# CANADIAN RAILWAY OFFICE OF ARBITRATION

# CASE NO. 1761

Heard at Montreal, Wednesday, March 9, 1988

Concerning

## CANADIAN NATIONAL RAILWAY

And

## BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

### DISPUTE:

Dismissal of Classified Labourer Mr. Clifford A. Masek, Transcona, Manitoba.

### JOINT STATEMENT OF ISSUE:

Mr. Masek commenced work for the Company on 10 July 1986 and was discharged from the Company's service on 5 November 1986, within his 90 working day probationary period.

The Brotherhood contends that the dismissal was unjustified and that the Company acted in an arbitrary and discriminatory manner in dismissing Mr. Masek.

The Company disagrees with the Brotherhood's contention.

| FOR THE BROTHERHOOD: | FOR THE COMPANY: |
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| (SGD.) G. SCHNEIDER | (SGD.) J. P. GREEN |
| SYSTEM FEDERATION GENERAL CHAIRMAN | FOR: ASSISTANT VICE-PRESIDENT LABOUR RELATIONS |

There appeared on behalf of the Company:

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| J. Glazer | – Counsel, Montreal |
| E. D. Ferens | – Manager, Labour Relations, Montreal |
| G. Blundell | – Labour Relations Officer, Montreal |
| M. Vaillancourt | – Engineerg Coordinator, Montreal |
| A. Watson | – System Labour Relations Trainee, Montreal |
| A. Atamanchuk | – Project Supervisor, Winnipeg |
| S. J. Botchar | – Supervisor, Winnipeg |
| D. G. Price | – Project Coordinator, Winnipeg |

And on behalf of the Brotherhood:

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| M. Gottheil | – Counsel, Assistant to the Vice-President, Ottawa |
| G. Schneider | – System Federation General Chairman, Winnipeg |
| R. A. Bowden | – System Federation General Chairman Ottawa |
| R. Phillips | – General Chairman, Belleville |
| J. Rioux | – General Chairman, Hornepayne |
| S. Glass | – Observer |
| C. A. Masek | – Grievor |

## AWARD OF THE ARBITRATOR

The rights of Mr. Masek are governed by Article 2.1 of the Collective Agreement which states, in part, as follows:

> **2.1** Except as otherwise provided for in Article 7, a new employee shall not be regarded as permanently employed until after 90 working days' service, which service must be accumulated within the preceding 24 months. Within such period he may, without investigation, be removed for cause which in the opinion of the Company renders him undesirable for its service. ...

The nature of the Company's discretion, given the language of the above article, was described in the following terms in **CROA 821** where this Office was called upon to construe similar language in another Collective Agreement:

The Collective Agreement, by the first paragraph of Article 6.2.4, contemplates that a probationary employee may be removed "for cause which in the opinion of the Company renders him undesirable for its service". The issue of substance which arises in this grievance is whether or not such cause existed. Such an issue has two aspects. First, there is the question whether or not, as a matter of fact, any "cause" for Company action existed. Second, there is the question of the Company's opinion of such cause, that is, whether or not it was one which rendered the employee undesirable for its service. Such a provision gives the Company a broad discretion, but not a license to act arbitrarily or in a discriminatory manner. The "removal for cause" of a probationary employee under this provision should not, I think, be confused with the requirement that there be "just" or "proper" cause for the discharge of a permanent employee. An employer has a real and important discretion - and responsibility - to exercise in deciding whether or not to retain a probationer as a permanent employee. (*See also* ***CROA 1427***.)

The evidence establishes that during the relatively short period of his employment Mr. Masek was late for work twice, without calling or advising the Company. One of those occasions involved lateness of some three hours. On two further occasions he was absent, but failed to call in to so advise his superiors. Lastly, he failed to attend at a medical examination arranged for him by the Company. His actions plainly amounted to a failure to observe the reporting obligations of employees which are clearly described in a manual provided to him at the commencement of his employment. By his own admission, Mr. Masek did not familiarize himself with the contents of the manual. He was, however, verbally instructed on more than one occasion of the importance of notifying the Company whenever he would be late or absent. Notwithstanding his evidence to the contrary, the Arbitrator must conclude that he in fact failed to do so on each of the occasions reviewed in evidence.

It was suggested that the grievor's termination was motivated, in part, by the fact that he had sustained an injury while at work, presumably because his subsequent absences might have occasioned disruption to the Company. In the Arbitrator's view, the evidence does not disclose any such motive on the part of the Company. On the contrary, it appears that the grievor was assigned light duties and, on one occasion, was instructed to stay home for a couple of days to allow his muscle injury a chance to improve. In neither event did he suffer any reduction or loss of wages. There is nothing in the evidence or in the material before the Arbitrator to sustain the allegation of the Brotherhood that the Company was arbitrary or discriminatory in its treatment of the grievor.

The issue to be determined is whether the Company removed Mr. Masek from employment for cause which, in its opinion, rendered him undesirable for permanent employment. It is axiomatic that an employer must be able to rely on its employee to give reasonable notice when he or she will be late or absent. In this the grievor failed completely. Moreover, on the occasion of the three hour lateness, he appears to have been without any valid excuse for his failure to be at work on time. The very purpose of the probationary period described in Article 2.1 is to permit the Company to identify employees who are prone to such failings before they are granted permanent employment. The terms of Article 2.1 plainly vest in the Company a discretion which should not lightly be interfered with by an arbitrator.

For the reasons given, I am satisfied that the Company had cause, within the meaning of Article 2.1 of the Collective Agreement, to terminate the grievor's employment. The grievance must therefore be dismissed.

**(signed) MICHEL G. PICHER**
**ARBITRATOR**