CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1933

Heard at Montreal, Thursday, 13 July 1989

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Trainperson S.K. Grabo, Jasper, Alberta, July 12, 1988.

JOINT STATEMENT OF ISSUE:

On July 12, 1988, the Company dispensed with the services of Trainperson S.K. Grabo on the grounds that her performance did not meet required Company standards.

The Union asserts that the dismissal of the grievor was unjustified and that the Company's action was unreasonable and arbitrary.

The Company denied the appeal.

The Union seeks the reinstatement of Trainperson S.K. Grabo with full compensation and no loss of seniority.

| FOR THE UNION: | FOR THE COMPANY: |
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| (SGD) L. H. OLSON | (SGD) M. DELGRECO |
| GENERAL CHAIRMAN | for: ASSISTANT VICE-PRESIDENT LABOUR RELATIONS |

There appeared on behalf of the Company:

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| J. R. Hnatiuk | - Manager, Labour Relations, Montreal |
| K. G. Macdonald | - Manager, Labour Relations, Edmonton |
| W. V. Stasiuk | - Labour Relations Officer, Edmonton |
| D. E. Lussier | - Co-Ordinator, Special Projects, Montreal |
| K. L. Hammell | - Superintendent, Calgary |

And on behalf of the Union:

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| L. H. Olson | - General Chairman, Edmonton |
| C. S. Lewis | - Secretary, GCA, Edmonton |
| S. K. Grabo | - Grievor |

AWARD OF THE ARBITRATOR

The material establishes that as a probationary employee the grievor did have some problems with her availability for work. This was not overly serious, however, and following a written reminder from

General Yardmaster L. R. MacDonald with respect to the rules governing booking off and the expectations of the Company as to the availability of junior employees, particularly on weekends, Ms. Grabo's attendance and availability improved. It does not appear disputed that her discharge was precipitated by her booking off from June 29 to July 5, 1988. This was for a period of seven days, although she had obtained authorization for only a four-day leave of absence.

The standard of review for the arbitration of the discharge of a probationary employee is admittedly narrow. In the instant case the grievor's rights are governed by Article 108.5 of the Collective Agreement which provides as follows:

> 108.5 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 under this Agreement. 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.

In CROA 1568 the following comments were made with respect to the standard of review in a case of this kind:

> 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.

(See also CROA 1761, 1481 and 821.)

The concept of what constitutes arbitrary decision making has been the subject of considerable examination in the jurisprudence of Canadian labour relations. In Re Board of Education of the Burrough of Scarborough and Ontario Secondary School Teachers' Federation (1980) 26 L.A.C. (2d) 160 (M.G. Picher) at p.177 the following was stated:

> ... The term "arbitrary" has been considered and interpreted in a number of cases by the Courts. It is generally accepted the mean "capricious", "without any reasonable cause" and "without reason": ... A source of analysis in the field of employment relations has been the decisions of Courts and labour boards defining the common law or statutory duty of a union not to be arbitrary in its representation of employees. These cases have found "arbitrary" to mean "at whim" ... and "perfunctory" ... Canadian labour boards have defined as arbitrary decisions which demonstrate a failure to put one's mind to the issue and engage in a process of rational decision-making ... and a failure to "take a reasonable view of the problem and arrive at a thoughtful judgement about what to do after considering the various relevant and conflicting considerations" ...
>
> It is not necessary for this Board to exhaustively canvas the possible meanings of arbitrariness as that term relates to duty of an employer not to discharge a probationary employee except

> for just cause. For the purposes of this award we accept that it means, at a minimum, that in considering the discharge of a probationary employee an employer must not demonstrate an attitude of not caring or of failing to turn his mind to the merits of the issue.

When the foregoing standard is applied to the circumstances at hand, the Arbitrator is compelled to conclude that there are grounds to review the decision of the Company on the basis of arbitrariness. It should perhaps be emphasized, however, that there is not any suggestion in the material before me of any ill-will or bad faith aimed at Ms. Grabo. On the contrary, the Company's officers, and in particular Superintendent K.L. Hammell showed genuine consideration for her personal circumstances.

