CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 952

Heard at Montreal, Wednesday, May 12, 1982
Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
EASTERN REGION

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Dismissal of T. W. Bushey for the accumulation of in excess of 60 demerits.

JOINT STATEMENT OF ISSUE:

1. On July 9, 1981, T. W. Bushey was assessed 60 demerits for refusing to work on June 15, 1981.

2. The Union contends:
- that Mr. Bushey's refusal to work was justified account imminent danger.

- that T. W. Bushey was prepared to work at another job on June 15, 198l, that would not require being in a steel gondola car unloading track spikes;

- that T. W. Bushey be paid for all wages since dismissal on July 9, 1981, until reinstated, including overtime.

3. The Company declined to reinstate Mr. Bushey.

FOR THE UNION:	FOR THE COMPANY
(SGD.) H. J. THIESSEN	(SGD.) A. A. BOYAR
System Federation General Chairman	Acting General Manager Operation and Maintenance

There appeared on behalf of the Company:

L. A. Clarke	- Supervisor, Labour Relations, CP Rail, Toronto
J. Laliberte	- Roadmaster, CP Rail, Peterborough
R. A. Colquhoun	- Labour Relations Officer, CP Rail, Montreal

And on behalf of the Union:

F. L. Stoppler	- Vice-President, BMWE, Ottawa
A. Passaretti	- Vice-President, BMWE, Ottawa
H. J. Thiessen	- System Federation General Chairman, BMWE, Ottawa
R. Wyrostok	- Federation General Chairman, BMWE, Edmonton
E. J. Smith	- General Chairman, BMWE, London
A. W. Olson	- General Chairman, BMWE, Regina

AWARD OF THE ARBITRATOR

The grievor refused to perform the work to which he was assigned, taking the position that it was unsafe. No report of the matter was made pursuant to the provisions of the Canada Labour Code. In any event, it is my conclusion from the material before me that the grievor did not have reasonable cause to believe that a condition existed in the place that would constitute an ixminent danger to his own safety and health.

Thus, neither under the Canada Labour Code nor as a general matter had the grievor any justification for his refusal to work.

The grievor refused to work unloading steel spikes from an open gondola car because, as he maintained, there was lightning in the sky, and since the car, the ground around it and the spikes in it were wet, he feared injury if lightning should strike the car. I do not make any determination of the reasonableness of fear for one's safety in the event of working in an open railway car during a lightning storm. It is not at all clear that the risks would be different from working on or near track, or even in an open field in such circumstances. In the instant case, the conclusion from all of the material before me is that the thunderstorm had ended and the lightning had moved away from the area before the employees were asked to work in the gondola car. Thus, even if the grievor's fears would have been justified had there been lightning, there was no lightning, and so no factual or reasonable basis for the grievor's expressed fears.

There was, then, no justification for the grievor's refusal to perform his assigned work. It may be noted that many other employees were already engaged in the work which the grievor purported to find unsafe. The grievor's conduct was improper, and he was subject to discipline.

In my view, discharge would be too severe a penalty for one offence of this nature, serious though it is. In Case No. 818, the penalty there assessed was reduced to one of thirty demerits. In the instant case, the grievor himself had been assessed thirty demerits for refusal to work in the rain in November, 1980. While I would consider sixty demerits an excessive penalty, and would reduce it to thirty, the result is nevertheless the accumulation of sixty demerits, and the grievor was still subject to discharge.

In the result, therefore, the grievance is dismissed.

J. F. W. WEATHERILL,
ARBITRATOR