CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO.1721

Heard at Montreal, Thursday 12 November 1987

Concerning

CANADIAN PACIFIC LIMITED

And

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of Trainman D. L. Turcotte.

JOINT STATEMENT OF ISSUE:

On October 6, 1986, the Company dismissed Trainman Denis L. Turcotte.

The Company's position is that Mr. Turcotte was a Trainman Trainee at the time of his dismissal and that he did not meet the requirements of employment as a Trainman.

As a preliminary matter, the Union's position is that the dismissal of Mr. Turcotte is null and void because of the Company's failure to hold an investigation as required by Article 33 of the Collective Agreement in all cases of discipline or dismissal.

Also, the Union's position is that by virtue of his previous service with the Company, Mr. Turcotte ought to have been considered permanently employed at the time of his dismissal and that the Company did not have just cause to terminate his employment. In the alternative, even if Mr. Turcotte was not a permanent employee, the Union's position is that the Company had insufficient cause to terminate Mr. Turcotte's employment, that the Company's action was unreasonable and arbitrary, and that Mr. Turcotte was not given a bona fide trial period.

The Union seeks the reinstatement of Mr. Turcotte with full compensation and no loss of seniority.

FOR THE UNION:	FOR THE COMPANY:
(SGD) B. MARCOLINI	(SGD) R. A. DECICCO
GENERAL CHAIRMAN	OR GENERAL MANAGER, OPERATION & MAINTENANCE

There appeared on behalf of the Company:

H. B. Butterworth	– Assistant Supervisor, Labour Relations, Toronto
B. P. Scott	– Labour Relations Officer, Montreal
G. Crichton	– Trainman Trainee Instructor, Chapleau
R. A. Decicco	– Supervisor, Labour Relations, Toronto

And on behalf of the Union:

B. Marcolini	– Vice-President, Toronto
J. R. Austin	– General Chairman, Eastern & Atlantic, Toronto
D. Colasimone	– Vice-General Chairman, Toronto
J. Shannon	– Vice-General Chairman, Montreal
D. Warren	– Local Chairman, Chapleau

AWARD OF THE ARBITRATOR

An issue raised in this grievance is whether the termination of the grievor was a disciplinary matter. The Union maintains that it was, and that the Company failed to give the employee the protections of the investigation procedure required by Article 33 of the Collective Agreement.

The status of the grievor is described in Article 37(d) of the Collective Agreement which provides as follows:

> **37(d)** A new Brakeman shall not be regarded as permanently employed until after 6 months service (that is six months from date of making first pay trip) and, if retained, shall then rank on the master seniority list from the date and time he commenced his first pay trip. In the meantime, unless removed for cause, which, in the opinion of the Company, renders him undesirable for its service, the Brakeman shall be regarded as coming within the terms of this Collective Agreement.

The conduct of investigations is governed by Article 33, which provides, in part, as follows:

> **33(d)** An employee will not be disciplined or dismissed until after investigation has been held and until the employee's responsibility is established by assessing the evidence produced and no employee will be required to assume this responsibility in his statement or statements. The employee shall be advised in writing of the decision within 20 days of the date the investigation is completed, i.e., the date the last statement in connection with the investigation is taken except as otherwise mutually agreed.

The Company's position is that the discharge of the grievor was non-disciplinary. In support of its position it cites the decision of this office in **CROA 852**. That case also involved the termination of a probationary employee under Article 37(d) of the same Collective Agreement. In dismissing that grievance the Arbitrator made the following observations:

Under a provision of this sort, the Company may exercise its discretion, although it must do so in a way that is not arbitrary or which discriminates improperly against the employee. It has not been shown that the Company's action was arbitrary or discriminatory in this case. There were instances in which the grievor, being subject to call did not respond, and there was one instance in which, having accepted a call, she did not report for duty. There was, then, a factual basis for the determination made by the Company. That being the case, it is clear that it is the Company's right under the Collective Agreement, to come to its own conclusion with respect to retaining the employee.

This is not a case of discipline: there is no particular misconduct on the grievor's part (although failure to report may become a disciplinary matter), and it is acknowledged that the grievor's actual work was satisfactory. Rather, it is simply a matter of the Company's making, on certain objective grounds, a determination with respect to the grievor's desirability for its service. Whether or not, by reason of her subsequent move to Schreiber, it could be said that the likelihood of reliable attendance improved, the fact is that at the time the decision was made there were grounds on which the Company could rely in coming to a conclusion with respect to the retention of this probationary employee.

In the Arbitrator's view the foregoing provision cannot be construed as an assertion that the termination of a probationary employee can never be disciplinary. On the contrary, the award expressly acknowledges that the conduct there in question could become a disciplinary matter. This would appear consistent with the general arbitral approach to the termination of probationary employees, and indeed of employees in general. The termination of an employee can be said to be non-disciplinary when it is for reasons unrelated to willful misconduct. Where, for example, an employee's place of residence, their physical or mental inability to perform certain tasks or other such limitations render their continued employment inappropriate, their termination can be said to be non-disciplinary. Where, on the other hand, the reasons for the employee's discharge is his or her conduct, entirely unrelated to the capacity to attend at work and to perform the tasks required, the discharge is disciplinary.

In the instant case the material establishes that the Company's treatment of the grievor was clearly directed towards what it perceived as failings in his conduct. Indeed, it characterizes his performance from July 22, 1986 to October 6, 1986 as reflecting "no less than five work-related infractions". It submits that the employee was removed from the Company Training Program for the "failure to heed instructions, be available for duty and displaying an unacceptable attitude ...". The material further reflects that the grievor was spoken to on a number of occasions with

respect to the perceived shortcomings in his performance. At a meeting on September 2, 1986, he was cautioned by Assistant Superintendent V. Moxness that he was not displaying the appropriate dedication and attitude and should "pull up his socks". On September 16th, after a failure to report for duty on September 7th the Assistant Superintendent again cautioned the grievor about his poor attitude and his poor ability to heed instructions. He was then told that he was being kept on the Training Program "for one last chance".

In the circumstances of this case the Arbitrator cannot conclude that the treatment of the grievor, including his termination, was not disciplinary. This was not a circumstance where the employee was found to be lacking the physical, mental or other qualifications or attributes necessary to perform the job. Notwithstanding that he was a probationary employee, the reasons for his termination were entirely disciplinary. In these circumstances the Arbitrator must accept the position of the Union that the grievor was entitled to the protections of Article 33 of the Collective Agreement. That does not mean, however, that the standard for his discharge is just cause. As reflected in **CROA 836**, the question would then become whether, in the opinion of the Company, the employee is shown to be undesirable for its service, in light of the findings of a properly conducted investigtion.

Under the terms of Article 37(d) the protections of the Collective Agreement apply to the grievor until such time as he is removed for cause. One of those protections is that he is not to be subject to a disciplinary dismissal until after an investigation in keeping with Article 33 of the Collective Agreement. In the instant case the Company has failed to observe that requirement and the grievor's dismissal must be viewed as null and void. (**CROA 550, 1255** and **1475**) The grievor shall therefore be reinstated into his position, with the credited service as a probationary employee which he held at the date of his termination, with compensation for all wages and benefits lost and without prejudice to his seniority in the event that he successfully completes his probation. I remain seized of this matter in the event of any dispute between the parties respecting the interpretation or implementation of this award.

(signed) MICHEL G. PICHER
ARBITRATOR