CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 742

Heard at Montreal, Tuesday, March 11, 1980

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)

and

UNITED TRANSPORTATION UNION (T)

DISPUTE:

Removal of discipline assessed Conductor H. C. Gaffney, Coquitlam, B.C., resulting from investigation in connection with delay to Extra 5851 East at Coquitlam, March 15, 1979, and payment for lost wages when withheld from service.

JOINT STATEMENT OF ISSUE:

Conductor H. C. Gaffney was called to take charge of train Extra 5851 East on March 15, 1979 and after commencing work, a dispute arose between Conductor H. C. Gaffney and Trainman J. Lupul, wherein Conductor Gaffney requested that the Company call another Trainman to replace Trainman Lupul on his crew. When Assistant Superintendent J. H. Bay arrived at the scene and after a discussion with Mr. Gaffney, he ordered Mr. Gaffney to leave the terminal with his train. Conductor H. C. Gaffney refused as the train had a bad order car No. 333391 that had to be checked. There was a problem re garding the radio and Trainman John Lupul was refusing to take instructions from him (the Conductor of the crew). Conductor H. C. Gaffney was then held out of service for investigation.

The investigation was held at Coquitlam on March 20-22, 1979. Following the investigation, the Company informed Conductor H. C. Gaffney that his record was being debited with 45 demerit marks for refusing duty by not carrying out a reasonable instruction from a Company Officer resulting in an unnecessary delay to Extra 5851 East at Coquitlam, March 15, 1979 and that he was being dismissed for accumulation of demerit marks.

The Union appealed the discipline assessed Conductor H. C. Gaffney, requesting the removal of the demerit marks and payment for all time lost on the grounds the Company did not establish Conductor Gaffney's res ponsibility in respect to the charges against him. The Union contends that the Company violated Article 32, Clauses (c), (d) and (e), as well as Clause (g) of the Run-Through Caboose Agreement of the Collective Agreement.

The Company declined the Union Appeal contending there was no violation of the Collective Agreement and that Conductor H. C. Gaffney's responsibility was established by the evidence adduced at

the investigation an that he was properly disciplined.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.) P. P. BURKE	(SGD) J. M. PATTERSON
General Chairman	General Manager, O & M

There appeared on behalf of the Company:

P. E. Timpson	Asst. Supervisor Labour Rel's, CP rail, Vancouver
J. H. Bay	Assistant Superintendent, CP Rail, Vancouver
J. T. Sparrow	Manager, Labour Relations, CP Rail, Montreal
B. P. Scott	Labour Relations Officer, CP Rail, Montreal

And on behalf of the Brotherhood:

P. P. Burke	General Chairman, U.T.U.(T) - Calgary
R. T. O'Brien	Vice President, U.T.U. Ottawa

AWARD OF THE ARBITRATOR

The issue in this case is whether or not there was just cause for the discharge of the grievor, following assessment of forty-five demerits against the grievor on the ground stated, which is in essence that the grievor was insubordinate on March 15, 1978.

On that day the grievor was the conductor responsible for Train Extra 5851 East, ordered for 1630, the grievor having been called for duty before that. The grievor registered out in the train register and then left the yard office to go to the units. His rear trainman, J. Lupul, noticed that the grievor did not take a radio. Mr. Lupul checked into that, and ended by requesting and signing for a radio himself. There was nothing wrong in that. There exists a Run-Through (Pooled) Caboose Agreement made by the parties, dated February 24, 1967, Clause (g) of which reads in part as follows:

> "Run-through (pooled) cabooses will be kept in a clean condition, maintained in good running order, windows cleaned, kept heated when necessary, and properly supplied including fuel, water, stationery and necessary equipment, by personnel other than trainmen."

One of the Union submissions is that there was a breach of that agreement by the Company. The basis of that submission appears to be that radios are necessary equipment, and that in this case the radio was not supplied by "personnel other than trainmen". Assuming that a radio is "necess ary equipment" then it would be the case that the Company should ensure that one would be supplied, and it would not be entitled to require trainmen to supply the caboose with a radio. In the instant case the Company did require that a radio be in the caboose: it was the grievor himself who protested its presence, on grounds which, as will appear, were entirely spurious. Further, the Company did not require a trainman to supply the caboose with a radio. The grievor himself was not at fault in not obtaining a radio

at the yard office. On the other hand the trainman, while not obliged to do so, was certainly not committing any offence when he signed for and took a radio to the caboose. He did not have to do that, but it was not wrong of him to do so, and the trainman's action quite obviously does not constitute a violation by the Company of Clause (g) of the Run-Through (Pooled) Caboose Agreement. The Company was not in violation of that agreement in this case.

The grievor, seeing Mr. Lupul with the radio, told him that he should not place the radio in the caboose, and that the train would not leave the terminal if it were. This confused Mr. Lupul, who then returned to the yard office to seek advice. He was told by the assistant superintendent that he could use the radio if it had been properly signed out. That had been done, and so Mr. Lupul took the radio to the caboose. This behaviour on the part of Mr. Lupul was entirely correct. To question an instruction is not necessarily to disobey it. Having sought higher authority than the conductor Mr. Lupul was then justified in what he did. There was no ground whatever for the grievor to seek a replacement for Mr. Lupul, or to take the position that he had somehow contradicted his authority as a conductor.

The grievor, it is said, was concerned about the presence of the radio, because he had received discipline (later removed) for not signing out a radio in the appropriate log. A grievance relating to that matter seems to have turned on the controversy, similiar to that referred to above, relating to the application of an understanding between the parties to the effect that radios would be handled by personnel other than trainmen. The particular dispute, however, arose over the requirement - surely not improper - of signing a log where a radio is issued. There was no requirement that a trainman get the radio; it was the grievor himself who asked for one in that case, and then refused to sign for it. In any event, none was issued, and since for that reason there was no need for the grievor to sign the log the discipline was - subsequently to the events involved in this case - removed. There was, however, no substantial relationship between the two incidents, an the grievor's refusal to have on his train a radio brought to it by Mr. Lupul and signed for by him, had no justification whatever.

Shortly after Mr. Lupul arrived at the caboose with the radio, the grievor arrived. There had been a brake test performed by the carman, who had indicated the train was OK to depart. On walking down to the caboose from the engine, however, the grievor had noticed an air leak on one of the cars. On reaching the caboose the grievor advised the carman, who was there, of the air leak and then, finding that Mr. Lupul had brought the radio, took the carman's radio and called for a replacement for Mr. Lupul. This action was, as has already been noted, quite unjustified.

The assistant superintendent and the general yardmaster then went to the train. They were informed by the engineman that the train had been given an OK to proceed from the carman, and that he was waiting for the OK from the conductor. They then went to the caboose. There, the assistant superintendent asked the grievor if he had the OK to go. The grievor replied yes, and then added that "there were problems about John (Mr. Lupul) not leaving". At that point that

point the assistant superintended stated "Do you mean the radio? The radio stays". The grievor then said he would have to wait until the issue was solved. Asked if he was refusing duty the grievor said "No sir, I am not" but then went on to say there were certain issues. The grievor was then told he would have to be taken from service, and he replied "Fine, I shall have to go home". As he was leaving the cab the assistant superintendet told the grievor he would call him in the morning with respect to an inves tigation, to which the grievor replied "Not likely".

This account of what took place in the caboose is drawn entirely from the grievor's own statement. His answers with respect to questions re lating to his having been directed to take the train out appear somewhat equivocal, although at one point in his statement the grievor did acknowledge that the assistant superintendent requested him to have the train leave the terminal. He did not comply with that request.

The grievor, at the investigation, explained his refusal to take out the train on three grounds. One was that there was what he called a "bad order car", being a reference to the air leak he had seen. The second was his dissatisfaction with the trainman, Mr. Lupul, and the third was that "the radio issue was not clear". Of these three reasons, only the first was of any substance. The grievor did report the air leak to the carman when he reached the caboose. He then did nothing further about it. Rather, finding that Mr. Lupul had brought the radio to the caboose, he then used the carman's radio to call for a new trainman. He made no request for any exam ination of the air leak. The grievor knew that the brake test had been per formed, and it appears from the material before me that the leak was not a serious one. However that may be, it would have been quite proper for the grievor to have done something about it, safety considerations being paramount. In fact, the grievor did not raise the matter again on that day, and gave no indication to the assistant superintendent that such an issue - the only one that might be thought to have substance - had arisen.

Thus, the grievor refused to take out the train for reasons which would not justify such refusal. The trainman had done nothing wrong and there was no cause to seek to replace him. The radio "question" was nothing more than a lack of understanding on the grievor's part. Certainly when the assistant superintendent said "the radio stays", that relieved the grievor of any concern he might have felt in respect of signing for it. It had, in fact, been made clear to the grievor that he was to take the train out. He did not do so, and he did not hesitate to leave work, making a rather brusque remark to the assistant superintendent, but certainly not raising any issue of safety.

In these circumstances the grievor refused duty by not carrying out a reasonable instruction from a Company officer. He was liable to dis cipline on that account.

In addition to alleging that the Company was in violation of paragraph (g) of the Run-Through (Pooled) Caboose Agreement (and I have already given reasons for concluding that the Company was not in violation of that agreement), the Union has alleged that the Company

was in violation of para graphs (c) (d) and (e) of Article 32 of the collective agreement, which deals with the matter of investigations and discipline. In my view, the Company was not in violation of its obligations under that article. The grievor was present at the investigation of others and had full opportunity to rebut their evidence.

The grievor was, therefore, properly subject to discipline, and the Company complied with the appropriate procedural requirements. It is not necessary to make any precise finding as to the number of demerits it would have been proper to assess. Whether or not forty-five demerits was proper, I have no doubt that it would not have been excessive to assess twenty demerits. That alone, added to the forty-five demerits which had been assessed against the grievor in September, 1978, for insubordination (and which were upheld at arbitration), would have meant the accummulation of over sixty demerits. In the circumstances, therefore, it is my conclusion that there was just cause for the assessment of a substantial number of demerits against the grievor, and that there was just cause for his discharge.

The grievance must therefore be dismissed.

J.F.W. WEATHERILL
ARBITRATOR