CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1390

Heard at Montreal, Wednesday, July 10, 1985

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Appeal of the discipline assessed the record of Track Maintenance Foreman A. Borden, 6 August 1984.

JOINT STATEMENT OF ISSUE:

Mr. Borden was notified to patrol his territory on 6 August 1984, a statutory holiday. Following an investigation Mr. Borden was assessed 15 demerit marks for refusing to patrol his territory on statutory holiday, August 06, 1984 – a violation of Rule 2.12, Form 1233E, Part 1, Rules for Foremen.

The Brotherhood appealed the assessment of 15 demerit marks on the grounds that it was unjustified.

The Company has declined the appeal.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) G. SCHNEIDER	(SGD.) D. C. FRALEIGH
SYSTEM FEDERATION GENERAL CHAIRMAN	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS.

There appeared on behalf of the Company:

J. Russell	– Labour Relations Officer, Montreal
T. D. Ferens	– Manager Labour Relations, Montreal
S. Williams	– Labour Relations Officer, Winnipeg

And on behalf of the Brotherhood:

G. Schneider	– System Federation General Chairman, Winnipeg
R. Y. Gaudreau	– Vice-President, Ottawa
T. J. Jasson	– Federation General Chairman, Winnipeg.

AWARD OF THE ARBITRATOR

This is an appeal of the propriety of the 15 demerit marks assessed the grievor for his failure to report for duty on the August 6, 1984, Statutory Holiday. There is no dispute that Mr. Borden was properly advised in advance of the requirement that the would be expected to report for work on that holiday.

It appears from the material in the parties' briefs that Mr. Borden expressed two concerns in responding to the company's requirement that he work on general holidays. The first was that the company has failed to arrange for more qualified Track Maintenance Foremen (with a 'D' Book) to share the inconvenience of being required to work on the holidays. And, the second concern pertained to the company's decision to alter its practice of paying him a full 8 hour day for the holiday.

The company simply relied upon the "obey now, grieve later" rule with respect to the appropriate response that the grievor should have made to the company's actions. Or, more precisely, he should have reported to work on the statutory holiday, as directed, and grieved his complaints against the company in an appropriate manner.

I am satisfied that the company is quite correct with respect to the grievor's complaint about the amount of payment he should have received for working on a general holiday. Quite clearly, if the company should be "estopped" by its practice of paying the 8 hour rate despite the strict language of Article 10.9 of Agreement 10.1 to the contrary then that should have been made the subject matter of a grievance. In that sense, the grievor was clearly insubordinate for his failure to obey the company's directive to report.

The grievor's second complaint is more difficult to deal with. The materials indicated that the company has taken some measure to alleviate the pressure exerted upon the grievor to work each and every statutory holiday by training more appropriate personnel in the performance of his work duties. To this extent, the grievor's strategy has proven successful. That is to say, there existed a measure of substance to that complaint. Yet, should the legitimacy on the merits of a complaint that cannot necessarily be dealt with under the grievance procedure warrant an insubordinate response?

In a recent case in **CROA #1381** I suggested that not all complaints need necessarily be susceptible to the grievance procedure in order that they might be resolved. A reasoned position presented to management with respect to a legitimate complaint often results in success without recourse to the grievance procedure. So long as the grievor has access through his trade union representatives to the airing of a complaint his recourse to self-help simply should have been contained. In other words, as the arbitral precedents suggest there are very few instances where reliance upon insubordination will be condoned.

Nevertheless, in the light of the grievors' service with the company I am satisfied that 15 demerit marks is unusually harsh for a first offence. It is my ruling that five (5) demerits should have been assessed the grievor for his infraction and his disciplinary record should adjusted accordingly.

(signed) DAVID H. KATES
ARBITRATOR