CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1246

Heard at Montreal, Thursday, May 10, 1984

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Eastern Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

On May 13, 1983, Mr. T. P. Constantineau, did not complete his tour of duty. Subsequent to an investigation into this matter he was assessed 30 demerits. The grievor was dismissed for accumulation of more than 60 demerit marks.

JOINT STATEMENT OF ISSUE:

The Union contends:

1. The Company violated Section 18.3 in not rendering the decision within specified time limit.

2. The Company violated Section 81, Part IV Canada Labour Code.

3. Mr. T. P. Constantineau be compensated from time of dismissal, demerits removed and reinstated to his former position.

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

| FOR THE BROTHERHOOD: | FOR THE COMPANY: |
|---|---|
| (SGD.) H. J. THIESSEN | (SGD.) G. A. SWANSON |
| System Federation General Chairman | General Manager, Operation & Maintenance. |

There appeared on behalf of the Company:
P. A. Pender - Supervisor Labour Relations, CPR, Toronto
R. A. Colquhoun - Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:
H. J. Thiessen - System Federation General Chairman, BMWE, Ottawa
L. M. DiMassimo - Federation General Chairman, BMWE, Montreal
R. Y. Gaudreau - Vice-President, BMWE, Ottawa
E. J. Smith - General Chairman, BMWE, London

AWARD OF THE ARBITRATOR

On May 13, 1983, the grievor, Mr. T. P. Constantineau was employed as

a Trackman and was a mex?er of a crew of twenty-three employee on the Schreiber Division Curve Gang. On that day the Curve Gang was involved in transposing worn rails and replacing them with good rails. The grievor's responsibility was reversing the top and bottom rails on the curve at mileage 78.21 Heron Bay Subdivision.

The weather reports secured from Environment Canada established that May 13, 1983, was a rainy day. Members of the Gang had worked part of the morning shift and had become"soaken wet". After a protracted lunch break of two hours Extra Gang Foreman R. Beauvais directed the crew to complete the work that had already been started. At that time the company took the position that Mr. Beauvais had concluded that the weather conditions had improved. In any event there was work that remained to be done and if not completed could have created a "dangerous" situation. At that time "a slow order" of 20 miles per hour was in effect with respect to the passage of trains.

Of the twenty-three members of the crew, thirteen refused to comply with Extra Gang Foreman Beauvais' direction to return to work. Instead they remained sheltered in the track boarding car for the balance of their shift.

In due course each of the thirteen employees who refused to work were investigated and upon completion of that investigation were assessed 30 demerit marks. The grievor had accumulated 35 demerit marks at the time of the incident. Mr. Constantineau entered the company's service on February 9, 1981, and on May 13, 1983 had accumulated 20 months total working service. On June 9, 1983 the grievor was informed of his termination because his disciplinary record was in excess of 60 demerit marks.

Rule 11 of Board Car Rules states:

> "Gang Supervisor will decide if gang will work on wet and stormy days."

In the past in CROA Case 817, the Arbitrator ruled that failure by an employee to comply with a Supervisor's direction to work in wet and rainy weather amounts to serious insubordination that warrants a substantial penalty. In CROA Case 1126 the same Arbitrator ruled that although 60 demerit marks would be excessive for that infraction, 30 demerit marks represented an appropriate penalty. In that case the termination issue was academic because of the grievor's accumulation of 40 demerit marks at the time of the incident. It appears from the CROA precedents that 30 demerit marks representa a standard with respect to discipline for like infractions.

The underlying reason governing the Arbitrator's approach is two-fold. Firstly, the nature of the work assumed by the employee when hired requires that he be outdoors. Secondly, the exigencies of that work are just as demanding in inclement weather as in normal conditions. Accordingly it is stated in CROA Case 818:

> "....it is precisely because of the wet and stormy conditions that the employees were needed at work. Whether or not the situation was an emergency is irrelevant.

> There was work which the grievors were assigned and nothing in Article 12.4 justified... their refusal of that assignment."

In this case the grievor in a like manner engaged in a serious act of insubordination and was appropriately assessed 30 demerit marks. In this regard, he was treated in a manner that was consistent with the penalty that was assessed his colleagues. In other words, to be perfectly clear, the grievor, an employee with relatively short service, was dismissed not solely because of the culminating incident but because of his accumulation of 65 demerit marks.

The trade union advanced a number of procedural challenges to vitiate the discharge. The most serious pertained to the allegation that the company violated the time limit for the imposition of discipline under Article 18.3 of the collective Agreement:

> "18.3 An employee will not be held out of service pending the rendering of a decision, unless the offence is considered sufficiently serious to warrant such action. The decision will be rendered within twenty-eight calendar days from the date the investigation is completed unless otherwise mutually arranged."

The evidence established that the grievor was interviewed by the company on May 19, 1983. It is the trade union's position that the 28 calendar day time limit for making a decision imposing discipline ran from the point the grievor's interview was completed. The company argued, on the other hand, that the investigation was not completed until all the relevant circumstances with respect to the grievor's infraction (which included the interviewing of each mem?er of the crew who had been charged)was achieved. On May 27, 1983, the last member of the crew who had been charged was interviewed (i.e., Mr. J. R. Martel). It is at that point that the company contends that the twenty-eight calendar day time limit with respect to making a decision imposihg discipline began to run.

In the particular circumstances of this case the company submissions must prevail. Article 18.3 contemplates that the employer may defer making a decision with respect to the imposition of discipline until all relevant circumstances have been investigated. This would include the roles played by each of the members of the crew who were charged with responsibility for the alleged insubordinate activity. Indeed, in this particular case, the company had legitimate reason to be suspicious that concerted activity amongst the employees was engaged in that might warrant the assessment of varying quantums of demerit marks commensurate with the degree of individual responsibility. To satisfy itself that such "concerted" activity took place the company was obliged to interview each of the participants in the alleged insubordination before the investigation was completed. The grievor's own statement appears to have warranted an investigation of wide scope where he candidly states on May 19, 1983:

> "...I had lunch and I was talking with the other men as to whether we should go out.

Majority of the guys said no and I agreed."

Since I am of the view that the investigation was not completed until the last employee charged with an offence was interviewed I cannot hold that the employer breached the 28 calendar day time limit when Mr. Constantineau received notification of his dismissal on June 21, 1983.

The argument with respect to the employer's alleged violation of Section 81, Part IV of the Canada Labour Code is of no relevance to these proceedings. In any event proceedings have been initiated with respect to that allegation with the appropriate government authorities. The grievor's fate with respect to that allegation will be determined on the basis of the outcome of those proceedings.

For all the foregoing reasons the grievance is denied.

DAVID H. KATES,
ARBITRATOR.