CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1405

Heard at Montreal, Wednesday, September 11, 1985

Concerning

CANADIAN PACIFIC LIMITED (CP RAIL)
(Prairie Region)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Extra Gang Labourer S. L. McKenzie was released from service August 2, 1984, without investigation. The Company claims he was a probationary employee, the Union does not agree.

JOINT STATEMENT OF ISSUE:

The Union contends that:

1. Mr. S. L. McKenzie had the required three months service and was not a probation employee. Section 4.1, Wage Agreement 42.

2. The Company violated Section 18.1, 18.2 and 18.3, Wage Agreement 41.

3. Mr. S. L. McKenzie be paid for all wages and compensation he could
have earned since August 2, 1984, until reinstated including any expenses he incurred.

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

FOR THE BROTHERHOOD:

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

FOR THE COMPANY:

(SGD.) J. D. CHAMPION
FOR: General Manager,
Operation and
Maintenance

There appeared on behalf of the Company:

J. D. Champion - Supervisor, Labour Relations, CPR, Winnipeg
R. E. Noseworthy - Asst. Supervisor, Labour Relations, CPR, Winnipeg

R. A. Colquhoun - Labour Relations Officer, CPR, Montreal

And on behalf of the Brotherhood:

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

AWARD OF THE ARBITRATOR

The preamble to Wage Agreement 42 (governing Extra Gang Labourers) clearly provides:

> "Except as otherwise provided herein
> Wage Agreement No. 41 will apply."

It seems patently obvious to me that the parties intended Wage Agreement No. 41 to apply to Gang Labourers only to the extent that no conflict or inconsistency resulted with respect to the provisions contained in Wage Agreement 42. In other words, in the event of a conflict between the two agreements any inconsistency was to be decided in favour of Wage Agreement No. 42. Accordingly, the assertion made by the trade union that Article 18.01 of Wage Agreement 41 should override Article 4.1 of Wage Agreement 42 is clearly wrong. Article 18.01 of Wage Agreement No. 41, to the extent it ensures "all employees" access to a fair and impartial investigation of an alleged disciplinary offence, simly is not intended to apply to probationary employees as defined under Article 4.1 of Agreement 42. That provision reads as follows:

> " A new employee shall not be regarded as permanently employed until after 3 months' service which service must be accumulated within the preceding 24 months on the Railway on which employed. Within such 3-month period he may, without investigation, be removed for cause which in the opinion of the Company renders him undesirable for its service."

In analysing Article 4.1 of Wage Agreement 42, I find no merit in the trade union's interpretation suggesting that a new employee need only hold three months continuous employment in order to satisfy the "three months service" prerequisite for being elevated to permanent status. Surely, if that were the case and service were only to be calculated on the basis of three calendar months of employment then there was absolutely no need for the parties to have inserted a

twenty-four month framework within which a new employee would be entitled to accumulate three months service. Such a framework is entirely superfluous if the probationary period were only to be measured on a continuous calendar month basis from the date of hire.

I quite agree with the employer's submission and the arbitral cases relied upon in its brief that the three month service requirement is intended to mean, in the probationary context, three months of active or working service. It is in that context that it is anticipated that the company might make an informed judgment as to a new employee's abilities and suitability to be elevated to permanent status.

In analysing the arbiral decision relied upon by the trade union in Re Royal Canadian Mint and Public Service Alliance of Canada (1975) 11 LAC (2d (Abbott) I am satisfied that it is based on a provision of a collective agreement that reads differently from the collective agreement before me. In that case the provision allowed for the probationary period to run "whether or not those days....are interrupted by one or more lay-offs". To the extent that the decision allowed "consecutive days" that were interrupted by a strike to be included in the calculation of the probationary period I find some concern with the wisdom of the arbitral result.

It suffices to say in the disposition of this case that the grievor, because of his numerous lay-offs from work since his date of hire failed to satisfy the requirement of three months service within the framework of a twenty-four month period so as to entitle him to permanent employee status. The employer accordingly was not required to extend him the benefit of a fair and impartial investigation when it terminated the grievor's services.

The grievance is therefore denied.

DAVID H. KATES,
ARBITRATOR.