

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 583

Heard at Montreal, Tuesday, December 14th, 1976

Concerning

CANADIAN PACIFIC LIMITED (C.P. RAIL)

and

UNITED TRANSPORTATION UNION (T)

DISPUTE:

Dismissal of Trainman R. C. McDougall, Minnedosa, on December 30th, 1974 account not being available for duty since November 5th, 1974.

JOINT STATEMENT OF ISSUE:

Trainman R. C. McDougall was notified on December 30th, 1974 that he was dismissed account not being available for duty at Minnedosa since November 5th, 1974.

The Union appealed the dismissal of Trainman McDougall requesting that he be reinstated in the Company's service, without payment for time lost, on the grounds he was being unfairly treated, as he could not be available for duty since he was serving a sentence in the Brandon Correctional Institute for a Highway Traffic violation that took place when he was not in the employ of the Company. The Union further contends that there was no cause for discipline and, in any case, the discipline was too severe.

FOR THE EMPLOYEE:

(SGD.) P. P. BURKE
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) R. J. SHEPP
GENERAL MANAGER - O. & M.

There appeared on behalf of the Company:

R. Colosimo - Manager, Labour Relations, CP Rail, Montreal
J. Ramage - Special Representative, " "
F.B. Reynolds - Asst. Supervisor, Labour Relations, CP Rail,
Winnipeg
K.W. Edwards - Asst. Superintendent, CP Rail, Brandon

And on behalf of the Brotherhood:

P.P. Burke - General Chairman, U.T.U.(T) - Calgary

AWARD OF THE ARBITRATOR

The grievor was in fact not available for duty on the date in

question because he had to appear in court for sentencing on charges of impaired driving and driving while his licence was suspended, to which he had previously pleaded guilty. He was sentenced to three months' imprisonment on the one charge and to nine months' imprisonment on the other, the sentences to run concurrently. As a result of this the grievor was unavailable for duty for some considerable period of time, and it was on December 30, 1974, that he was dismissed.

Whether it is proper for an employer to discharge an employee who is unable to report for work because he is in jail is a question which has arisen in a number of arbitration cases. The result will, however, depend on the circumstances of each case. In the instant case, which is one of a long-service employee, special care must be taken to ensure that the Company's action was justified.

Such justification is clear, in my view, on a consideration of the circumstances. The grievor's convictions on the charges referred to were simply the latest in a series of convictions for related offences. From the material before me it is obvious that the grievor had a drinking problem and that his fellow employees, his union and his employer had all concerned themselves with it. On one occasion he had been discharged and was subsequently reinstated. He had been convicted and fined for drinking offences on several occasions. His most recent conviction was the result of his repetition of a serious offence, and a jail sentence was quite foreseeable. It was clearly as a result of his own misconduct that the grievor was unable to report for work, and it may be noted that the misconduct in question was of a nature which could give serious concern to the Company, since the grievor was involved in train operations.

It may be that in some circumstances an employee might be considered on leave of absence while serving a jail sentence. Under Article 29 (b) of this collective agreement, however, leaves of absence are in the discretion of the Company, and are not to exceed three months. In these circumstances the grievor had no right to a leave of absence, and the Company did not exercise its discretion in his favour. It may be noted as well that leave of absence is to be in writing and that in this case there was no leave granted in writing nor was there any request to that effect.

The grievor was not, therefore, entitled to be considered as on leave of absence. While he had properly been allowed to book off in order to attend court, this did not mean that he was entitled to be absent so that he could serve a substantial jail sentence. He had an obligation to make himself available for work, and since his own misconduct made that impossible he must be considered in violation of that obligation.

For the foregoing reasons the grievance must be dismissed.

J. F. W. WEATHERILL
ARBITRATOR