CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3242
Heard in Montreal, Tuesday, 12 February 2002
concerning
VIA RAIL CANADA INC.
and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS
EX PARTE

DISPUTE – BROTHERHOOD:
Discipline assessed Engineers William Selbie and Dan Christie

BROTHERHOOD'S STATEMENT OF ISSUE:
On February 7th, 2001, the two aforementioned locomotive engineers were assigned to train 68 between Toronto and Montreal.

East of Guildwood the engineers were alerted by the service manager of a "loud metal noise" coming from under the train while in motion.

A delay to the train occurred as inspections were performed. In the end the crew decided that the coach was unsafe.

A lengthy investigation was held and the crew was heavily disciplined. The Brotherhood contends that the discipline assessed in this case was not warranted and sets a dangerous precedent bordering on fear motivation.

DISPUTE – CORPORATION:
The discipline of 30 demerits assessed Locomotive Engineers D.J. Christie and W.C. Selbie for alleged improper application of General Operating Instructions Section 5, Sub-section 5.8 and their alleged refusal to bring the original equipment of Train No. 68 from Toronto to Montreal.

CORPORATION'S STATEMENT OF ISSUE:
On February 7, 2001, Messrs. Christie and Selbie were the locomotive engineers operating Train No. 68 between Toronto and Montreal.

The locomotive engineers were advised of a loud noise emanating from beneath the train while it was in motion. The train was stopped and inspected near Ajax, Ontario. The locomotive engineers believed that certain wheels on the equipment were unsafe and the train should not proceed further.

Train No. 68 was reversed to Guildwood Station where the cars in question were inspected by an equipment supervisor who determined that the wheels in question were not "condemnable" and that the train could proceed to Montreal.

The Corporation alleges that the locomotive engineers refused to proceed with the equipment and improperly applied General Operating Instructions Section 5, Sub-Section 5.8 resulting in serious delay to the passengers and expense to the Corporation.

The Brotherhood maintains that the locomotive engineers did not refuse to proceed with the equipment and properly applied General Operating Instruction Section 5, Sub-Section 5.8 in the circumstances.

FOR THE BROTHERHOOD: FOR THE CORPORATION:
(SGD.) J. R. TOFFLEMIRE (SGD.) E. J. HOULIHAN
GENERAL CHAIRMAN SENIOR MANAGER, LABOUR RELATIONS
There appeared on behalf of the Corporation:
E. J. Houlihan – Senior Manager, Labour Relations, Montreal
G. Benn – Labour Relations Officer, Montreal
G. Selesnic – Manager, Customer Services
M. Salem – Manager, Equipment Maintenance
And on behalf of the Brotherhood:
J. R. Tofflemire – General Chairman, Oakville
E. MacKinnon – Local Chairman, Montreal
D. Christie – Grievor
Wm. Selbie – Grievor

AWARD OF THE ARBITRATOR

The facts in relation to this grievance do not appear to be substantially disputed. The grievors, Locomotive Engineers D. Christie and W. Selbie were assigned to operate train no. 68 between Toronto and Montreal on February 7, 2001. Shortly out of Toronto the train's service manager advised the locomotive engineers that a loud noise was emanating from underneath the coaches. When nothing could be identified when the train stopped at Guildwood Station, because of the difficulty of access to the undercarriage of the cars, Locomotive Engineer Selbie decided to ride in the body of the coaches for a distance to determine the source of the noise. He found that in fact the noise was emanating from between the last two of the three cars of the train, being cars 4008 and 4111. It appears that the last car in the consist, car 4008 was the club car.

When the train was brought to a stop at mileage 309 of the Kingston Subdivision, near Ajax, both Mr. Selbie and Mr. Christie did a close inspection of the coaches. They then found "shelling" on certain of the forward wheels of car 4008, as well as the trailing wheels of car 4111. In discussion with the operations control centre and the rail traffic controller it was determined that the train should back up to Guildwood Station where Equipment Supervisor Wayne Burgess was to meet them to do an inspection of the wheels in question.

After the train's arrival at Guildwood Mr. Burgess did do a hands on inspection of cars 4111 and 4008. The wheels in question were found to have a degree of "shelling", a condition whereby small pieces of metal may have flaked off the surface of the wheels. It appears that the wheels of the club car were the most affected. It is common ground that the Corporation has General Operating Instructions which deal with minimal maintenance standards, including the problem of shelling. Article 5 of the GOI equipment inspection processes specifically establishes the length and width of shelled tread which is permissible, and beyond which a wheel must be found to be condemnable. On the material before the Arbitrator it does not appear disputed that the "shelling" on the wheels which were inspected by Mr. Burgess did not place the wheels within the condemnable category. They were still of a quality to be utilized.

The evidence discloses that Mr. Burgess informed Mr. Selbie and Mr. Christie that, although the wheels did have some shelling, they conformed to the necessary standards, and that it was not necessary to take the cars out of service. It may be noted that Mr. Burgess' judgement in that regard was later

confirmed when the wheels were removed from the cars for more detailed inspection at the Montreal maintenance facility, shortly thereafter.

Unfortunately, the locomotive engineers were not reassured by the judgement of Mr. Burgess. It appears that at least one of them was troubled by an answer provided by Mr. Burgess to his question as to whether the space between two shells might break away during the course of the trip. Obviously Mr. Burgess could not give any guarantees, and responded that he did not believe that such a thing would happen, although it might be possible. On the strength of that comment, and their own view as to the general condition of the wheels of the train, both locomotive engineers refused to operate train no. 68 onward to Montreal. Their decision in that regard resulted in some passengers being removed from the train and taken by taxi for onward connection to Montreal by air, apparently for medical reasons. The remainder of the passengers suffered a five hour delay, as alternative equipment was brought to Guildwood from the Corporation's Toronto Maintenance Centre. The newly constituted train was then operated to Dorval by Mr. Christie and Mr. Selbie. At that point, as they had reached the legal limit of time in service, the Corporation was obliged to call an alternate crew to take the train from Dorval into Montreal. Apart from the delay, the cost of refunds to the passengers totalled in excess of $15,000.

Before leaving the facts it is important to appreciate the nature of the alternative scenarios put before the grievors at Guildwood in their discussions with Mr. Burgess, before they ultimately refused to take the original consist onward to Montreal. Among the alternatives considered was removing passengers from the club car, which Mr. Burgess obviously viewed as the problem. That was not acceptable to the grievors. They were next asked whether they would take the train to Montreal if the club car was removed from the consist. They again refused to operate under that alternative, apparently because of their belief that the wheels of the other cars were also in doubtful condition. As is evident from the evidence of Mr. Christie, he formed the view that the train must previously have been involved in an emergency brake application, as there was some flatness in the wheels, a condition which he had apparently found upon his initial inspection of the train at Ajax.

Following a subsequent disciplinary investigation, which was extensive in its duration, the Corporation concluded that the grievors did not have reasonable grounds to decline to operate their train when they were told by Mr. Burgess that it was proper to do so, either with the club car or without it. The Corporation submits that the grievors acted properly in their initial reporting of the noise experienced, their examination of the train at Ajax and the return of the train to Guildwood. It submits, however, that once the train was seen by Maintenance Director Burgess at Guildwood, and the wheels which were apparently the source of the noise were found to be in conformity with the standards established within the General Operating Instructions, it was then incumbent upon the grievors to operate the train to Montreal upon the advice of Mr. Burgess. The Brotherhood submits that the employees acted reasonably in refusing to operate what they viewed to be unsafe equipment. It also maintains that they were denied a fair and impartial investigation, regard being had to the time consumed in the investigation process.

The Arbitrator deals with the last issue first. In my view, although the investigation was obviously very extensive, it is less than clear that the Corporation is solely to blame for the many days which were required to

complete it. The record would indicate that the grievors, and in particular Mr. Christie, brought a relatively combative and adversarial attitude to the investigation process. Notably, at the outset of his own investigation statement, commenced on March 16, 2001, and resumed on March 21, 2001, Mr. Christie entered into evidence an audio cassette recording which he had made on the evening in question of conversations and parts of conversations between himself, Mr. Selbie, Mr. Burgess and others during the course of the events surrounding train 68 at Guildwood. It does not appear disputed that the recordings made by Mr. Christie were made surreptitiously and without the knowledge or consent of the other persons involved. The tape was apparently taken into evidence by the investigating officer, although its legality and ultimate admissibility was questioned. When he was asked whether he had any other evidence to enter Mr. Christie immediately produced two letters, one of which was a letter he had written to the Corporation's president and copied to the then Minister of Transport, through his own personal lawyer, in April of 1996. The tone of excessive legalism which plagued the investigation was, in addition, not diminished by Mr. Christie's closing remarks, including the statement that he intended to advise the House of Common Standing Committee on Transport as well as "the Leader of Her Majesty's Loyal Opposition as well as any other interested parties in opposition" of the events of February 7, and the Corporation's investigation process.

When the entire record is examined, the Arbitrator is not persuaded that the length of the investigation was caused by the Corporation alone. The points referred to above, as well as the fact that the investigating officer was obliged to obtain assurances from Mr. Christie that he was not taping the investigation procedure, and many technical objections and requests for adjournment by the Brotherhood's own representatives, suggest that in fact both sides contributed to the longevity of the proceedings. Although what transpired was not a model investigation, this is not a circumstance which discloses the denial of a fair and impartial hearing.

I next consider the question of whether there was insubordination on the part of the grievors. Upon a careful review of the evidence I am satisfied that there was, to a degree. The evidence discloses that train 68 was returned to Guildwood by reason of the presence of noise detected between the trailing end of the second coach and the leading end of the club car. When the wheels in question were inspected at Guildwood by Mr. Burgess, the Corporation's equipment supervisor, they were not found to be condemnable, in accordance with the Corporation's own General Operating Instructions. I am satisfied, on the balance of probabilities, that Mr. Burgess was correct in his assessment of the equipment. That is confirmed by the fact that the wheels in issue were removed and photographed shortly thereafter in Montreal, prior to being repaired. The shelling disclosed is not of a size or pattern which would have justified the removal of the equipment from service. That conclusion is further supported by sensor readings taken the previous day, which confirm that the wheels on both cars were within the acceptable level of impact load.

I am satisfied that in that circumstance the grievors, or a reasonable employee in the position of the grievors, should have accepted the judgement of the Corporation's maintenance supervisor and agreed to operate the equipment as assigned. If there is any doubt on that issue, it is still more difficult to understand why they would not have agreed to handle the train onwards to Montreal with the club car removed from the consist, as was offered to them.

The grievors appeared adamant and inflexible in their own view that the cars in question should never have been released for service in the first place, regardless of the professional opinion of Mr. Burgess.

There is no doubt in the Arbitrator's mind that both Mr. Selbie and Mr. Christie took the position they did in the best of good faith. As they explained at the arbitration hearing, their concerns with respect to Mr. Burgess' judgement were fuelled in part by what they took to be the doubtful tone of his voice when they asked him whether there might be further damage to the wheels if they should proceed onwards. It is clear that their concerns were also prompted, in part, by their examination of the wheels of all three cars when they did their initial inspection at Ajax. Noting that there were some flat parts on the wheels, they repeatedly expressed their own surmise that the cars must have been involved in an emergency brake application, and that they should never have been released for service on train 68.

There is, however, some serious uncertainty with respect to the flattening of the wheels which was raised as a problem by the grievors. As is evident from the material before the Arbitrator, certain flat spots are condemnable, while others are not, depending on the size of a flat spot or two adjoining skid flats. It would not appear disputed that there were no condemnable flat spots identified on the wheels which were directly inspected by Mr. Burgess. Nor is there any evidence to suggest that either of the grievors attempted to draw the attention of Mr. Burgess to any other wheel which had a flat spot or spots which would have rendered the wheel condemnable. In the Arbitrator's view, at a minimum, it was then incumbent upon the grievors to clearly demonstrate to Mr. Burgess that there were wheels on their movement which were in fact visibly condemnable. They did not do so, nor is the Arbitrator persuaded, on the balance of probabilities, that they could have. While they may have detected some skid flats on other wheels, those deficiencies may well have been within the tolerable limits for continued service.

I am satisfied that the Corporation has established, on the balance of probabilities, that in the circumstances which unfolded at Ajax and Guildwood on February 7, 2001, the grievors did not have reasonable grounds to refuse to handle train 68 to Montreal when advised by a person more qualified than themselves that it was appropriate to do so. Their response to the information given to them by Mr. Burgess was an improper refusal, in the Arbitrator's view, to carry out an appropriate direction without justifiable excuse. They were, to that extent, liable to discipline for insubordination.

There were, however, significant circumstances of mitigating value which, in the Arbitrator's view, must be taken into account in assessing the appropriate measure of discipline in the case at hand. Thirty demerits is an extremely serious level of discipline, approaching as it does the range of discipline normally associated with a cardinal rules infraction. As stressed above, I am satisfied that both Mr. Christie and Mr. Selbie proceeded as they did on the night in question on the basis of their own honestly held belief and good faith, and out of a professional concern for the safety of their train and its passengers. As noted above, I am satisfied that when they refused to change their view in the face of the opinion of the Corporation's own equipment inspector they went farther than they were reasonably entitled to. They were, nevertheless, motivated by genuine concern, and were not seeking to shirk their

responsibility or be relieved of their tour of duty. If anything, they worked a longer night as a result of their insistence on a substitution of equipment.

There are other mitigating factors to be weighed when regard is had to the grievors' employment records. Locomotive Engineer Selbie has worked for VIA without incurring any prior discipline. First hired by CN in 1974, he was only once disciplined by that company, in 1982 when he received ten demerits. Similarly Locomotive Engineer Christie has long service, having hired on with CN in April of 1974 and transferred to VIA in 1991. Like Mr. Selbie, he incurred only ten demerits, on one occasion while in the employment with CN, over his entire railroading career. The grievors are, as the evidence in the instant case indicates, conscientious employees of long service with very good disciplinary records. In the Arbitrator's view the full measure of thirty demerits was excessive to bring home to them the necessity to perform their duties as assigned when safety issues have properly been dealt with by a qualified Corporation supervisor/inspector with the proper authority to deal with such matters. In my view the assessment of twenty demerits would have been sufficient in the circumstances, and I deem it appropriate to exercise my discretion to make an adjustment accordingly.

Before leaving this matter, the Arbitrator further notes that in the case at hand the grievors did not invoke their right under the Canada Labour Code to refuse to perform unsafe work. Although it seems doubtful that their position would have been sustained by a safety inspector, it appears that their failure to invoke that right arises in part because of their unfamiliarity with the provisions of the Code. That problem was raised at the hearing by the Brotherhood's representative. In response the Corporation's counsel undertook that appropriate postings would be made in the Corporation's terminals with respect to the right of employees to refuse unsafe work, and the appropriate procedures which attach to the exercise of that right.

In the result the grievance is allowed, in part. The Arbitrator directs that the discipline assessed to the grievor be adjusted the reflect the assessment of twenty demerits for their failure to operate train 68 as assigned on February 7, 2001.

February 15, 2002 (signed) MICHEL G. PICHER
ARBITRATOR