CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1354

Heard at Montreal, Wednesday, May 15, 1985

Concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE;

On July 6, 1984, the Company notified Mr. Ronald J. McLoughlin that his record was closed effective immediately, account failure to attend investigation July 5, 1984.

BROTHERHOOD'S STATEMENT OF ISSUE;

The Union contends that: **1.)** Mr. McLoughlin did not refuse to attend the investigation, however, he desired to have legal counsel present as it related to a charge of possession of Company property against another employee. **2.)** Mr. R.J. McLoughlin was dismissed without cause and the Company violated Section 18.4 and 18.5 **3.)** Mr. R.J. McLoughlin be reinstated to his former position and paid for all wages and benefits from September 1, 1984, and onward.

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

FOR THE BROTHERHOOD;

(SGD.) H. J. THIESSEN
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

F. R. Shreenan	– Supervisor Labour Relations, Vancouver
R. A. Colquhoun	– Labour Relations Officer, Montreal

And on behalf of the Brotherhood:

H. J. Thiessen	– System Federation General Chairman, Ottawa
R. Y. Gaudreau	– Vice-President, Ottawa
L. M. DiMassimo	– Federation General Chairman, Montreal
M. L. McInnes	– General Chairman, Lucky Lake, Sask.
V. Dolynchuk	– General Chairman, Edmonton

INTERIM AWARD OF THE ARBITRATOR

The grievor, Mr. R.J. McLoughlin, was notified on July 6, 1984, by letter that "his record had been closed". Apparently, the grievor had been served with several notices of disciplinary investigation pursuant to Section 18.1 of Wage Agreement Nos. 41 and 42 with respect to his alleged involvement in the conversion of Company property found at his residence. The grievor insisted that he wanted to be represented by his lawyer at the investigation. The Company refused his request arguing that the collective agreement solely permitted representation by his trade union representative. In the disposition of the employer's challenge to the arbitrability of the grievor's grievance I make no remarks with respect to the validity or the prudence of the company's position in this regard. It suffices to say that the grievor's refusal to attend the investigation on the Company's terms precipitated his dismissal.

In due course the grievor was exonerated of the criminal charge relating to his alleged involvement in the conversion of company property. Following his acquittal the grievor advised the trade union of his predicament which triggered the presentation of a grievance at the first level of the grievance procedure on October 30, 1984, challenging the propriety of his discharge. Apparently the Company refused his attempts to return to work after he had been exonerated.

The Company challenged the arbitrability of the grievor's grievance for being in violation of the 28 calendar day mandatory time limit provided for the presentation of a written grievance pursuant to Section 18.6 of the Collective Agreement. Accordingly, in invoking Section 18.9 of the Collective Agreement the Company submitted that the grievance "shall be considered settled". The trade union appeared to accept the notion that if I should conclude that the alleged infraction for which the grievor was discharged was known to him as of July 6, 1984, then the October 30, 1984, grievance was clearly beyond the mandatory time limits prescribed by the Collective Agreement.

Rather, the trade union alleged that the grievor did not appreciate that he had been dismissed until he sought to return to work after his acquittal of the criminal charge. Nowhere in the trade union's brief am I advised of the date of the grievor's acquittal or his attempt to return to work. Nonetheless, the grievor, it is alleged, interpreted the letter of July 6, 1984, informing him that "his record had been closed" as an indefinite suspension from duty pending the outcome of the criminal proceedings. And, it was only after his attempt to return to work that he realized that the Company had terminated his employment for his failure to appear at the investigation. At that juncture he contacted his trade union with a view to presenting a grievance. And, it is at this point that the trade union suggests that the 28 calendar day time limit should have been measured for the purposes of the presentation of a timely grievance.

Implicit in the trade union's submission is the notion that a heavy onus rests with the company to communicate exactly and precisely what it means when informing an employee of the imposition of discipline, particularly the discharge penalty. The reason for imposing this responsibility on the company is obviously because significant employee rights and benefits flow from what is intended. Quite simply, an employee may very well not appreciate the consequences of the company's action if he, or she, is not told clearly what is meant. Accordingly, an employee's right to grieve the company's actions may very well be prejudiced.

And so what does it mean to an employee when he learns that "his record has been closed"? The employer argues, that while the term lacks the desired clarity, the inference is clear that termination was intended because the employer requested in that same letter that the grievor sign the appropriate form arranging for the refund of his pension contributions. Accordingly, the only reasonable and sensible conclusion that should be reached upon the grievor signing the form was that he knew he had been terminated.

Indeed, on July 24, 1984, the grievor did sign the form with respect to the refund of his pension contributions. But at a close examination of the form shows that three boxes have been inserted for the purpose of indicating the reason for the pension refund. These boxes are entitled "resigned", "dismissed" and "record closed". It is significant to note that the employer placed an "xx" in the box showing "record closed". Or, from a different perspective, the box indicating that the reason for the refund was the grievor's "dismissal" was left blank.

In other words, for purposes of the employer's own records the grievor is not shown as having been dismissed. Moreover, I still do not know (nor does the grievor) what it means "to have closed an employee's record".

In resolving the arbitrability issue I have been satisfied that the grievor only learned that he had been dismissed when he attempted to return to work after he had been acquitted of the criminal charge. At that point, I am satisfied that the 28 calendar time limit ought to have been measured for the purpose of determining the timeliness of the grievor's grievance.

Because I was not advised by the trade union of the exact date the grievor is alleged to have learned of his dismissal I am bereft of the information necessary to ascertain whether the October 30, 1984, grievance is in compliance with the time limits contained in the collective agreement. I therefore direct the parties to meet with a view to fixing the said date and failing agreement I shall remain seized for the purpose of entertaining further evidence.

The arbitrability issue is held in abeyance until advised further.

(signed) DAVID H. KATES
ARBITRATOR

[The matter was ultimately resolved between the parties and no further award was issued.]