CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1352

Heard at Montreal, Tuesday, May 14, 1985

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

Appeal of thirty demerits assessed the personal record of Tractor Trailer Operator J.D. Riley of Moncton, New Brunswick.

JOINT STATEMENT OF ISSUE:

On 17 September 1984 Tractor Trailer Operator Riley reported for work for his 07:00 hours Tractor Trailer Operator assignment at the Intermodal ramp in Moncton, New Brunswick. At approximately 07:10 hours he spoke with the Senior Administration Clerk who was in charge of work assignments. After this conversation Tractor Trailer Operator Riley left work.

The Company subsequently investigated Tractor Trailer Operator Riley for refusing duty at the piggyback ramp in Moncton on 17 September 1984. Following the investigation, the Company assessed Tractor Trailer Operator Riley's personal record thirty demerits for "refusing duty – Moncton Piggyback Ramp – 17 September 1984".

The Brotherhood contends that the assessment of discipline was not warranted and requests the removal of the discipline. The Company denies the contention and has declined the request.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) TOM MCGRATH	(SGD.) D. C. FRALEIGH
NATIONAL VICE-PRESIDENT	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

W. W. Wilson	– Manager Labour Relations, Montreal
S. A. MacDougald	– Labour Relations Officer, Montreal
H. J. Koberinski	– Manager Labour Relations, Moncton
A. Heft	– Labour Relations Officer, Toronto
E. J. McGuire	– Manager Intermodal Services, Moncton
L. Laxton	– Senior Administration Clerk, Moncton

And on behalf of the Brotherhood:

G. T. Murray	– Representative, Moncton
J.D. Riley	– Grievor, Moncton

AWARD OF THE ARBITRATOR

This dispute arises out of the employer's decision to remove the grievor, Tractor Trailer Operator J.D. Riley from performing driving functions while the alleged incident resulting in the broken pinion gear (described in **CROA #1351**) was under investigation. Rather than taking the grievor out of service pending the investigation of that incident the employer assigned the grievor "helper's" duties at the Moncton "piggyback" ramp while it continued to pay him the regular rate of pay of a tractor-trailer operator. At all material times the grievor had bid on a driver's position and was apparently awarded that position in accordance with his seniority.

The evidence established that when Senior Administration Clerk L. Laxton advised him that a less senior employee had been assigned the driver's position the grievor refused to accept any alternative position offered him at the Moncton Ramp. Instead, the grievor booked off and left the work premises. He advised Mr. Laxton that his Supervisor (Mr. R. Lewis) could reach him at his home or the trade union office. Mr. Laxton denied that the grievor at any time informed him that he was booking off because he was sick. Mr. Riley indicated that a nervous condition affecting his stomach and bowel functions caused him to leave the work premises.

The grievor suggested that he has suffered from this condition for a lengthy period since April 1984 when he was involved in a vehicle accident. Although he was not feeling well at the time he reported for work on September 17, 1984, he felt he could complete his shift in what he considered the relatively easy driving job that he had been assigned. When he learned he had been removed from that position he concluded that his condition would not allow him to perform any other function. Accordingly, he booked off sick.

I do not believe the grievor was sick. Rather the evidence indicated that the grievor was upset because if the employer's decision in removing him from the anticipated driver's position. For better or worse he concluded that the employer's actions in suspending his driving privileges (in light of the damaged pinion gear incident) was unwarranted. Accordingly, Mr. Riley reacted in a petulant, childish manner in booking off. In this context, the grievor showed he was clearly insubordinate. Moreover, because I have rejected his excuse of sickness he has not demonstrated that he falls within the exceptions to the "obey now, grieve later" rule.

The more important issue raised herein is the enormity and harshness of the thirty demerit mark penalty that was imposed. Clearly this is not an incident that ought to have culminated in the grievor's discharge. The employer's policy was to enable the grievor to remain gainfully employed at his regular rate of pay while a prior incident was under investigation. That policy represented the alternative to taking the grievor out of service without pay pending the completion of an investigation of a serious alleged infraction relating to his driving competence. This surely is a progressive policy that is designed to assist the employee. In my view, the more prudent action for the employer to have taken in light of Mr. Riley's refusal to accept the helper's position was simply to have kept the grievor out of service until the investigation had been completed.

Nonetheless, the employer has chosen to impose a thirty demerit mark penalty for that incident resulting in the grievor's discharge I cannot agree with the reasonableness of that result. I am satisfied that the grievor simply should have been placed on suspension pending the completion of the investigation of the incident resulting in the damaged pinion gear. That period would span approximately ten days between September 17 and September 27, 1984. In all other respects the grievor's reinstatement is directed with compensation and the usual benefits. I shall remain seized for the purposes of implementation of this decision.

(signed) DAVID H. KATES
ARBITRATOR