

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 662

Heard at Montreal, Tuesday, May 9th, 1978

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN BROTHERHOOD OF RAILWAY,
TRANSPORT AND GENERAL WORKERS**

DISPUTE:

Discharge of Mr. J.D. Dennehy, Motorman, effective February 16, 1977, for misuse of pass privileges.

JOINT STATEMENT OF ISSUE:

On February 16, 1977 Mr. J. . Dennehy, Motorman at Concord, Toronto, was discharged account misuse of pass privileges. Mr. Dennehy had applied on November 24, 1976 for a return trip pass from Toronto to Vancouver, B.C., in the name of J. Dennehy and wife, Linda.

The pass was duly issued but was not picked up by Mr. Dennehy. It was picked up by a Mr. Howitt, then a fellow employee at Concord. The pass was used by Mr. Howitt, on his resignation from the Company shortly thereafter, to travel to Vancouver where an attempted sale of the return portion of the pass caused the pass to be confiscated at Vancouver in the second week of December, 1976.

The Brotherhood contends that while Mr. Dennehy was not legally married he did have a common-law wife and therefore did not misuse the pass privileges extended to employees.

The Company contends that as Mr. Dennehy was not married when he made application for the pass to Vancouver for himself and wife, Linda, such application was a misuse of a pass privilege.

FOR THE EMPLOYEES:

(SGD.) J. A. PELLETIER
NATIONAL VICE PRESIDENT

FOR THE COMPANY:

(SGD.) S. T. COOKE
ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

C. L. LaRoche	– System Labour Relations Officer, Montreal
W. W. Wilson	– Labour Relations Assistant, Toronto
J. W. Randall	– District Manager Express, Toronto
G. F. Strike	– Lieutenant, CN Police, Toronto
C. A. Henery	– General Supervisor Express, Toronto

And on behalf of the Brotherhood:

J. D. Hunter	– Regional Vice President, Toronto
R. Robinson	– Local Chairman, Toronto
J. Dennehy	– Grievor

AWARD OF THE ARBITRATOR

The pass for which the grievor applied was picked up, and later used improperly by a fellow-employee who was a close friend of his. It has not been shown that the actual misuse of the pass was attributable to the grievor. It was not a ground for the imposition of discipline on the grievor.

The ground relied on is rather that the grievor misused the pass privilege by applying for a pass for himself and his wife when he was not in fact married.

The grievor did make application for a pass for himself "and wife, Linda". The grievor was not married at the time. His testimony was to the effect that the lady referred to was his common-law wife. The evidence does not establish, however, that a true common-law relationship existed between the grievor and the lady, with whom he had lived for a certain time. She did not in fact form part of his "family" in the proper sense of the term, and under the regulations relating to passes, the grievor was not entitled to a travel pass in respect of her.

The grievor, it seems, was not aware of the regulations with respect to pass privileges. An employee needs no special notice, however, to be aware that travel passes are not simply handed out to whomever asks: obviously they are subject to regulation, and a person seeking to make use of the pass privilege must undertake the responsibility of finding out the terms on which passes are issued. This is at least the case with respect to the forms used when requesting a pass. From the form used, it would appear that an employee might request a pass for members of his family. The lady with whom the grievor was then living was not a member of his family. It would be at least questionable whether the grievor would be entitled to a pass for her, and it would be up to the grievor to enquire.

The grievor made no such enquiry. He had indeed obtained passes on certain previous occasions in respect of the same lady. That, of course, would not bind the Company to some sort of implicit acceptance of her as the grievor's wife, unless it were shown that the Company then had knowledge of the situation.

In the circumstances, it is my conclusion that the grievor improperly sought to take advantage of the pass privilege by applying for a pass for a person whom he knew – or ought to have known – was not entitled thereto. That is a matter for which discipline might properly be imposed.

In considering the matter of the severity of penalty, regard is to be had to the circumstances of the offence and to the grievor's discipline record. The offence itself would not, in my view, be grounds for discharge, although there may well be circumstances in which an improper application for a travel pass would justify that penalty. The grievor, it seems, considered the lady in question to be in some sense his "wife", although as I have noted she was not in any sense recognized by law. In terms of the system of discipline used by the Company, I should think that the offence in this particular case would merit ten, or at most twenty, demerit points.

The grievor's discipline record shows that on March 30, 1976, he was assessed 10 demerits for lateness and absenteeism. On May 28, 1976, he was assessed 35 demerits for withholding Company funds for a certain period, but this penalty was reduced to one of 10 demerits. On November 12, 1976, he was assessed 20 demerits for failing to telephone his controller and to finish his assigned workload, as well as for mishandling certain shipments. On February 1, 1977, he was assessed 10 demerits for lateness and absenteeism. By February 16, 1977, then, the date of his discharge, the grievor had been disciplined on five occasions during a period of less than one year, and had a total of 50 demerits. He had less than four years' seniority.

The notice of discipline issued to the grievor states that he was "discharged for misuse of pass privileges". It does not follow, from the statement of that ground (which was the immediate reason for the imposition of discipline), that the penalty itself (as apart from the existence of some occasion for discipline), must be justified on the basis of that one offence. It is open to the Company, once it has shown the offence stated, to rely on the grievor's record as well in seeking to justify the penalty imposed. Whether by virtue of a system of demerit points or otherwise, it should be clear that an employee who has committed five disciplinable offences in less than a year is one whose job is in jeopardy. Under some systems, he would have had a series of warnings and suspensions. Under the system in use here, the grievor has received fifty demerit points. Even taking the position most favourable to the grievor, and concluding that he should be assessed 10 demerits for the offence in question, he will then have accumulated 60 demerits and be subject to discharge.

For the foregoing reasons, it is my conclusion that it has been shown that there was just cause to impose discipline on the grievor and that, having regard to the grievor's record, there was just cause for his discharge. The grievance is therefore dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR