CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1278

Heard at Montreal, Wednesday, September 12, 1984

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

DISPUTE:

Dismissal of Mr. Richard Huot dated
December 29, 1983.

JOINT STATEMENT OF ISSUE:

On December 12, 1983 R. Huot was su?m oned to a disciplinary
investigation for attendance for the months of October, November and December, 1983. As a result of this investigation, Mr. Huot was advised of his dismissal, effective Decem?er 29, 1983.

The Brotherhood contend that the decision rendered is excessive, due to the fact that in the past, Mr. R. Huot has never been
disciplined for attendance and that the theory of the culminating incident cannot be invoked.

The Company rejected the appeal.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) J. MANCHIP	(SGD.) R. L. BENNER
General Chairman	Manager of Materials

There appeared on behalf of the Company:

R. L. Benner	- Manager of Materials, CPR, Montreal
J. Viens	- Assistant Superintendent of Materials, CPR, Montreal
H. Ryan	- Night Supervisor, Materials Dept. CPR, Montreal
P. Macarone	- Supervisor of Training, Materials Dept.CPR, Montreal
P. E. Timpson	- Labour Relations Officer, CPR, Montreal
D. J. David	- Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

P. Vermette	- Vice-General Chairman, BRAC, Montreal
C. Pinard	- Local Chairman, Lodge 1267, BRAC, Montreal
R. Huot	- Grievor, Montreal

AWARD OF THE ARBITRATOR

Two grievances have been referred to CROA contesting the appropriateness of the employer's decision to impose a fifteen day suspension and the discharge penalty for the alleged infractions set out in the grievor's notification of discipline. Because the issues raised in both grievances are practically identical, I have resolved to treat the cases together.

In the first grievance the grievor was disciplined for having been discovered with two colleagues in a janitor's closet where they otherwise ought to have been at their work stations. The union does not challenge the incidents' occurence or that it warranted a disciplinary response on the employer's part.

The crux of the trade union's case relates to the harshness of the fifteen day suspension in light of the fact that the grievor's colleagues were only given written warnings for the same infraction. In short, the trade union submits that the grievor has been treated in a discriminatory manner with respect to the imposition of disciplinary penalty.

The employer however argued that it has strictly adhered to the principle of progressive discipline in having regard to the grievor's "abysmal" record with respect to past disciplinary incidents. The reason it alleges that the grievor received a harsher penalty than that assessed his colleagues is related to their less serious work records.

The trade union in this regard pointed out that the company has assessed discipline against the grievor for past infractions (approximately five) where oral reprimands have been issued and noted on the grievor's personal record where appropriate investigations had not taken place in accordance with the requirements of Article 27.1 of the collective agreement. Accordingly it is requested that those particular incidents that were not subject to investigation should not form a part of that record. When the grievor's past record is viewed in light of the discarded incidents that record compares favourably with the past records of his colleagues who were given a written reprimand. ?rticle

27.1 reads in part as follows:

> "An employee shall not be disciplined or dismissed until after a fair and impartial investigation has been held....."

The company does not deny that those impugned incidents isolated by the trade union as part of the grievor's record were incidents that were not subject to an appropriate investigation. It was submitted however that the same record of the grievor was placed before the Arbitrator in CROA Case No. 1078 in May 1983 at which time the grievor's two day suspension was sustained. The company accordingly submits that no objection was taken at that time to the propriety of the evidence of the grievor's past record and no such objection should be permitted before me. The trade union's representative could offer no explanation for the delay of grieving the employer's actions when it knew, or ought to have known some time ago, of the employer's impropriety.

While I am partial to the company's position that the trade union cannot be allowed to await indefinitely to advance a grievance to arbitration when it becomes aware or should be deemed to be aware of an employer's procedural irregularity, I have concerns for other reasons about the company's reliance, in support of disciplinary penalties, on past infractions where oral reprimands are issued. I am satisfied that it accepted arbitral jurisprudence that oral reprimands (particularly such oral reprimands that are approximately five years old) are not intended to be given substantial weight at a subsequent arbitration hearing. The purpose of an oral reprimand is to place an employee on notice of the employer's concern with respect to his or her impugned conduct. The oral reprimand represents an attempt, without further recourse, to quell undesirable activity before such activity assumes more serious proportions. It is my view that such oral reprimands implicit are not to be used in subsequent arbitration cases as part of an employees personal record. Or, if it is used, minimal weight ought to be accorded them. Indeed, I have concluded that it is for this very reasons that the employer did not invoke the procedures under Article 27.1 of the collective agreement when the company issued the five oral reprimands that are relied upon in this case.

Having made these cor? ents the grievor's personal record, even when stripped of these incidents, is not an enviable one. I quite agree with the company's representatives that they demonstrate a pattern of activity that reflects a serious attitudinal problem towards his duties and responsibilities as an employee. Indeed, it is for this reason that I cannot reduce the grievor's fifteen day suspension to a written reprimand as requested by the trade union representative. Rather, I am satisfied, given the grievor's personal record (with minimal weight being attached to the incidents that resulted in oral reprimands) that the fifteen day suspension should be reduced to ten days.

The grievor's record is to be amended accordingly and he is to be compensated for five (5) days pay in addition to the four (4) days loss in pay for the holiday period that corresponded with the initial fifteen day suspension.

Almost concurrently with the incident that resulted in the grievor's fifteen day suspension, the employer invoked the investigation procedures to inquire into the grievor's absentee record. As a matter of practice the employer reviews employees attendance records in three month periods. An employee in a three month period exceeding a co??ination of six late or early quit instances or a single instance of a "no show" is subject to investigation and, in the absence of an appropriate explanation, to discipline.

The uncontradicted evidence shows that the grievor was a "no show" on three occasions for the three (3) month period comprising October, Novem?er and December 1983. At his investigation the grievor complained of sundry medical excuses for his absences but offered no real explanation as to why he did not inform the company in advance or at the time of his intended absences. Contrary to the trade union's suggestion, I have no reluctance in finding that the grievor's failure to inform his superiors of an absence from work, irrespective of the legitimacy of the excuse, is a serious dereliction of duty. Itcannot be seriously argued that such action puts the employer's operations in an adverse circumstance affecting productivity.

Again, the trade union's arguments with respect to the arguments with respect to the mitigation of the discharge penalty are the same as advanced in its defence of the grievor's fifteen day suspension. The personal records of two employees were adduced to demonstrate that these employees allegedly with like absentee records (as well as records of lateness and early quits) were not subjected to the same treatment as that imposed upon the grievor. Accordingly, it is submitted that the employer has improperly and unfairly singled the grievor out for discipline.

The company answered the allegation by submitting that between January 1983 to September 1984 approximately twenty-nine investigations had been invoked involving employees with dubious absentee records. These investigations resulted in a variety of disciplinary penalties assessed a nua?er of employees. In the two instances raised by the trade union the company demonstrated that where the employees had obvious explanations for their absences from work no further recourse was taken. Even so, the uncontradicted evidence did demonstrate where the occasion dictated the employees were given appropriate suspensions. In sum, the evidence falls far short of establishing the allegation of discriminatory treatment by the employer.

What I am left with however is the trade union's submission with respect to his past record containing the incidents of oral reprimanc that have previously been discussed. The company has candidly accepted the notion that the culminating incident, per s?, would not have precipitated the grievor's discharge. It was pointed out, however, that the grievor's past record, irrespective of the impugned incidents! does reflect a poor attitudinal problem towards his work responsibilit?es. I have already agreed with the company's assertion in this regard.

Upon serious reflection of the grievor's circumstance I must with some reluctance conclude that the five incidents resulting in oral reprimands played a substantial part in the company's decision to discharge the grievor. In so doing, I am of the view that more weight was attached to those incidents than was warranted. Nonetheless, I am concerned that the grievor should not interpret any leniency on my part in directing his reinstatement as a victory.

The culminating incident represents a serious infraction that cannot be treated lightly. Accordingly, in extending the grievor one last chance, I am directing his reinstatement effective upon the receipt of this award without compensation or other benefits.

I shall remain seized for the purpose of implementation.

DAVID H. KATES,
ARBITRATOR.