CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1696

Heard at Montreal, Tuesday, October 13, 1987

Concerning

CANADIAN NATIONAL RAILWAY

And

THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS

DISPUTE;

Appeal of discipline assessed the record of Locomotive Engineer E. G. Schiestel of Edmonton, Alberta, May 4, 1985.

JOINT STATEMENT OF ISSUE:

Locomotive Engineer E. G. Schiestel's record was assessed 30 demerit marks effective May 4, 1985.

> For the violation of Rule Number 292 of the Uniform Code of Operating Rules (Revision 1962) at Signal 61N on the North Main Track at Union Junction, Edson East Subdivision, on May 4, 1985, with Engine 5330.

The Brotherhood has appealed the discipline on the grounds that the Company violated paragraph 86.1 of Article 86 of Agreement 1.2, as Locomotive Engineer Schiestel was not advised in writing of the discipline assessed within the 20 day time limit. The discipline assessed should, therefore, be removed from Locomotive Engineer Schiestel's record.

The Company has declined the appeal.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD) P. SEAGRIS GENERAL CHAIRMAN	(SGD) D. C. FRALEIGH ASSISTANT VICE-PRESIDENT LABOUR RELATIONS

There appeared on behalf of the Company:

D. C. St. Cyr	- System Labour Relations Officer, Montreal
J. Hnatiuk	- Manager Labour Relations, Montreal
M. Darby	- Transportation Co-Ordinator, Montreal
B. Ballingall	- Regional Labour Relations Officer, Edmonton
L. F. Caron	- Regional Labour Relations Offcer, Montreal

And on behalf of the Brotherhood:

P. Seagris - General Chairman, BLE

AWARD OF THE ARBITRATOR

It is common ground that the grievor received written notification of his discipline 21 days after the investigation conducted by the Company under article 86.1. It provides as follows:

> 86.1 A Locomotive Engineer will not be disciplined or dismissed without having had a fair and impartial hearing and his responsibility established and shall be advised in writing of the decision within 20 days from the date the investigation is held, except as otherwise mutually agreed.
> (emphasis added)

The Union submits that the Company's failure to notify the grievor within the 20 days, in writing, vitiates the discipline imposed.

The effect of time limits in collective agreements has the been the subject of much arbitral litigation. The general principle is that when a time limit established in a collective agreement is, expressly or impliedly, mandatory, a failure to meet the time limit will void the action taken. Where, however, time limits are inserted only as a general direction to the parties, and are said to be "directory" rather than "mandatory", failure to adhere to them may not result in any prejudice or adverse consequences. Typically, the collective agreement may contain a number of time limits, and whether a given limit is intended to be mandatory must depend on the language and the context of the collective agreement. (See, Brown and Beatty, Canadian Labour Arbitration, 2nd ed., (Aurora, 1984) pp. 95-98)

In considering the meaning of Article 86.1 of the instant Agreement, it is significant to note that it stands in stark contrast to other provisions of the contract which set out time limits. For example, Article 91, which governs the grievance procedure, establishes fixed limits for the progressing of grievances by the Union and, in some cases, the time during which the response of the Company must be made. The Article is very specific about the consequences of failing to abide by those time limits, as evidenced by the following provisions:

> 91.4 Any grievance not progressed by the Union within the prescribed time limits shall be considered settled on the basis of the last decision and shall not be subject to further appeal. The settlement of a grievance on this basis will not constitute a precedent or waiver of the contention of the Union in that case or in respect of other similar claims.

Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may, except as provided in paragraph 91.5, be progressed to the next step in the grievance procedure.

91.5 In the application of paragraph 91.1 of the Article to a grievance concerning an alleged violation which involves a disputed time claim, if a decision is not rendered by the appropriate officer of the Company within the time limits specified, such time claims will be paid. Payment of time claims in such circumstances will not constitute a precedent or waiver of the contentions of the Company in that case or in respect of other similar claims.

As the above provisions indicate, the parties have intended that the failure to abide by the time limits set out in the grievance procedure will bring about a finality in the disposition of the matter. In this context, it is fair to conclude that where they intended such consequences, the parties chose to articulate them specifically.

In contrast, Article 86.1 is devoid of any provision suggesting that a failure to strictly comply with the time limit established therein must vitiate the discipline. Moreover, from a practical standpoint, that is understandable. There may well be circumstances, particularly when an employee subject to discipline is retained in service, when it is difficult or impossible for the Company to serve him or her personally with a written communication. That is what transpired in the instant case, as the grievor was on the road in the service of the Company on the 20th day following his investigation. In the arbitrator's view it would require clear and specific language to conclude that in this context the parties intended a strict application of the time limits, failing which the Company would forfeit its ability impose discipline for misconduct, however serious. Moreover, although this aspect of the case was not argued, the Arbitrator would seriously doubt that the Union could refuse to agree to an extension of the time limits for other than reasonable and defensible motives. It is at least arguable that that much may be implied from the terms of article 86.1. There is no suggestion here of laxity or an abuse of the process by the Company, operating to the prejudice of the grievor.

For the foregoing reasons the arbitrator is satisfied that Article 86.1 establishes a directory, and not a mandatory time limit. (See also C.R.O.A. Case No. 1222 and C.R.O.A. CASE No. 1473) The grievance is therefore dismissed.

MICHEL G. PICHER
ARBITRATOR