CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1673

Heard at Montreal, Wednesday, 15 July 1987

Concerning

CANADIAN NATIONAL RAILWAYS

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Appeal of unjust dismissal of Mr. D. Leblanc, Extra Gang Labourer, effective 4 July 1986.

BROTHERHOOD'S TATEMENT OF ISSUE:

The Brotherhood contends that the discharge of Mr. D. Leblanc is unjust as the Company violated article 18.1 (c) of Agreement 10.1.

The Company disagrees with the Brotherhood's contention.

FOR THE BROTHERHOOD:

(SGD) G. SCHNEIDER
System Federation
General Chairman

There appeared for the Brotherhood

M. Gottheil	- Assistant to the Vice-President, Ottawa

And for the Company

A. Glazer	- Attorney, Montreal
T. D. Ferens	- Manager, Labour Relations, Montreal
A. Watson	- Labour Relations Trainee, Montreal

At the request of the parties, the Arbitrator adjourned the hearing to November.

On Wednesday, November 11, 1987;

There appeared on behalf of the Company:

J. Glazer	- Counsel, Montreal
T. D. Ferens	- Manager Labour Relations, Montreal
G. Blundell	- System Labour Relations Officer, Montreal
M. Vaillancourt	- Engineering Co-ordinator, Montreal
A. Watson	- Labour Relations Trainee, Montreal
D. Nikolic	- Program Co-ordinator, Prince George
E. Astorina	- Material Expiditor, Prince George

And on behalf of the Brotherhood:

M. Gottheil	- Assistant to Vice-President, Ottawa
G. Schneider	- System Federation General Chairman Winnipeg
D. Leblanc	- Grievor

AWARD OF THE ARBITRATOR:

Article 18.1 of the Collective Agreement describes the obligations of the parties in respect of informal investigations. Article 18.1 (c) provides the following:

> 18.1(c) In cases where the assessment of discipline is warranted, the employee will be advised in writing within 28 days from the date the incident is reviewed with the employee except as otherwise mutually agreed. A copy of the Incident Report and a copy of the Form 780 issued will be sent to the General Chairman.

Formal investigations are dealt with separately under Article 18.2. Article 18.2(e) makes the following provision:

> 18.2(e) If corrective action is to be taken, the employee will be so notified in writing of the Company's decision within 28 days from the completion of the employee's investigation, unless otherwise mutually agreed. Such notification will be given at the same time or after the employee is personally interviewed by the appropriate Company officer(s) unless the employee is not available for such an interview within the time limit prescribed.

The Union argues that in the instant case the requirements of paragraph 18.2(e) were not complied with. With that conclusion, quite apart from whether the requirements of that article are mandatory or directory, the Arbitrator cannot agree. It is common ground that on July 8, 1986 an employee of the Company delivered to the grievor an envelope containing at least two 780-B Forms. While the Company maintains that in fact there were three forms in the envelope, it is unnecessary to resolve that question. The two forms which the grievor acknowledges having received notified him that he had been assessed twenty demerits for using discriminatory and racist slurs against a fellow employee and, secondly, that he had an accumulation of sixty demerit points, resulting in his dismissal. The grievor acknowledges that he was not surprised to receive a notice of dismissal indicating that his record exceeded sixty

demerits. A day or two prior to receiving the envelope, the grievor telephoned the author of the 780-B Forms, Mr. L. D. Hurrell. Mr. Hurrell informed him by telephone that the result of his investigation was the assessment of twenty demerits for using discriminatory and racist slurs against a fellow employee, which was the subject of one investigation, and a further twenty demerits for threatening a foreman with physical harm on May 22, 1986, the subject of a separate investigation held at the same time.

Under Article 18.2(e) the Company is under no obligation to issue a Form 780 Notice to the employee. The obligation is only to provide a written form of notice of the Company's decision. That requirement is in contrast to the apparent obligation to provide a Form 780 contained in Article 18.1(c). It is common ground that the grievor's case did not fall under that article.

In this case, prior to receiving the notices delivered to his home, upon his own inquiry by telephone, Mr. Leblanc was unequivocally advised that forty demerits were being assessed against him as a result of the investigations in respect of the racial slur and the physical threat to the foreman. He knew that that result would cause his disciplinary record, which previously was at thirty-five demerits, to exceed sixty, resulting in his dismissal. In the circumstances the Form 780-B which was delivered to his home advising him that his record now exceeded sixty demerits, resulting in his discharge, in light of his knowledge of the true facts, simply confirmed what he had been told and must be construed as effective notice that the investigation of his threat to the foreman resulted in the imposition of demerits which caused his record to exceed sixty. I am therefore satisfied, in accepting the grievor's construction of the evidence, that the Company substantially complied with the requirements of Article 18.2(e) of the Collective Agreement. That provision does not require the delivery of a Form 780-B in respect of each and every infraction investigated. In the circumstances, no violation of the grievor's rights under the Collective Agreement is disclosed.

In the alternative, if it were necessary to do so, I would conclude that in fact the grievor did receive the three form 780-B's at the time of delivery. The evidence of the Company establishes a continuous chain of custody of the forms up to the time the sealed envelope was given to Mr. Leblanc. The evidence of Mr. D. Nikolic, Program Co-ordinator at Prince George, confirms that three forms were placed in the sealed envelope conveyed to the grievor. The grievor refused to sign the documents to acknowledge their receipt, even though he had done so on other occasions of discipline in the past. That refusal effectively deprived the Company of the best evidence of delivery, and in the circumstances the arbitrator is not inclined to resolve any doubt in the grievor's favour. I would conclude, on the balance of probabilities, that three Form 780-B's were served on the grievor, including the one relating to his threat to the foreman.

For these reasons the grievance must be dismissed.

MICHEL G. PICHER
ARBITRATOR