CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 852

Heard at Montreal, Tuesday, July 14, 1981

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

The dismissal of Trainperson C.G. Llewellyn, Schreiber, Ontario, from CP Rail's Service, effective July 25, 1980.

FOR THE EMPLOYEES:

(SGD.) L.H. BREEN
GENERAL CHAIRMAN

There appeared on behalf of the Company:

L.A. Clarke -- Supervisor Labour Relations, CP Rail, Toronto

B.P. Scott -- Labour Relations Officer, CP Rail, Montreal

K. O'Brien -- Assistant Superintendent, CP Rail, Smiths Falls

And on behalf of the Brotherhood:

L.H. Breen -- General Chairman, UTU, Toronto

B. Marcolini -- Vice-General Chairman, UTU, Toronto
J.R. Austin -- Secretary of the General Coxmittee of Adjustment, UTU, Toronto

AWARD OF THE ARBITRATOR

This is the continuation of Case No. 836. As is there noted, the grievor was a probationary employee at the time of her termination. The matter of probationary employees is dealt with in Article 37(d) of the Collective Agreement, which is as follows:

> "A new Brakeman shall not be regarded as permanently employed until after 6 months service (that is, six months from date of making first pay trip) and, if retained, shall then rank

> on the master seniority list from the date and time he commenced his first pay trip. In the meantime, unless removed for cause, which, in the opinion of the Company renders him undesirable for its service, the Brakeman shall be regarded as coming within the terms of this Collective Agreement."

It is clear from that provision that the Company has a discretion to exercise as to whether or not it will retain an employee who, not yet having six months' service, is not to be regarded as permanently employed. Such an employee may be removed "for cause", but the "cause" referred to in Article 37(d) is to be distinguished from the "just" or "proper" cause which must be established to support the discharge of a permanent employee. Rather, as was noted in Case No. 836, the Company may remove a probationary employee for cause "which, in the opinion of the Company, renders him undesirable for its service".

Under a provision of this sort, the Company may exercise its discretion, although it must do so in a way that is not arbitrary or which discriminates improperly against the employee. It has not been shown that the Company's action was arbitrary or discriminatory in this case. There were instances in which the grievor, being subject to call did not respond, and there was one instance in which, having accepted a call, she did not report for duty. There was, then, a factual basis for the determination made by the Company. That being the case, it is clear that it is the Company's right under the Collective Agreement, to come to its own conclusion with respect to retaining the employee.

This is not a case of discipline: there is no particular misconduct on the grievor's part (although failure to report may become a disciplinary matter), and it is acknowledged that the grievor's actual work was satisfactory. Rather, it is simply a matter of the Company's making, on certain objective grounds, a determination with respect to the grievor's desirability for its service. Whether or not, by reason of her subsequent move to Schreiber, it could be said that the likelihood of reliable attendance improved, the fact is that at the time the decision was made there were grounds on which the Company could rely in coming to a conclusion with respect to the retention of this probationary employee.

For the foregoing reasons, the grievance is dismissed.

J.F.W. Weatherill,
Arbitrator.