CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 787

Heard at Montreal, Tuesday, November 11,1980

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)

and

UNITED TRANSPORTATION UNION (T)

DISPUTE:

Removal of discipline assessed Yardman B.D. Freisting, Thunder Bay, Ontario, resulting from investigation in connection with the charge of insubordination at Thunder Bay, April 10, 1978, and payment for lost wages when withheld from service.

JOINT STATEMENT OF ISSUE:

On April 10, 1978, Yardman Freisting was working as a Helper on the 1630 Hauling Assignment and after Caboose No. 437173 was placed on the tail-end of their transfer movement, he entered the caboose and considered it was unfit for service. He contacted the Company Supervisor and requested that a properly equipped caboose be supplied but the Assistant General Yardmaster refused to allow the caboose to change off contending it was suitable and properly equipped for service after flagging kit had been supplied. Yardman Freisting was instructed by the Assistant General Yardmaster to proceed with his work using Caboose No. 437173 and to file his complaint through proper channels. This he refused to do and was held out of service for investigation.

The investigation was held at Thunder Bay on April 12, 1978. Following the investigation, the Company informed Yardman B. D. Freisting that his record was debited with 40 demerit marks for insubordination Thunder Bay, Ontario, April 10, 1978.

The Union appealed the discipline assessed Yardman Freisting requesting the removal of the demerit marks and payment for all time lost on the grounds the Company did not establish his responsibility with respect to the charges against him. The Union contends that the Company violated Article 13, Clauses (c), (d), (e) and Article 16 of the Collective Agreement.

The Company declined the Union's appeal contending there was no violation of the Collective Agreement and that Yardman B.D. Freisting's responsibility was established by the evidence adduced at the investigation and that he was properly disciplined.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.) P. P. BURKE	(SGD.) R. J. SHEPP
GENERAL CHAIRMAN	GENERAL MANAGER, O&M

There appeared on behalf of the Company:

F. B. Reynolds – Assistant Supervisor Labour Relations, Winnipeg
B. P. Scott – Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

P. P. Burke – General Chairman, Calgary
G. McLellan – General Chairman, Toronto

AWARD OF THE ARBITRATOR

Article 16 of the collective agreement provides, insofar as it is material to this case, that yardmen in transfer service will be supplied with a caboose or other suitable car properly equipped. No doubt the quality of the car provided and the extent of its equipment need not be, in transfer service, what could properly be expected in road service. Nevertheless the car provided must be "suitable" and "properly equipped", at least for the rudimentary requirements of transfer service.

From the material before me, it is my conclusion that the car provided in this case was neither suitable nor properly equipped. It was not suitable because it was smelly and excessively dirty. There is a conflict in the evidence on this point. Utility Foreman Wyrozub found no smell, no mud, grime or soot, and felt the car was, comparatively, "darn good". All of the other evidence is to the contrary, including the objective evidence of photographs. The car was not properly equipped because of a lack of marking lights, because there was (at first) no flagging kit, because the stove did not work and the cupola seating was broken. The windows were too dirty to be seen through and (although I make no finding as to whether or not it was essential) the air pressure indicator did not work.

It would, it appears, have been possible for the Company to have supplied an alternative caboose with only a slight delay. The grievor had requested, but had been refused, a choice of caboose. It is true that other employees were, subsequently, willing to use the caboose in question during the assignment, and I expect it would have been possible for the grievor to have done so. The onus is on the employee to show that equipment he refuses to use is unsafe, and I do not consider that that onus has been met in this case. While the caboose was not suitable and was not properly equipped, it does not necessarily follow that it was unsafe. While there is doubt on the point, I do not consider that the grievor has established sufficient justification for his refusal to carry out his instructions.

There was, therefore, the occasion for the imposition of some discipline on the grievor. While it is alleged that various sections of Article 13 were violated, it has not been shown that that was the case. The grievor was present during the examination of witnesses, and had opportunity for rebuttal. There was no unfairness in the Company's investigation and all those whose evidence might have a bearing on the grievor's responsibility gave evidence which the grievor had an opportunity to rebut. The grievor was, however, held out of service from April 10 until May 4. That represents a substantial period of suspension which in my view was unnecessary. This was not a case in which discharge ought to have been seriously considered, since, as I have noted, there was a real question of safety involved, as well as the question of the violation of the collective agreement by the Company itself.

In assessing the penalty imposed on the grievor, all of the circumstances are to be considered. The grievor was assigned a dirty, ill-equipped caboose on a cold day (0 degrees C; even Mr. Wyrozub tried unsuccessfully to light the stove), when he could, without much loss of time, have been assigned suitable equipment. He was, as I have found, justified in considering that the Company had not complied with the collective agreement. He ought nevertheless to have obeyed his instructions when they were repeated. Having regard to all of these circumstances, it is my view that a penalty of 20 demerits would have been appropriate. In **Case No. 120**, which is in many ways analogous to this, only 10 demerits were imposed. There, no clear instruction to take out his train was issued to the grievor. Here, the grievor refused a repeated direction.

My award is, therefore, that the penalty imposed on the grievor be reduced to one of 20 demerits, and that he be compensated for the time he was held out of service.

(signed) J. F. W. WEATHERILL
ARBITRATOR