

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 1887

Heard at Montreal, Wednesday, 15 February 1989

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**UNITED TRANSPORTATION UNION**

### **DISPUTE:**

Dismissal of Conductor E.J. McKenzie and Brakeman D.J. Jewell, Windsor, Ontario, 22 April 1988.

### **JOINT STATEMENT OF ISSUE:**

Conductor E.J. McKenzie and Brakeman D.J. Jewell were assigned to Extra 9647 East (Train 382) on 13 January 1988 and were working in the caboose at the rear of the train. At Mile 1.9 Longwood Subdivision, VIA Train No. 72 ran into the rear end of Train 382, derailing engine VIA 6902, 4 passenger and 3 freight cars and resulting in a number of injuries to passengers and crew members. An investigation was held concerning this rear collision and as a result Conductor McKenzie and Trainman Jewell were discharged for failure to ensure that full protection was provided as required by UCOR Rule 99 and failure to comply with the requirements of UCOR Rule 106, paragraph 2.

The Union appealed the discipline assessed contending that: (1) the grievor did not receive a fair and impartial hearing in connection with the charges made, (2) there were mitigating circumstances, and (3) the penalty of discharge was too severe.

The Company failed to respond to the Union's appeal within the time limits stated in the provisions of Article 84.5 of the 4.16 Agreement. The Union then requested a Joint Statement from the Company.

### **FOR THE UNION:**

**(SGD) T. G. HODGES**  
GENERAL CHAIRMAN

### **FOR THE COMPANY:**

**(SGD) M. DELGRECO**  
for: ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

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|----------------|--|
| P. D. Morrisey | – Labour Relations Officer, Montreal     |
| J. B. Bart     | – Manager, Labour Relations, Montreal    |
| R. R. Paquette | – Labour Relations Officer, Montreal     |
| D. E. Lussier  | – Co-Ordinator, Transportation, Montreal |
| J. H. Rousseau | – Assistant Superintendent, Hornepayne   |
| T. Wilson      | – Assistant Manager - Rules, Montreal    |

And on behalf of the Union:

- |                 |   |
|-----------------|---|
| M. P. Gregotski | – Vice-General Chairman, St. Catharines |
| L. Karn         | – Vice-General Chairman, Windsor        |
| R. Beatty       | – Local Chairman, Hornepayne            |
| E. J. McKenzie  | – Grievor                               |
| D. J. Jewell    | – Grievor                               |

## **AWARD OF THE ARBITRATOR**

At the hearing the Union withdrew the contention that the grievors did not receive a fair and impartial investigation hearing. The only issue to be resolved therefore, is the effect of mitigating circumstances and the appropriate measure of discipline.

The material discloses that Conductor E.J. McKenzie and Brakeman D. J. Jewell were on duty in the caboose of Train 382 travelling from Windsor to London, Ontario on January 13, 1988. As their train was proceeding on the Longwood Subdivision from Glencoe to Komoka, at Mile 1.9 it was struck from the rear by Via Train No. 72, causing the derailment of the passenger train as well a number of cars on the rear end of Train 382. There were no fatalities, although forty-two people, including the grievors, were injured. The collision also caused substantial cost in respect of damage to Company property and equipment.

Traffic on the Longwood Subdivision was controlled by train order. On the day in question Train 382, consisting of three diesel units and eighty-six cars, was under an order authorizing it to run ahead of Via Train No. 72 from Glencoe to Komoka. The train order, described as a "Form B" train order, effectively placed the crew of Train 382 in a position of responsibility for protecting their train from being overtaken by Train No. 72. It is not disputed that by remaining vigilant with respect to their own speed and location, and reading the scheduled location of Train 72 according to the timetable, Conductor McKenzie and Brakeman Jewell had the means to determine whether their train was at risk of being overtaken. In the event that they were at such risk they were governed by the terms of UCOR Rule 99 which is as follows:

**99** When a train is moving under circumstances in which it may be overtaken by another train, lighted fusees must be dropped off at proper intervals and such other action taken as may be necessary to ensure full protection.

