CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1622

Heard at Montreal, Wednesday, February 11, 1987

Concerning

CANADIAN PACIFIC LIMITED (CP Rail)
(Prairie Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Mr. R. L. McDonald, B&B Foreman was assessed 35 demerits for failure to comply with flagging requirements for Train Order No. 111. Example 2, Form "Y" violation Rule 42, Paragraphs E and F U.C.O.R., August 13, 14, 15, 1985, Mileage 39.0 to 40.0, Tyvan SubdivisIon.

JOINT STATEMENT OF ISSUE:

The Union contends that the discipline assessed is not warranted.

The Union further contends that the demerits be removed, Mr. McDonald reinstated to his former position with all seniority rights and benefits and payment for full compensation for all time held out of service.

The Company denies the Union's contention and declines payment.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) H. J. THIESSEN	(SGD.) E. S. CAVANAUGH
System Federation	General Manager,
Operation and Maintenance	Operation and Maintenance

There appeared on behalf of the Company:

G. W. McBurney	- Asst. Supervisor Labour Relations, CPR, Winnipeg
D. A. Lypka	- Supervisor Labour Relations, CPR, Winnipeg
R. A. Colquhoun	- Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	- System Federation General Chairman, BMWE, Ottawa
L. M. DiMassimo	- Federation General Chairman, BMWE, Montreal
R. Y. Gaudreau	- Vice-President, BMWE, Ottawa

AWARD OF THE ARBITRATOR

The Company objects to the arbitrability of this grievance. Its objection does not, however, appear on the face of the Joint

Statement of Issue. It is common ground, in fact, that in the normal case the grievance would have proceeded on an Ex Parte basis if an issue in respect of arbitrability had been raised. The Union submits that arbitrability cannot now be pleaded at the hearing. It cites, in support of that proposition the provisions of Article 12 of the Agreement governing the procedures of the Canadian Railway Office of Arbitration. It provides as follows:

> 12. The decision of the Arbitrator shall be limited to the disputes or questions contained in the joint statement submitted to him by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues, conditions or questions which may be arbitrated, to such issues, conditions or questions.

It does not appear in dispute that Mr. McDonald's grievance was not submitted in a timely fashion at Step 1. The record establishes that in a letter dated November 7, 1985, Division Engineer R. A. Sillitto expressly refused the Step 1 grievance filed by General Chairman McInnes, noting that the grievance was out of time and referring to Article 18.6 of the Collective Agreement. It appears, however, that the matter was progressed from that point directly to Step 3, and that the Company Officer responsible at that stage, Regional Engineer W. C. Tripp did not inform himself of the position taken at Step 1, or that the Union had omitted to exhaust Step 2. In effect Mr. Tripp acceded to the request of Mr. McInnes to extend the time limits for Step 3, thereby giving every outward indication that he was not adhering to the position on arbitrability taken by the Company at Step 1.

The Arbitrator has some difficulty accepting the characterization of what occurred as a misleading of the Company's Step 3 Officer, Mr. Tripp, by the Union. It is plainly not the responsibility of the Union to remind the Company at each point of encounter of the various elements of its case. The Union was entitled to assume that the Company's officer dealing with the grievance at Step 3 was fully apprised of the facts of the case as well as the positions taken by the Company as the grievance progressed. Different considerations might apply if it were established that some misrepresentation on the part of the Union had induced the Company's error. That is not the case here, and I must conclude that in all of the circumstances the Company must be taken to have waived or abandoned any objection to the timeliness of the grievance, or to the failure on the part of the Union to progress it through Step 2, by its acquiescence in the extension of time limits at Step 3 and its consistent involvement in the progressing of the grievance thereafter up to and including the framing of the Joint Statement of Issue. In these circumstances Article 12 of the CROA rules must be applied and the Company's objection as to the arbitrability of the grievance cannot be sustained.

I turn to consider the merits of the grievance. The material establishes beyond dispute that B&B Foreman McDonald failed to comply with flagging requirements mandated by Rule 42 of the Uniform Code of Operating Rules. It is not disputed that his error caused the delay of Work Extra Train 3007 for approximately one hour on August 15, 1985

Any violation of the Uniform Code of Operating Rules is a serious matter. It is also true, however, that the breach of certain rules will create more obvious situations of peril than others, and in that sense there may be degrees of gravity in rules infractions which must be assessed on a case by case basis. The records of this office indicate that in the past the Company has responded to rule violations having regard to a number of factors, including the gravity of the offense, any consequences flowing from it in respect of health and safety, damage to Company equipment or interference with operations, as well as the prior record of the employee concerned. Discipline imposed in cases involving violations of the Uniform Code of Operating Rules has therefore ranged from the imposition of a relatively low number of demerit marks up to and including dismissal. (See CROA 1592, and material and cases considered therein).

The grievor is an employee of some nine years' service. While his record is plainly not without blemish, during that entire period he has never been disciplined for a violation of the Uniform Code of Operating Rules. While I do not share the Union's characterization of what happened as a "technical violation", it is true that the grievor properly took out train order 111, which would require all trains with notice of the order to stop in the absence of the flags being displayed, as in fact occurred in this case. While the grievor's error was serious, it did not create a circumstance of imminent peril. In light of that fact, and having regard to the grievor's prior record in respect of the rules, the Arbitrator deems it appropriate to substitute the imposition of 20 demerit marks against the grievor for the incident in question.

His record shall therefore stand at 55 demerits, and he shall be reinstated in his position without compensation or benefits, but without loss of seniority. The Arbitrator retains jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this decision.

MICHEL G. PICHER,
ARBITRATOR.