CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2214

Heard at Montreal, Tuesday, 10 December 1991

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

The dismissal of Locomotive Engineer A.F. McMahon of Sydney, N.S.

JOINT STATEMENT OF ISSUE:

Mr. A.F. McMahon was the locomotive engineer on Train No. 340 (ex 9529 East) on the Sydney, N.S. Subdivision on 21 July 1990.

At approximately 0610 hours on that date, the train operated by Mr. McMahon was in collision with a private automobile at a public crossing, Mileage 102.09, Sydney Subdivision.

Following investigation, Mr. McMahon was dismissed for the following rule violations:

Rule 14L of the Uniform Code of Operating Rules
Rule 30 of the Uniform Code of Operating Rules
General Operating Instructions, CN Form 696, Items 1.4 and 16.1, Paragraph 9
Atlantic Region Time Table No. 97, Item 5.1
Locomotive Engineer's Operating Manual CN Form 8960, Section A, Item 1.13.

The Brotherhood contends that dismissal is too severe, and has asked for a reduction in the discipline.

The Company disagrees.

FOR THE BROTHERHOOD:

(SGD.) G. HALLÉ
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) W. D. AGNEW
FOR: VICE-PRESIDENT, ATLANTIC REGION

There appeared on behalf of the Company:

W. D. Agnew	– Manager, Labour Relations, Moncton
G. O. Steeves	– Labour Relations Officer, Moncton
M. P. Leblanc	– Manager, Train & Engine Service, Truro
J. B. Bart	– Manager, Labour Relations, Montreal
D. L. Brodie	– System Labour Relations Officer, Montreal
N. D. Dionne	– System Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

G. Hallé	– General Chairman, Quebec
B. E. Wood	– Vice-General Chairman, Moncton
R. Bourgoin	– Vice-General Chairman, Rivière du Loup
A. F. McMahon	– Grievor

AWARD OF THE ARBITRATOR

On the basis of the material filed, and the evidence given at the hearing, the Arbitrator is satisfied that the allegations of rules violations made against the grievor in the Joint Statement of Issue are all sustained. The record reveals that at approximately 0610 hours on July 21, 1990, the grievor's train collided with a private automobile at a public crossing at Mileage 102.09 of the Sydney Subdivision. The accident resulted in the death of the car's driver and serious injuries to the passenger in the vehicle.

The record reveals numerous rules violations committed by Mr. McMahon from the time Train 340 departed Havre Boucher to the point of the collision, over a distance of 102 miles. The event recorder, which the Arbitrator accepts as providing reliable information in the instant case, discloses that for virtually all of the trip the grievor's train operated at overspeeds from five to fifteen miles per hour. In the moments prior to the collision the grievor's train was travelling at approximately forty miles per hour in a thirty mile per hour zone.

The evidence further discloses that at some three crossings over the course of the trip the grievor failed to sound his engine whistle. The evidence revealed by the event recorder indicates that at Mileage 102.09 the whistle of the grievor's trains was first sounded when it was approximately 800 feet west of the crossing, rather than at the whistle board, located some 1,325 feet west of the crossing. It is further admitted that Mr. McMahon did not activate the engine bell at the crossing at Mileage 102.09, nor at any other crossing during the entire trip, in contravention of Rule 30 of the Uniform Code of Operating Rules. The evidence also discloses that Mr. McMahon further violated operating instructions by tying down the bail of the independent brake valve, which controls the independent braking system of the locomotives. This would nullify the application of the locomotive brakes in the event of an emergency application of the train's automatic brake.

The evidence raises some doubt as to whether a collision at the level crossing could have been avoided if the grievor's train had been travelling at the appropriate rate of speed. Nor is it clear that Mr. McMahon's tampering with the independent brake valve would have made any practical difference, given the brevity of the response time of both the locomotive engineer and the driver of the vehicle. It does not appear disputed that a substantial contributing factor to the accident was the apparent failure of the automobile's driver to exercise a sufficient degree of vigilance in watching for an oncoming train, and his resulting failure to stop his vehicle in time. A further contributing factor appears to be the limited sight lines at the level crossing on the day in question. The crossing is located on a curve and it appears from photographic evidence that at the time the automobile driver's view of the oncoming train would have been inhibited, in part, by overgrown brush near the intersection of the track and the roadway.

However, the limited visibility also raises questions about the consequences of the failure of Mr. McMahon either to sound his bell or to commence the use of his whistle at an earlier point in time, in keeping with the Operating Rules. It is, of course, impossible to know what would have happened if all rules had been complied with. It is not unreasonable to conclude, however, that by failing to sound his whistle at the required time, by failing to activate his locomotive's bell, and by failing to observe the speed limit, the grievor aggravated the chances of a collision and the gravity of its consequences. It cannot be known whether a reduction in the rate of speed to the allowable 30 mile per hour limit might have reduced the severity of the impact and the chances of serious injury or fatality, or whether proper use of the whistle and bell might have alerted the driver of the car in time to avoid the collision. Regrettably, the very uncertainty of those questions speaks to the gravity of the rules violations in the case at hand. While it cannot be said with any certainty that the grievor's actions caused the collision, it is difficult to avoid the possibility that due observation of the Operating Rules on his part might, at a minimum, have reduced the impact of the collision and could have mitigated the consequences of the tragedy which unfolded.

The Brotherhood relies on **CROA 2122** in support of its position that discharge was an excessive measure of discipline in the circumstances. That case involved similar conduct, in respect of overspeeding, blocking the bail of the independent brake valve as well as whistle and bell infractions. However, the grievor in that case, whose discharge was sustained, was not placed in a circumstance in which his misconduct became an arguable factor in a fatal accident. In any case of discipline the company, and a board of arbitration, can look to the actual or possible consequences of employee misconduct. If a union can argue the absence of an accident, property damage or the loss of productivity in mitigation of an employee's actions, the converse must also be true. Where, as in the instant case, a collision occurs when a train is travelling at thirty-three per cent in excess of the permissible rate of speed, with inadequate whistle and bell signalling, it is open to an arbitrator to view the entirety of the event, including the likely consequences of the employee's misconduct, as aggravating factors. Even if one accepts that a collision was

inevitable in the case at hand, it is difficult to escape the conclusion that the substantial overspeed of the grievor's train would, in all likelihood, have been a significant contributing factor in the destruction that resulted. The seriousness of the grievor's misconduct, and its probable consequences, cannot be overlooked in assessing the appropriateness of discipline in this case, notwithstanding his years of service. Moreover, Mr. McMahon's disciplinary record, while clear at the time of the incident, does contain a history of serious rules infractions. On the whole, the Arbitrator can find no compelling basis for the reduction of the penalty in the circumstances of this case.

For the foregoing reasons the grievance must be dismissed.

December 13, 1991 **(Sgd.) MICHEL G. PICHER**
ARBITRATOR