CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 900

Heard at Montreal, Tuesday, January 12th, 1982

Concerning

CANADIAN PACIFIC LIMITED

and

UNITED TRANSPORTATION UNION

DISPUTE:

The assessment of 20 demerit marks to the record of Conductor D.A. Berarducci, Revelstoke, B.C., for his responsibility in delaying Train Extra 5829 East on January 6, 1981, to take a meal, and his dismissal for refusing to comply with instructions from a Company Officer to proceed with Train Extra 5829 East from Golden on January 6, 1981.

JOINT STATEMENT OF ISSUE:

An investigation was held at Revelstoke, B.C., on January 9, 1981, concerning the delay to Extra 5829 East account Conductor D.A. Berarducci eating at Golden, B.C., January 6, 1981. Following the investigation, Conductor D.A. Berarducci was issued Form 104 dated January 13, 1981, reading as follows:

> Please be informed that your record has been debited with twenty (20) demerit marks for your responsibility in delaying your train Extra 5829 East on January 6, 1981, to take meal in violation of the Memorandum of Understanding, dated September 13, 1980, and Superintendent's Bulletin No. 613 of July 30, 1980.

The Union appealed the discipline assessed Conductor D.A. Berarducci requesting the removal of the 20 demerit marks on the grounds the Company did not establish Conductor Berarducci's responsibility in respect to the charges against him. The Union further contends the Company violated Article 23, Clause (g) and Article 32, Clauses (d) and (e) of the Collective Agreement.

An investigation was held at Revelstoke, B.C., commencing on January 9, 1981, and concluded on January 12, 1981, concerning Conductor D.A. Berarducci's refusal to follow instructions to proceed with his train from Golden to Field on January 6, 1981.

Following the investigation, Conductor D.A. Berarducci was issued Form 104 dated January 13, 1981, reading as follows:

> Please be informed that you have been DISMISSED for refusing to comply with instruction from Company Officer to proceed with your train Extra 5829 East, from Golden, B.C., on January 6, 1981.

The Union appealed the dismissal of Conductor Berarducci and requested his reinstatement into service with payment for all time lost on the grounds the Company did not establish his responsibility in respect to the charges against him and that dismissal was too severe a penalty in this instance. The Union further contends the Company violated Article 9, Clause (4), and Article 32, Clauses (d) and (e) of the Collective Agreement.

The Company declined both appeals on the basis that the investigations were properly conducted and that the discipline assessed was proper and justified based upon the evidence produced at the investigations.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.) PHILIP P. BURKE	**(SGD.) L. A. HILL**
GENERAL CHAIRMAN	**GENERAL MANAGER, OPERATION & MAINTENANCE**

There appeared on behalf of the Company:

L. J. Masur	– Supervisor, Labour Relations, Vancouver
J. T. Sparrow	– Manager, Labour Relations, Montreal
P. E. Timpson	– Labour Relations Officer, Montreal
F. R. Shreenan	– Assistant Supervisor, Vancouver

And on behalf of the Employee:

P. P. Burk	– General Chairman, Calgary
J. H. McLeod	– Vice General Chairman
J. Mason	– Secretary, General Committee

AWARD OF THE ARBITRATOR

There are two heads of discipline, involving distinct offences, although they occurred on the same day and in quick succession While the offences are separate ones, there is a relationship between them in that it would appear that in each case the grievor was motivated by a particular (and, I think, incorrect) interpretation of the Collective Agreement.

With respect to each matter, it may be noted at the outset that I find no violation of Article 32, which deals with the investigation procedure. The grievor was not required to assume responsibility: the questions put to him would allow an assessment of the whole matter. And, in my view, he was not held out of service unnecessarily.

The grievor did in fact delay his train on January 6, 1981, in order to have a meal. Article 23 (g) contemplates that meals will be taken en route. Where a train is delayed because of trainmen taking time to eat, such time is deducted in calculating overtime or arbitraries Of course employees must eat, and from time to time exceptional circumstances may arise in which it would be necessary to delay a train in order to eat. In the instant case there was opportunity for the grievor to eat from time to time during his trip, and it has not been shown that a delay was necessary. It was wrong for the grievor to delay the train as he did, and he was subject to discipline therefor.

