CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1290

Heard at Montreal, Thursday, October 11, 1984

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Prairie Region)

and

(RCTC) RAIL CANADA TRAFFIC CONTROLLERS

DISPUTE:

Discipline assessed Train Dispatcher D. B. Lewry, Moose Jaw, Saskatchewan.

JOINT STATEMENT OF ISSUE:

On January 4th, 1983, Train Dispatcher D. B. Lewry was assigned to work the 0001 to 0800 shift as train dispatcher in the Moose Jaw Dispatching Center. Train Dispatcher Lewry refused to operate the Hot Box Detectors during this shift.

Following an investigation, Train Dispatcher Lewry was issued a discipline (letter from Superintendent A. S. Harris) on January 18th, 1983, which stated that his record was debited with 45 demerit marks for "Insubordination in refusing to obey a direct instruction to operate hot box detectors by the Night Chief Dispatcher, Moose Jaw, Saskatchewan, January 4th, 1983". Furthermore, he has been dismissed from Company service for "Accumulation in excess of 60 demerit marks, Moose Jaw, January 18, 1983".

The Union contends that the discipline assessed Dispatcher Lewry is too excessive.

The Company contends that the discipline assessed Dispatcher Lewry is appropriate.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) D. H. ARNOLD System Chairman, RCTC-CP	(SGD.) E. S. CAVANAUGH General Manager, Operation and Maintenance.

There appeared on behalf of the Company:

J. D. Champion	- Supervisor, CPR, Winnipeg
D. Lypka	- Assistant Supervisor, CPR, Winnipeg
J. D. Gudmunson	- Asst. Superintendent Transportation, CPR, Winnipeg
J. W. McColgan	- Labour Relations Officer, CPR, Montreal

And on behalf of the Union:

D. H. Arnold - System Chairman, CP System, RCTC, Winnipeg

AWARD OF THE ARBITRATOR

The grievor, Train Dispatcher D. B. Lewry, was disciplined for his alleged insubordination occasioned by his refusal to operate the "hot box detector" on the statutory holidays that fell on December 28, 1982 and January 4, 1983. For his first infraction the grievor was assessed 30 demerit marks, and, for his second infraction he was assessed 45 demerit marks. Accordingly, the grievor was discharged.

Because the issues with respect to the propriety of the employer's decision to take disciplinary action are practically identical in both instances I have consolidated the two cases.

It is common ground that "the hot box detector" serves the purpose of providing a safe, secure railway service. This technology is designed to detect defects in the wheel operation of a train consist. Normally this technology is monitored by an operator located at the Moose Jaw Dispatcher's Office. His function in the event the hot box detects an irregularity is to alert the train crew of the problem.

Because the Christmas holiday fell on December 28, 1982, the employer operated its rail service on a drastically reduced basis. Since only four passenger trains were scheduled to run in the territory of the Moose Jaw Dispatcher's Office that day the normal work force was reduced to one employee.

On December 28, 1982 the grievor was assigned his normal dispatcher's functions and was also assigned the operator's functions on "the hot box detector". The parties agree that the grievor refused to perform the operator's duties on "the hot box detector". The evidence established that the two passenger trains that were scheduled to run during the grievor's shift would have required the consumption of eighteen minutes of the grievor's time.

There is no doubt in my mind that the grievor was given a clear directive by his employer to perform the operator's duties on "the hot box detector". I do not find that the clarity of the employer's directive should be allowed to be blurred in the grievor's telling Mr. T. K. Sinclair, Night Chief Dispatcher, on December 23, 1982, "that he was not going to operate the scanner". In my view that statement formed a part of the grievor's overall strategy to deliberately defy a reasonable order of his employer. As a result of his insubordinate behavior the two passenger trains served by the Moose Jaw Dispatcher's Office were deprived of the protection afforded by "the hot box detector" Aside from the grievor's inappropriate behavior he may have created an unnecessary safety hazard to the crews and passengers of the two trains.

I am totally in agreement with the company's position that this case represents a classic instance of where the grievor should have obeyed his employer's directive and grieved later. The several excuses advanced by the grievor for his failure to abide by the directive aside from their transparency, serve to illustrate the wisdom of the "obey now, grieve later" rule.

