

# CANADIAN RAILWAY OFFICE OF ARBITRATION

## CASE NO. 294

Heard at Montreal, Tuesday, June 8th, 1971

Concerning

### CANADIAN PACIFIC EXPRESS COMPANY

and

### BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

#### DISPUTE:

Dismissal of Warehouseman L.J. McCabe.

#### JOINT STATEMENT OF ISSUE:

On September 10, 1970, Warehouseman L.J. McCabe was advised that he was dismissed from the service.

The Brotherhood claims demerit marks were unfairly assessed to employee McCabe during the period extending from September 3rd to September 10th, 1970 inclusive which resulted in his dismissal from service September 10.

The Brotherhood has requested that Warehouseman McCabe be returned to service with full seniority and compensation for all time loss.

The Company contends that Mr. McCabe's dismissal was fully warranted and has declined to reinstate him.

#### **FOR THE EMPLOYEES:**

**(SGD.) L. M. PETERSON**  
GENERAL CHAIRMAN

#### **FOR THE COMPANY:**

**(SGD.) W. BOWERS**  
PRESIDENT

There appeared on behalf of the Company:

F. E. Adlam	– Industrial Relations Representative, Toronto
J. T. Harford	– Director Personnel, Toronto
J. G. MacMillan	– Supervisor Personnel, Toronto
R. J. Daniels	– Regional Manager, Toronto
H. R. Pierce	– Terminal Operations Manager, Toronto

And on behalf of the Brotherhood:

L. M. Peterson	– General Chairman, Toronto
G. Moore	– Vice General Chairman, Toronto
F. C. Sowery	– Vice General Chairman, Montreal
M. Peloquin	– Administrative Assistant to International Vice-President, Montreal
J. F. DanhoWer	– Local Chairman, Toronto

## AWARD OF THE ARBITRATOR

On Wednesday, September 2, 1970, the grievor did not report prior to the regular starting time of his shift for overtime work, as he had been requested to do. Overtime is mandatory under the collective agreement, and the grievor was properly subject to discipline. The company, upon consideration of the matter, imposed a penalty of five demerit marks. Certain other employees who had likewise failed to come in for overtime, and whose explanations had not been accepted, were likewise penalized. The material before me does not indicate any grievance with respect to this particular matter. In any event, there is no doubt that the discipline was properly imposed.

On September 8, 1970, the grievor again failed to report for overtime work in advance of his regular shift. Again, he was subject to discipline. In respect of this occasion, he was assessed ten demerit marks. On September 9, he again failed to report for overtime, and in respect of this was assessed twenty demerit marks. He likewise failed to report for overtime on September 10, although he had been specifically directed to do so. In respect of this, it had apparently been determined that the grievor would be assessed forty demerit marks, so that his accumulated demerits would be seventy-five. Although his record had been clear of demerits as of the beginning of September, it now contained more than sixty demerits, and whatever the policy may have been as to demerit marks, it can at least be said that the grievor's continued employment was under review.

The grievor was interviewed on September 10, at a meeting at which both union and company officials were present. It seems that he was unwilling to accept the directions of the company with respect to reporting for overtime, and that his attitude was, although the material before me is not very detailed on the point, one of defiance. At the conclusion of the meeting the grievor was discharged, for "adamant refusal to accept proper direction from management, insubordination, and an accumulation of in excess of 60 demerits".

The collective agreement does not require the holding of an investigation prior to the imposition of discipline. Article 8(a) provides simply that no employee will be disciplined or dismissed from service without just cause. There is provision for investigation in the course of the grievance procedure, but this arises following the taking of some disciplinary action by management. The issue before me is simply whether the grievor was discharged for just cause.

The grievor is said to be an employee of some eighteen years' seniority, and his record was, as has been noted, free of demerits at the time in question. He was, again, quite properly assessed five demerits for failure to report for overtime on September 2. (From the company's brief, it would appear that this penalty was assessed for his failure to report on September 1 as well as September 2, but in any event, only the one discipline was imposed). The grievor has stated that he was told the discipline would not be doubled or piled up, but this is denied by company officials who had been present at the meeting on September 3, and who made their denial at the hearing of this matter. Without making any determination on the point, it may be considered highly unlikely that the company would have given the grievor any assurance that he could repeat his offence with only the same light penalty.

For his offences on September 8, 9 and 10 – that is, for his failure to report for overtime – the grievor was properly subject to discipline and in my view it was quite proper to increase the discipline progressively as the offences continued. It appears, however, that the grievor was not given notice of the discipline imposed except on the first, and again on the final occasion. It was not, in fact, unmistakably brought home to him by September 9 that one further violation would make him subject to discharge. It was argued by the company that time did not permit review and issuance of demerits separately in each case, but that this did not affect the propriety of their issuance. Certainly it is true that the grievor was properly subject to discipline in each case. Where he has not been advised of the extent of the discipline, however, then the effectiveness of progressively increasing penalties is obviously lost. The grievor may well have known, and of course ought to have known that what he did was wrong, but he did not in fact know that he had been disciplined more than once, until September 10, when he was advised he had been disciplined four times. Disciplinary procedures of which the employee is not advised can scarcely be called disciplinary procedures at all. In fact, the grievor was really disciplined on three occasions. When the events described are properly considered. He was disciplined on September 3, and properly assessed five demerits. He was disciplined again on September 10, over his failure to report for overtime on September 8, 9 and 10. He was again disciplined on that day, later in the same meeting, for insubordination. The insubordination was related to the matter of reporting for overtime, and forms part of the whole set of circumstances.

It will be seen from the foregoing that the company did not in fact apply an orderly system of progressive discipline in the grievor's case since it failed to advise him in a timely fashion of each occasion on which discipline

was imposed. Since the events described really form part of a single protracted incident, it is best to consider the matter as such in determining whether the grievor was discharged for just cause. That he committed a number of offences, and that he had adopted a quite unjustifiable attitude towards the proper directions of management, seems clear. The grievor was certainly liable to severe discipline. But it cannot, in my view be said that his rather precipitate discharge fell within the range of reasonable disciplinary responses to the situation. The action was clearly excessive, and the company did not, in the circumstances, have just cause to discharge the grievor.

It follows that the grievor is entitled to reinstatement in employment, without loss of seniority or other benefits, and to receive compensation for loss of earnings. In determining the amount of compensation payable to the grievor, however, it may be considered that he is not entitled to compensation for the period from the time of his discharge until December 10, 1970. That would represent a three-month suspension, a substantial penalty which could not have been held to have been unjustified. For the period following that, the grievor is entitled to compensation for actual loss of earnings, if any. His demerit record could properly indicate thirty demerit marks, as of the date of his return to work.

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