CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3181

Heard in Montreal, Tuesday, 13 February 2001

concerning

VIA RAIL CANADA INC.

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

EX PARTE

DISPUTE:

The discharge of Locomotive Engineer McAndrew

BROTHERHOOD'S STATEMENT OF ISSUE:

On July 22nd 2000, Locomotive Engineers Mike McAndrew and Tom McGuire operated Train 95 to Niagara Falls from Toronto.

At Niagara Falls Engineer McAndrew went home from the Station and walked to work the following morning for train 92.

When he arrived for duty, Mr. McGuire was not there. He then performed the preliminary duties, tried to contact him before departure, was not successful. He left him a telephone message and proceeded to operate to Toronto.

Mr. McAndrew spoke with the VIA Crew Management Officer leaving Aldershot Station and advised her that his son was with him. No instructions or orders were given to Engineer McAndrew by the Corporation, CN, or the RTC between Aldershot and Toronto nor was he met by an Officer of the Corporation upon arrival at Toronto.

The Corporation held a subsequent investigation into the matter. Mr. McAndrew was forthright and open during his investigation, accepted responsibilities for his actions and was discharged.

The Brotherhood appealed the discipline citing it was too severe. The Corporation did not answer the appeal.

The Brotherhood has learned that there were mitigating circumstances which may have contributed to Mr. McAndrew's decision on the day in question.

FOR THE BROTHERHOOD:
(SGD.) J. R. TOFFLEMIRE
GENERAL CHAIRMAN

There appeared on behalf of the Corporation:

E. J. Houlihan	– Senior Manager, Labour Relations, Montreal
C. Harish	– Operations Officer, Toronto
B. E. Woods	– Director, Labour Relations, Montreal
J. M. Lalonde	– Chief of Transportation, Montreal

And on behalf of the Brotherhood:

J. L. Shields	– Counsel, Ottawa
J. Tofflemire	– General Chairman, Oakville
M. McAndrew	– Grievor

AWARD OF THE ARBITRATOR

The facts material to this grievance are not in substantial dispute. On Sunday, July 23, 2000 the grievor was assigned as one of two locomotive engineers to operate Train No. 92 between Niagara Falls and Toronto. The second locomotive engineer, Mr. T.E. McGuire, did not in fact appear at the train terminal at 06:30, as scheduled. The evidence discloses that the grievor nevertheless went through the steps of preparing the train for departure, assisted in part by his ten year old son who, in fact, accompanied him in the cab of the locomotive on the trip from Niagara Falls to Toronto. When Mr. McGuire to failed to appear prior to the departure time of the train Mr. McAndrew nevertheless undertook to operate the train himself, as the single running trades employee aboard. He in fact did so, without notifying any Corporation officer of the absence of Mr. McGuire. Mr. McAndrew knowingly operated the train contrary to all rules, which contemplate that two locomotive engineers are to be on duty in the cab of a passenger train. It appears that the Corporation only learned of Mr. McGuire's absence when it reached him on his own cellular phone and learned from him that he was not in fact aboard Train No. 92.

The record before the Arbitrator leads to the unfortunate inference that on the day in question Mr. McAndrew deliberately attempted to conceal from the Corporation that his work mate, Mr. McGuire, was not in the locomotive cab with him during the operation of Train No. 92. It was his obvious obligation to contact the Corporation officer responsible for train movements when he realized that Mr. McGuire was not available to work the train with him. Contrary to his most fundamental obligation, the grievor pursued a course of obvious concealment. It is only when he was contacted by Crew Controller Brenda Wilson, more than one hour into the trip, and was specifically asked who was with him, that he admitted that he was only accompanied in the locomotive cab by his ten year old son. Notwithstanding that recorded communication, at the subsequent Company investigation the grievor attempted to deny that his son was in the locomotive cab with him, it being understood that such a presence would be in violation of Corporation rules. It was only upon being confronted with a transcription of his radio conversation with the crew controller that the grievor finally admitted that his son travelled in the locomotive with him.

There can be little doubt that the grievor pursued a potentially dangerous course of action by undertaking to operate Train No. 92 alone. At the time in question there were no longer conductors in service, and he would have found himself alone in the event of any irregularity or emergency. He would have been unable to comply with a number of rules fashioned to ensure the safe operation a train, as for example GBO Form V, Item 4, which governs protection of crossings at grade where warning devices are defective, CROR Rule 102 which mandates flagging protection in circumstances of emergency stops and CROR Rule 35(b) which mandates flagging in both directions in the event of an emergency stop. The Arbitrator is unable to avoid the compelling conclusion that the grievor acted recklessly, placing himself and his passengers in a situation of unacceptable risk, and that his misconduct in that regard is compounded by what can only be characterized as an attempt to conceal his actions in a way which clearly undermines the bond of trust fundamental to the employment relationship of a person exercising the responsibilities of a locomotive engineer, a highly remunerated classification of employees who normally work without direct supervision.

The record before the Arbitrator discloses that while Mr. McAndrew has some thirty years of service as a railroader, his disciplinary record is not without blemish. Significantly, in 1998 he was assessed a sixty day suspension for a violation of CROR Rule 104, relating to running through a reversed switch on the Chatham Subdivision where in fact the grievor had left his position in the cab of the locomotive and was within the body of the train at the time of the incident.

The Arbitrator cannot sustain the suggestion of the Brotherhood to the effect that the Corporation failed to conduct a fair and impartial investigation prior to terminating the grievor. Its position in that regard is based on statements from a number of employees to the effect that they had heard that the grievor was going to be fired before the conclusion of the investigation, as well an unsubstantiated hearsay statement from a Corporation officer who was not involved in conducting the investigation. In addition the Brotherhood notes the fact that the grievor's Corporation supplied cellular phone service was discontinued, and his family's rail pass annulled, before his termination. In the Arbitrator's view none of these elements, assuming their truth, would of themselves amount to a departure from the standard of a fair and impartial investigation. In fact, having regard to the reconvening of the investigation on a number of occasions, specifically to give the grievor the opportunity to respond to evidence contrary to his earlier statements to the Corporation, the record suggests a high degree of care and attention on the part of the employer in attempting to obtain the full picture of what occurred. There is no suggestion that the Corporation officer conducting the investigation exhibited bias or prejudged the outcome.

The Arbitrator can find no basis to mitigate or reduce the penalty in the case at hand. As the operator of a national passenger rail service the Corporation is in a high-profile position. It must adhere to the highest standards of safety, and must manifestly be seen to do so. While it is fortunate that the events giving rise to the grievor's termination did not result in any adverse incident or injury to passengers or equipment, the grievor's reckless disregard as to those possible consequences calls into question his fitness for continued employment as a locomotive engineer. Nor is the Arbitrator persuaded by the suggestion that Mr. McAndrew may, at the time, have been under the influence of stressful events in his own life, and a degree of anxiety. While a general note from his physician with respect to those circumstances was tendered in evidence, it does not contain any compelling analysis or diagnosis which would suggest that his faculties were impaired or that his conduct was influenced by any form of illness beyond his control. In the circumstances, given the gravity of the incident, the Arbitrator has no alternative but to dismiss the grievance and sustain Mr. McAndrew's termination.

February 19, 2001

(signed) MICHEL G. PICHER
ARBITRATOR