CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1813

Heard at Montreal, Wednesday, 13 July 1988

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

Appeal of the dismissal and termination of services of Trainman T. S. Dallyn of Prince George, B.C., November 21, 1986.

JOINT STATEMENT OF ISSUE:

The Union feels that the testing of Trainman T. S. Dallyn was unfair in that it did not give T.S. Dallyn a fair opportunity to demonstrate his abilities in that he was not eligible or at best barely eligible for examination for promotion to Conductor.

The Union further contends that the discipline issued Trainman T.S. Dallyn was invalid, null and void due to the fact that Trainman T.S. Dallyn was not investigated according to the Collective Agreement. We therefore request that Trainman T.S. Dallyn be reinstated with full compensation and full seniority.

In the alternative the Union pleads that in view of the circumstances the discipline assessed was too severe and ought to be mitigated in favour of the grievor.

FOR THE UNION:

(SGD) L. H. OLSON
General Chairman

There appeared on behalf of the Company:

L. A. Harms	- Labour Relations Officer, Montreal
D. C. St. Cyr	- Labour Relations Officer, Montreal
D. Lussier	- Co-ordinator Transportation, Montreal
B. Ballingall	- Labour Relations Officer, Edmonton

And on behalf of the Union:

J. Armstrong	- Vice-General Chairman, Edmonton
R. Proulx	- Vice-President, Ottawa
T. S. Dallyn	- Grievor

At the request of the parties the hearing was adjourned to Tuesday, 11 October 1988.

On Tuesday, 11 October 1988:

There appeared on behalf of the Company:

L. A. Harms	- Labour Relations Officer, Montreal
J. R. Hnatiuk	- Manager, Labour Relations, Montreal
D. C. St. Cyr	- Labour Relations Officer, Montreal
K. Macdonald,	- Manager, Labour Relations, Edmonton
P. F. Stephenson	- System Transportation Officer, Edmonton

And on behalf of the Union:

J. Armstrong	- Vice-General Chairman, Edmonton
R. J. Proulx	- National Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The grievor was terminated under the terms of Article 45.8 of the Collective Agreement which provides as follows:

> 45.8 Brakemen employed subsequent to October 26, 1985, shall not be permitted to refuse examination and shall be examined for promotion to Conductor as provided in paragraph 45.1. Such Brakemen failing to pass first examination for promotion to Conductor shall be given another examination within 6 months, and should they fail to pass on second examination, their names shall be placed at the foot of the Brakeman's seniority list or their services dispensed with at the option of the Company and will have the right to appeal under the provisions of the Grievance Procedure.

The material establishes without controversy that 90% is the established pass mark in the examination for promotion to Conductor. After attending promotional classes from June 16, 1986 to June 27, 1986 Trainman Dallyn received a final mark of 85.2%. This constituted a fail mark. On October 10, 1986 the grievor again wrote an examination, which resulted in a final mark of 88.8%. On the basis of that outcome the Company terminated the grievor's employment

At the initial hearing, in July of 1988, the Union asserted that the grievor had been dealt with contrary to the terms of Item No. 3 of Addendum No. 18 to the Collective Agreement which provides as

follows:

> 3. In the application of Items 1 and 2 hereof, the provisions of paragraph 45.8 of Article 45 will apply with the understanding that the "second examination" referred to in paragraph 45.8 will apply only to that portion of the respective training program which the employee failed to pass.

The position of the Union is that the grievor had apparently had difficulty with the Manual Block System portion of the examination of the U.C.O.R. Rules. It submitted that the Company had erred in requiring him, on the occasion of his second examination, to be tested on all of the rules as well as on, as it then believed, separate rules concerning hazardous goods. Since at the first hearing neither of the parties had clear information with respect to the course syllabus or Mr. Dallyn's actual results, an adjournment was granted to provide further time to produce the necessary information, as it could have a bearing on the application of Item No. 3 of Addendum 18.

At the continuation of the hearing in October of 1988 it was disclosed by the Company's representatives that the second examination of the grievor consisted solely of an examination on the entirety of the U.C.O.R. Rules. Moreover, the material discloses that the grievor's failure of the initial examination, on June 27, 1986 was not attributable to a failure to understand the Manual Block System portion of the U.C.O.R. Rules. It is clear that Mr. Dallyn then had errors in some eighteen areas of the rules.

The Union submits that the intention of Addendum 18 is that an employee failing a promotion test should be re-examined only on those parts of the tests which he or she failed, and should not be re-examined on matters successfully completed the first time. The Company advances a different view. Its representative submits that the Uniform Code of Operating Rules is a distinct portion of the training program within the meaning of Item No. 3 of Addendum No. 18. He stresses that a training program may consist of a number of elements, the U.C.O.R. being one of seven areas in which Conductors are examined. On that basis he argues that it was appropriate for the Company to re-examine the grievor on the U.C.O.R. as a whole.

In the circumstances of this case it is unnecessary to resolve the difference of interpretation which separates the parties. Even accepting, for the purposes of argument, the position advanced by the Union, it is clear that the grievor could not fairly be re-examined on any specific segment of the U.C.O.R. to the exclusion of any others, since his errors on the test of June 27, 1986 involved a broad spectrum of the Uniform Code of Operating Rules. In these circumstances the Arbitrator can find no error on the part of the Company in the manner in which the second test was administered in October of the same year.

The alternative thrust of the Union's grievance is that the Company was unduly harsh in terminating the grievor's services after he failed the promotion examination by barely more than one percentage

point. It stresses that the Company had the option of placing the grievor at the foot of the seniority list, rather than terminating his services. The essential issue is whether the Arbitrator should disturb the exercise of the Company's discretion to discharge Mr. Dallyn. It would appear from the express terms of Article 45.8 that the Company's decision is not immune from arbitral review. The language in the instant case can, therefore, be distinguished from collective agreement language which gives an employer an unreviewable discretion in similar circumstances (Cf. CROA 1345).

In the Arbitrator's view a Union seeking relief under the provisions of an article such as Article 45.8 must be prepared to demonstrate objective facts that would justify intervention. The demonstration of bias, unfairness or overt discrimination in the administration of a test or, perhaps, documented proof of a candidate's illness are the kinds of elements which may be looked to in this regard.

There is no evidence of that kind in the instant case. The clear, and admittedly unfortunate, truth is that Mr. Dallyn took the test for promotion to Conductor twice and failed it twice, albeit by the slimmest of margins on the second attempt. That fact, standing alone, does not justify an interference with the decision taken by the Company. Nor can the Arbitrator accept the submission of the Union, made in the alternative, that the grievor was terminated for disciplinary reasons, and was therefore entitled to the procedural protections of a disciplinary investigation.

For the foregoing reasons the grievance must be dismissed.

OCTOBER 14, 1988 (SGD) MICHEL G. PICHER
ARBITRATOR