CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1956

Heard at Montreal, Tuesday, 10 October 1989

Concerning

VIA RAIL CANADA INC.

And

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

The Brotherhood's appeal of the discipline assessed to the record of Locomotive Engineer B.D. Gould of Windsor, Ontario.

JOINT STATEMENT OF ISSUE:

Locomotive Engineer B.D. Gould worked as second engineer on Train #72 on January 13, 1988. Train 72 collided with CN Freight Train #382 at Mileage 2.0 of CN's Longwood Subdivision at Komoka, Ontario.

Subsequent to the collision, CN, the Corporation and the National Transportation Agency conducted detailed investigations to determine its cause(s). Mr. Gould was ultimately assessed discipline in the form of a 12-month restriction to classifications other than those of locomotive engineer, conductor or yard foreman for a period of 12 months of active service, for failure to exercise proper care in compliance with safe operation practices resulting in the collision.

The Brotherhood contends that the discipline assessed was unwarranted and should be removed in its entirety.

The Corporation disagrees with the Brotherhood's contention.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD) J. D. PICKLE	(SGD) P. THIVIERGE
GENERAL CHAIRMAN	for: DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Company:

A. Cartier	- Counsel, Montreal
P. D.Thivierge	- Acting Director, Labour Relations, Montreal
D. Brodie	- Labour Relations Officer, Montreal
W. R. Radcliffe	- Superintendent, Transportation, Toronto

And on behalf of the Brotherhood:

M. Church	- Counsel, Toronto
J. D. Pickle	- General Chairman, Sarnia
C. Hamilton	- Vice-General Chairman, Montreal

B. D. Gould - Grievor

AWARD OF THE ARBITRATOR

The facts in the instant case are related in CROA 1887. On January 13, 1988, while travelling through snowy conditions on the Longwood Subdivision, Via Train No. 72 struck the rear end of freight Train No. 382 (Extra 9647 East) causing the derailment of the passenger train as well as several cars on the rear end of Train 382. Thirty-two people, including the grievor, were injured and the collision occasioned substantial economic damage to the equipment and trackage of CN, whose freight train was struck, as well as the equipment of the Corporation.

As the award in CROA 1887 discloses, a contributing cause of the collision was the failure on the part of the conductor and rear brakeman of Train 382, who were riding in its caboose, to notify the crew of Via Train No. 72 of the freight train's progress along the subdivision, which was slower than anticipated.

The two trains were travelling on a subdivision whose traffic is regulated by train order. In such circumstances it is incumbent on the crews of trains to observe the scheduled time of the respective movements on the subdivision. In the case of a train which precedes another, in the event that it is slowed down and runs the risk of being overtaken, under UCOR Rule 99 its crew is under an obligation to drop lighted fusees, as well as to take such other action as is necessary to alert the crew of the overtaking train. As the award in CROA 1887 discloses, the tailend crew of Train 382 failed in that obligation, and thereby became liable to discipline. The award in that case includes the following comment:

> 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.

It is common ground that the two engineers in control of Via Train No. 72 complied fully with all requirements of the Uniform Code of Operating Rules as well as any rules or orders of the Corporation at all relevant times prior to the collision. They were under no affirmative obligation to themselves communicate with the crew of Train 382 to ascertain its whereabouts and were, in the circumstances, entitled to expect that its would take all necessary precautions to advise the passenger train in the event of any risk of overtaking.

The material further discloses that the dispatcher on the subdivision was aware of the slower than anticipated progress of Train 382. The crew of the passenger train was entitled to expect that the dispatcher would monitor the movement of the trains on the subdivision and notify it in the event of any departure from the timing of the movements contemplated in the train orders of that day. However, no such communication was received by the two enginemen in control of Train No. 72. Lastly, the record discloses without controversy that although both movements passed a maintenance of way ground crew, presumably under circumstances which would have alerted them to the shortened distance between the two trains, no radio communication was received from that source, in consequence of which the headend crew of Train 72 continued to travel in the reasonable expectation that all was normal. Finally, in snowy conditions, at a quarter mile's distance the grievor and his fellow engineman first sighted the tailend of the freight train, and immediately applied the emergency brake. Given the speed of the passenger train, then moving at approximately 80 miles per hour, a collision with Train 382, then moving at just under thirty miles per hour, was inevitable.

An investigation into the collision was conducted by the National Transportation Agency of Canada. Its report confirms that the engine crew of Via Train No. 72 complied in all respects with all applicable running rules and procedures. The report concluded that the failure on the part of the crew of Train 382 to drop fusees was an act of neglect which resulted in the accident. It makes no such finding in respect of the crew of the passenger train, however. In assessing "... a combination of factors which could individually or cumulatively have prevent this collision ..." the report of the Agency makes the following notation:

> The entire crew operating Via No. 72 failed to utilize their radios, to determine the location of CN Extra 9647 East. ...
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> Although operating rules, general instructions and training of employees cannot cover every possible situation, common sense in the use of radios would have prevented this accident.

It is not the place of a board of arbitration to substitute its judgement for that of a federal agency. By the same token, there is a certain concurrence between the jurisdiction of this Board, which involves determining whether the grievor was deserving of discipline, and the examination of the facts and cause of the accident conducted by the National Transportation Agency. In the Arbitrator's view there is nothing in the report of the Agency to fasten culpability, in a disciplinary sense, on the headend crew of Via Train No. 72. At best, the comments pertaining to the "failure" of the grievor and his co-engineman to radio the crew of Train 382 is a recognition that while they were under no obligation to do so, if they had the collision might have been adverted. The use of the word "failure" in that context is considerably less negative than it might otherwise be. In my view it is paramount to the merits of this grievance that the grievor and his crew-mate did not fail to do anything which it was their obligation to do in accordance with the rules they were bound to observe and all training and instructions which had been

given to them. Taken at face value, the observation of the Agency, obviously made with the advantage of hindsight, is the rather self-evident proposition that if the grievor and the first engineer had taken the extra precaution of radioing the freight train, the collision might have been avoided.

Can it be concluded from the facts so construed that Mr. Gould committed any infraction or engaged in any action which violated his obligation to his employer in such a way as to attract discipline? The Arbitrator cannot find that any such conclusion is supportable on the facts. The grievor's train was travelling at the permissible and planned speed of 80 miles per hour on a subdivision over which all movements were subject to train orders under the supervision of a dispatcher. Under the control of its crew it complied in all respects with the orders and the requirements of the UCOR. Its crew did not know and had no reasonable grounds to know that, in conditions of reduced visibility, it was in fact overtaking Train No. 382. In fact, the silence of the dispatcher, of the road repair crew and the failure of any signal from the crew of the freight train, which did have an obligation to communicate the problem, gave the grievor and his cohort every reason to believe that nothing was amiss. On the whole of the record it must be concluded that, as unfortunate as the collision was, and however serious the error of the crew of Train No. 382, there was no failure of duty on the part of the two locomotive engineers at the headend of Via Train No. 72. In the circumstances I must therefore conclude that the Company did not have just cause to discipline Locomotive Engineer Gould.

For the foregoing reasons the grievance is allowed. Mr. Gould shall be reinstated forthwith into his position as a locomotive engineer. As it would appear that he has not worked since the collision because of injuries which he sustained in the accident, it would seem that Mr. Gould has not suffered any direct loss in terms of wages, benefits or seniority. In the event that there has been any such loss, that issue may be spoken to.

October 12, 1989 (Sgd.) MICHEL G. PICHER
ARBITRATOR