CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 267

Heard at Montreal, Tuesday, March 9th, 1971

Concerning

PACIFIC GREAT EASTERN RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION (T)

DISPUTE:

Assessment of 40 demerit marks against the record of Yard Foreman J.T. Leask, effective September 8, 1970, for an act of insubordination in refusing to follow instructions.

JOINT STATEMENT OF ISSUE:

On September 5th, 1970, Yard Foreman J.T. Leask was Foreman in charge of the 0800K "Bridge Yard" assignment at the Prince George, B. C., terminal. During his shift he was instructed to move cars from the South Yard to the Bridge Yard.

Following a discussion with the Train/Yard Co-ordinator on duty Yard Foreman Leask refused to move the cars from the South Yard until his crew was supplied with a caboose.

Following a hearing on September 8th, 1970, the record of Yard Foreman Leask was assessed 40 demerit marks for his act of insubordination in refusing to follow instructions.

The Union has requested removal of the discipline assessed.

The Company has declined.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(Sgd.) A. BECKMAN	(Sgd.) M. C. NORRIS
GENERAL CHAIRMAN	REGIONAL MANAGER

There appeared on behalf of the Company:

R. E. Richmond – Chief Industrial Relations Officer, Vancouver
H. Collins – Supervisor Labour Relations, Vancouver

And on behalf of the Brotherhood:

A. Beckman – General Chairman, Lillooet

AWARD OF THE ARBITRATOR

Yard Foreman Leask did indeed refuse to move certain cars unless caboose was supplied. He was expressly directed to move the cars without a caboose, and he refused to do so. He did this for a number of reasons, which included his feeling that it was not a safe practice to operate without a caboose, and his opinion that his crew was entitled to a caboose under the collective agreement.

In my view, the grievor was not entitled to refuse to perform the work which he was directed to do, on grounds of safety. It may be that it is safer for crews to carry out certain work with a caboose, and that may be referred to with regard to the application of the provisions of the collective agreement, but the fact is that the grievor had carried out his assignment on a number of occasions prior to the incident without a caboose, although one had been requested. There was no apprehension of any immediate risk of harm beyond that normally associated with the grievor's work. Only in the face of such a risk, however, is an employee justified in refusing to carry out an otherwise proper order.

Where the order is improper, different considerations arise. It has been held in a great many arbitration cases that even where an employee is given an improper order, his proper course is to comply with the order and then file a grievance if he believes his rights under the collective agreement have been infringed. The uninterrupted continuation of operations and the maintenance of proper respect for authority have been said to be the reasons behind such decisions. Thus, in **Case No. 120**, it was held that a conductor ought to have taken his train out on time, even though the company was itself in breach of its obligation to provide certain supplies. In that case, it is of interest to note, the grievor, who held up his train because the caboose was supplied with a metal rather than an earthenware teapot, was assessed ten demerit marks in the instant case, where the caboose itself was not provided, forty demerit marks were assessed.

In **Case No. 120** it was said that the provision of the wrong type of teapot in the caboose hardly constituted such a radical change of circumstances as to raise a question whether the train should proceed. In Case No. 1 it was said that in other circumstances, for example if essential supplies were missing, the conductor might quite properly have refused to take out the train. In this case, it is contended that the grievor was entitled to be furnished with a caboose for his assignment. For this, the union relies on Rule 23 of the Yard Service Rules, which form part of the collective agreement Rule 23 is as follows:

> **RULE 23**
>
> Yardmen will not be required to operate weigh scales. Yardmen will not be required to water livestock. Yardmen will not be required to fill water cars, except in emergency, or in the event there is no man of the mechanical or maintenance of way department on duty and available who can be used.
>
> Yardmen will be furnished with a caboose in transfer service, also on other extended runs justifying same."

It is, of course, only the last paragraph of the rule which is material here.

While it was argued that this article could not be misconstrued I am unable to agree that its application in the circumstances of this case is crystal-clear. It provides that in some cases yardmen will be furnished with a caboose, and the implication is that they are not entitled to a caboose in every case. They are entitled to a caboose if in "transfer service" or if on "every other extended runs justifying" the provision of a caboose. Whether this implies that "transfer service" itself involves "extended runs" or not is a question which was not raised. It was the company's contention that it did not employ "transfer" crews per se, and that the fourth paragraph of Rule 23 serves no useful purpose. It is, however, a part of the collective agreement, and that has to be determined in any particular case is whether the facts involved come within the scope of its provisions. The fact that yard assignments are not bulletined in a specific way does not necessarily resolve the question of the nature of a particular assignment for the purpose of applying Rule 23.

In fact, cabooses have been provided for at least some yard crews at the Prince George terminal. While it was denied that there was such thing as a "regular transfer cab", it was acknowledged by the company that yard crews were expected to work "in transfer service". The caboose which had been used was, it seems, damaged some weeks before the incident in question, and the parties seem to be in agreement that a cab had not been used "for weeks".

Plainly there had been a caboose provided, and it seems that after it had been damaged the grievor had made requests that another be provided. There is no record of any of these requests being denied on the ground that a caboose need not be provided; rather, it seems, none was provided because none was available. If a caboose is necessary, then of course it is up to the company to make one available.

A request for a caboose was made by the grievor on the day in question. His work included the movement of a transfer from Northwood Pulp. There is nothing in the material before me to negate the apparent conclusion that this was transfer service, for which a caboose ought to be furnished. This conclusion, however, is arrived at only in the particular circumstances of this case, and does not constitute any determination, binding for future cases, as to the nature of this work.

On the material before me, then, it is my conclusion that the company was obliged, under Rule 23, to furnish a caboose to the grievor in this particular instance. Its breach of this obligation is clearly of a very different nature than the breach of an obligation, say, to provide an earthenware rather than a metal teapot. The caboose of course is a very substantial piece of equipment, the provision of which makes an important difference not only to the working conditions of the employees but also to the methods in which operations may be conducted. Where the company is in breach of an obligation to supply equipment of this sort, the employee's conduct in the face of that breach must be judged in a very different light than in some other cases. Even here, of course, it could be that it would be necessary for an employee to obey an order even if it were improper in this respect. If some sudden emergency had made the provision of a caboose impossible, an employee might be obliged to carry out his work without one, despite the violation of the rule. Here, however, the grievor had drawn the default to the company's attention on a number of occasions without result. There was no emergency on September 5, and since the grievor had given ample notice of his position, it is my view that his refusal to continue in the face of a default of this nature could not properly be considered "insubordinate". It must be stressed, however, that this conclusion is reached having regard to the particular circumstances of the instant case as they appear from the material before me.

For the foregoing reasons the grievance is allowed. It is my award that the forty demerit marks assessed against the grievor be removed from his record.

(signed) J. F. W. WEATHERILL
ARBITRATOR