CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 875

Heard at Montreal, Wednesday, October 14, 1981

Concerning

CANADIAN PACIFIC EXPRESS LIMITED

and

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

EX PARTE

DISPUTE:

The dismissal of probationary employee G. Burnett, Fredericton, New Brunswick.

EMPLOYEES' STATEMENT OF ISSUE:

Employee G. Burnett was released from the service of the Company after fifty-eight tours of duty with the reason given that Mr. Burnett did not meet Company Standards.

The Brotherhood requested Mr. Burnett be reinstated and paid for all time lost.

The Company declined the claim.

FOR THE EMPLOYEES:

(SGD.) J. J. BOYCE
GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. R. Smith	– Director, Industrial Relations, Personnel & Administration, Toronto
B. Neill	– Manager, Labour Relations, Toronto
R. A. Colquhoun	– Labour Relations Officer, CP Rail, Montreal

And on behalf of the Brotherhood:

J. J. Boyce	– General Chairman, Toronto
F. W. McNeely	– General Secretary-Treasurer, Toronto
J. Crabb	– Vice-General Chairman, Toronto

AWARD OF THE ARBITRATOR

Article 6.2.4 of the Collective Agreement is as follows:

> **6.2.4** A new employee shall not be regarded as permanently employed until completion of 65 working days cumulative service. In the meantime, unless removed for cause which in the opinion of the Company renders him undesirable for its service, the employee shall accumulate seniority from the date first employed on a position covered by this Agreement.

> An employee with more than 65 working days cumulative service shall not be discharged without being given a proper investigation as provided in Article 8 of this Agreement.

The grievor was, at the material times, a "new employee" within the meaning of Article 6.2.4. That is, he was a "probationer". There is no doubt, however, that he was entitled to file a grievance in respect of his discharge, and that the matter is arbitrable: see **Case No. 821**.

As to the nature of the issue which arises where a probationary employee is discharged, what is said in Case No. 821 applies equally here:

> The Collective Agreement, by the first paragraph of Article 6.2.4, contemplates that a probationary employee may be removed "for cause which in the opinion of the Company renders him undesirable for its service".

The issue of substance which arises in this grievance is whether or not such cause existed. Such an issue has two aspects. First, there is the question whether or not, as a matter of fact, any "cause" for Company action existed. Second, there is the question of the Company's opinion of such cause, that is, whether or not it was one which rendered the employee undesirable for its service. Such a provision gives the Company a broad discretion, but not a license to act arbitrarily or in a discriminatory manner. The "removal for cause" of a probationary employee under this provision should not, I think, be confused with the requirement that there be "just" or "proper" cause for the discharge of a permanent employee. An employer has a real and important discretion – and responsibility – to exercise in deciding whether or not to retain a probationer as a permanent employee.

There are, then, two aspects to the issue: first, was there any "cause" for the Company's action? and second, did the Company properly exercise its discretion in forming its opinion that such cause rendered the grievor undesirable for its service?

As to the first matter, the "cause" on which the Company acted was its discovery, as a result of a request made to the New Brunswick Motor Vehicle Branch, that there were some five entries of driving offences on the grievor's record. Consideration of such a record is, I think, obviously appropriate in the case of an employee whose work includes the driving of Company vehicles, and who requires an operation licence.

It is true that there was no "cause" in the sense of an offence committed by the employee during the term of his employment. It may be noted, however, that on November 6, 1980, the grievor was charged with speeding while driving a Company vehicle. There was, in respect of that, "cause" for the Company to conclude that the grievor was undesirable for its service. Subsequently, the grievor's licence was suspended for accumulation of demerits. That matter was not known to the Company at the time of discharge, because the grievor had (improperly) failed to report it. That too would be cause for an adverse determination.

While a past record of bad driving while with a previous employer might not be considered as "cause" for discipline in the case of a permanent employee it may, I think, properly be considered in the case of a probationer. The distinction between the "removal for cause" of a probationer and the requirement of "just or proper cause" for the discharge of a permanent employee which is underlined in **Case No. 821** is to be borne in mind. An employer has, it was said, a real and important discretion – and responsibility – to exercise in deciding whether or not to retain a probationer as a permanent employee. Here, the employer considered a substantial and relevant matter – a driving record showing several offences – affecting an employee whose work involved driving Company vehicles. In addition, as has been seen, there existed cause for a Company determination which was apparently concealed by the grievor.

In all of the circumstances, I find that there was indeed cause on which the Company could conclude that the grievor was undesirable for its service.

As to the second aspect of the matter, it is my view that the Company's decision was one which it was entitled to make in the exercise of the discretion set out in Article 6.2.4. It did not act in an arbitrary or discriminating manner.

For the foregoing reasons, the grievance must be dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR