CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3607

Heard in Montreal, Thursday, 15 February 2007

Concerning

VIA RAIL CANADA INC.

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discipline and discharge of VIA Rail Locomotive Engineers Brian Pethick and Mike Walker.

JOINT STATEMENT OF ISSUE:

On June 8, 2006, VIA Locomotive Engineers Brian Pethick and Mike Walker were operating train 87 between Toronto and Sarnia.

The Union submits that during the trip, while in OCS territory, a cell phone miscommunication occurred between VIA and GEXR crew members while on the Guelph Subdivision. This resulted in 87's crew operating into the limits of GEXR 518 without authority. As a result of several mitigating circumstances, the VIA crew was under the impression they had authority to enter 518's limits following communication with a crew member on GEXR 433. Once it became evident an error had occurred the movement was stopped. The crew members on trains 518 and 87 jointly resolved the problem among themselves and mutually erred in judgement by not reporting the incident.

The Corporation submits that Mr. Pethick and Mr. Walker committed serious rule and safety violations resulting in the near head-on collision between passenger train 87 and GEXR 518. The Corporation further submits that Mr. Pethick and Mr. Walker then conspired with the crew of GEXR 518 to conceal the event and deliberately chose not to report the incident to the proper authorities as required.

The GEXR later discovered the incident and a joint investigation ensued in September 2006. The Union maintains that the crew members admitted their mistakes with remorse when investigated and were subsequently discharged by their employers. Grievances were filed by both TCRC General Committees on behalf of their members involved. The GEXR crew members were reinstated on November 13, 2006.

The Corporation maintains that the negligence and dishonesty of Mr. Pethick and Mr. Walker have broken the essential bond of trust between employer and employee and that it cannot be restored. Accordingly, termination of the employment relationship was the appropriate discipline in the circumstances.

FOR THE UNION:	**FOR THE CORPORATION:**
(SGD.) J. R. TOFFLEMIRE	**(SGD.) E. J. HOULIHAN**
GENERAL CHAIRMAN	**DIRECTOR, LABOUR RELATIONS**

There appeared on behalf of the Corporation:

L. Béchamp	– Counsel, Montreal
G. Selesnic	– Manager, Train Operations
A. Richard	– Senior Advisor, Labour Relations, Montreal
E. J. Houlihan	– Director, Labour Relations, Montreal
B. A. Blair	– Senior Advisor, Labour Relations, Montreal
J. Pastor	– Advisor, Labour Relations, Montreal

And on behalf of the Union:

J. C. Morrison	– Counsel, Ottawa
J. Tofflemire	– General Chairman
Wm. Selbie	– Local Chairman
M. Walker	– Grievor
B. Pethick	– Grievor

AWARD OF THE ARBITRATOR

The very unfortunate facts giving rise to this grievance are not in dispute. On June 6, 2006, Locomotive Engineers Pethick and Walker were responsible for the operation of train no. 87 travelling from Toronto to Sarnia. Part of their trip involved travel over territory on the Guelph Subdivision operated by a short line railway, GEXR, specifically between Silver, at mile 30 and London Junction, at mile 119.9. In the vicinity of Kitchener the grievors' train received clearance no. 743 from the Rail America RTC responsible for the territory. That clearance carried a restriction protecting against GEXR work train 3856 between mile 72 and the West Siding switch at Stratford. That territory is not well serviced by radio communication. Consequently, communication between trains or between a train and a track maintenance crew must be generally be by cell phone. It is common ground that when Locomotive Engineer Pethick, who acted as the In-Charge engineer, got the clearance he did not request the cellular phone number for work train 3856. It appears that he was in possession of cellular phone numbers for GEXR trains, and relied on the numbers that he had.

Shortly after leaving Kitchener Mr. Pethick called a cellular phone number which he believed would connect him to GEXR work train 3856, to obtain permission to enter that work train's work limits. In fact, the cell number which he had connected him to another work train, GEXR train 4046, which was operating further west, between the East Siding switch at Thorndale and the West Siding switch at Stratford. The grievor's train was eventually required to obtain a clearance from work train 4046, but only after it had cleared the territory of work train 3856. When Locomotive Engineer Pethick reached the crew of work train 4046, he erroneously believed that he was speaking to the crew of work train 3856, when dealing with Locomotive Engineer Ballantyne, who was in charge of GEXR work train 4046. Believing that the call was to obtain clearance through his own territory, Locomotive Engineer Ballantyne gave the clearance to Mr. Pethick who, nevertheless, continued to believe that he was dealing with the locomotive engineer of GEXR work train 3856.

As a result, an extremely dangerous situation developed. VIA passenger train no. 87 entered the limits of GEXR work train 3856 without proper permission, in clear violation of the clearance which governed the movement of train no. 87. Work train 3856 in fact was travelling eastward, in a direction opposite to the direction of train no. 87, when by chance its crew heard a broadcast emanating from the hot box detector within the limits of their territory, at mile 73.7. That alerted the crew of work train 3856 that another train was moving over their territory, causing the locomotive engineer of 3856 to issue instructions over the radio stating "stop your train immediately", as he proceeded to stop his own train by an emergency brake application. In fact both trains came to a stop. There is some difference of opinion as to the distance which then separated them. It appears that the crew of GEXR work train 3856 subsequently reported the distance between the trains to be a half mile, while the grievors maintain that the distance was in fact one mile separating the trains once they had stopped. The Arbitrator does not consider the difference of opinion in that respect to be material to the merits of this grievance. On the most generous interpretation, at their respective speeds, the two trains were less than two minutes from a head-on collision.

It appears that shortly thereafter Locomotive Engineer Pethick communicated by radio with work train 3856, requesting their cell phone number. Conversations ensued between the two crews by cell phone. As a result of those exchanges the crews of both trains effectively agreed between themselves not to report the incident to the rail traffic controller or to their respective employers. It was agreed between the two crews that train 87 would back up, a manoeuvre which was clearly contrary to operating rules, to clear the Alpine switch and allow the GEXR work train 3856 to enter the spur, then allowing the VIA train to clear through the rest of the work train's limits and proceed on its way.

The facts of the incident remained suppressed for a number of months, and might never have come to light but for a similar incident which apparently occurred on August 21, 2006. It appears that the investigation of that incident brought out the facts which had occurred on June 6, 2006, causing the Corporation to make a more thorough investigation. That investigation effectively produced the facts which are related above. At the conclusion of the

investigation the Corporation assessed sixty demerits against each of the grievors for the violation of a number of CROR rules, including the concealment of the incident which resulted in their dismissal. Among the rules found to be violated, which the Arbitrator accepts as correct, are CROR rules 142(a) and (b) which govern the understanding between crew members of GBOs and clearances. In addition there was a violation of CROR rule 121 and Rail America Special Instruction to CROR rule 121(a), rules calling for the positive identification of parties when communication is made by telephone. Clearly Locomotive Engineer Pethick failed to properly identify the work train which he was calling. It appears that in fact the violation of CROR rule 121 was not charged against Locomotive Engineer Walker. In addition the grievors were found to have violated rule 308.1 by effecting a reverse movement of their train, contrary to the express limitations of their clearance. Similarly, rule 309(b) was also violated as it requires a thorough understanding with the crew of a work train with which another train is engaged, within working limits. Finally, and perhaps most critically, General Rule A (iii) and (iv), and Rail Link GOI Safety Rules 1.6 and 2.1.6 were violated. Among other things, those rules provide for the prompt and mandatory reporting of the violation of any rule, special instruction or general operating instructions, including the obligation to report all "incidents".

On behalf of the grievors, the Union does not seek to minimize the seriousness of what occurred. It accepts that they were involved in cardinal rule violations and, significantly, exercised extremely questionable judgment in their decision not to report the incident. Their counsel stresses the length of service of the grievors, being twenty-six years for Mr. Walker and thirty years for Mr. Pethick, in combined service with CN and VIA. Counsel also notes that they have relatively positive disciplinary records, and that in fact Mr. Walker had only been disciplined once, for a ten demerit penalty, in all of his years of service.

Counsel for the Corporation stresses the seriousness of the rules infractions committed by the grievors. She also emphasizes the fact that they were not forthcoming with the facts of the incident until the disciplinary investigation was well under way. Stressing the fact that the grievors seriously compounded the errors they committed by attempting to conceal the incident, counsel submits that the Corporation is of the view that the bond of trust essential to its ongoing employment relationship with the two grievors has been destroyed. Moreover, she maintains that this is not a circumstance in which mitigating factors should come to bear, given that the event which was made the subject of a cover-up by the grievors was in fact a near head-on collision.

In the Arbitrator's view the most serious aspect of this case is the considered and deliberate decision of both of the grievors not to report the near collision of June 6, 2006. By so doing, they effectively deprived the Corporation and arguably other employees of the benefit of knowing of the potential dangers inherent in communicating with work trains or others holding track occupancy permits by means of cell phones, particularly where multiple cell phone numbers and multiple TOP holders might be involved. The failure to report an incident has always been viewed as extremely serious, and has been treated accordingly in this Office. In some cases employee deception has been deemed sufficiently serious to sustain the discharge of the individuals involved, whereas in other cases mitigating circumstances have been seen as justifying a reduction in penalty (see, e.g., **CROA 3181, 3189**). In **CROA 3189** the failure of a passenger train crew to report a speeding infraction while travelling over a cross-over track was viewed as not justifying the termination of the employees involved, regard being had to certain mitigating factors. In the Arbitrator's view that case must be distinguished from the facts of the case at hand.

In the instant case the grievors were responsible for the safe conduct of a passenger train which, by their own error, they placed on a head-on collision path with an oncoming work train. The devastation which could have resulted from their error need scarcely be described, even accepting that their train was proceeding at reduced speed. As employees of long service, the grievors knew, or reasonably should have known, that the importance of reporting such an incident, if only to allow its examination by the Corporation, and possibly by government authorities, might yield insights which would allow the avoidance of a similar event in the future. That is, of course, quite apart from the ongoing general obligation of the grievors to be truthful with their employer and, as required by the rules cited above, to immediately advise the rail traffic controller of the rules violations and the incident which resulted from them. To some degree, the continued concealment of what transpired by reason of the mix up in the use of cell phone numbers can be viewed as an ongoing deliberate failure by the grievors to bring a potentially hazardous condition to the attention of their supervisors. In the facts of the case at hand, it is the failure of candour and honesty on the part of the grievors, much more than their rules infractions in the operation of their train, which calls into question their ongoing employability in the operation of a high-profile public passenger train service.

Regrettably, notwithstanding the length and quality of the service rendered by both of the grievors, the Arbitrator is compelled to conclude that the Corporation is correct in its assessment that there had been a destruction

of the bond of trust essential for their ongoing employment. The cover-up is itself more serious than the events covered up. Given the seriousness of the incident, involving a potential head-on collision, that unfortunate fact cannot be disregarded. For these reasons the Arbitrator is satisfied that the grievance must be dismissed.

February 16, 2007

(signed) MICHEL G. PICHER
ARBITRATOR