CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1665

Heard at Montreal, Tuesday, July 14, 1987

Concerning

CANADIAN PACIFIC LIMITED

AND

UNITED TRANSPORTATION UNION

DISPUTE:

Discipline of 30 demerits assessed the record of Conductor R.A. Hagerty of Moose Jaw, Saskatchewan, for failure to comply with a direct instruction from a Company Officer, Moose Jaw, May 4, 1986.

JOINT STATEMENT OF ISSUE:

On May 4, 1986 Mr. R.A. Hagerty of Moose Jaw was assigned as the Conductor on a run through train at Moose Jaw. It was noted by Conductor Hagerty that Car CP 505268 had the air brakes cut out but no Form 1124, Report of Detention to Trains, Repairs to Cars Enroute, Air Brake Cut Out and Disabled Cars Set Out, was present on the caboose. This information was, however, shown on the Form MCB-82 which was stapled to the car's waybill and which was in Conductor Hagerty's possession in the caboose as well as shown on the Schedule "A" Form 582-1 which was on the engine of Conductor Hagerty's train. He was informed by the Assistant Superintendent by telephone that it was not necessary to have the Form 1124 and Conductor Hagerty was instructed to proceed without delay to this train.

Conductor Hagerty did not immediately go to his train but chose instead to contact another Company Officer, Road Foreman Buxton, in order to question him in regard to the need for Form 1124. Road Foreman Buxton also advised Conductor Hagerty that a Form 1124 was not required for the movement of the train. An investigation was held in connection with delay to Conductor Hagerty's train and as a result, Conductor Hagerty was assessed the discipline noted in the dispute.

The Union contends that Conductor Hagerty's actions in response to the Assistant Superintendent's instructions were not taken to challenge his authority but were rather a result of genuine concern toward his responsibility as a Conductor to ensure that the information which he was given was in complete compliance with the rules and regulations set down by the Canadian Transport Commission. They have requested that the discipline be expunged.

The Company contends that the evidence adduced during the investigation established Conductor Hagerty's responsibility for the offence and that the discipline assessed was appropriate in the circumstances. The Company declined the Union's request to remove the discipline from Conductor Hagerty's record.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) W. M. JESSOP	(SGD.) E. S. CAVANAUGH
GENERAL CHAIRMAN	GENERAL MANAGER, OPERATION & MAINTENANCE, WEST

There appeared on behalf of the Company:

G. W. McBurney	– Assistant Supervisor, Labour Relations, Winnipeg
D. A. Lypka	– Supervisor Labour Relations, Winnipeg
B. P. Scott	– Labour Relations Officer, Montreal

A. Hanevelt – Assistant Superintendent, Moose Jaw

And on behalf of the Union:

W. M. Jessop – General Chairman, Calgary
P. P. Burke – Vice-President, Calgary

AWARD OF THE ARBITRATOR

The Company raised a preliminary objection with respect to the scope of the Arbitrator's remedial authority. It submits that because the joint statement of issue reflects the Union's position that no discipline should have been imposed in the circumstances of this case, and does not recite the alternative position that if discipline was justified, a lesser penalty should be substituted, the Arbitrator's jurisdiction to reduce the penalty is ousted. In this regard the Company relies on Section 12 of the Rules governing the Canadian Railway Office of Arbitration which is 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.
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> His decision shall be rendered, in writing together with his written reasons therefor, to the parties concerned within 30 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail.
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> The decision of the Arbitrator shall not in any case add to, subtract from, modify, rescind or disregard any provision of the applicable collective agreement.

This Office has grave difficulty with the position advanced by the Company. Given the history of the arbitration of industrial relations disputes in Canada, it is a startling proposition to suggest that the request by a Union, through a grievance, for the full exoneration of an employee be construed to exclude the alternative of a reduction in discipline unless that possibility is specifically pleaded. The all or nothing approach that that suggests has no foundation in law or convention. The jurisdiction of arbitrators to substitute a lesser degree of discipline has long been established in arbitral jurisprudence, in the decisions of the courts, and in statute laws in Canada. (*See, generally, Brown and Beatty,* ***Canadian Labour Arbitration****, 2nd Edition, (1984. Aurora) at pp 77-78*).

