CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2463

Heard in Montreal, Wednesday, 9 March 1994

concerning

CANADIAN PACIFIC LIMITED

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
[UNITED TRANSPORTATION UNION]

DISPUTE:

The dismissal of Trainperson K.D. Lensen of Coquitlam, B.C.

JOINT STATEMENT OF ISSUE:

On May 23, 1993, Mr. Lensen was the Trainperson on Extra 5654 West, which was operating on the Cascade Subdivision as a work train. This work train entered and operated within the limits of a Rule 42 authority, without the permission of the Foreman in charge, a violation of a number of operating rules, including CROR Rule 42(b) and (c).

After a fair and impartial investigation, each member of the work train crew had their discipline record debited with 40 demerit marks. As a result, Trainperson Lensen's discipline record stood at 60 demerit marks, and he was dismissed for accumulation of demerit marks under the Brown System of Discipline at Coquitlam, B.C., on June 10, 1993.

The Union contends that the Special Agreement concerning Deferred Discipline should have been used in this particular case, permitting Trainperson Lensen to continue his employment with the Company under the conditions laid out in that agreement. The Union requests that Trainperson Lensen be reinstated without loss of seniority, and with full compensation for wages and benefits for all time subsequent to his dismissal.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) L. O. SCHILLACI	(SGD.) R. WILSON
GENERAL CHAIRPERSON	FOR: GENERAL MANAGER, OPERATIONS & MAINTENANCE, HHC

There appeared on behalf of the Company:

R. E. Wilson – Labour Relations Officer, Vancouver
M. E. Keiran – Manager, Labour Relations, Vancouver
R. Hunt – Labour Relations Officer, Montreal

And on behalf of the Union:

L. O. Schillaci – General Chairperson, Calgary
S. Keene – Vice-General Chairperson, CP Lines East, London

AWARD OF THE ARBITRATOR

The instant grievance involves the application of paragraph 3 of the Memorandum of Agreement of February 13, 1991 concerning deferred discipline. Under the terms of that agreement the Company may make accommodation in the assessment of discipline to a person found responsible for misconduct which, of itself, would not be dismissable

but which would lead to dismissal by virtue of the accumulation of demerit marks. In that circumstance the discipline may be annotated to the employee's file but not added to his or her demerit total for a period of one year. Following a year of discipline free service the employee's record reverts to its prior standing. It is not disputed that the decision as to the application of deferred discipline remains within the discretion of the Company. That is reflected in paragraph 3 of the memorandum of agreement which provides as follows:

> **3)** Where it is felt that the service record of the individual warrants his retention in employment, he/she may be assessed "deferred discipline".

The Union grieves the failure of the Company to apply the deferred discipline agreement to the circumstances of Trainperson Lensen. It does not dispute that the assessment of forty demerits was justified for the rules infraction for which he was disciplined, or that he was dismissable for the accumulation of sixty demerit marks. It argues, however, that the Company's application of the deferred discipline as unequal or inequitable as applied to Mr. Lensen.

The Arbitrator cannot agree. Firstly, the standard of review in respect of any decision of the employer under the deferred discipline policy is relatively narrow. Honest persons may differ on whether the service record of any individual warrants his or her retention in employment. Having regard to the purpose of the agreement, it appears to the Arbitrator that the Company observes the terms of the agreement if it fairly applies its mind to the circumstances of the employee under consideration, and arrives at a decision in a manner that is not arbitrary, discriminatory or in bad faith. The standard of review to be applied by an arbitrator is plainly not the same as would obtain in a "just cause" determination in respect of the merits of discipline. Even though a given decision may not be one which an arbitrator would have made, it should not be struck down if it is arrived at fairly and in good faith, having regard to relevant considerations.

In the case at hand the evidence is clear that the Company has substantial grounds to consider the circumstances of Mr. Lensen as distinguishable from those of the other members of his train crew who were given the benefit of deferred discipline. Firstly, he is considerably junior to both the conductor and the locomotive engineer involved, and had a substantially more negative prior disciplinary record. Significantly, in the Arbitrator's view, a prior award of this Office in **CROA 2328** found that the grievor's submitting of an improper wage claim was a serious infraction deserving of a suspension of just under one year. There is no comparable infraction in the disciplinary records of the other members of trainperson Lensen's crew, nor in the case of other employees whom the Union submits have received preferential treatment in respect of deferred discipline. I am satisfied that the Company officers gave full consideration to the merits of applying deferred discipline to Mr. Lensen and fairly concluded, in light of his prior disciplinary record, that he did not merit the benefit of deferred discipline. That decision was plainly not arbitrary, discriminatory or taken in bad faith.

In the result, no violation of the terms of the collective agreement, or of the memorandum of agreement of February 13, 1991 is disclosed. The grievance must therefore be dismissed.

11 March 1994

(sgd.) MICHEL G. PICHER
ARBITRATOR