CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 794

Heard at Montreal, Tuesday, December 9, 1980

Concerning

ONTARIO NORTHLAND RAILWAY

and

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

DISPUTE:

Release of Telephone Operator Roberta Hermeston.

JOINT STATEMENT OF ISSUE:

Miss Hermestron was hired on November 8, 1979 as a Telephone Operator for spare and relief work. Her service was intermittent. She was terminated on June 25, 1980 and shown by the company as "released during probationary period". The union claimed that the probationary period had expired on May 8, 1980 and that the employee was unjustly disciplined. The union seeks her reinstatement with payment of all lost wages from the date of termination.

FOR THE EMPLOYEE:	FOR THE COMPANY:
(SGD.) G. E. HLADY	(SGD.) R. O. BEATTY
SYSTEM GENERAL CHAIRMAN	GENERAL MANAGER

There appeared on behalf of the Company:

A. Rotondo	– Manager, Labour Relations, North Bay
G. A. Dillworth	– Manager, Traffic & Marketing, North Bay

And on behalf of the Brotherhood:

G. E. Hlady	– System General Chairman, Barrie

AWARD OF THE ARBITRATOR

The issue in this case is simply whether or not the grievor was released on probation. If she was, the grievance must be dismissed. If she was not, then the grievance must be allowed even though, as appears from some of the material before me, there was certainly ground for some criticism of her conduct and perhaps for disciplinary action. This is not, however, a case in which the issue of just cause for discipline arises. It is, as I have noted, one in which the issue is whether or not the grievor had completed her probationary period.

The matter of a probationary period is dealt with in Article 2 of the collective agreement. That article is as follows:

> **2.5** A new employee shall be on a six months' period of probation from date of employment and if retained beyond this period will then rank on the seniority list from the date first employed in a position governed by this agreement. In the meantime, unless removed for cause, which in the opinion of the System renders him undesirable for its services, the employee will be regarded as coming within the terms of this agreement.

The grievor, as indicated in the joint statement, was hired on November 8, 1979. If the "six months' period" of probation referred to in Article 2.5 is a period of six calendar months, then it is clear that the grievor had been retained beyond that period and was no longer a probationer at the time of the termination of her employment. The Company contends, however, that the "six months' period" referred to in Article 2.5 is to be defined in terms of cumulative service. For this, it relies on Article 26.8 of the collective agreement, which is as follows:

> **26.8** When employees are placed on the payroll and their service is not continuous, 22 days' work shall be considered equivalent to one month and 125 days equivalent to six months; the second six months' rate to apply after 125 days' service and so on until full rate is attained.

Article 26 of the collective agreement contains various provisions which apply only to Commercial Telephone Department employees and not to others. The only specific reference to seniority in that article is in Article 26.1, which provides that the seniority of long distance operators will date from the time they last entered service as such. That provision has no real relationship to the matter of acquisition of seniority in the first place, by being retained in service for a period of more than six months, although it is certainly consistent with the view that a single period of six calendar months was intended. Article 26.8, however, has very clear significance with respect to salary increases, the rates for telephone operators being set out in Article 34.6 on a basis of six-monthly increases (subject to a first increase following a training period). It is not necessary, then, to read Article 26.8 as setting out a definition of a month's work, or of what constitutes six months' service for the purpose of determining what is the "six months' period" of probation referred to in Article 2.5. Indeed, there are in my view convincing reasons why Article 26.8 should not be read that way.

It is true that in Article 11.2 the provision that one hundred and twenty five days constitutes six months' service appears to mean, in the context of Article 11, that the probationary period for persons to whom that article applies is to be calculated in terms of cumulative days worked. Article 11 of the collective agreement is applicable to construction forces only. Article 11.1 deals with seniority grouping of such employees. It is, I think, reasonable to read Article 11.2 as setting out a special definition of the phrase "six months' service" for the purposes of Article 11. It is to be noted that the phrase thus defined is precisely that used in Article 2.5. That is not the case with Article 26.8, which does not refer to that phrase, and which deals expressly with the matter of the timing of rate increases. Thus, I do not consider that Article 26.8 is analogous to Article 11.2 as setting out a special definition of "six months' period" for the purpose of applying the probation provision to a special case, namely that of telephone operators.

As a general matter, it is my view that the reference to a six month period of probationary employment should be taken to be a reference to a period of six calendar months. While I do not disagree with the view that the probationary period is one in which the employer may assess the employee so as to arrive at a conclusion as to whether or not he wishes to keep him as a permanent employee with seniority, it would be appropriate to limit the cumulative working days (if such is what the parties intend) during which such assessment is to be made to those occurring within a set period of time. No such provision occurs here. It may be, of course, that where a probationary employee works only occasionally, the employer may feel, as the probationary period draws to a close, that it has not had the opportunity to make a proper assessment. In such a case (absent some appropriate agreement extending

probation, if that is possible) the employer may indeed think it best to terminate the employee rather than have him attain seniority. Such a possibility is, I think, inherent in an Article such as Article 2.5.

It was not contended that Article 2.5 provides for six months' cumulative work in all cases. Such a suggestion would be negated by the reference, in Article 2.6, to the acquisition of seniority by occasional employees after fifteen continuous days (not counting days off) of service. Rather, it is a general reference to a period of six months which, absent some specification to the contrary, means a period of six calendar months. Article 26 does not affect the application of this general provision to Telephone Department employees.

Accordingly, it is my conclusion that the grievor had passed her probationary period at the time her employment was terminated. It was not then open to the employer to release her on probation. The grievance is therefore allowed, and it is my award that the grievor be reinstated in employment with compensation for loss of earnings.

(signed) J. F. W. WEATHERILL
ARBITRATOR