Since the **Port Arthur Shipbuilding case** ((1968 70 D.L.R. (2d) 693 (SCC)) there has been a recognition by the Courts that in assessing the issue of just cause for discipline, the notions of cause and penalty are intertwined and, that in the words of Brown and Beatty at n.766, pp 461, "... as a matter of both institutional competence and sound industrial relations policy, arbitrators ought to have jurisdiction over both." (*See* **Dairy Producers Cooperative Limited V. Lyons et al**. *(1982), 132 D.L.R. (3d) 616, /7 CLLC 14, 085 (SCC). See also* **Air Canada** *(1978), 18 L.A.C. (2d) 400 (Swan).*)

While the express rules governing the Canadian Railway Office of Arbitration are significant, they must be construed in light of the conventions, practices and expectations that have evolved in the operation of this Office over many years. It is common ground that the objection raised by the Company has, apparently, never before been made in any of the sixteen hundred cases and more that have been heard by this Office. It can safely be said that through many years of practice the parties have demonstrated their understanding that when a Union challenges the discipline imposed against an employee in its entirety, it implicitly seeks a reduction of discipline if that is all that it can justify on the merits of the case. If the remedial whole is the sum of its parts, it inevitably follows that a request for the whole implies a request for whatever part of the whole can be obtained, if the complete success of the grievance is not possible.

It would, in my view, be unduly technical, and inconsistent with the Memorandum of Agreement which governs this Office, to require a Union to plead in all discipline cases specifically each and every alternative remedy, short of full exoneration, which it seeks to obtain. I am satisfied that by submitting for arbitration a grievance that claims that the Company did not have just cause for the discipline imposed on an employee, through the joint statement, the parties must be taken to have submitted to this office the question of whether there was just cause for the discipline

imposed and, by necessary implication, whether just cause is established for some lesser penalty. To that extent 'cause' and 'penalty' are inevitably related. To approach this matter differently would, in my view, import a degree of technicality, rigidity, and inefficiency to the resolution of grievances which the signatories to the memorandum establishing this Office never intended. For these reasons the preliminary objection of the Company is dismissed.

I turn to consider the merits of the grievance. The material establishes that in September of 1985 Conductor Hagerty was disciplined for "failure to ensure (his) train had proper documentation prior to and after departure as per Section 2-11 of the Dangerous Goods, as per letter of September 10, 1985 from Mr. Hedden."

The conflict giving rise to the instant case arises from the grievor's uncertainty as to what his obligation was in respect of the presence of Form 1124 aboard his train. That document, instituted to facilitate information for the service and repair of cars, is generated by a conductor whenever the air brakes on a car are cut out and the car remains part of a train en route. The text of Form 1124 provides, in part, as follows:

> Conductors must transmit contents of this form to train dispatcher by radio or telephone at first opportunity; send original to Division Superintendent and leave a copy for the Mechanical Officer on arrival at terminal except that, at run-through terminals, copy will be left on train for information of relieving conductor instead of being left for the Mechanical Officer.

Bulletin #27, signed by Superintendent M.L. Hedden in February of 1985, issued to conductors instructions concerning the use of Form 1124 and states, in part:

> In this regard, Conductors will complete 4 copies of Form 1124, one copy to be placed with the waybill, one copy to be submitted on arrival at destination to Operator, one copy to Yardmaster or Terminal Supervisor, and one final copy left in the caboose for the Car Departments information.
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> On run through trains Form 1124 remaining in the caboose will be considered information for the outgoing crew, this is in addition to Form 1124 copy attached to the Waybill.

The Arbitrator is satisfied that the foregoing directive coupled with the wording appearing on Form 1124 itself could leave a person in the position of Conductor Hagerty with a *bona fide* doubt as to whether the form was mandatory in the circumstances. While, in the leisure of hindsight, it may now be clarified that he could have proceeded without it, I find it difficult to accept the Company's characterization of his actions at the time as insubordinate, recalcitrant or unreasonable. The conductor has the ultimate responsibility for the movement of a train and the documentation that accompanies it. There may be circumstances in which a crew member's uncertainty about the necessity for documentation may not reasonably be justified, particularly to the point of insisting on obtaining a second opinion from higher management. On the other hand, the fact that an employee proceeds on his or her superior's instructions may not be an answer to subsequent discipline if that instruction is in fact contrary to a rule of general application. In that circumstance both the supervisor and the employee may be subject to a disciplinary penalty.

The material establishes that Conductor Hagerty's conduct was motivated by a good faith concern, and does not suggest that he was disrespectful or abusive with either the Assistant Superintendent or the Road Foreman. Moreover, his train was not substantially delayed by what transpired. In all of the circumstances, I must accept the position of the Union that the Company did not have cause to discipline the grievor. The grievance is therefore allowed, and the 30 demerit marks assessed against Conductor Hagerty shall be removed from his record forthwith.

(signed) MICHEL G. PICHER
ARBITRATOR