CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1247

Heard at Montreal, Thursday, May 10, 1984

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

On May 13, 1983, Mr. B. Blow, did not complete his tour of duty. Subsequent to an investigation into this matter he was assessed 30 demerits. The grievor was subsequently dismissed for accumulation of 60 demerit marks.

JOINT STATEMENT OF ISSUE:

The Union contends: **(1.)** The Company violated Section 18.3 in not rendering the decision within specified time limit. **(2.)** The Company violated Section 81, Part IV Canada Labour Code. **(3.)** That the 30 demerits be removed from his record and he be reinstated with all seniority and paid for total compensation from July 14, 1983, and onward.

The Company declines the Union's contention and denies payment.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) H. J. THIESSEN	(SGD.) G. A. SWANSON
SYSTEM FEDERATION GENERAL CHAIRMAN	GENERAL MANAGER, OPERATION & MAINTENANCE.

There appeared on behalf of the Company:

P. A. Pender	– Supervisor Labour Relations, Toronto
R. A. Colquhoun	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	– System Federation General Chairman, Ottawa
L. M. DiMassimo	– Federation General Chairman, Montreal
R. Y. Gaudreau	– Vice-President, Ottawa
E. J. Smith	– General Chairman, London

AWARD OF THE ARBITRATOR

This case pertains to the dismissal of trackman B. Blow for his alleged insubordination in refusing to work on the afternoon of May 13, 1983, because of the alleged inclement working conditions. The facts surrounding the grievor's discharge are exactly the same as precipitated the imposition of thirty demerit marks on twelve of the grievor's colleagues on his crew and as was described in the Constantineau discharge case in **CROA 1246**.

Because of my ruling in **CROA 1246**, I am satisfied that the Company's investigation of Mr. Blow's alleged infraction was not completed until May 27, 1983. Accordingly, since Mr. Blow was notified of the Company's decision to impose thirty demerit marks on June 17, 1983, I am satisfied that the twenty-eight calendar day time limit for assessing these demerit marks had been met.

The grievor, however, was not notified of his discharge until July 17, 1983. Apparently the grievor had accumulated 60 demerit marks, owing to his previous disciplinary record, but was not dismissed on June 17th when he was advised of his assessment of 30 demerit marks for the incident. In this regard the Company explained the oversight in its brief as follows at pages 6 and 7:

> ... When Mr. Blow was given his 30 demerits on June 17, 1983 for his refusal to work the afternoon of May 13th, it was not known by Mr. Cline that the grievor already had 30 demerits on his record for the incident which occurred on November 2, 1982. It was only after the grievor's discipline file was updated by a Secretary in the Superintendent's Office, that it was noticed that the grievor already had 30 demerits on his record. This resulted in a Form 104, dated July 11, 1983 being delivered to the grievor on July 13, advising the grievor he was dismissed.

And at page 12:

> The discipline assessed as a result of the incident on May 13th when added to the grievor's previous discipline assessed on November 10, 1982, brought the grievor's record to a total of 60 demerits. As stated earlier, only an administrative error was responsible for the grievor not being dismissed at the same time as he received the 30 demerits on June 17, 1983.

Article 18.3 of the collective agreement reads as follows:

> **18.3** An employee will not be held out of service pending the rendering of a decision, unless the offence is considered sufficiently serious to warrant such action. The decision will be rendered within twenty-eight calendar days from the date the investigation is completed unless otherwise mutually arranged.

In this case the Employer's decision to dismiss the grievor was not made until well after the 28 calendar day time limit had elapsed upon completion of the Company's investigation on May 27, 1983. And, in the absence of an agreement from the Trade Union, article 18.3 mandatorily requires that "the decision will be rendered within twenty-eight calendar days". The language is clear, unambiguous and mandatory.

The Company argued that the decision to dismiss was merely an administrative act that should be permitted to be effected any time after the grievor had been assessed 30 demerit marks for the culminating incident. The important point was that the Company had complied with article 18.3 with respect to that penalty. And since as of that date the grievor was properly informed of his discipline, the Company's discretion remained unaffected by article 18.3 with respect to perfecting in a belated manner its decision to dismiss.

The fallacy in the Company's argument is quite obvious. Although in most cases the accumulation of 60 demerit marks will result predictably in a decision to dismiss, this outcome may not necessarily be the case in all instances. Employers using the Brown system have been known upon an employee's attainment of 60 demerit marks to waive their entitlement to discharge. In lieu of discharge an employee may be permitted to resign or he may be suspended. Indeed, an Employer may very well defer doing anything until time elapses permitting the depletion of the employee's demerit marks so he might avoid termination. In short, although it may be foreseeable that an employee will be discharged on reaching 60 demerit marks, that result still remains problematic until such disciplinary recourse is actually taken.

As I pointed out in **CROA 1233**, I am just as bound as the parties to the mandatory language of the collective agreement In this case, as in the previous case, the cause of the breached time limit was rooted in inadvertence. An

Arbitrator, however, lacks the jurisdiction to correct that error in that he would be amending and modifying the terms of the collective agreement in excess of his jurisdiction.

In the result the grievor's reinstatement is directed with compensation and other benefits. I shall remain seized in the event of difficulty in the implementation of this award.

(signed) DAVID H. KATES
ARBITRATOR