CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 863

Heard at Montreal, Thursday, September 10, 1981

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)

and

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Conductor J. G. Evans, Revelstoke, B.C. for accumulation of demerit marks resulting from the assessment of 160 demerit marks for delaying eight trains between September 19, 1980 and October 18, 1980, to take meals and his dismissal for refusing to comply with instructions from Company Officers to proceed with Train 404 from Golden on September 22, 1980.

JOINT STATEMENT OF ISSUE:
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1. An investigation was held at Revelstoke comnencing on October 31, 1980 and concluding November 19, 1980, in connection with delay to the following trains as a result of taking meals: No. 405 - September 19, 1980; No. 404 - September 22, 1980; Boxes - October 4, 1980; No. 675 - October 5, 1980; No. 677 - October 7, 1980; No. 67 - October 16, 1980; No. 482 - October 17, 1980; No. 821 - October 18, 1980.

Following the investigation, Conductor Evans was issued Form 104's dated December 2, 1980, reading as follows:

"Please be informed that your record has been debited with 160 demerit marks for your responsibility in delaying the following trains to take meals in violation of the Memorandum of Understanding dated September 13, 1980:

No. 405 - September 19, 1980
No. 404 - September 22, 1980
BOXES - October 4, 1980
No. 675 - October 5, 1980
No. 677 - October 7, 1980
No. 67 - October 16, 1980
No. 482 - October 17, 1980
No. 821 - October 18, 1980

Please be informed that you have been DISMISSED for accumulation of demerit marks."

The Union appealed the discipline assessed Conductor J. G. Evans requesting the removal of the 160 demerit marks and reinstatement into service with payment for all time lost, on the grounds the Company did not establish Conductor Evans' responsibility in respect

to the charges against him. The Union further contends the Company violated Article 23, Clause (g) and Article 32 of the Collective Agreement.

2. An investigation was held at Revelstoke on November 13, 1980 in connection with Mr. Evans' refusal to follow instructions to proceed with his train from Golden to Field on September 22, 1980.

Following the investigation, Conductor Evans was issued Form 104 dated December 2, 1980, reading as follows:

> "Please be informed that you have been DISMISSED for refusing to comply with instructions from Company Officers to proceed with your train, No. 404, from Golden, September 22, 1980."

The Union appealed this dismissal of Conductor Evans and requested his reinstatement into service with payment for all time lost on the grounds the Company excessively delayed the investigation. In addition, the Union contends that dismissal was too severe a penalty in this instance.

The Company declined both appeals on the basis that the investigations were properly conducted and that the discipline assessed was proper and justified based on the evidence produced at the investigations.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) P. P. BURKE GENERAL CHAIRMAN	(SGD.) L. A. HILL GENERAL MANAGER, OPERATION AND MAINTENANCE

There appeared on behalf of the Company:

R. Colosimo	-- Vice-President, Industrial Relations, CP Rail, Montreal
J.D. Bromley	-- Vice-President, Operations & Maintenance, CP Rail, Vancouver, B.C.
J.M. White	-- Superintendent, CP Rail, Revelstoke Division, Revelstoke, B.C.
P.E. Timpson	-- Labour Relations Officer, CP Rail, Montreal
L.J. Masur	-- Supervisor, Labour Relations, CP Rail, Vancouver, B.C.

And on behalf of the Brotherhood:

P.P. Burke	-- General Chairman, UTU, Calgary, Alta.
R.T. O'Brien	-- Vice-President, UTU, Ottawa, Ont.
J.H. McLeod	-- Vice-General Chairman, UTU, Medicine Hat, Alta.
W.J. Cyronek	-- Local Chairman, UTU, Revelstoke, B.C.

AWARD OF THE ARBITRATOR

The grievor was dismissed on two counts, for accumulation of demerits in respect of a series of eight incidents in which trains were delayed, and for refusal to comply with certain instructions on September 22, 1980. The two grounds of discipline are quite different, and this is not at all a case of "double jeopardy", which term has no application in these circumstances.

In the eight cases referred to, the grievor caused delays to his train by taking time to eat. While the grievor, at his investigation, appears to have questioned the times given by the company from its records, there is no real doubt that in each case the train was delayed, and that in each case delay was due to the crew taking time to eat. It was, indeed, the grievor's position that he was entitled to halt operations while he ate. Thus, at the investigation in respect of delay on September 22, 1980, the grievor stated, in part, that "We were going to eat after 8 hours and 10 minutes on duty anyway".