...

Fusees are a type of flare which can be dropped onto the roadway from the rear of a caboose as a means of signalling a train which is approaching from the rear and is at peril of overtaking. Upon seeing the fusee the crew of the train which is following is required to stop their movement and proceed thereafter at restricted speed for two thousand yards, as stipulated by UCOR Rule 11.

The position of the Company is that in the circumstances at hand the grievors failed to advert to the location of Via Train No. 72 and took no action with respect to attempting to signal by means of fusees, in consequence of which the collision resulted. The grievors' own evidence, however, is that they did drop two lighted red fusees, the first at one and one-half miles east of Longwood and the second at Mileage 5 near Mount Brydges. Although the enginemen in Via Train No. 72 maintain that they did not see any fusees in the locations the grievors maintain they dropped them, the objective evidence is not inconsistent with the grievors' claim. A subsequent inspection of the area disclosed a substantial number of spent fusees found between the point of impact and mileage 5.35, two of which were west of mileage 5.0. While it is impossible to know with any certainty which, if any, of those fusees may have been dropped by the grievors on the day in question, their account of events is not inconsistent with that evidence. It also appears that visibility was substantially reduced by blowing snow at the time of the collision.

On the whole the Arbitrator is inclined to accept the account of the grievors with respect to the dropping of the two fusees. Their statements in that regard were made the same day as the collision when they were hospitalized. This is not, in other words, a circumstance in which a self-serving explanation is advanced at a substantially later time in response to factual assertions made adversely by the Company.

The Arbitrator must nevertheless conclude that the grievors were in violation of UCOR Rule 99 in two respects. Firstly, they obviously did not drop fusees in numbers and at intervals sufficient to warn the overtaking train. Secondly, given that the weather conditions were marked by reduced visibility due to blowing snow, normal caution would have suggested that they make use of radio communication to ensure that the head end crew of Via Train No. 72 was clearly aware of their location. Without necessarily accepting the suggestion of the Company that the grievors' actions caused the collision, the Arbitrator must conclude that greater diligence on their part in complying with Rule 99 would have prevented the unfortunate collision that resulted.

There are other mitigating factors to be considered. Brakeman Jewell is a relatively junior employee with a clear disciplinary record. He had not attained the level of a qualified conductor at the time of the incident. To that extent,

for the reasons stated by this Office in **CROA 168**, his responsibility may thereby be considered to be less serious. Conductor McKenzie, on the other hand, is a long service employee with a positive work record. There was also no disciplinary blemish registered against him at the time of the collision.

In considering the assessment of discipline it is also pertinent to note that the head end trainman on Train 382 was assessed thirty-five demerits while the engineman was restricted to yard service for a period of one year. The notion of shared responsibility for the collision is further reflected in the undisputed fact that the two enginemens of Via Train No. 72 were each assessed thirty demerits. It appears undisputed that all of the crew members involved failed, in some measure, to do their part in ensuring that the rules were observed and that a safe distance was maintained between the two trains. In light of these facts, and when the actions of the grievors are considered in comparison with other cases involving derailments and collisions, there are compelling reasons to accept the Union's assertion that the discharge of the grievors was an excessive measure of discipline in the circumstances (*see CROA 168, 690, 1198 and 1677*).

For the foregoing reasons the Arbitrator deems it appropriate to substitute a lesser penalty with respect to each of the grievors. Trainman Jewell shall be reinstated into his employment forthwith, without compensation and without loss of seniority. In the Arbitrator's view, however, the circumstances of Conductor McKenzie must be viewed more seriously. It is therefore ordered that he be reinstated forthwith into a position other than conductor, such position to be determined in consultation with the Union, also without compensation and without loss of seniority.

The Arbitrator retains jurisdiction in the event of any dispute between the parties with respect to the interpretation of implementation of this award.

February 17, 1989

**(Sgd.) MICHEL G. PICHER**  
**ARBITRATOR**