# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 201

Heard at Montreal, Tuesday, January 13th, 1970

Concerning

## PACIFIC GREAT EASTERN RAILWAY COMPANY

and

## UNITED TRANSPORTATION UNION (T)

## EX PARTE

**DISPUTE:**

Reinstatement of Trainman G.T. Manvell

**EMPLOYEES' STATEMENT OF ISSUE:**

Trainman G.T. Manvell was advised under date of March 10, 1969, that he was dismissed from the service of the Railway, due to services being unsatisfactory account accumulation of sixty (60) demerit marks.

In case No. A-180, the Arbitrator has directed that fifteen (15) demerit marks assessed under date of March 10, 1969, are to be removed from the grievor's record.

Under date of May 2, 1969, the grievor was advised he had been credited with five (5) merit marks for valuable service rendered on February 13, 1969.

The Union contends that: (a) Merit marks should be deducted from demerit marks and (b) The grievor should be reinstated to service with the Railway. The Regional Manager has indicated that he can find no support for the grievor's reinstatement.

**FOR THE EMPLOYEES:**

**(SGD.) R. F. LANGFORD**
**GENERAL CHAIRMAN**

There appeared on behalf of the Company:

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| R. E. Richmond | – Chief Industrial Relations Officer, Vancouver |
| B. G. Metz | – Personnel Assistant, Vancouver |

And on behalf of the Brotherhood:

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| R. F. Langford | – General Chairman, Prince George, |
| F. R. Ruddell | – Vice Chairman, Vancouver |

**PRELIMINARY AWARD OF THE ARBITRATOR**

The company has raised two preliminary objections going to the arbitrability of this matter. It is said **(1)** that the matter has not been properly processed through the grievance procedure; and **(2)** that the subject-matter of the grievance is not arbitrable.

As to (1), it is to be noted that the relief sought by the Union in this case is the reinstatement of the grievor. It appears that the grievor was discharged on March 10, 1969, on the ground that he had accumulated sixty demerit marks. On the same date he was advised that he had been assessed fifteen demerit marks in respect of an incident which had occurred on February 23, 1969. In **Case No. 180**, it was decided that the fifteen demerit marks were improperly assessed against the grievor, and it was awarded that that assessment be removed from his record. On October 28, 1969, following receipt of the award in **Case No. 180**, the union wrote to the company's regional manager, asking that the grievor be reinstated. While the matter was not argued on this ground, it might be contended that the request ought really to have been made to the "Superintendent", pursuant to step one of the

grievance procedure set out in article 104 of the collective agreement. If this request had been the initial grievance, and if step one of the grievance procedure were applicable, then it would appear that the grievance was untimely, having been brought more than thirty days from the date of the discharge of the grievor. However, no such objection was taken by the regional manager, nor was the matter argued on this basis at the hearing. The matter really relates to the effect of the award in **Case No. 180**, although it has come up of a separately arbitrable issue.

On November 6, 1969, the regional manager wrote the Union rejecting the request on the ground that, even after effect was given to the award of the arbitrator in **Case No. 180**, the grievor's record remained debited with 60 demerit marks. The Union subsequently sought to refer the matter to arbitration. It seems there was a meeting held between the parties on November 27, 1969, and that the Company was unwilling to join in a joint statement of issue. The Union thereupon proceeded upon notice by way of *ex parte* application.

In my view, the matter has been brought forward in substantial compliance with the requirements of the grievance procedure. The issue, as will be seen, is a policy question relating to the administration of the Company's disciplinary system and arises with respect to the enforcement of the earlier award. It has not been shown that any issue as to timeliness or as to compliance with the grievance procedure was properly taken by the company, or that it has been in any way prejudiced by the manner in which the grievance has been processed. Certainly the Union could not, at this late date, raise any question as to the propriety of some earlier disciplinary assessment now appearing on the grievor's record, but this is not such a case. The essence of the union's claim in this case is that, having regard to the entries then appearing on the grievor's record, and the removal of fifteen demerit marks pursuant to the arbitrator's award, the grievor was entitled to be reinstated. On the facts of this particular case, it is my view that the requirements of the grievance procedure have been complied with and that (on this aspect of the matter), it is properly before me.

As to (2), it is the company's contention that its disciplinary policy is not a matter dealt with in the collective agreement, and is therefore not an arbitrable matter. While this is correct as a general proposition, it must be remembered that the application of that policy, where it results in the discharge or discipline of an employee, may indeed be arbitrable. In the instant case, it is claimed that the grievor is entitled to be reinstated in employment. Implicit in such a grievance is the allegation that the grievor has been wrongfully discharged, and certainly, a grievance of this sort is arbitrable. In this case, however, the matter turns on the assertion that the company failed to credit the grievor's record with five merit marks which he was awarded on May 2, 1969, in respect of certain services performed on February 13, 1969. The Company's position is, in effect, that it was under no obligation to use the merit marks which it may see fit to grant so as to reduce the number of demerits, if any, appearing on an employee's record. This is not, strictly speaking, a preliminary objection, but is rather in the nature of a reply to what is anticipated as the Union's argument.

