CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2220

Heard at Montreal, Thursday, 12 December 1991

concerning

CANADIAN PACIFIC EXPRESS & TRANSPORT

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE:

Employee Ronald Brault, Calgary, Alberta, was dismissed by the Company.

UNION'S STATEMENT OF ISSUE:

The Union alleges a violation of Article 8 of the collective agreement, in particular 8.1, 8.2, 8.3, 8.4 and 8.8, and any other relevant provision of the collective agreement; and is requesting reinstatement with full seniority, benefits and compensation or such other remedy as the Arbitrator deems appropriate.

The Union asserts that the grievor has always been willing to work and shown an intent to work but the Company has not let him work; and that the harassment of Dale Boehm was also responsible for the grievor nor working; and that the Company's threat that if the grievor grieved the 4 – 10 hour days matter, he would be fired, was carried out.

The Union further asserts that the Company has never offered the grievor the proper job to which he is entitled.

The Union asserts that the Company was informed that the grievor was able to return to work on June 20, 1990, and that the grievor has always shown a willingness to work for the Company. He never intended to quit and did not do so. The Union also claims all time lost since June 20, 1990.

The Company asserts that the grievor showed no intent of continuing his employment with the Company and that the Company removed his seniority, his name from the seniority list, and closed his file as of August 7, 1990. The Company further asserts that the grievance ought to be dismissed.

FOR THE UNION:

(SGD.) J. CRABB
EXECUTIVE VICE-PRESIDENT

There appeared on behalf of the Company:

M. D. Failes	– Counsel, Toronto
B. F. Weinert	– Director, Labour Relations

And on behalf of the Union:

H. Caley	– Counsel, Toronto
J. Crabb	– Executive Vice-President, Toronto
M. Gauthier	– Division Vice-President, Montreal
R. Brault	– Grievor

AWARD OF THE ARBITRATOR

The Arbitrator accepts, without qualification, the submissions of Counsel for the Company that the actions of Mr. Brault in June and July of 1990 rendered him liable to discharge. The record discloses, beyond controversy, that on June 27, 1990 Mr. Brault was in receipt of a written directive from Mr. D. Boehm, the Terminal Manager at Calgary, advising him, in part, as follows:

> "Accordingly, you are required to report for work, as required by your afternoon bulletin."

By any account, a reasonable employee in the position of Mr. Brault should reasonably have known that he was under an obligation to return to work, as communicated in the above directive. In the circumstances the Company was entitled to terminate the grievor, and the Arbitrator is satisfied that it was not under any obligation to conduct an investigation under Article 8 prior to doing so.

The issue then becomes whether the Arbitrator should exercise his discretion in the circumstances of this case in mitigation of the penalty. After considerable reflection, and with the fullest appreciation for the sense of frustration expressed by the Employer, I am satisfied that it is appropriate to do so. A review of the material, and the grievor's own comments at the hearing, reveal the perception of an employee who, on the one hand, saw himself enmeshed in a personal conflict with Terminal Manager Boehm, who has since left the service of the Company, and who on the other hand was hopelessly inept in identifying, articulating and advancing his own rights under the collective agreement. He clearly had a misguided sense of his right to exercise his seniority rights to a position on the night shift, and believed, in good faith, that his ability to do so should take priority over all other rights and obligations running between himself and the Company. In this he was plainly wrong, and should have adhered to the work now -- grieve later principle.

However, the entirety of the record lends plausibility to the view that he was, at least to some degree, being unduly put upon by his terminal manager. That is supported, in part, by a paragraph in the letter of Mr. Boehm of June 27, 1990 which purports to require the grievor, in apparent compliance with some unstated provision of the collective agreement, to provide a "written satisfactory explanation" to him within seven days of the letter. While that unexplained ultimatum does not, of itself, justify the course of action taken by the grievor in failing to return to work, it does lend substance to the view that what transpired was a dialogue between two persons not given to rational response in a situation of conflict. In these circumstances it is difficult to dismiss out of hand Mr. Brault's belief, whether or not it was valid, that he was being invited by Mr. Boehm to return to a highly doubtful situation, particularly in light of his prior reinstatement following a successful grievance.

Mr. Brault is an employee of some ten years' service whose discipline record was clear at the time his termination. In all of the circumstances, and with the clear admonition that Mr. Brault must understand that in future the application of the collective agreement to his circumstances should be left to his union, he shall be returned to service, without compensation and without loss of seniority, to such bulletined position, and on such tour of duty, as the Company deems appropriate. It is so awarded.

December 13, 1991

(Sgd.) MICHEL G. PICHER
ARBITRATOR