Firstly the grievor argued that he was not properly qualified to perform the Operator's functions. This excuse was clearly answered by the grievor's past assignment to perform the very same function the previous Christmas holiday. Secondly,' the grievor indicated he may have been rendered unqualified by reason of any new instruction that may have been issued during the course of that year. The company demonstrated that any instruction with respect to "the hot box detector" that may have been issued would have been sent to the dispatchers as well as the operators. And, in any event, the grievor had access to any such new instructions.

Thirdly, the grievor suggested that he would be creating a safety hazard to rail traffic by leaving his Dispatcher's Office to attend to the operator's duties (see UCOR Rule 216). The employer demonstrated that it is a normal part of the grievor's duties as a dispatcher to leave his office on a short, intermittent basis. In any event loudspeakers are dispersed throughout the office complex to alert the grievor to any emergency while away from his dispatcher's post.

Finally, it was submitted that the employer would be in breach of Article 8.26.01 of the collective agreement in requiring the grievor to do "clerical work" that would interfere with the proper handling of his duties. Indeed, the trade union representative could not bring himself to seriously accept that operating a new technological device designed to protect public safety was "clerical work".

In the last analysis the issue of whether or not the grievor had a legitimate complaint under the collective agreement or with respect to the UCOR rules is not relevant. In the absence of any evidence that would bring the grievor within the exceptions to the "obey now, grieve later" rule, he was duty bound to perform the operator's functions on "the hot box detector" and grieve any violation of the UCOR rules or the collective agreement at a later date. The irony of the grievor's case is in his advancing the theory that he was performing a safety service in taking this particular stand. As has already been suggested the grievor by his insubordinate action created a hazard that was both unnecessary and ill advised. In short, the grievor has not brought himself within any exception to the "obey now, grieve later" rule. Accordingly in my view he was appropriately disciplined for his insubordinate action by the imposition of thirty demerit marks.

It is also common ground that approximately one week later the statutory New Year's holiday fell on January 4, 1983. Again, the grievor was the sole dispatcher to be assigned to the Moose Jaw Dispatcher's Office. At that time he was clearly directed to perform the operator's duties on "the hot box detector". The grievor repeated the same insubordinate action, and refused to perform the duties required of him. The employer thereupon took the grievor out of service and ultimately assessed the grievor 45 demerit marks which resulted in his discharge.

The same issues were raised in this particular instance as was already discussed with respect to the grievor's insubordinate

activity of December 28, 1982. No useful purpose will be served in my repeating them once again. It suffices to say that the employer had cause once more to take disciplinary action against the grievor for his second infraction on January 4, 1983.

There is one very disturbing twist however in the second case that differs from the first. And, quite frankly, through no fault of the employer, this concern is causing me some diffidence with respect to sustaining the discharge penalty. The facts creating this difficulty ought to be explained.

The grievor was called for a disciplinary interview on December 31, 1982 with respect to the incident of December 28th. At that time he put his case forward in an effort to justify his insubordinate actions. The employer obviously was not impressed with his explanations (as I was not) and on January 7, 1983 advised him of the imposition of a penalty of thirty demerit marks. By that time the grievor had already coamitted his second infraction on January 4, 1983.

What the employer clearly was communicating to the grievor by the imposition of thirty demerit marks was the seriousness with which it viewed his actions on December 28th. And, at the same time, the grievor was being told he was being given "one last chance". In my mind, the full impact of the first disciplinary action, having regard to its corrective purpose, would have obviously eluded the grievor. Or, from a different perspective, the nagging question that has been raised is whether the grievor would have committed the second infraction had he known of the employer's intention to assess him thirty demerit marks for the first. In short, the grievor has been denied the benefit of the type of progressive discipline anticipated under "The Brown System". And, quite frankly, the only way this dilexma could have been avoided was for the employer to have taken Mr. Lewry out of service pending its decision with respect to the December 28th infraction.

Notwithstanding some reluctance on my part, I have decided for the above reason to give the grievor "his last chance". The employer is directed to remove the forty-five demerit marks from the grievor's personal record and to reinstate him forthwith without compensation or other benefits upon the receipt of this decision. In lieu thereof the grievor is to be suspended from the service of the company effective January 18,1983 until his reinstatement in accordance with this decision.

I shall remain seized for the purpose of implementation.

DAVID H. KATES,
ARBITRATOR.