CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1130

Heard at Montreal, Wednesday, July 6, 1983

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Prairie Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

A claim by the Union that Mr. N. B. Gordon, Group 4 Operator, was dismissed from his position as Group 4 Operator on Tie Gang, Prairie Region, on May 18, 1982.

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. The Company violated Section 18.1, Wage Agreement 41, when they dismissed him as Machine Operator without investigation.

2. The Company violated Section 2.3 and 2.4 of the Machine Operators Memorandum when they replaced him with a junior employee.

3. Mr. Gordon be compensated for loss of wages he could have earned as a Group 4 Operator from May 18, 1982, and onward, until allowed to again exercise his seniority as Group 4 Operator.

The Company declines the Union's contention and denies payment.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) H. J. THIESSEN System Federation General Chairman	(SGD.) R. J. SHEPP General Manager, Operation and Maintenance

There appeared on behalf of the Company:

R. A. Falzerano	- Assistant Supervisor, Labour Relations, CPR, Winnipeg
R. A. Colquhoun	- Labour Relations Officer, CPR, Montreal
H. B. Schroeder	- Roadmaster, Prairie Region, CPR, Winnipeg
R. A. Graham	- General Foreman, Brandon Division, CPR, Brandon

And on behalf of the Brotherhood:

H. J. Thiessen	- System Federation General Chairman, BMWE,

Ottawa
F. L. Stoppler - Vice-President, BMWE, Ottawa
L. DiMassimo - Federation General Chairman, BMWE, Ottawa
E. J. Smith - General Chairman, BMWE, London

AWARD OF THE ARBITRATOR

Although it would appear that this matter was not processed through the grievance procedure in accordance with the time limits set out in the Collective Agreement, the Joint Statement of Issue, signed by both parties, makes no reference to that issue, and in my view rights of objection in that respect have been waived.

The grievor, who had been absent from work due to an injury, was assigned to operate the Tie Place Setter on his return to active duty on April 19, 1982. That would appear to have been in accordance with Articles 2.3 and 2.4 of the Collective Agreement, which are as follows:

> "2.3 The order of preference in filling bulletined positions within the Machine Operators classifications shall be as follows:
>
> 1. Group 1 Machine Operators.
> 2. Group 2 Machine Operators.
> 3. Assistant Operators.
> 4. Group 3 Machine Operators.
> 5. Operators Helpers, Group 4 Machine Operators covered by Clause 4.2.
>
> 2.4 If qualified employees are not available in the Machine Operators' group, other Maintenance of Way Employees from within the seniority territory, qualified to perform the work, will be given preference in filling vacancies or new positions before new men are hired. In the application of this Clause 2.4, successful applicants will be selected in order of their first day of entry into the Maintenance of Way service."

The grievor's entitlement to remain in that job depended, however, on his being qualified to perform it adequately. In this respect, the matter is governed by Article 2.5, which is as follows:

> "2.5 In the event that within 3 months of exercising seniority to a position governed by this Agreement, an employee is found to be unsuitable, such employee may be returned to his former employment. An employee who wishes to return to his former employment, may do so provided he expresses his desire to do so in writing within 12 months following the date of

his appointment to a position covered by this Agreement."

The grievor was found to be unsuitable. That determination was made having regard to his performance on the job, and not for any improper reason. The grievor was, accordingly, returned to his former job. He was not investigated, and could not properly have been dismissed. In fact, the grievor was not dismissed. He simply left work, and did not return. When, eventually, the grievor's record was closed, that was not any disciplinary reason, but was merely recognition of the fact that the grievor had withdrawn from work. There was no violation of Article 18.1 because the grievor was not "suspended, disciplined or discharged". Accordingly, the grievance must be dismissed.

J. F. W. WEATHERILL,
ARBITRATOR.