CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 442

Heard at Montreal, Tuesday, May 14, 1974

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYEES

DISPUTE:

Involving dismissal of Messrs. M.W. Blair, K. R. Bartley, J.P. Di Mauro, V. Rak and W. Sokol.

JOINT STATEMENT OF lSSUE:

Shortly after 1300 January 31, 1973, twenty-four employees at King Street Freight Shed were instructed to report to Lambton Freight Shed. Messrs. Blair, Bartley and Di Mauro refused to comply with these instructions. Again shortly after 0800 February 1, 1973, twelve men at King Street were instructed to report to Lambton. Messrs. Rak and Sokol refused. These employees were dismissed for refusing to carry out proper instructions of the General Foreman at King Street Freight Shed.

The Union contends that the dismissals were not warranted because the instructions could have been detrimental to the employees' health due to inadequate arrangements made for transportation, weather conditions, and difference in working conditions between King Street Freight Shed and Lambton Freight Shed.

The Company contends that the dismissals were justified.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) W. T. SWAIN	(SGD.) L. A. HILL
GENERAL CHAIRMAN	GENERAL MANAGER, O. & M.

There appeared on behalf of the Company:

H. E. Lyttle - Supervisor, Labour Relations, CP Rail, Toronto

D. Cardi - Labour Relations Officer, CP Rail, Montreal

B. P. Scott - Assistant Supervisor, Labour Relations, CP. Rail, Toronto

And on behalf of the Brotherhood:

W. T. Swain - General Chairman, B.R.A.C. - Montreal

AWARD OF THE ARBITRATOR

The assignment of the grievors to work at the Lambton Freight Shed on the days in question was a proper one, and it was the grievors' duty to comply, as they had done in the past, unless there existed some substantial justification for their refusal, in the sense in which this principle has been developed in a number of arbitration cases. In this case the grievors allege that there was such justification. A number of the allegations, such as difficulty of transportation or personal inconvenience seems to me, from the material before me, and in the light of the past willingness of the employees to accept such assignments, to be insubstantial, and in most cases to have arisen as afterthoughts.

The only objection which I am able to consider as having any weight is that relating to the potential danger to the health of the grievors involved in working at the Lambton Freight Shed on the days in question. As to this, I am satisfied from the material before me that what was involved was more a question of comfort than of health. If indeed the conditions at the Lambton Freiqht Shed should turn out to be such that employees could not properly be expected to work, then that would be another matter. Here, however, it was the duty of the grievors to report as assigned and they failed to do so. They were therefore subject to discipline.

The assignment of the grievors to Lambton appears to have been a result of the refusal of certain employees there to carry on with their work. While there has not been shown to be any direct relation between the conduct of that group of employees and that of the grievors, it is significant that the Lambton employees, who refused to complete their tour of duty, were assessed two days' pay, whereas the grievor were discharged.

The circumstances in which the action of the Lambton employees was taken are not set out in the material before me, but it is difficult to imagine what differences could justify such a great difference between the penalty meted out to them, and that imposed on the grievors, who were discharged. Further, while I have found that the grievors were not justified in their refusal to go to Lambton (and I rely on the principles referred to in cases 120, 139 and 418 among other arbitral decisions on the point), it may be noted that while the grievors' excuses were not sufficient, their refusal was not utterly without foundation. I could not conclude that discharge was justified in the circumstances.

One major difficulty which I have in the disposition of this matter is that the parties did not deal with the question of the severity of the penalty assessed. The company, in its brief, contends that the only issue is whether the grievors were insubordinate. That is not, however, the issue which appears from the joint statement of issue,

which is, whether the dismissals were justified. While I would find that the grievors were insubordinate, I would not find that the dismissals were justified. Individual records were not analyzed, although these might have supported greater penalties in some cases than in others. The offence itself is not, ipso facto, necessarily the occasion for discharge and I would not say that it was here.

In Case No. 323 it was held that a penalty in the form of the assessment of demerit marks was unduly severe. Since no representations had been made as to the reduction of the penalty, I made no determination of that matter, although I did note that if that penalty were to be referred to in any future case, it should be considered in the light of that award. The instant case is a different matter, since the grievors have been discharged, and while the effect of the penalty imposed in Case No. 323 may be said at least to have been tempered by what was said in the award, that would not be the result here if the penalty were left undisturbed.

I could not, in good conscience, allow the penalty of discharge to stand in these circumstances, and it is my view that justice requires an award of reinstatement, based, of course, on the finding which has been made that the discharge of the grievors was not justified. I think it must be a concomitant of that, in the circumstances of this case, that the grievors receive certain substantial compensation for the loss of earnings they have suffered because of the excessive penalty. The fact remains that the matter of the reduction of the penalty was not argued, and the bargaining agent must bear some of the responsibility for that.

Having regard to all of the circumstances, it is my award that the penalty of discharge be set aside and a penalty of two months' suspension substituted therefore. This does not involve the implication that such a penalty would otherwise have been appropriate. The grievors are to be reinstated in employment, without loss of seniority or other benefits, save that their compensation shall be for their loss of regular earnings for the period following two months after the date of their discharge until the date of their reinstatement.

Arbitrator