CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO.76

Heard at Montreal, Monday, September 11th, 1967

Concerning

CANADIAN PACIFIC RAILWAY COMPANY (PACIFIC REGION)

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE:

Request for removal of 15 demerit marks debitted against the record of Engineer J. A. Cherry for failing to follow the instructions of the Superintendent relative to the movement of Extra 4104 North Spillimacheen to Golden, November 23, 1966 and claim for time lost including one days pay for time occupied in returning to his home terminal from Spillimacheen.

JOINT STATEMENT 0F ISSUE:

The Brotherhood contends that there was a violation of clauses D and E of Article 19 of the Collective Agreement in that Engineer Cherry did not commit any disciplinary offence and that he was held off unnecessarily in connection with the investigation. The Company contends that Engineer Cherry did commit a disciplinary offence, was not unnecessarily held off for investigation, and declines to remove the discipline and pay for the time lost as well as compensation.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(Sgd.) A. C. DOULL GENERAL CHAIRMAN	(Sgd.) R. S. ALLISON GENERAL MANAGER PACIFIC REGION

There appeared on behalf of the Company:

J. G. Benedetti	Supervisor Personnel & Lab. Rel's., CPR Vancouver
F. W. Booth	Superintendent - CPR, Revelstoke, B.C.

And on behalf of the Brotherhood:

A. C. Doull	General Chairman, B. L. E., Winnipeg

AWARD OF THE ARBITRATOR

In this matter the Arbitrator was supplied with a copy of the

statement taken from Engineer Cherry at the official investigation. In part, it told:

"Train orders received at Colvalli authorized our movement as Extra 4104 North from Colvalli to Golden.... While we were at Lake Windermere Conductor McDonald told me that it was the intention of the train crew to take rest after being on duty 12 hours. We arrived Spillimacheen, Mile 125.6 at about 22.5Ok, where the Conductor went to the telephone and notified the dispatcher of the train crew taking rest. In the meantime our train was moved into the siding and we tied up at Spillimacheen at 23.1Ok. Conductor McDonald told me that the train crew were on rest until 7.OOk the following morning. The following morning I was on diesel unit 4104 when Trainman Bradly came to the engine and told me that Mr. Booth, Superintendent, Revelstoke, wanted to speak to me on the telephone. I went to the telephone and Mr. Booth spoke to me about the movement of our train from Spillimacheen to Golden. Trains 82 and 84 were two opposing superior trains which were overdue at Spillimacheen. Mr. Booth said that as the Conductor would not copy a train order to cover the movement of our train to Golden, would I proceed to Golden under a flagging arrangement between Conductor McDonald and the dispatcher. I said that I would not. Mr. Booth said that I should proceed under the flagging arrangement he had told me about and if I had any grievance about the matter it should be taken up through the proper channels. Conductor McDonald was also at the telephone during my conversation with Mr. Booth. I spoke to Conductor McDonald and it was decided that we would not proceed to Golden without receiving the train orders necessary to our movement and I advised Mr. Booth of this. Mr. Booth then asked me to speak to the Fireman and two trainmen to enquire whether or not they would proceed to Golden under the flagging arrangement between Conductor McDonald and the dispatcher and I spoke to Fireman Huxtable and Trainmen Trower and Bradley and they said they would not proceed under the proposed arrangement and I told Mr. Booth of this.

Question: Did Mr. Booth ask you why you would not proceed under the proposed flagging arrangement and if so what was your reply?

Answer: Mr. Booth did ask me this question and my reply was that in my opinion it was not legal to do so.

Question: Did Mr. Booth assure you that the flagging arrangement proposed between the Conductor and the dispatcher for the movement of Extra 4104 North to Golden was quite legal both with the Company and with the Board of Transport Commissioners?

Answer: Yes, he did.

Question: Why then did you not agree to proceed to Golden under the proposed flagging arrangement?

Answer: Because I did not think that the proposed flagging arrangement was legal."

For the Brotherhood it was contended that Rule 99 of the Uniform Code of Operating Rules, which is the flagging rule for trains, is specific in its requirements. It does not provide for train operation under flag protection but only for train protection It does not provide for any form of verbal flagging. Its last paragraph states:

"Conductors and Enginemen are responsible for the protection of their trains."

Reference was also made to Rule 106 - 2nd paragraph:

"Conductors, enginemen and pilots, if any, are responsible for the safety of their trains and the observance of the rules and under conditions not provided for by the rules must take every precaution for protection. This does not relieve other employees of their responsibility under the rules."

Rule 108 was said to be applicable, reading:

"In case of doubt or uncertainty, the safe course must be taken."

It was submitted the safe course was to remain in the siding where the train was fully protected against any condition which might have arisen.

In summary the representative for the Brotherhood claimed:

1. Engineer Cherry committed no offence but carried out his duties as required by the rules.

2. He had no responsibility in creating any situation as he had not participated in the controversy.

3. He was unnecessarily brought into the dispute by the Superintendent as the situation had already been established between the Conductor and the Superintendent.

4. The whole situation was the result of lack of foresight and cooperation by the administrative staff at Revelstoke."

The representative for the Company told that when Conductor McDonald called the Dispatcher in Revelstoke requesting written orders for the movement of this train to Golden, he had been advised the Dispatcher was unable to have train orders delivered to Spillimacheen by any other train; that at that time he read to the Conductor the contents of 19-R Train Order No. 241, Dated November 23rd, 1966, addressed to trains No. 82 and 84 at Golden, which gave Extra 4101 North right over both these from Spillimacheen to Golden. The Superintendent then requested Conductor McDonald on the telephone to copy the

necessary train order. Conductor McDonald refused to copy the train order and also to take his train to Golden under the flagging arrangement, which he said he did not consider legal. He was given assurance that a flagging arrangement between himself and the Dispatcher was in order, both with the Company and with the Board of Transport Commissioners, but the Conductor stated he and the other members of the crew would not proceed to Golden under such an arrangement and would only proceed if written train orders were delivered to them at Spillimacheen. Conductor McDonald was tben notified by the Superintendent that he was held out of service.

The disciplinary action taken as result of this conduct was that Engineer Cherry's was debited with 15 demerit marks while Conductor McDonald was assessed 25 demerit marks and the remainder of the crew each 10 demerits.

It was contended that Engineer Cherry was fully aware of the fact that the train order Conductor McDonald refused to copy and which had been issued to Trains 82 and 84 at Golden gave his train the right over Trains 82 an 84 Spillimacheen to Golden, the objective terminal. It was further urged he was also well aware of the fact that the Dispatcher, with the full authority of the Superintendent and the Chief Dispatcher of the Division, was responsible for holding trains 82 and 84 at Golden until the arrival of Extra 4101 North at that point under the proposed flagging arrangement. In the face of those facts, it was submitted, to suggest there was any "doubt" or "uncertainty" or necessity for "precaution" cannot be realistically supported.

Consideration of the foregoing convinces that while ordinarily insubordination, for failure to comply with a reasonable order from proper authority, must be viewed seriously, there are circumstances in the situation detailed that in my opinion represent justification for the action taken by the Engineer involved.

I am persuaded to this conclusion by Rule 201 of the Uniform Code of Operating Rules, that reads in part:

> "For movements requiring their use, train orders will be issued by authority and over the signature of the superintendent or designated train dispatchers and only contain information or instructions essential to such movements."

Pertinent, too, in this situation is Rule 106, 2nd paragraph:

> "Conductors, enginemen and pilots, if any, are responsible for the safety of their trains and the observance of the rules and under conditions not provided for by the rules must take every precaution for protection. This does not relieve other employees of their responsibility under the rules."

I can find nothing in Rule 99 that makes it applicable to the situation that existed. As contended for the Brotherhood, it contains nothing about a train's operation, but only for train protection. Its emphasis by managerial representatives to the crew as having special significance in the circumstances was unwise.

Substance is given this conclusion by the contents of a letter sent the Brotherhood by the Secretary of the Board of Transport Commissioners for Canada, dated February 8, 1967, which said, in part:

> "As I understand your inquiry, however, you simply wish to clear up the substance of a question asked by the Investigating Officer relating to the operation of the train involved under so-called flag protection and on verbal instructions, the implication being that such a procedure is acceptable to the Board of Transport Commissioners.
>
> This matter has been referred to the Board and I am directed to state tht it has no record of any under- standing with railway companies subject to its juris- diction confirming the acccptance of such a procedure."

I am also persuaded that in deciding that the refusal of the grievor to proceed without written orders merited a penalty, the Company failed to take into consideration the circumstances that created the situation. It was stated the administrative staff were fully aware at 23.OOk November 22 of the condition that would prevail at 7.OOk November 23. However, no action was taken in that eight-hour period to arrange for the proper movement of this train in a manner complying with the rules.

I am convinced there was no mischievious intent in the general refusal to proceed as described. It is apparent all members of the crew in so refusing had qualms about their own safety as well as the protection of the Company's property. They believed they were placing themselves in an untenable position by failing to have in their possession the written orders contemplated by Rule 201. Had the members of the crew on either Train 82 or 84 misunderstood or neglected to properly comply with the holding instructions said to have been delivered to them and an accident resulted, the grievor would have had to depend for confirmation of the verbal instructions by those issuing them to justify his position. That is not the protection Rule 201 contemplates for him.

For these reasons I find the demerit makrs imposed on this grievor should be expunged from his record. I further find that under the provisions of Article 19 (e) this grievor having "been found blameless" should be reimbursed for time lost as result of the investigation.

J. A. HANRAHAN
ARBITRATOR