CANANIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1568

Heard at Montreal, Wednesday, October 15, 1986

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION

DISPUTE:

Termination of the employment of probationary employee R. S. Bevan, Yardman, Oshawa, Ontario.

JOINT STATEMENT OF ISSUE:

On July 29, 1985, Mr. R. S. Bevan commenced service under Agreement 4.16. Between that date and September 3, 1985, Mr. Bevan was employed as a Yard Helper at Oshawa, Ontario and completed 21 tours of duty as such.

On September 3, while still in his probation period, Mr. Bevan was advised by letter that his services had been found unsuitable and that, as a consequence, his employment was terminated.

Pursuant to the provisions of Article 58 of Agreement 4.16 the General Chairman of the Union appealed the termination of Mr. Bevan's employment.

The Company declined the Union's appeal.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) W. G. SCARROW	(SGD.) M. DELGRECO
General Chairman	FOR: Assistant Vice-President Labour Relations

There appeared on behalf of the Company:

J. S. Glazer	- Counsel, CNR, Montreal
D. W. Coughlin	- Manager Labour Relations, CNR, Montreal
J. B. Bart	- Labour Relations Officer, CNR, Montreal
M. C. Darby	- Coordinator Transportation, CNR, Montreal
T. W. Maw	- Assistant Superintendent, CNR, Oshawa
D. W. Brohm	- General Yardmaster, CNR, Oshawa

And on behalf of the Union:

D. Wray	- Counsel, Toronto
W. G. Scarrow	- General Chairman, UTU, Sarnia
R. A. Bennett	- General Chairman, UTU, Toronto

B. Leclerc - General Chairman, UTU, Quebec
J. F. O'Brien - Vice-General Chairman, UTU, London
T. G. Hodges - Vice-General Chairman, UTU, Toronto
P. G. Gallagher - Local Chairman, UTU, Niagara Falls
W. C. E. Crossman - Local Chairman, UTU, Oshawa
J. F. Hartwick - Witness
R. Bevan - Grievor

AWARD OF THE ARBITRATOR

The evidence establishes that Mr. Bevan has some five years of prior service with the Company, having been employed as a Welder within the bargaining unit of employees representing the Brotherhood of Maintenance of Way Employees. On his own request he transferred into the bargaining unit of the United Transportation Union, as a yard helper at Oshawa, Ontario, effective July 29, 1985. It is not disputed that he is a probationary employee within that bargaining unit, subject to the terms of Article 58.1 which provides as follows:

> "58.1 An employee will be considered as on probation until he has completed 90 tours of service under this Agreement. If found unsuitable prior to the completion of 90 such tours, an employee will not be retained in service and such action will not be construed as discipline or dismissal, but may be subject to appeal by the General Chairman on behalf of such employee."

The evidence establishes that on the 13th and 14th of August the grievor was late for work on a shift commencing at 1500 hours. On the second of those days he was verbally reminded by General Yardmaster Denis Brohm that his lateness was unacceptable. He was again late on August 16th, which resulted in a written reprimand from Mr. Brohm, dated August 21, 1985.

Mr. Bevan, who is 32 years old, had recently suffered the death of his wife following a lengthy bout with cancer, leaving him with the sole charge of three small children. It also appears that during the initial weeks of his employment in the Oshawa Yard the grievor did not have a motor vehicle, and commuted from his home in Cobourg, some 45 miles distant, by train. During the course of his second interview with Mr. Brohm on August 16th the grievor indicated that he would be obtaining a car, and that that would resolve the problem of his arriving late. In fact he did obtain the use of a vehicle and there is no evidence the grievor being late from that time to the date of his discharge on September 3, 1985.

However, on two further occasions in August the grievor was absent from work. The evidence of Mr. T. W. Maw, Assistant Superintendent of the Company's Oshawa Yard, establishes that he did not believe that either of those absences was legitimate. More precisely, he formed the opinion that on the occasion of the first absence, on August 22nd, the grievor failed altogether to call in to advise the Company that he would not be at work. The grievor's evidence is that he did call the crews' toll free number and notified the Company that he would not be in work. According to his evidence the reason for

his absence was the illness of his son, who was suffering a high fever and had a history of convulsions in such circumstances. While the evidence of the parties on whether Mr. Bevan called in is in obvious contradiction, the only direct evidence before the Arbitrator is that of the grievor himself. Mr. Maw's knowledge of whether the grievor did call the crews' office, which apparently records all telephone calls, is based on information related to him by others, which is heresay in nature. It is also not clear on the evidence whether the call in question was through Belleville or Toronto. It appears that Mr. Maw's inquiry was limited to the Belleville office.