It must be concluded therefore that the matter is arbitrable. It may well be, as the Company argues, that the arbitrator is without jurisdiction to make an award requiring the Company to deduct merit marks from demerit marks, as the Union requests. There may, however, be other arguments open to the Union, and it is entitled to the opportunity to present them. A case may be "arbitrable", even although it may appear that it could not succeed on the grounds relied on. The issue now before me is one of arbitrability, not whether the Union's case is good or bad. In the circumstances, the Union may wish to reconsider its position, but the interim award must be that the matter is arbitrable. It will therefore be listed for hearing in the usual way.

On Tuesday April 14th, 1970, there appeared on behalf of the Company:

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| R. E. Richmond | – Chief Industrial Relations Officer, Vancouver |
| H. Collins | – Supervisor – Labour Relations, Vancouver |

And on behalf of the Brotherhood:

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| J. L. R. Piche | –Acting General Chairman, Prince George, |
| F. R. Ruddell | – Vice Chairman, Vancouver |

## AWARD OF THE ARBITRATOR

As set out in the interim award, the substantial question in this case is whether, at the time of his discharge on March 10, 1969 the grievor's discipline record ought to have reflected the five merit marks which were awarded him on May 2, 1969, in respect of services performed on February 13, 1969. The company's form 243 records that the five merit marks were awarded the grievor "effective February 13, 1969".

At the time of the grievor's discharge his record, as maintained by the company, showed an accumulation of 75 demerits. The five merit marks had not been credited to this record. By the award in **Case No. 180**, fifteen demerit marks were removed from the record, so that it appeared to stand at 60 demerits. The incidents which had led to the imposition of these demerit marks were not in question either in **Case No. 180** or in these proceedings. If the record properly stood at 60 demerits then, under the company's policy of discipline, the grievor would properly have been subject to discharge and no argument is made in this case on that matter. If, however, the grievor was entitled to credit for the five merit marks, then his record would have shown only 55 demerits and his discharge would have been improper. He would be entitled to reinstatement in employment.

The system of discipline used by the company is not a matter dealt with in the collective agreement, and not in itself subject to challenge in arbitration proceedings. As was said in the interim award, while this general proposition is correct, it must be remembered that the application of a disciplinary policy, where it results in the discharge or discipline of an employee, may indeed be arbitrable. It need not be spelled out in a collective agreement that the employer must deal with its employees, in matters of discipline, in an even-handed way, without discrimination, and meet the general requirement of treating like cases alike. In fact, the company's policy does involve the application of merit marks to the reduction of accumulated demerits. The particular question in this case is whether the company applied that policy consistently and fairly.

No question arises here as to any "entitlement" to merit marks as such. Five marks were in fact awarded to the grievor, effective February 13, 1969. It is true that in 1961 the company's general manager wrote to the general chairman of the union stating that "merit marks will be used to adjust or clear a record". The union relies on this statement. It argues, quite properly, that while the company is free to change such a policy, it is unfair for it to do so without notice, and to the prejudice of a particular case. In fact, however, the policy which has been applied by the company has been to use merit marks to adjust or clear a record on annual review of an employee's record on the anniversary of the last recorded discipline. In the case of the grievor his record had last been subject to such annual review on October 3, 1968. At that time his record, which had shown 50 demerits, was reduced to 30 demerits pursuant to the policy of clearing 20 demerits for one year's service free of recorded discipline. The policy had not been to credit a disciplinary record with merit points when they were issued, but only to credit them against accumulated demerits upon annual review. Thus, on February 13, 1969 the grievor's accumulated record remained at 30 demerits. On February 26, 1969, he was assessed 15 demerits, but these were removed by the award in **Case No. 180** and his record must be deemed to have stood at 30 demerits at that time. On March 7, 1969, he was assessed 30 demerits. The propriety of that discipline is not in issue. As a result of it, the grievor's record stood at 60 demerits and upon consideration of his case, he was discharged. There has been no grievance brought specifically on the issue whether he was properly discharged in the circumstances, in the light of that record. The only question has been whether the record was proper, and in particular whether it ought then to have shown 55, rather than 60, demerits.

On the material before me, it does not appear that the grievor has, in the matter of his disciplinary record, been treated differently from any other employee, or has otherwise been discriminated against. Although he was granted five merit marks effective February 13, 1969, he could not have expected (even though the company's form did not make this clear) to have these merit marks applied in reduction of his demerits, until October 1969 at the earliest, and in conjunction with a year free of demerits. The occasion for reducing his demerit record simply did not arise.

I must find that the company did act in accordance with its policy, and that there was no discrimination against the grievor with respect to his discipline record. Even giving effect to the Award in **Case No. 180**, the grievor's accumulated demerits stood at 60. For these reasons the grievance must be dismissed.

**(signed) J. F. W. WEATHERILL**
**ARBITRATOR**