

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1179

Heard at Montreal, Wednesday, January 11, 1984  
Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)  
(Pacific Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Assistant Track Maintenance Foreman J. M. Tuba was dismissed from service for an accumulation of demerits on February 5, 1983. Mr. Tuba was assessed 40 demerits for his act of insubordination by striking his immediate supervisor on December 21, 1982 and 20 demerits for being absent from duty without permission during prescribed working hours, December 31, 1982, violation of General Rule "S", Form 568, Maintenance of Way Rules and Instructions (second offence).

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. The discipline assessed for both instances is too severe and the demerits reduced and/or removed completely.
2. He be reinstated to his position with no loss of seniority and be compensated for all time lost since February 5, 1983.

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

FOR THE BROTHERHOOD:

(SGD.) H. J. THIESSEN  
System Federation  
General Chairman

FOR THE COMPANY:

(SGD.) L. A. HILL  
General Manager  
Operation and Maintenance

There appeared on behalf of the Company:

F. R. Shreenan - Asst. Supervisor, Labour Relations, CPR,  
Vancouver  
R. A. Colquhoun - Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen - System Federation General Chairman, BMWE,  
Ottawa  
L. DiMassimo - Federation General Chairman, BMWE, Montreal  
R. Gaudreau - Vice-President, BMWE, Ottawa  
G. Valence - General Chairman, BMWE, Sherbrooke

E. J. Smith

- General Chairman, BMW, London

#### AWARD OF THE ARBITRATOR

The grievor was terminated from the employ of the company on February 5, 1983 for the accumulation of seventy demerit marks. The two infractions for which demerit marks were assessed have been referred to arbitration. The first relates to the grievor's assault on his foreman for which forty demerit marks were assessed. The second relates to an unauthorized absence from duty on December 31, 1982 for which twenty demerit marks were assessed. The latter infraction was the second infraction of the same nature incurred by the grievor within a four month period. On the first occasion the grievor was assessed ten demerit marks. He did not grieve the company's decision to impose that particular penalty.

The grievor, Mr. J. M. Tuba entered the company's employ in January, 1981. He was promoted to the position of Assistant Track Foreman on August 17, 1981. The grievor is twenty-two years old. In December, 1982 the grievor applied to Revelstoke Engineer Mr. K. Jansens requesting a leave of absence for a two month period between January 5, 1983 and March 5, 1983 to go to Jamaica. Because of operational requirements at the Alberta Canyon Section on the Mountain Division of Revelstoke during the winter months the grievor's services were needed. The company, accordingly, denied his request for leave for the two month period that was requested. He was advised, however, that the company could dispense with his services for a two week period provided it was taken as vacation leave.

During the lunch period on December 21, 1982, Track Maintenance Foreman, B. C. Riches, who was the grievor's immediate supervisor handed Mr. Tuba the letter advising him that his request for a leave of absence had been rejected. To say the least, the grievor was bitterly disappointed. Mr. Tuba telephoned Mr. Jansens to determine why his request had not been approved. He was told that the Roadmaster required his services at the time he requested leave. Following this telephone conversation Mr. Tuba appeared agitated, if not enraged, by the company's decision. It was at this moment that the grievor is alleged to have called Foreman Riches various names and to have slapped him in the face.

The grievor did not dispute that he had slapped Foreman Riches "because I was mad and I lost my temper and I hit him in a fit of rage....".

Apparently after the grievor had terminated his telephone conversation with Mr. Jansens he returned to the lunchroom area in a state that has already been described. At that time he called Mr. Riches "a few names" and accused him of being jealous "if he had his time". Mr. Riches then admitted saying: "I told him that would be good if he had the time off that maybe when he returned he would work better as at present he was very lazy".

Mr. Riches' remark further enraged Mr. Tuba who proceeded "to get real mad and kept arguing". Mr. Riches attempted to avoid any further friction by turning his back on the grievor to walk away. At

this moment the slapping incident occurred. Mr. Riches did not report the incident to his supervisors immediately. It suffices to say, for purposes of this case that when management learned of the assault on Mr. Riches they took measures that ultimately resulted in the grievor's assessment of forty demerit marks.

Although the company cannot condone physical assaults on its supervisors it must when it assesses an appropriate disciplinary penalty take all relevant factors into consideration. It must be noted that Mr. Riches was aware of the degree of the grievor's upset when Mr. Tuba learned that his request for a leave of absence had not been approved. Mr. Riches had observed his bitter reaction and his desperate efforts to determine the reason for the employer's rejection from Mr. Jansens in Revelstoke. When his telephone conversation confirmed the employer's initial position Mr. Riches made what can only be considered an utterly stupid remark. Although I do not wish to be suggesting that the grievor's assault was warranted I am quite satisfied that Mr. Riches' inappropriate remark was the immediate cause of the "slapping" incident. In other words, given the grievor's frenzied state of mind the grievor reacted in a spontaneous and irrational manner to Mr. Riches' provocative "dig". Moreover, Mr. Riches should have appreciated, owing to his observations of the grievor's reaction to the company's letter, that his remark might trigger a reaction of that nature.

I am of the view the employer should have taken this specific factor into account when it assessed the grievor forty demerit marks. In failing to do so I have resolved that the penalty imposed should be reduced by fifteen to twenty-five demerit marks for the alleged infraction.

I find no reason, particularly in light of the grievor's prior infraction, to mitigate the twenty demerit markss assessed for his unauthorized leave of absence. Accordingly the grievor's record should be adjusted to show that he has accumulated fifty-five demerit marks.

The grievor, therefore, will be reinstated forthwith to his position as Assistant Track Maintenance Foreman without compensation. I shall remain seized for the purpose of implementing this decision.

DAVID H. KATES,  
ARBITRATOR.