CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 845

Heard at Montreal, Tuesday, July 14, 1981

Concerning

CANADIAN PACIFIC LIMITED

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

The dismissal of Trainman D.K. Andrews for accumulation of demerit marks, at London, Ontario, as advised by letter from Superintendent CP Rail, dated August 7th, 1979.

FOR THE EMPLOYEES:

(SGD.) L. H. BREEN
GENERAL CHAIRMAN

There appeared on behalf of the Company:

L. A. Clarke	– Supervisor Labour Relations, Toronto
B. P. Scott	– Labour Relations Officer, Montreal
E. F. Dixon	– Assistant Superintendent, Windsor

And on behalf of the Brotherhood:

L. H. Breen	– General Chairman, Toronto
B. Marcolini	– Vice-General Chairman, Toronto
J.R. Austin	– Secretary of the General Committee of Adjustment, Toronto

AWARD OF THE ARBITRATOR

This grievance relates to the dismissal of the grievor effective August 7, 1979, account accumulation of more than 60 demerit marks.

The Company has raised a preliminary objection to the arbitrability of this matter, asserting that no timely grievance was filed.

Article 39(c) of the Collective Agreement sets out the procedure to be followed in cases of appeals against discipline. Step 1 of that procedure is as follows:

> **STEP 1 - APPEAL TO SUPERINTENDENT**
> Within 60 calendar days from the date the employee is notified of discipline assessed the employee and/or Local Chairman may appeal the discipline in writing to the Superintendent.
>
> The appeal shall include a written statement of the employee's and/or the Union's contention as to why the discipline should be reduced or removed. A decision will be rendered in writing within 60 calendar days of the date of the appeal

In the instant case, the grievor's Local Chairman wrote to the Superintendent on August 9, 1979. The text of that letter is as follows:

> The deplorable conduct in this matter is an exercise in stupidity brought on entirely by an alcoholic sickness. We do not for one minute condone this behaviour.
>
> D.K. Andrews is aware that he does indeed have a drinking problem and would very much like to take advantage of treatment offered by Renaissant House, Toronto. We most respectfully appeal to your good will and generosity to grant this trainman a personal interview.

On August 14, 1979, the Superintendent replied to the Local Chairman's letter as follows:

> Referring to your letter of August 9th, 1979, concerning the dismissal of former trainman D.K. Andrews.
>
> I certainly concur with your remarks concerning the deplorable conduct of Mr. Andrews.
>
> In view of the fact that Mr. D.K. Andrews has been dismissed for cause and is, therefore, no longer an employee of this Company, the Company program for assistance to employees with alcoholic problems is not available to him. It is my understanding, however, that Renascent House, which is an independent treatment centre, is available to all persons and I presume there would be nothing to prevent Mr. Andrews seeking admission on his own initiative, and at his own expense, if he so desires.
>
> In view of the foregoing, I am not certain that I understand the necessity of interviewing Mr. Andrews.
>
> If you wish to discuss this matter further, please feel free to contact me at your convenience.

Subsequently, on October 1, 1979, the General Chairman appealed the matter to the General Manager. That would be a timely resort to Step 2 of the grievance procedure. The General Manager's reply was to the effect that the grievance had never been filed at Step 1, and was invalid. He did, however, indicate that he did not consider that there was merit to the grievance in any event.

The issue to be determined on the preliminary objection is whether or not the Local Chairman's letter of August 9th constituted a "grievance" or not that is, was it an appeal of the sort contemplated at Step 1 of the grievance procedure?

In my view, the letter of August 9, 1979, ought to have been treated as though it were a grievance as contemplated by Article 39(c). While the letter does not state in express terms that it is a "grievance" or an "appeal against discipline", it should surely be apparent that such is the thrust of a written intervention by a Local Chairman on behalf of an employee who has just been discharged. It was no doubt understandable in the circumstances that the letter should appeal to the good will and generosity of the Superintendent, but the failure to specify more precise relief is not fatal. The clear implication is that some reduction in discipline was sought, and the apparent reason for

that is that the penalty was considered too severe. It would, I think, be unduly restrictive to require a high standard of precise drafting in documents of this sort. The letter of August 9th should, I think, have been dealt with as what it essentially was, namely an appeal at Step 1 of the grievance procedure.

In my view, the requirements of the Collective Agreement were met, and the matter is properly before me. The preliminary objection is dismissed.

On the merits, the issue is whether or not there was just cause for the assessment of demerits on three counts, leading to the grievor's discharge. The grievor was assessed 20 demerits for using ungentlemanly language to make a vulgar and indecent advance to a female employee; he was assessed 30 demerits for giving false and misleading information in an investigation; and he was assessed 40 demerits for being unavailable for duty.

On the first matter, there is no doubt that the grievor did misbehave toward the female employee. This was apparently the "deplorable conduct" referred to in the Local Chairman's letter. The female employee was the crew clerk, and the grievor's wrongful conduct consisted of an improper suggestion made to her, in obscene terms, in a telephone conversation while the crew clerk was on duty. There is no doubt that the grievor's remarks, which caused upset and embarrassment to the crew clerk, were wrong and subjected him to discipline. In my view, the assessment of 20 demerits was not excessive.

As to the second matter, it is my conclusion that the grievor did make a false statement as to his having booked leave on July 12, 1979. That was the date on which the grievor, being drunk, missed a call and made the obscene suggestion to the crew clerk referred to above. While the improper conduct with respect to the crew clerk is a separate offence, it is my view that the matter of giving "false and misleading" statements at the investigation should be considered as related to the offence under investigation, and that discipline should, generally speaking, not be imposed under separate heads.

The grievor did miss a call on the day in question, and he did not book leave. The Assistant Chief Clerk, apparently in order to protect the grievor, had told him that evening (after he had missed his call) that he would be shown as on leave. In the end, however, the grievor falsely stated he had booked leave, and the employer assessed discipline for the missed call – that is, it did not, despite what the Assistant Chief Clerk had said, treat the grievor as on leave. A total of 70 demerits was assessed with respect to that situation.

In my view, discipline was proper on this account. Whether or not it would be generally open to the employer to assess discipline for a missed call after having said he would be treated as on leave, it was clearly wrong for the grievor then to assert that he had booked leave. In the circumstances of this case at least, the employer is not bound by any undertaking in that regard. The grievor, I find, had been advised earlier in the evening to expect a call, and had then made himself unavailable for duty by getting drunk. Certainly discipline was proper in respect of the whole incident. In my view, 70 demerits was excessive. Without making any determination as to any appropriate amount of discipline for similar cases, I have no doubt that at least 20 demerits would have been justified in this case.

The effect of the foregoing is that a total of at least 40 demerits could justifiably have been assessed against the grievor in respect of the incidents referred to. Since the grievor's record stood at 30 demerits, the result was the accumulation of more than 60 demerits. The grievor was, therefore, subject to discharge.

For all of the foregoing reasons, I find that there was just cause for discharge in this case. The grievance is accordingly dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR