two miles. During all of this portion of the trip Train 413 was travelling westward on the northerly portion of a segment of double track. At Dalehurst, located at mile 173, the double track ends, converting to single track for the next 33 miles westward towards Jasper. In other words the double track extends only from Hargwen to Dalehurst, a distance of 11.2 miles. The Material establishes that the dispatcher in control of the movement of trains on the relevant portion of the Edson subdivision had made a determination that Conductor Smith’s train should stop at Dalehurst, before entering the single track, to allow eastbound VIA Train No. 4 to proceed onto the southerly portion of the double track, clearing Dalehurst before Extra 5586 West would be allowed to proceed onto the single track and on to Jasper.

The approach signal to Dalehurst is located at mile 170.2 and first comes into view at a point approximately 2,400 feet east of the signal. The finding of the Commission of Inquiry is that the approach signal, Signal 1703N, displayed yellow/red to Train 413, indicating that the train would be required to stop at Signal 1729N at Dalehurst. The findings of the Inquiry establish beyond any doubt that those were the signals displayed, and that the switch at Dalehurst was lined to permit VIA Train No. 4 to proceed, without stopping, onto the south portion of the double track. However, before it was able to do so, Train 413 proceeded through all of the signals at Dalehurst without slowing or stopping, entered the single track westbound for some eighteen seconds and collided at an estimated speed of 59 miles per hour with the eastbound passenger train, one tenth of a mile west of the Dalehurst turnout. The finding of the Commission of Inquiry, not disputed in these proceedings, is that at the point of impact Train 413 was travelling in excess of the track speed of 50 miles per hours as noted, and was in fact gaining speed.

Operating Rule 3.2(b) placed upon Conductor Smith an obligation to communicate with the crew in the engine as his train approached Signal 1703N. Conductor Smith’s evidence is that at mileage 169 he attempted to radio Engineer Hudson to get confirmation of the indication of Signal 1703N, but was unable to get any response. According to his account, he first attempted to communicate by means of his portable grey radio, trying three or four times without success. He concluded that his grey radio must be malfunctioning, and then proceeded to use the red radio in the cupola of the caboose. He also experienced difficulty with the red radio finding that the channel changer turned freely rather than “clicking” into the four transmission channels. Conductor Smith relates that he turned the channel changer fully to one side hoping to locate the control at channel 1 to communicate with Engineer Hudson. When that was not successful he turned the channel changer, attempting to find channels 2, 3 and 4, still trying to get a response from his engineer. It should be noted that the investigation of the equipment conducted by the

Commission of Inquiry confirms Conductor Smith's observations about the condition of the channel changer on the red radio.

For the reasons related below, I must take it as established that Mr. Smith did attempt to radio the engineer. It is important, at this point, to emphasize the difference between the process engaged in by the Commission of Inquiry and the obligations of this board of arbitration, mandated as it is to hear a grievance under the provisions of the **Canada Labour Code** and the collective agreement that governs the parties. The responsibility of Mr. Justice Foisy was to thoroughly examine the circumstances of the Hinton crash and to report, to the best of his ability, on the cause or causes of that tragedy, making recommendations with a view to assisting the parties to the Inquiry and federal authorities with responsibility for the safe movement of railway traffic to avoid the recurrence of such an event in the future. This Office, on the other hand, is charged with determining, in accordance with the rules of procedure and evidence appropriate to the quasi-judicial responsibilities of a board of arbitration, whether there was just cause for the imposition of discipline on the grievor, including his discharge, based on the issue as framed in the joint statement of the parties.

In this forum the burden of proof is upon the Company to establish, on the balance of probabilities, that the actions of Mr. Smith were deserving of the disciplinary sanction ultimately imposed. Mr. Justice Foisy's Report contains some general observations expressing skepticism about the actions of Conductor Smith, including whether he radioed at all, and the overall credibility of his account of the events immediately preceding the Hinton collision. It is, of course, entirely appropriate for a commission of inquiry to express doubt, in a speculative way, about any aspect of the testimony before it. A board of arbitration, however, is not so unconstrained, and is limited to making such findings as are sustainable on the balance of probabilities, based on the evidence before it. It is not appropriate for this board, whatever doubts it may or may not have, to dispose of the rights of either the Company or the grievor on the basis of surmise or speculation. My jurisdiction is restricted to the issues as stated by the parties, and my findings must be based on the evidence bearing on those issues, applying the standard of proof appropriate to civil proceedings.

According to the wording of the issue put to the Arbitrator, Conductor Smith was disciplined, in part, for failing to stop his train when he received no response to his attempted radio communication from his head-end crew. Therefore, his evidence that he did attempt to radio his fellow crew members in the locomotive must be taken as established for the purposes of this case. It is beyond the jurisdiction of this Board to deal with any issue of whether he, in fact, radioed the locomotive. As framed, the joint statement of issue presumes that fact to be established. The sole issue, apart from his general attentiveness to his duties, is whether he responded adequately in the circumstances, and if not, what measure of discipline is appropriate.

The only direct evidence as to what occurred in the caboose of Train 413 in the minutes prior to the collision is the testimony of Conductor Smith. His evidence, both before the Commission of Inquiry and during the Company's own internal investigation, which together form the record for these proceedings, is that on the approach to Dalehurst he made several attempts to communicate with the head-end of his train using both his portable grey radio and the red radio in the caboose. Neither radio brought him any response. It is important to focus carefully on Mr. Smith's state of mind at that point. Mr. Justice Foisy's Report confirms, based on the evidence of a number of running trades employees familiar with the area, that it is not uncommon to experience "dead spots" in radio communication caused by the topography of a locality. Based on extensive tests performed after the collision, the Commissioner concluded that no dead spots did in fact exist that would interfere with transmission at the time and place in question, either because of the Dalehurst topography or unusually severe geomagnetic activity. The fact remains, however, that a reasonable employee in the situation of the grievor would have reason to believe that such phenomenon was possible, which in the circumstances of this case could be taken to explain the inability to raise a response from Engineer Hudson or Trainman Edwards. In considering this aspect of the evidence, it is also worthy of note that the Commission found that, on occasion, noise levels in locomotive cabs have rendered radio transmissions inaudible to the trainman riding beside the engineer.

In the Arbitrator's view the foregoing findings suggest that it was possible for Conductor Smith to form the opinion that his failure to get a response on the radio from the front end did not necessarily mean that there must be something amiss in the locomotive. In light of the evidence respecting occasional irregularities in radio transmission, it is not altogether implausible that Conductor Smith believed his train was under control, notwithstanding that he received no answer to his calls.

There are, as well, other elements of objective evidence that give further substance to Conductor Smith's account of his overall impression at the time. The material establishes that while the track on which Train 413 was travelling from Obed Summit to Dalehurst is generally on a downhill grade, there is a slight uphill grade commencing at or about mileage 170, a little to the east of Dalehurst. It does not appear disputed that a train moving uphill on that grade would experience an accordion-like compaction of the cars which would give the outward impression that the train was slowing down or braking. Conductor Smith testified that, in fact, at the time he was attempting to reach the head-end by radio he could feel an effect in the train which he took to be a slowing or braking sensation, leading him to believe that the train was under control and responding to the directions of the locomotive crew.

It is clear that the collision at Hinton could have been avoided had Mr. Smith applied the air brakes, known in railway jargon as "pulling the air", when there was no response to his attempted radio calls. I am satisfied, however, that his actions, or more precisely, his failure to act, were not the originating cause of the collision. Conductor Smith would have had no way of knowing the indications of the Dalehurst signals. It appears beyond dispute that the originating cause of the collision must be traced to the actions or condition of the Engineer and head-end Trainman at the time they apparently disregarded the signals. As neither of them survived the crash or was observed by any eyewitness, the facts concerning what they did or did not do may never be known. All that is known, as reflected in the observations and concerns expressed by the Commission of Inquiry, is the fact that both Engineer Hudson and Trainman Edwards were found to be suffering from a deficiency in rest and that Engineer Hudson's prior medical history was cause for serious concern. The evidence of Mr. Smith, corroborated by the testimony of other witnesses who observed Engineer Hudson and Trainman Edwards when they reported for duty at Edson on the morning of February 8th, confirms, however, that there was then nothing in the outward appearance of either man to suggest anything unusual.

During the course of questioning by a member of the Royal Canadian Mounted Police very shortly after the collision, when asked what might have caused the freight train to ignore the restrictive signals, Conductor Smith offered the opinion that the head-end crew must have been asleep. Commissioner Foisy's Report expresses the view that Conductor Smith's statement to the RCMP that he thought the front end crew was asleep must be viewed as inconsistent with his evidence that it was his impression that there was a brake application and that the train was under control. With the fullest deference for the remarkable care and thoroughness of the Commission's Report, the arbitrator must confess to some difficulty in understanding and accepting the logic of that conclusion. While the Report does not contain a verbatim account of Mr. Smith's statement to the RCMP, it does appear that he was asked for and expressed an after-the-fact opinion of what might have caused the accident. I can see nothing incriminating, or particularly informative, in the expression of his ex post facto belief that Mr. Edwards and Mr. Hudson must have been asleep. What Conductor Smith came to believe after the terrible impact at Dalehurst, and what was in his mind in the critical moments as his train approached the Dalehurst signals are two very different things. There is simply nothing in the record to sustain any suggestion that during the approach to Dalehurst Mr. Smith formed the opinion that his fellow crew members were asleep in the locomotive and that his train was out of control. At that critical time, the grievor was in no better position than anyone else to know the state of things in the locomotive of Train 413. That remains so no matter what opinion he may have expressed after the collision, when it became obvious that his train had indeed been out of control. I therefore fail to see any inconsistency in his statement to the RCMP after the collision and his testimony as to what he believed was happening in the minutes prior to impact. If anything, Conductor Smith's failure to pull the emergency brake on the approach to Dalehurst is more consistent with his evidence that he believed that the brakes were being applied and the train was under control.

Much of the argument of the parties in this arbitration relates to the meaning and application of Rule 3.2(b) of the CN Rail General Operating Instructions. The essential issue is whether by failing to stop the train when he received no response to his radio calls to the front end Conductor Smith violated his obligation under the Rule. The Rule is not one of general application in the railroading industry. There is no comparable rule governing conductors employed by CP Rail. It is also established that the Rule has fairly recently been amended to appear to vest a certain degree of discretion in a member of the crew stationed at the rear of the train. Prior to June of 1985 the words "when practicable" were not found in the first and last paragraphs of the Rule. The Commission of Inquiry concluded that the reason for inserting the words "when practicable" "... was to remove from the CN Rail General Operating Instructions any impediment to the operation of caboosless trains."

The Commission of Inquiry was plainly not impressed with either the motivation for the amendment of the rule or its probable impact on employees required to interpret and apply it. At pp.143-42 of his Report, Mr. Justice Foisy makes the following observations:

CN may not have intended to introduce any uncertainty into the rule by adding the words “when practicable”. Indeed, it seems likely that it was not until after the collision that it even occurred to CN that the change was capable of being interpreted as having introduced an element of discretion. The explanations given for the introduction of the words “when practicable” have a flavour of after the fact rationalization. The Commission, as has been observed, believes there is substantial reason to conclude that the real reason for the change was anticipation of the cabooseless train debate.

The Commission concludes that whatever might be the proper interpretation of the rule, in its present form, in the absence of any authoritative pronouncement (there not having been any forum in which the issue has been determined authoritatively since June, 1985) the only reasonable conclusion is that the rule is capable of misinterpretation. Few conductors who appeared before the Commission had an unequivocal understanding of the rule.

(I) CONCLUSIONS

The Commission concludes that if Smith acted as he said he did, his failure to apply the emergency brake when he did not receive a response, having used all available means of communication to the head-end was, even by his own interpretation of the rule, a violation of it. The Commission also concludes that CN bears a significant degree of responsibility for the non-compliance. Changing such a fundamental rule in such a fundamental way without explanation, and without confirmation that no difference in the standard of conduct was intended, is to court laxity in the observation of the rule by running crew members and the type of disaster which can flow therefrom. The Commission concludes that the effect of the amendment has been to significantly reduce the quality of the rule as an assurance of appropriate engineer response to signals.

(emphasis added)

As related below, the foregoing conclusion, with which the Arbitrator must agree, has a significant bearing on the degree of responsibility to be ascribed to Conductor Smith and the measure of discipline that is appropriate in the circumstances.

While it is not necessary, for the purposes of this grievance, to define in any exhaustive way the outside limits of a conductor’s discretion under Rule 3.2(b), it is, in my view, significant that the Commission of Inquiry was constrained to find that “... the only reasonable conclusion is that the rule is capable of misinterpretation.”. The Commission found that Conductor Smith did in fact violate Rule 3.2(b). On a careful review of the evidence, for reasons elaborated below, the Arbitrator does not disagree with that finding. Of equal significance, however, is Mr. Justice Foisy’s conclusion that the change in the rule in June of 1985 was not adequately explained to employees, and that the rule could be viewed as including an element of discretion and is plainly capable of misinterpretation. The Commission concluded that in view of that ambiguity the Company must share the responsibility for Mr. Smith’s non-compliance with Rule 3.2(b). With that conclusion I must also agree. If the Company intended that Mr. Smith’s obligation in the circumstances should be to stop the train automatically upon being unable to communicate with the head-end, and it wishes to fasten him with that responsibility, it must be able to point to a clear and unequivocal rule to that effect in force at the time. For the reasons given, it cannot. In light of the objective standard that must be applied, it would, in my view, be inequitable to hold Conductor Smith solely to blame for the failure to apply the emergency brakes of Train 413 upon its approach to Dalehurst.

Part of the Company’s further argument is that, according to Mr. Smith’s own account, he believes that the rule required him to stop the train in the circumstances he confronted on the approach to Signal 1703N at Dalehurst. In the Arbitrator’s view, that argument is not persuasive. Clearly the actions of Conductor Smith are to be judged by the standard of rules promulgated by the Company to govern his conduct. The fact that he may have misunderstood the rule, or interpreted it more strictly than intended, cannot be brought to bear against him in assessing the quality of what he did. The question is whether he complied with the rule, an issue that can only be determined having regard to the objective standard of the rule itself

The Arbitrator is satisfied that for the purposes of these proceedings, the words “when practicable” must be construed as vesting some degree of judgement in the crew member at the rear of the train. Plainly, the rule contemplates that in some circumstances the conductor, or a rear-end brakeman, may conclude in good faith that it is not practicable to stop a train when a radio communication requesting confirmation of the indication of an approach signal to a control location brings no response from the head-end. “Practicability” is nowhere defined in the rule, and its meaning is left to the employee to apply having regard to the particular circumstances. In assessing the gravity of Mr. Smith’s actions, the Union argues that it is instructive to recall that had he been situated in the caboose of a train operated by CP, rather than CN Rail, in identical circumstances, he would have been in violation of no rule or obligation whatever. I do not believe that much weight can be attached to that fact.

In the instant case, quite apart from his own understanding of the rule, Conductor Smith did advert to a number of factors in forming his belief that it was neither necessary nor appropriate to engage the emergency brakes of Train 413. One of those already touched upon is his belief, as prompted by the compaction of the cars on the uphill grade, that the brakes were in fact being applied at a point when the head-end was at or near the approach signal to Dalehurst, causing him to believe that the train was in fact under control. For reasons discussed above, he did have reason to believe that if both radios failed, his train could be within a radio transmission “dead spot”. Moreover, he experienced some difficulty with radio communications on the trip from Jasper to Edson the day previous, although he was then travelling in a different caboose.

A further element relating to Conductor Smith’s assessment of the practicability of pulling the air as the train approached Dalehurst was his estimate of the possible consequences of such an action. It does not appear disputed that there is a belief among some running trades crew members that applying the emergency brakes to a train moving at a high rate of speed, can, in some circumstances, precipitate a derailment. The popular word for such an action is “dynamiting” a train. Whether valid or invalid, there is a widely-held belief that “pulling the air” can be an extremely dangerous thing to do. The unchallenged evidence of Mr. Smith is that he held that belief and was aware that Train 413 contained a number of cars carrying dangerous or hazardous goods. He testified that he believed that applying the emergency brake while the train was travelling at full speed could have caused the derailment of the train and the possible spillage of the hazardous cargo it was carrying. Given his impression that the train was braking and remained under control he determined, on balance, that a risk of that magnitude was not warranted.

Accepting Conductor Smith’s account of the events, however, and allowing for the responsibility of the Company arising from the amendment of Rule 3.2(b), there is still much to be concerned about in the grievor’s actions in the hours and minutes prior to the tragedy at Hinton, including the information which he used to assess the practicability of bringing his train to a stop. Foremost among the Arbitrator’s concerns is the amount of rest which Conductor Smith had prior to going on duty on the morning of February 8, 1986, a factor which could quite obviously affect his alertness and judgement in the minutes prior to the collision. It was the Commission’s finding that the grievor did not have sufficient rest when he assumed responsibility for Train 413. With that conclusion I must agree. It appears beyond dispute that upon his arrival in Edson the night before, the grievor could have proceeded immediately to the bunkhouse on the station property, and gone immediately to bed. That would have assured him of a minimum of five hours sleep. He chose instead to linger in the station, conversing with the operator and a clerk, and to wait for the operator to go and have coffee with her. That circumstance, and the fact that he spent the night some distance from the station at the operator’s apartment, leaves substantial doubt about the quality and quantity of his rest that night. At a minimum, accepting his own account, he may have had no more than three and one half hours of sleep. That, taken together with his previous night’s sleep of some seven hours, also at the apartment of a friend in Edson, causes the Arbitrator to conclude that he did not bring a sufficient degree of care to his obligation to obtain adequate rest between his assignments, and in particular before undertaking the responsibility of Conductor for Train 413 on the morning of December 8, 1986.

There are other deficiencies revealed in the evidence. It appears beyond dispute that it is the responsibility of the Conductor to monitor the speed of his train at all times. While there is no speedometer or gauge in the caboose that would give the conductor a direct reading, a conductor is trained to know the speed of his or her train by timing the movement of his caboose between mile posts. Had Conductor Smith followed that procedure, it would have been apparent to him that Train 413 was travelling at 59 miles per hour at Dalehurst, and not 45 to 50 miles per hour as he believed. Such a realization, coupled with the failure of the head-end crew to respond to his radio calls, might have prompted a different reaction. Secondly, when it seemed to Conductor Smith that the train was braking as the head-end approached Dalehurst, he could have easily confirmed that belief by checking the braking system’s air gauge located in the caboose. A change in the reading of that gauge would indicate that the brakes were being applied. He

admits, however, that he did not think to check the gauge, and was content to rely on his overall impression that the train was slowing on the approach to Dalehurst, and must therefore be under control. Moreover, ordinarily an air whistle in the caboose would sound whenever a brake application was in effect. Conductor Smith admits that he did not hear the whistle sound. Although it appears that in some units, whether because of tampering by crews or for other causes, the brake whistle does not function, tests conducted subsequent to the crash established that the whistle in his caboose was functioning. It is fair to conclude, therefore, that Conductor Smith would have heard the whistle during a prior application of the brakes, when his train stopped in the siding at Medicine Lodge. Accordingly, he had reason to know that the brake whistle on his train was working and had not been tampered with. He should have known, therefore, that the train was not in fact braking as it approached Dalehurst because he did not hear the brake whistle, which he knew, or had reason to know, was in operating order. Accordingly, his failure to hear the air whistle attached to that system should have caused him concern. A degree of inattention on the part of Conductor Smith is further suggested by his own admission that he was seated at his desk on the approach to Dalehurst, without any apparent reason to be there, and was not riding in the cupola of the caboose, as he normally would be expected to do. While these shortcomings do not of themselves disclose negligence that can be said to have caused the unfortunate event at Hinton, they do confirm that by the exercise of a greater degree of care and attention on Mr. Smith's part, the terrible loss of that day could have been avoided.

The history of the Hinton disaster, now so thoroughly examined and re-examined, reveals that Conductor Smith made a serious error in judgement. He failed for a fateful moment to bring to his job a standard of care and attention that might have averted that tragic event. Based on his personal impressions, over the period of perhaps a minute, Conductor Smith made certain assumptions which later proved wrong.

On a careful review of the evidence, the Arbitrator is satisfied that the Company had just cause to impose discipline on Conductor Smith in relation to his actions on December 8, 1986. In my view, the critical inaction on the part of Mr. Smith points to a failure to maintain a level of care and alertness commensurate with the serious responsibilities of a conductor. His lack of adequate rest hampered his ability to make the most informed judgement as to the practicability of pulling the air brake, and the relative risks of not doing so. His failure to exercise proper judgement when his attempts at radio communication went unanswered and, in particular, his failure to monitor the speed of his train and to make an objective check of the air gauge in the caboose to confirm his feeling that the brakes had been applied and that the train was under control, fall seriously short of the standard of care to be expected of a conductor in such circumstances. That is particularly so when, as it appears by his own admission, he did not hear the air whistle in the caboose that should sound when the brakes are being applied. These responses, or failure of response, on Mr. Smith's part, raise grave inferences about his overall level of concentration and the impact of his failure to get sufficient rest and sleep before reporting for duty that day. In these circumstances, the Arbitrator must find that Conductor Smith did violate Rule 3.2(b). At a minimum, that rule, in its new wording, requires a conductor to consider all information at his or her disposal to fully assess the practicability of stopping a train. Better information about the speed of the train and a check of the air gauge could have provided Mr. Smith with vital data that would have given him a very different view of the practicability of bringing his train to an immediate stop, even allowing for the hazardous goods aboard.

It is established that Conductor Smith's actions on the approach to Dalehurst did not amount to a violation by him of any part of the federally established Uniform Code of Operating Rules. It is nevertheless undisputed that a greater degree of care on his part towards his duties, including his obligations under Rule 3.2(b), might have averted the infraction of the Uniform Code of Operating Rules committed by Conductor Smith's train when it ignored the signals at Dalehurst. While he was not the primary cause of that infraction, as Conductor, he is accountable for his train's failure to observe the Uniform Code of Operating Rules, and he must bear some degree of responsibility for it. I agree with counsel for the Corporation that the following words of a previous Award of this Office in **CROA Case No. 1503** are singularly appropriate in respect of Conductor Smith's actions in this case:

It appears to me that, with obvious hindsight, it always pays to exercise caution in the stewardship of a train when in doubt as to a specific situation that might ultimately culminate in a hazardous result. This is even more sensible when it is the conductor who, because of a mechanical breakdown in his radio, is not aware of the immediate status of his train. He is the employee who is primarily responsible and therefore is duty bound to be extremely cautious as to his train's every movement. From a practical viewpoint, I do not know whether this means, as the trade union contends, that the conductor must stop his train in every contingency where there is a gap in knowledge with respect to the status of his train. Each case will obviously have to depend on its

own circumstances. Quite clearly, however, in situations where the conductor is denied data upon which to make an informed decision with respect to his train's movement he will always err on the side of the angels if he adopts the cautious approach.

This is not intended to suggest any adverse reflection on his colleagues. They, too, are equally bound to exercise caution in the operation of the train. But it is simply no answer for the conductor to say, in the event of an infraction of the UCOR rules, that "I did not know what was happening because my radio broke down".

The actions of Conductor Smith may be summarized as follows: On the morning of February 8, 1986 he reported for duty having had no more than four hours' sleep. The amount of his sleep was reduced by his own choice to spend approximately an hour having coffee in the company of the operator after his arrival at Edson on the night of February 7th. It was also open to him to book off for rest at Edson, and he chose not to do so, accepting a call to return back to work for 5:45 a.m. On the previous night he had ample opportunity to have the fullest night's sleep before going on duty in Jasper at 16:00 hours, on February 7th. Notwithstanding the grievor's evidence to the contrary, the Arbitrator concludes that Conductor Smith was not sufficiently rested when he undertook responsibility for Train 413 and that his physical condition did, on balance, affect the quality of his alertness and judgement in the hours that followed. As his train approached Dalehurst Conductor Smith, who is responsible for seeing that his train observes speed limits at all times, failed to notice that his train was exceeding the 50 mile per hour speed limit, and was in fact accelerating. Attention to his responsibilities, including the timing of the train by the use of mile boards, would have made him aware of that fact. When Conductor Smith attempted, by the use of two different radios, to communicate with Engineer Hudson to determine the indication of the approach signal at Dalehurst, he received no reply. Having worked on that section of road for some seven months, he was familiar with it and with the regular train traffic, including the presence in the area of VIA Train No. 4. Notwithstanding repeated unsuccessful attempts to raise the head-end, Conductor Smith formed the opinion that there must be some difficulty with the radios, that in fact the brakes were being applied and that the train was under control. As an experienced conductor, he knew that he did not need to rely on his surmise about a brake application. The fact that the brakes were being applied would have been confirmed by the sound of the air whistle in the van as well as by a reading of the air gauge at his disposal. Notwithstanding that he did not hear the whistle, Conductor Smith failed to check the air gauge, which would have either confirmed or corrected his impression that the braking system was being engaged. His error of judgement in that regard was a violation of his obligation under Rule 3.2(b), for which he is subject to discipline, as is his failure to observe the speed of his train.

In assessing the appropriateness of discipline in the instant case, a number of factors are to be considered. Conductor Smith's actions were not the originating cause of the collision at Hinton. The collision was caused by a failure of the head-end crew to perform their duty. The failure of Train 413 to obey the signals at Dalehurst resulted from the actions or condition of Trainman Edwards and Engineer Hudson. They were described by Commissioner Foisy as "probably experiencing chronic fatigue" and, in the case of Engineer Hudson, subject to a questionable medical condition that placed him under what one doctor described as "... an elevated risk of heart attack or stroke ...". The collision at Hinton was not caused by the exercise of judgement which was vested in Mr. Smith by the recent change in the Company's Rule. There was clearly no conscious or deliberate wrongdoing by Conductor Smith, as revealed in the evidence before me.

Moreover, Conductor Smith directed his mind to the practicability of stopping the train. He was concerned that if he "pulled the air" he might cause the derailment of his train. He was particularly concerned about the potential danger involved in a derailment because of the hazardous goods being carried by the train. In addition, he believed that his inability to make contact with the head-end was due to a problem with the radios. The day before he had experienced difficulties with his portable radio and, as later confirmed, there was a defect in the dial of the red radio in the caboose. He was also aware that "dead spots" can be encountered on a route, temporarily disrupting the ability to make radio contact. His belief that the radios might be at fault was not without some foundation.

A further factor causing Conductor Smith to decline to apply the brakes was that he believed he could feel the train braking, an impression which was caused by the compaction of the cars as the train met an uphill grade. While he could and should have checked that impression against the air gauge and should have monitored his train's speed more closely, it is none the less the case that he had some grounds for his belief that the train was under control. On the whole, while Conductor Smith's error of judgement cannot be minimized, it must be assessed within the context of all of the factors bearing upon him in those final minutes before the collision.

In the Arbitrator's assessment it is further significant, as found by Mr. Justice Foisy, on an objective application of Rule 3.2(b), that the responsibility for Mr. Smith's failure to properly apply the Rule and stop his train must be shared substantially by the Company. Had the Company explained to its employees the meaning of the amended Rule, making clear to a person in Mr. Smith's position the parameters of "practicability" to be applied in deciding to stop a train in emergency conditions, this incident might not have occurred. No such instruction was given, however, in consequence of which the Company bears some responsibility for Mr. Smith's uninformed reaction to the circumstances he confronted. Given that conclusion, coupled with Mr. Smith's excellent prior service of 12 years, which is without blemish, there is reason to conclude that his permanent termination from company service is not justified in the circumstances, and is indeed inequitable.

In coming to this conclusion, the Arbitrator also places some weight on the statement made by Conductor Smith at the arbitration hearing. Weeping openly, he reflected an obvious understanding of the nature and magnitude of his error. I am satisfied that he is a sincere individual who has recounted truthfully, and without self-serving rationalization, the events of the Hinton collision to the best of his understanding and recollection. He has, at this time, been held out of the Company's service for close to two years, and has suffered a significant degree of personal emotional hardship. In light of the unusually high quality of his years of service prior to the unfortunate events at Hinton, I find it difficult to conclude that he cannot be returned to useful service with the Company, in a capacity other than conductor. It is my conclusion that he should, and that it is appropriate, in all of the circumstances, for me to exercise my discretion under the **Canada Labour Code** to find accordingly, and substitute a measure of discipline other than discharge.

For the foregoing reasons, Mr. Smith shall be reinstated forthwith into the employment of the Company, without compensation or benefits and without loss of seniority, into a position within the bargaining unit other than conductor, to be determined by the Company, in consultation with the Union. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this award.

(sgd.) MICHEL G. PICHER
ARBITRATOR