CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1749

Heard at Montreal, Tuesday, 9 February 1988

Concerning

CANADIAN PACIFIC LIMITED

And

TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION

EX PARTE

DISPUTE:

Mr. McKye was not compensated the four (4) days held out of service, March 17th to March 20, 1987.

UNION'S STATEMENT OF ISSUE:

Mr. McKye was improperly held out of service from March 17th to March 20th, 1987, pending an investigation of an accident that occurred March 11, 1987.

Mr. McKye was subsequently assessed discipline of forty-five (45) demerit marks.

The Union contends, Mr. McKye should be compensated the four (4) days wages, as the Discipline Form #104 did not include the time held out of service and he was improperly held out of service.

FOR THE UNION:

(SGD.) J. MANCHIP
FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

P. E. Timpson	– Labour Relations Officer, Montreal
E. P. Wahl	– Manager, Operations, Toronto
M. Kennedy	– Acting Terminal Manager, Toronto
C. Lohan	– Director, Accident Prevention, Montreal

And on behalf of the Union:

J. Manchip	– Vice-General Chairman, GST, Toronto
J. H. Germain	– General Chairman, Montreal
C. Pinard	– Vice-General Chairman,
G. B. Gonzales	– Local Chairman, Toronto
F. Devine	– Local Chairman, Toronto
M. McKye	– Grievor

AWARD OF THE ARBITRATOR

The Company's representative raised a preliminary issue. He noted that the Union was proceeding on an ex parte statement of issue. On behalf of the Company, he requested that the Arbitrator accept a joint statement of issue, which apparently had been signed in draft form by the Union and sent to the Company. It is not disputed, however, that the joint statement was not returned to the Union signed by the Company in a timely fashion. In these circumstances the Arbitrator sees no reason why the Union should not, as it maintains, be permitted to proceed on the basis of the ex parte statement of issue which it filed when it had no timely response from the Company.

I turn to consider the merits of the grievance. The Company's right to hold an employee out of service pending an investigation is described in Article 27.1 of the Collective Agreement which provides as follows:

> **27.1** An employee shall not be disciplined or dismissed until after a fair and impartial investigation has been held and the employee's responsibility is established by assessing the evidence produced and the employee will not be required to assume this responsibility in his statement. An employee is not to be held out of service unnecessarily in connection with an investigation but, where necessary, the time so held out of service shall not exceed five working days and he will be notified in writing of the charges against him.

At approximately 13:10 on March 11, 1987 a Toplifter, a piece of heavy equipment used for transporting freight containers at the Company's terminal in Etobicoke, tipped over while being operated by the grievor. On March 12 and March 13 the grievor continued to work as a Toplift Operator. On Monday March 16, however, he was instructed to report for work on an assignment as a Groundman. The position of the Company is that a preliminary finding of its own investigation raised questions about the grievor's fault in the accident, and his ability to safely operate a Toplifter. Because the transfer to the position of Groundman involved work on a separate shift, the grievor refused to work from Tuesday March 17, 1987 until March 20, 1987, the day of his formal investigation. It appears that he was reinstated to work as an operator on Monday March 23, 1987. The Union's claim is for the grievor's wages lost from March 17 to March 20, 1987 inclusive.

The Arbitrator cannot sustain the Union's position. The accident in which the grievor was involved was a serious one, causing some $30,000.00 in damages. Preliminary indications were that the grievor had used excessive speed and inadequate care in rounding a corner, causing his vehicle to go out of control. Strictly speaking, the grievor was not "held out of service" since alternate employment was provided to him for each of the days in question. While there is some doubt about the matter, the Arbitrator accepts the account of the Company that Mr. McKye was advised that he would continue to be paid at the rate of a Toplifter Operator. In these circumstances it is unnecessary for the Arbitrator to determine whether the Company's actions were in violation of Article 23.10 and 23.11 of the Collective Agreement provisions which relate to the bulletining of positions. Assuming, without finding, that those articles were violated, the grievor was, nevertheless, under the general obligation to "work now – grieve later", and to take all reasonable steps to mitigate his losses. There is nothing in the material to suggest that the grievor was for any reason unable to work as a Groundman on the later shift that was offered to him, or that the Company's action otherwise amounted to a forced suspension. No irreparable prejudice would have resulted to the grievor if he had worked as a Groundman on the days that he refused to. In these circumstances he is the author of his own misfortune, and cannot successfully claim wages which were in fact available to him, on the basis that he was "held out of service".

For these reasons the grievance must be dismissed.

(signed) MICHEL G. PICHER
ARBITRATOR