This case, in this respect, appears quite similar to **Case No. 865**. There, the grievor was assessed ten demerits in respect of each of four occasions on which he delayed his train to eat. The penalty imposed there was distinguished from that imposed in **Cases 862** and **863**, where the grievors had been leaders in an illegal strike or series of strikes, and where the assessment of twenty demerits for each instance of improper delay was upheld. The same distinction should apply in the instant case, as it does not appear that the grievor was a leader of this illegal activity. He had no disciplinary record at the time. In my view, the penalty imposed under this first head should have been one of ten demerits.

As to the second ground of discipline, it is clear that the grievor did, quite consciously, refuse to follow the clear instructions of the Chief Dispatcher, namely to take his train on from Golden to Field. The grievor had been ordered at 2230 to work as Conductor on Train Extra 5829 East, Revelstoke to Field. He was operating with a reduced crew. He departed Revelstoke at 0025 on January 6, arriving at Golden at 0420. He set out a block of cars, and then took an hour and five minutes for a meal. He then lifted a string of cars (there was a problem with handbrakes, but that has no effect on the issue before me) and was ready to proceed at 0710.

From the material before me, it appears that had the grievor left Golden at that time, he would probably have arrived at Field, on that particular occasion at approximately 0825, for a total on-duty time of just under ten hours. The grievor, however, did not believe that he could reach Field within that time. He believed, too, that his was a "ten-hour crew", by virtue of Article 9 (4) of the Collective Agreement. That Article is as follows:

> **(4)** Reduced crews who are required to switch en route between the initial terminal and the objective terminal of the trip will have the right to book rest after 10 hours on duty. Every effort will be made to have such reduced crews reach the objective terminal within the 10 hours which could require the discontinuance of switching en route.

The grievor's was a reduced crew. The matter of whether or not it performed "switching" is one which need not be determined in any definitive way for the purposes of this case. In Bulletin No. 620, dated August 21, 1980, the Company defined switching en route for the purposes of this Article in such a way as to exclude making "a straight set off or pick up of cars". Here, the grievor made "a straight set off" of a block of cars. He also made "a straight pick up" of another block of cars. The "or" in the Company's definition is not disjunctive but is alternative, and does not require the conclusion that there may not be both a straight set off and a separate straight pick up without "switching" taking place. Thus, it would be my view that, on the definition referred to for the purposes of this case, the grievor did not "switch", and so his crew was not a "ten-hour crew".

Even if the grievor's interpretation of the Collective Agreement were correct, however, it was still his duty to proceed to Field. The likelihood was, in this case at least, that he would have arrived there before having been on duty ten hours. Article 9 (4) provides, not that an objective terminal must be reached within the ten hours, but that "every effort will be made" to achieve that. The Company was making those efforts, but the grievor seems to have been determined to obstruct them.

In any event, even if the grievor's views were entirely correct (although in fact he was quite misguided), it was his duty to follow the instructions he was given. That principle has been established in innumerable cases. None of the circumstances existed which might have justified refusal of a direct order.

The grievor was, therefore, subject to discipline on this second ground. While the grievor had committed an offence shortly before (in delaying his train for a meal), he had a clear discipline record. In my view, the decision to discharge the grievor in respect of this one misguided refusal to follow instructions went beyond the range of reasonable disciplinary responses to the situation. This was a first offence of this nature, and there appears to have been no reason to consider that the assessment of substantial discipline would be ineffective. In my view, the assessment of thirty demerits would have been justified.

For the foregoing reasons, the grievance is allowed in part. It is my award that the discharge of the grievor be set aside, and that he be reinstated in employment forthwith without loss of seniority or other benefits, and with compensation for loss of earnings for the period from and after January 13, 1981. The grievor's disciplinary record should show a total of forty demerits, assessed as of the date of his actual reinstatement.

(signed) J. F. W. WEATHERILL
ARBITRATOR