CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1927

Heard at Montreal, 14 June 1989

Concerning

VIA RAIL CANADA INC.

And

UNITED TRANSPORTATION UNION

DISPUTE:

Appeal of the severity of the discipline of 40 demerit marks and subsequent discharge for accumulation of demerit marks assessed to the record of Conductor K.M. Joudwa of Sarnia, Ontario, effective November 7, 1988.

JOINT STATEMENT OF ISSUE:

On October 7, 1988, Mr. Joudwa worked as Conductor on Train 83 between Toronto and Sarnia. During his assignment Mr. Joudwa became involved in a physical altercation with Assistant Conductor J.B. Wallace in the baggage compartment of the train.

Following an investigation into the incident, Mr. Joudwa's discipline record was assessed 40 demerit marks for being involved in a physical altercation with a crew member and causing a delay to the train. Mr. Joudwa was subsequently discharged for accumulation of 75 demerit marks, effective November 7, 1988.

The Union has contended that the discipline assessed was too severe and that Mr. Joudwa should be returned to the service of the Corporation.

The Corporation has declined the Union's appeal.

FOR THE UNION:	FOR THE CORPORATION:
(SGD) T. G. HODGES	(SGD) A. D. ANDREW
GENERAL CHAIRMAN	DIRECTOR, LABOUR RELATIONS

There appeared on behalf of the Corporation:

D. Scalia	- Counsel, Montreal
P.J. Thivierge	- Manager, Labour Relations, Montreal
D. Brodie	- Officer, Labour Relations, Montreal
B.E. Woods	- Trainmaster, Master Mechanic, London
J.B. Wallace	- Witness
W.A. Burr	- Witness

And on behalf of the Union:

C. Watson - Counsel, Toronto
G. Binsfeld - Secretary, G.C.A., St. Catharines
W.G. Scarrow - General Chairman, Sarnia
L.H. Olson - General Chairman, Edmonton
K. M. Joudwa - Grievor

AWARD OF THE ARBITRATOR

The material establishes that the grievor did become involved in a physical altercation with Assistant Conductor J.B. Wallace during the run of VIA Train 83 between Toronto and Sarnia on October 7, 1988. Given the conflicting accounts of the fight, which transpired within the closed confines of the baggage car, the Corporation is unable to establish, on the balance of probabilities, exactly what happened or who initiated the altercation. The Union concedes, however, that the grievor shares in the responsibility for what occurred, in consequence of which some discipline was justified.

It is common ground that Mr. Joudwa was disciplined for two separate infractions. The first was engaging in a physical altercation with a fellow employee and the second for causing the delay of Train 83 at Kitchener Station. It is not disputed that after the altercation, when Train 83 reached Kitchener, Conductor Joudwa ordered Assistant Conductor Wallace off the train. Mr. Wallace refused to comply with that direction, as a result of which the grievor was required to summon the Kitchener Police to enforce his directive. Upon the arrival of the police Mr. Wallace was removed from the train, which left for Sarnia after a delay of some twenty-five minutes beyond its scheduled departure time.

In the circumstances of this case the Arbitrator is compelled to accept the submission of the Union that the delay of the train cannot, for the purposes of discipline, be attributed to Conductor Joudwa. It is established beyond dispute that the conductor of a train bears ultimate authority for its passengers, crew and movements. Following his physical altercation with Assistant Conductor Wallace, whether correctly or not, Mr. Joudwa formed the opinion that the smooth functioning of Train 83 would be better served if Mr. Wallace was removed from it. While there may be reason to doubt the wisdom of that judgement, as there apparently had been no difficulty following the physical dispute between the two employees, that decision remained within the judgement and jurisdiction of Conductor Joudwa. In the circumstances, upon being directed to leave the train, it was Mr. Wallace's obligation to do so. Any objection or complaint which he had could have subsequently been dealt with by addressing the matter to appropriate Corporation officials. As it was Mr. Wallace who violated his duty to obey the conductor's directive which caused the delay of Train 83, the Arbitrator is not persuaded that the Corporation had just cause to impose discipline based on the additional ground of responsibility for the delay of the train in departing Kitchener. Whatever the merits of the dispute between Mr. Joudwa and Mr. Wallace, the delay in the departure of the train was primarily, if not entirely, the

result of Mr. Wallace's intransigence in the face of a clear directive that fell within the ambit of authority of his conductor.

The Corporation has not specifically delineated which proportion of the forty demerits assessed against the grievor relates to the fight and which relates to the delay of the train, respectively. The Union submits that actions which cause a delay of a train have generally resulted in the imposition of twenty demerits while the Corporation's Counsel responds that the normal discipline for an action of that kind is within the range of fifteen to twenty demerits. In the Arbitrator's view there is little utility in pursuing a detailed or exhaustive review of those competing positions. Bearing in mind that the onus in this matter is upon the Corporation, and that the assessment of twenty demerits for delay of train is not uncommon, the Arbitrator is inclined to prefer the position of the Union on this issue. In the result, it would appear, at least on the balance of probabilities, that the discipline to which the grievor would have been liable on the sole basis of his altercation with another employee could have been in the order of twenty demerits. While I make no affirmative finding in that regard, if that had been so Mr. Joudwa would have been in the less than dismissable position of having fifty-five demerits on his record.

On the whole the Arbitrator is satisfied that the material discloses a serious disciplinary offense on the part of a conductor in charge of the orderly movement of a train. In mitigation, however, it may be noted that Mr. Joudwa is an employee of thirteen years' service with no prior evidence of aggressive or threatening behaviour. In that sense, therefore, the incident of October 7, 1988 may fairly be characterized as an isolated, spur of the moment event, not likely to recur. In the Arbitrator's view it is also significant that Mr. Joudwa has acknowledged some degree of personal responsibility for what occurred. In all of the circumstances I am satisfied that the substitution of a lesser penalty is appropriate, and that a lengthy suspension will serve a sufficiently corrective purpose in this case.

For the foregoing reasons the grievance is allowed, in part. Mr. Joudwa shall be reinstated forthwith into his employment, without compensation or benefits and without loss of seniority, with his disciplinary record to stand at thirty-five demerits. I retain jurisdiction in the event of any dispute between the parties relating to the interpretation or implementation of this award.

June 16, 1989

MICHEL G. PICHER
ARBITRATOR