It is not disputed that the circumstances in which the grievor found herself in June of 1988 were extremely unfortunate. The material discloses that she is the mother of a child from a previous marriage. Her former husband who resides in Halifax, has custody of their son, subject to a court order permitting Ms. Grabo to meet her son in Toronto, bring him west for a visit and return him to Toronto for his return flight to Halifax, on a once a year basis. It is established beyond contradiction that prior to entering the employment of the Company the grievor purchased air tickets for herself and her son at a premium rate, which were non-redeemable and were required to be used on the dates fixed at the time of purchase, which was June 28 and July 5, 1988, Edmonton-Toronto return.

Knowing of the upcoming visit the grievor requested a leave of absence from the Company, by means of a written application on June 7, 1988, with her proposed absence to be from June 29 to July 5. The reasons for the grievor's request were made known to General Yardmaster L.R. MacDonald, who was made fully aware of the inflexibility in the flight arrangements previously purchased by Ms. Grabo. On June 21, 1988 the grievor was advised that her request was denied, as confirmed in a letter from the General Yardmaster dated June 24, 1988. Needless to say, that refusal was deeply unsettling to the grievor, who then faced the possibility of not seeing her son for an additional period of one year.

On June 25, 1988 the Union's local chairman, K. Watts appealed the decision of the Company to Assistant Superintendent Hammell. It is common ground that Mr. Hammell was not made aware by General Yardmaster MacDonald of the inflexibility which Ms. Grabo faced with respect to her flight arrangements. It appears, moreover, that the local chairman may not have been fully aware of that difficulty either. In the result, Mr. Hammell agreed to allow her a four day leave of absence commencing June 28 until Friday, July 1, 1988. Ms. Grabo accepted this as it appeared that it was all she was going to get. She remained deeply troubled, however, to the extent that complying with the Company's limited permission for absence put her in peril of not being able to honour the conditions of the court order giving her visitation rights with her son. In the end she resolved to leave for the period originally planned, seeing no practical alternative and being unwilling to forego seeing her son for an additional full year.

In the Arbitrator's view there is a disturbing element within the evidence respecting the conduct of the Company's General Yardmaster in respect of the grievor's request for the leave of absence. It is not disputed that Ms. MacDonald, who was made aware of the inflexibility of the travel arrangements by the grievor, never conveyed that critical restraint to Mr. Hammell at the time he made his decision to decline the grievor's request for a full leave of absence. While, as noted above, I accept without reservation that Mr. Hammell acted entirely in good faith, I am compelled to conclude that to the extent that information which may well have been critical to an appreciation of the grievor's circumstances was not communicated to him by Ms. MacDonald, it may fairly be said that in these circumstances the Company did fail to truly turn its mind to the merits of the grievor's request. Without ascribing fault to Mr. Hammell, who was clearly unaware of the apparent indifference demonstrated by Ms. MacDonald, I am satisfied, on the balance of probabilities, that the decision of the Company declining the grievor's request for the seven-day leave of absence was made in a manner sufficiently uncaring of the grievor's circumstances, and in disregard of the merits of her situation, so as to be fairly characterized as arbitrary.

The union does not deny that prior to the culminating incident the grievor's attendance and availability record was not exemplary. Taking that factor into consideration, the Arbitrator views this as a case best resolved by an order reinstating the grievor into her employment, as a probationary employee, without any order in respect of compensation. It appears to the Arbitrator that the interest of the Company to be assured that the grievor will, as a probationary employee, demonstrate the requisite standard of availability for work will be satisfied by such a remedial order.

For these reasons the Arbitrator orders that the grievor be reinstated into her employment as a probationary employee with 43 tours of service to her credit. The grievor's reinstatement will be without compensation and without loss of seniority in the sense that her seniority, assuming successful completion of her probationary period, shall be established in accordance with the rights which she would have had but for the Company's decision to dispense with her services. The Arbitrator retains jurisdiction in the event of any dispute between the parties with respect to the interpretation or implementation of this award.

July 14, 1989 (Sgd.) MICHEL G. PICHER
ARBITRATOR