

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1677

PART B

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.

MICHEL G. PICHER
ARBITRATOR