That statement might appear to suggest that the grievor was doing nothing more than asserting a reasonable human need for meals, which was somehow being frustrated. Of course the grievor, like any employee or any human being was entitled to eat at reasonable times and at reasonable intervals. No one has suggested that he should work for eight hours without a break before taking some nourishment. The company had not sought to prevent the grievor from eating, and it is clear from the collective agreement that his right to do so was expressly recognized by the parties. What is in issue is not the grievor's right to eat, which is clear, but rather whether or not it was proper for him to delay his train while he did so.

On this point, both the collective agreement and common sense are also clear. Article 23 (g) of the collective agreement is as follows:

> "Time occupied in taking meals enroute will not be deducted in computing overtime or arbitraries unless such overtime or arbitraries have been increased by trainmen delaying the train by taking time to eat."

Obviously, the parties contemplate (not unnaturally) that members of train crews will take meals en route. Their doing so will not normally have any effect on their compensation. It is only where they delay their train by taking time to eat that that might occur. There may, then, be cases where trains are delayed because trainmen take time to eat. Where trainmen cause such delays, it will be a question of fact in each case whether or not the circumstances are such as to justify the delays. In the instances involved in this case, there would appear to have been opportunities during the course of the grievor's tours of duty when he could have taken his meal without delaying the train. Instead, the grievor seems to have chosen, on most occasions, to delay his train while he went to a restaurant - sometimes at a considerable distance - to take his meal. The collective agreement certainly does not contemplate that. The obvious expectation of the parties was that employees engaged in operations such as these would take their lunch with them, and find

an appropriate and reasonable time in the course of their tour of duty to eat it. Their taking such time would not result in any loss of income. It may be, however, that exceptional circumstances would make it impossible for meals to be taken in the normal course, and in such circumstances it may be that delays would be caused due to meals being taken. There might be an effect on income in such cases, but discipline would not be proper if the delay were justified. In the instances involved in this case, there was no such justification.

These were, therefore, instances in which discipline was proper. Like the grievor in case no. 862, the grievor in this case appears to have made a practice of causing delays of this sort, and perhaps other delays, in furtherance of what was determined by the Canada Labour Relations Board to have been an illegal strike. He had been disciplined on account of such delays, but the discipline was removed when a memorandum of agreement was signed, clarifying the terms of the collective agreement. It was intended that normal operations would be restored, but the grievor did not keep his part of the bargain and continued his illegal activity. He was quite properly subject to discipline therefore, and the assessment of 20 demerits was not excessive. In view of the grievor's key role and example with respect to this illegal activity, it was in no sense improper discrimination that the company may have assessed lesser penalties on employees who were not so active.

The grievance in respect of penalties assessed for causing delays to trains is therefore dismissed. It follows that the grievor's dismissal for accumulation of demerits was justified. In view of that conclusion, it is not necessary to deal at length with the matter of the grievor's refusal of instructions on September 22, 1980. It is clear, however, that the grievor did, expressly and indeed obstinately, refuse to follow the repeated instructions of company officers with respect to train movements. His reason for doing so was in no way related to safety or any other relevant consideration, but was based on an interpretation of the term "switching" as it appears in the collective agreement. There is, of course, an appropriate forum for the determination of questions of that sort. The grievor's duty in the circumstances (whether his view of the collective agreement was correct or not) was to carry out the instructions he had been given. His deliberate and, in this case, plainly insubordinate refusal subjected him to the most severe discipline.

It was contended that the company was in violation of article 32 of the collective agreement, relating to Investigations and Discipline. In my view, the requirements of that article were met. The grievor did have actual notice of the investigation and was accompanied by a union representative. While he requested to be present at the investigation of the grievor in case no. 862, who had been assigned to one of the trips in issue, that request was properly refused since thatperson was not, in the circumstances of this case, one "whose evidence may have a bearing on the employee's responsibility" on any reasonable reading of that provision. While there was no very substantial delay in investigating this matter, such delay as there was is attributable to the very tactics in which the grievor had engaged, and cannot be relied on as a ground of objection. In the circumstances, it was proper that the grievor was held out of service

for investigation in respect of the incidents in question. There was, as I find, compliance with the requirements of article 32.

For all of the foregoing reasons it must be concluded that discipline of the grievor was amply justified, and that discharge was appropriate in the circumstances. The grievance is therefore dismissed.

J.F.W. Weatherill
Arbitrator