CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 660

Heard at Montreal, Tuesday, May 9th, 1978

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Claim of the Union that C. McMillan be compensated for all time lost, including overtime, during the period April 25, 1977, to June 22, 1977.

JOINT STATEMENT OF ISSUE:

Grievor C. McMillan had been employed for over sixty-five working days within the preceding twenty-four months.

The Union contends that the dismissal of the grievor on April 25, 1977, without benefit of investigation was in violation of Section 18.1 of Wage Agreement No. 17.

The Union further contends that the claim should be paid under the provisions of Section 18.10 because the Company did not render a decision at Step I within twenty-eight days as required by Section 18.6 of Wage Agreement No. 17.

The Company contends that Section 18 of Wage Agreement No. 17 is not germane to Mr. McMillan's dismissal April 25, 1977, since at that time he was a probationary employee. Mr. McMillan left the Company's service September 30, 1976, when his services were required and upon re-entry into the Company's employ March 21, 1977, he became a new employee as contemplated in Section 13.2 of Wage Agreement No. 17. All conditions of his employment from March 21, 1977, to his dismissal April 25, 1977, were as a new or probationary employee contained in Section 13.1 of Wage Agreement No. 17.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.) A. PASSARETTI	**(SGD.) J. M. PATTERSON**
SYSTEM FEDERATION GENERAL CHAIRMAN	**GENERAL MANAGER, OPERATION & MAINTENANCE**

There appeared on behalf of the Company:

P. Timpson – Assistant Supervisor Labour Relations, Vancouver

And on behalf of the Brotherhood:

A. Passaretti – System Federation General Chairman, Ottawa

H. Thiessen – Federation General Chairman, Calgary

AWARD OF THE ARBITRATOR

There are two contentions that must be dealt with in this case. One is the claim that this is a claim for unpaid wages. The other is whether the grievor was a probationary employee at the time of his discharge. If he was not a probationary employee, then further questions would arise.

The essential facts of the case are that the grievor was dismissed, without investigation, on April 25, 1977. He was, subsequently, re-instated in employment. He now seeks compensation for loss of earnings. His grievance in this respect was not replied to within the time provided for in the collective agreement, and he therefore claims entitlement to be paid pursuant to Article 18.10 of the collective agreement, on the ground that this is "a claim for unpaid wages". This issue was dealt with in **CROA Case No. 507**, where, dealing with a very similar provision, it was said:

> … This special relief, which may result in the payment of incorrect claims, is to be confined to the class of cases for which, as I have indicated, it appears to be intended. Thus, a claim that an employee has performed certain work for a certain time and should be paid is, clearly, a claim "for unpaid wages". On the other hand, a claim that an employee ought to have been assigned work, but was not and should therefore be paid, is not a claim "for unpaid wages", but is rather a claim of improper discipline, a seniority claim, a contracting-out claim, or whatever the case may be. In such cases, failure to reply has the effect of allowing the case to go to the next stage of the grievance or arbitration procedure; it does not of itself preclude consideration of the merits and require payment.

In the instant case, the grievor's claim is one of improper discharge in connection with which certain monetary relief is sought. It is not a claim for unpaid wages, and is not payable pursuant to Article 18.10.

On the second question, whether or not the grievor was a probationary employee at the material times, the fact is that the grievor was hired by the Company on March 21, 1977. His discharge was some 35 days later. Article 13.1 provides, in effect, that an employee shall be on probation until he has accumulated 65 working days' service within a period of 24 months. Now while the grievor had only 35 days' service in 1977, he had in fact been employed in 1976, and had then accumulated more than 65 working days' service, becoming a permanent employee. Then, at the end of November, 1976, he simply left the service without notice, at a time when work in his classification was still going on and his services were required. He must be considered to have quit.

Article 13.2 of the collective agreement is as follows:

> **13.2** In the event of an employee leaving the service when his services are required, upon re-entering the service, he shall rank as a new employee.

The clear effect of this provision (whatever may have been in the parties' minds when it was negotiated) is that when a person in the grievor's situation (he having left the service when his services were required) is re-hired, he becomes a "new employee". This is so regardless of what may be done with respect to his rate of wages, having regard to his experience. Now by Article 13.1, "… a new employee shall not be regarded as permanently employed until he has accumulated the necessary service." The effect of this is that such a person becomes a probationary employee.

On the facts of this case, then, I find that the grievor was a probationary employee at the time of his discharge, and was then subject to discharge without investigation.

For the foregoing reasons, the grievance is dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR