CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1932

Heard at Montreal, Wednesday, 12 July 1989

Concerning

CANADIAN PARCEL DELIVERY

And

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

The dismissal of probationary employee John Madden, Driver Representative at St. John's, Newfoundland.

UNION'S STATEMENT OF ISSUE:

On November 25, 1988 Mr. Madden was given a notice advising him that "effective today" he was dismissed and that he was required to turn over his truck keys, his uniform and, instruction manuals, etc.

The Union contends that the employee was dismissed without any investigation or interview, without benefit of any Union representative and without cause. The Union further contends that the reasons listed on the dismissal notice were not adequate for dismissal or were unfounded and unreasonable. The Union further contends that, as the Company has listed these disciplinary matters on the dismissal notice, the employee should be entitled to the full protection of Article 6 of the Collective Agreement which the Company has violated.

The Company contends that Mr. Madden was a probationary employee, a fact they have confirmed by showing the hours he has worked, and as such was not entitled to an interview with a Union representative present before his dismissal, and they further contend that his performance rendered him undesirable for their service and that he was properly instructed on all matters and properly dismissed

The relief requested is the reinstatement of Mr. Madden without loss of seniority or benefits and with pay for all time lost since November 25, 1988.

FOR THE UNION:

(SGD) J. J. BOYCE
GENERAL CHAIRMAN, SYSTEM BOARD OF ADJUSTMENT 517

There appeared on behalf of the Company:

D. B. Francis	– Counsel, Toronto
J. G. Cyopeck	– Vice-President & Assistant General Manager, Toronto
C. Saunders	– Witness

And on behalf of the Union:

D. Wray	– Counsel, Toronto
J. J. Boyce	– General Chairman, Toronto
J. Crabb	– Secretary/Treasurer, Toronto
J. Madden	– Grievor

AWARD OF THE ARBITRATOR

The first issue to be resolved is whether the procedural provisions of Article 6 of the Collective Agreement should have been followed by the Company in the discharge of Mr. Madden. The Company submits that as a probationary employee he is not entitled to the protections of that article, while the Union submits that the failure of the Company to observe its requirements renders the grievor's discharge null and void.

The pertinent provisions of the Collective Agreement are as follows:

> **4.2.1** A new employee shall NOT be regarded as permanently employed until completion of 50 working days cumulative service. In the meantime, unless removed for cause which in the opinion of the Company renders him undesirable for its service, the employee shall accumulate seniority from the date first employed on a position covered by this Agreement.
>
> An employee with more than 50 working days cumulative service shall not be discharged without just cause as provided in Article 6 of this Agreement.
>
> **6.1** An employee may only be disciplined or dismissed for just cause.
>
> **6.2** Whenever an employee is to be interviewed by the Company with respect to his work or his conduct in accordance with Article 6.1, an accredited union representative must be in attendance. In the event an accredited representative is not reasonably available, a fellow employee, selected by the employee to be interviewed, shall be in attendance. Nothing herein compels an employee to answer any questions.
>
> **6.3** Failure to comply with Article 6.2 shall render any conclusion null and void, and any statements at such interview inadmissible at any subsequent proceedings.

In the Arbitrator's view the foregoing provisions are clear and unambiguous in their total effect. The protection against discharge without just cause is expressly limited by the second paragraph of Article 4.2.1 to permanent employees. It does not extend to probationary employees who have not completed fifty working days of cumulative service. Article 6, in turn, concerns itself exclusively with the discipline or dismissal of employees for just cause. By its own terms, Article 6.2 arises in respect of the interview of an employee with regard to alleged conduct "in accordance with Article 6.1". The effect of that language is inescapable: when an employee is susceptible of an interview which may lead to his or her discipline or discharge for just cause he or she is entitled to the procedural protections established within Article 6.2. Similar protections have not been provided within the Collective Agreement for the removal for cause of a probationary employee falling within the terms of Article 4.2.1. In this regard the language of the instant Collective Agreement is not, in its effect, unlike that found in **CROA 1761**, and is markedly different from the Collective Agreement provision which governed in **CROA 1721**. For these reasons the Arbitrator must conclude that there was no violation of Article 6 by the Company, as that provision had no application to the circumstances of Mr. Madden, a probationary employee.

It is conceded that the scope of arbitral review of the Company's decision respecting the removal of a probationary employee is, of necessity, more restricted than in the case of a permanent employee on grounds of just cause. In **CROA 1568** the following observation was made:

> It is sufficient to say that, at a minimum, the Company's decision to terminate a probationary employee must not be arbitrary, discriminatory or in bad faith. It must be exercised for a valid business purpose, having regard to the requirements of the job and the performance of the individual in question.

(*See also* **CROA 1761, 1481** *and* **821**.)

As noted in **CROA 821** the scope of review in a case such as the one at hand is arguably narrower still to the extent that the employee may only removed for cause which "in the opinion of the Company" demonstrates that he or she is undesirable for permanent employment. While an arbitrator may differ with the judgement of the Company, and be satisfied its opinion is erroneous, so long as that opinion is arrived at honestly and in keeping with the standards described above, no violation of the Collective Agreement in respect of the termination of the probationary employee is disclosed.

In the instant case the evidence adduced on behalf of the Company establishes, to the satisfaction of the Arbitrator, that Mr. Madden did fail in a number of particulars during the course of his probationary employment. While I accept that the opinion of his supervisor, Mr. Saunders, with respect to the standard of productivity to be met on Mr. Madden's route may be open to question, the merits of the Company's decision need not rest on that ground. Discounting productivity entirely, the balance of the evidence confirms that, notwithstanding repeated reminders, Mr. Madden failed to observe acceptable standards with respect to the documentation of deliveries, the reporting and colour coding of undelivered parcels, the following of safe parking procedures and, on at least one occasion, he knowingly failed to leave his truck locked during a delivery.

While it may be debatable that these failings would, standing alone, satisfy the requirement of establishing just cause for the termination of a permanent employee, they do, in the Arbitrator's view, sufficiently demonstrate that the employer had honest grounds for an opinion that Mr. Madden was not learning and correcting procedural errors at an acceptable rate, was in fact showing signs of recidivism and was therefore not an appropriate candidate for permanent employment. In arriving at that conclusion the Arbitrator places some weight upon a number of reminders and warnings, both verbal and written, addressed to the grievor by both Mr. Saunders, his immediate supervisor at the St. John's terminal, as well as the lead hand at that location. There is before the Arbitrator no evidence to confirm discrimination, arbitrariness or bad faith aimed at Mr. Madden, or that he was subjected to unreasonable standards out of keeping with the requirements of his job.

For the foregoing reasons the grievance must be dismissed.

July 14, 1989

(Sgd.) MICHEL G. PICHER
ARBITRATOR