The second absence occurred on the evening of August 30th, when the grievor was scheduled to work the tour commencing at 2359 hours. It is clear from the testimony of Mr. Maw that he was under the impression at the time that the grievor did not have a vehicle in which to get from Cobourg to Oshawa. The Assistant Superintendent understood that he was being driven by a fellow-employee on the shift, Yard Foreman John Hartwick, who also lived in the Cobourg area. Mr. Hartwick called in sick that evening, as did the grievor. Mr. Maw testified that he concluded that Mr. Bevan was not ill, but called in sick simply because he had no means to get to work. According to his evidence it is on the strength of that incident that he decided, in consultation with his immediate Supervisor, to terminate the grievor's services. When Mr. Bevan appeared for work on the following Tuesday, September 3, 1985, Mr. Maw presented him with a letter of discharge, apparently without asking for any explanation for his absence.

The evidence establishes to the Arbitrator's full satisfaction that the Assistant Superintendent was incorrect in his surmise. Firstly, the grievor was not dependent upon Mr. Hartwick for a ride to work. He had obtained the use of automobile from his girlfriend's parents, while they were out of the country for a number of weeks. Because they were coming from the same area, Mr. Bevan and Mr. Hartwick made an arrangement to alternate driving. During that week Mr. Hartwick's car was used on Tuesday and Wednesday while Mr. Bevan's automobile was to be used on Thursday the 29th and Friday the 30th. The evidence of Mr. Hartwick confirms that arrangement, and that he was driven home by the grievor at the conclusion of the shift on the 29th. His evidence further establishes the grievor complained to him during that shift of feeling the symptoms of a cold, flu and a fever.

The grievor's own evidence is that he felt extremely ill on the evening of August 30th. That testimony is confirmed by his girlfriend, Ms. Jean Haig. She testified, without contradiction, that on the evening of the 30th, at approximately 9:30 P.M., she found Mr. Bevan, lying on a sofa in his home in a profuse sweat, suffering the obvious symptoms of a flu. According to her testimony, she persuaded him to stay home from work that night, and she was present when he called in sick. She also corroborated the loan of her parents' car to the grievor during the period in question.

It is common ground that the standard of proof required to establish just cause for the termination of a probationary employee is substantially lighter than for a permanent employee. The determination of "suitability" obviously leaves room for a substantial discretion on the part of the employer in deciding

whether an employee should gain permanent employment status. By the same token, however, under the instant collective agreement that discretion is not unreviewable. That is plain from the language of Article 58.1 of the Collective Agreement, which expressly permits an appeal against the dismissal of a probationary employee. While the parties addressed argument to the appropriate standard of review in such cases, it is not necessary to exhaustively recount or resolve that debate for the purposes of the instant case. It is sufficient to say that, at a minimum, the Company's decision to terminate a probationary employee must not be arbitrary, discriminatory or in bad faith. It must be exercised for a valid business purpose, having regard to the requirements of the job and the performance of the individual in question.

The evidence establishes that the decision to terminate Mr. Bevan's employment was made on an erroneous interpretation of fact on the part of the Assistant Superintendent. It is clear that but for Mr. Maw incorrect conclusion that the grievor was malingering on August 30, 1985, his employment would not have been terminated. In these circumstances the Arbitrator can give little weight to the submission of Counsel for the Company that the events of that date nevertheless gave the Company occasion to review Mr. Bevan's performance and determine that he was not suitable. That right may, of course, accrue to the Company at the end of the probation period of 90 tours of service, or at some earlier point if a legitimate culminating incident should justify it. However, neither of those circumstances is established in the instant case. Arbitral authority universally recognizes that it is not open to a Company to seize upon an innocent event and treat it as though it were a culminating incident that would justify a review of an employee's performance. In this regard there is no reason in principle to distinguish the rights of a probationer from those of any other employee. Mr. Maw was wrong in his interpretation of the events of August 30th, and gave the grievor no opportunity to correct that misimpression before discharging him. On the whole the Arbitrator finds it difficult to disagree with the submission of Counsel for the Union that in the circumstances the summary discharge of Mr. Bevan was arbitrary.

For the foregoing reasons the grievance must be allowed. The grievor shall be reinstated into employment as a probationary employee, credited with 21 tours of service, with compensation for wages and benefits lost. For the purposes of clarity it should be noted that such rights as the Company and grievor may possess under Article 58.1 under the Collective Agreement continue for the balance of the probationary period. For future reference, the evidence to date establishes only that the grievor was late for work, albeit without reasonable excuse, on August 13th, 14th and 16th, 1985.

I retain jurisdiction in the event of any dispute between the parties respecting the interpretation of implementation of this Award.

MICHEL G. PICHER,
ARBITRATOR.