

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1427

Heard at Montreal, Tuesday, November 12, 1985

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Dismissal of probationary Trackman, B. Hughes, Redpass, B.C.

JOINT STATEMENT OF ISSUE:

Mr. Hughes commenced work for the Company as a Trackman on 14 August 1984 and he was discharged from the Company's service on 16 November 1984, within his 90 working day probationary period.

The Brotherhood contended that Mr. Hughes was wrongfully dismissed.

The Company denies the Brotherhood's contention.

FOR THE BROTHERHOOD:

(SGD.)) G. SCHNEIDER
System Federation General
Chairman

FOR THE COMPANY:

(SGD.) J. R. GILMAN
FOR: Assistant
Vice-President
Labour Relations.

There appeared on behalf of the Company:

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| T. D. Ferens | - Manager Labour Relations, CNR, Montreal |
| J. Russell | - System Labour Relations Officer, CNR, Montreal |
| B. Loutit | - Maintenance Engineer, (witness) CNR, Kamloops |
| John Gordey | - Roadmaster, (Witness) CNR, Jasper |

And on behalf of the Brotherhood:

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| G. Schneider | - System Federation General Chairman, BMWE, Winnipeg |
| T. J. Jasson | - Federation General Chairman, BMWE, Winnipeg |

AWARD OF THE ARBITRATION

Article 2.1 of Agreement 10.8 governs the employer's dealings with probationary employees as follows:

"2.1 Except as otherwise provided in Article 7.14,
a new employee shall not be regarded as permanently

employed until after 90 working days' service, which service must be accumulated within the preceding 24 months. Within such period he may, without investigation, be removed for cause which in the opinion of the Company renders him undesirable for its service. If removed for cause, he shall be provided with a written notice following his written or verbal request. If retained, his seniority in the maintenance of way department shall commence from the date of entry into the service as a maintenance of way employee under this Agreement."

As Article 2.1 anticipates the company is given a very wide latitude in determining within the ninety day probationary period whether a newly hired employee is sufficiently suitable to be elevated to permanent employee status.

In this regard the company marshalled forward a number of incidents relating to the grievor's mediocre work performance during the probationary period that allegedly resulted in its decision to reject the grievor. These incidents related to the grievor's laziness, insubordination disrespect, poor attitude and undesirable work habits.

What was significant in reviewing the trade union's brief was that the trade union made no effort to challenge any one of these incidents or to convince me that the employer was wrong or inaccurate with respect to the grievor's poor work habits.

The trade union's theory, irrespective of what appears to be an uncontradicted case in support of a rejection on probation, is that the grievor was terminated because of a personality conflict between the grievor and his supervisor, Mr. Lincoln Bailey. Indeed, the trade union's defence is based on the notion that the grievor was terminated for arbitrary and discriminatory reasons that had absolutely nothing to do with his allegedly mediocre work performance.

At the crux of the trade union's theory is an incident involving a letter dated October 15, 1984, where the grievor wrote Mr. Bailey (with a copy to Mr. J. Gordey, Roadmaster} complaining about his foreman's poor driving habits and the risk to the safety of the work crew under his authority. Notwithstanding the grievor's efforts to correct Mr. Bailey's driving faults the latter was involved in a traffic accident on October 26, 1984, where four members of his crew were injured. The grievor apparently participated in the investigation of the accident.

Approximately two weeks later, the grievor on November 16, 1984, at 7:00 A.M., was discharged by Mr. Bailey for his alleged attitudinal problems with respect to his work performance. Again, the unchallenged evidence provided by Mr. Gordey appeared to suggest that Mr. Hughes never did approach his work tasks with the appropriate alacrity expected of a probationary employee.

The trade union has argued that all of the incidents pertaining to the grievor's attitudinal problems were simply relied upon by the company to disguise the bad faith reasons hitherto suggested for the grievor's termination.

To compound the employer's allegedly improper "motive" in terminating the grievor, it was conceded that Mr. Bailey had absolutely no authority to terminate the grievor. Only Roadmaster J. Gordey could do that. And, the evidence indicated that Mr. Bailey was subsequently reprimanded for his unauthorized action. Nonetheless, once recourse to discharge was taken Roadmaster Gordey, upon consultation with his superiors, reaffirmed the termination for the work related concerns that have hitherto been discussed.

And, finally, although Mr. Gordey acceded to the grievor's written request of November 17, 1984, to provide him with appropriate reasons for his rejection while on probation he did so in an oral discussion with him. He omitted, as Article 2.1 of Agreement 10.8 prescribes, to provide him with a written letter outlining his faults.

Despite the admitted defects in the procedures adopted by the company to effect the grievor's rejection while on probation I am of the opinion that the uncontradicted evidence sustains the notion that the grievor was properly terminated, as Article 2.1 contemplates, because he was found to be a mediocre and unworthy employee.

The trade union's theory that the grievor was terminated for reasons that were unrelated to his work performance but was attributable to his conflict with Mr. Bailey remained unsubstantiated. Firstly, Mr. Bailey was not the only supervisor who could no longer tolerate Mr. Hughes' work habits. The uncontradicted evidence showed that Roadmaster Gordey and Foreman Pooli were also encountering difficulties with the grievor's reluctance to perform his duties. Moreover, of utmost significance these shortcomings were brought to the grievor's attention at the time the incidents occurred.

Secondly, the evidence did not indicate that the employer was seeking to terminate the grievor as part of a "cover-up" in order to conceal Mr. Bailey's responsibility for the accident. The evidence suggested that the R.C.M.P. was summoned to investigate the accident and that Mr. Bailey was ultimately assessed twenty demerit marks for his responsibility for the incident. Finally, I do not comprehend how a "cover up" could have possibly succeeded when four members of Mr. Bailey's crew were taken to hospital as a result of the incident. In other words, the notion that the grievor was fired as a means of thwarting an appropriate investigation of the accident is without any factual basis.

It seems to me that the only substantial allegation the trade union has established relates to Mr. Bailey's lack of authority to effect the discharge. That shortcoming, however, was corrected by Mr. Gordey's reaffirmation of the grievor's discharge in the face of the uncontradicted incidents evidencing the grievor's unchallenged mediocre work performance while on probation.

And, the shortcoming with respect to Mr. Gordey's omission to commit

to writing the oral reasons given Mr. Hughes for the company's decision to terminate does not represent in my view a fatal flaw. In due course the written correspondence between the parties and the grievor confirmed the very authentic reasons for Mr. Hughes' termination.

In the final analysis the trade union has only succeeded by recourse to innuendo prompted by the obvious difficulties encountered over the short probationary period between the grievor and Mr. Bailey to raise a suspicion of mal fides on the employer's part in its treatment of the grievor. In essence, however, the uncontradicted material before me indicated that the grievor simply was not worthy of being kept on as a permanent employee. And, in light of the wide discretion given the company under Article 2.1 of Agreement 10.8 to terminate or reject a probationary employee for cause, I simply cannot sustain the grievor's complaint that he was improperly treated.

Accordingly the grievance is denied.

DAVID H. KATES,
ARBITRATOR.