CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2496

Heard in Calgary, Thursday, 16 June 1994

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS [UNITED TRANSPORTATION UNION]

DISPUTE:

Appeal of the release of D. Carroll from Company service, effective 12 April 1991.

JOINT STATEMENT OF ISSUE:

Mr. Carroll commenced the Company's Brakeman/Yardman Training course on March 18, 1991. During the course of the grievor's training, it was discovered that he had a previous poor work record with the Company and had in fact been discharged as a result of an extended period of time being abesent without leave. The grievor's training was subsequently terminated and he was released from Company service effective 12 April 1991.

The Union maintains that the grievor passed all the required tests prior to beginning training and that no questions were raised concerning his performance during training. The Union further submits that the Company violated Article 117 of Agreement 4.3, as no formal investigation was undertaken and no Form 780 was issued. Therefore, the Union asserts that the grievor was wrongfully and unfairly removed from the Company's training course.

The Union requests that the grievor be allowed to complete his training with no loss of seniority and that he be reimbursed for any earnings lost as a result of being removed from the training course.

The Company has declined the Union's request on the basis that: **1.)** The grievance is not arbitrable; **2.)** In the alternative, if the grievance is arbitrable, the release of Mr. Carroll from Company service was for cause.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) M. G. ELDRIDGE	**(SGD.) G. BLUNDELL**
for: GENERAL CHAIRPERSON	**for: SENIOR VICE-PRESIDENT, WESTERN CANADA**

There appeared on behalf of the Company:

M. A. King	– Solicitor, Edmonton
G. C. Blundell	– Manager, Labour Relations, Edmonton
B. Laidlaw	– Labour Relations Officer, Edmonton
R. G. MacDougall	– Student at Law, Edmonton
J. Gosse	– General Yard Co-ordinator, Vancouver
J. Adamson	– Manager, Train Service, Edmonton
A. Wingrave	– Transportation Officer, Kamloops

And on behalf of the Union:

D. Ellickson	– Counsel, Toronto
J. W. Armstrong	– General Chairperson, Edmonton
L. H. Olson	– National President, UTU-Canada, Ottawa
M. G. Elridge	– Vice-General Chairperson, Edmonton
B. J. Henry	– Vice-General Chairperson, Edmonton

C. S. Lewis	– Secretary, GCofA, Edmonton
D. Gagnon	– Sr. Office Administrator, Edmonton
K. Armstrong	– Secretary, Edmonton
D. Carroll	– Grievor

AWARD OF THE ARBITRATOR

The Company raises a preliminary issue as to the arbitrability of this grievance. The facts pertinent to the preliminary issue are not in dispute. The grievor, Mr. Carroll, was previously employed by the Company as a Track Maintenance Foreman within the bargaining unit of the Brotherhood of Maintenance of Way Employees in the Manitoba East District. He engaged in an unauthorized leave of absence from June 3, 1989 through October 23, 1989. During that time he failed to respond to notices directing him to report for a formal investigation concerning his absence. In light of that, and against the background of the assessment of thirty-five demerits for his failure to appear for the investigation, the Company terminated Mr. Carroll's employment on October 23, 1989.

Subsequently, Mr. Carroll successfully applied for a job as a brakeperson/yardperson trainee. As part of his training he was required to undergo forty-five trial trips. At a point in time when he had completed eight trial trips the Company became aware of his prior disciplinary discharge. On that basis the Company determined that the grievor was unsuitable for further employment and terminated his services effective April 12, 1991.

The following provisions of the collective agreement are pertinent to the resolution of the grievance:

> **48.4** Brakemen will come within the scope of Agreement 4.3 at such time as they work their first shift or tour of duty.
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> **84.1 (e)** Yard helpers will come within the scope of Agreement 4.3 at such time as they work their first shift or tour of duty.
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> **108.1** Conductors and Yard Foremen will not be required to work a tour of duty without the assistance of a least one employee who has completed the Company training course for new Brakemen/Yardmen consisting of classroom training and 45 trial trips as a Brakeman/Yardman of which 15 must be in yard service and 30 must be in road service.
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> **108.6** An employee will be considered as on probation until he has completed 90 tours of service under this Agreement. If found unsuitable prior to the completion of 90 such tours, an employee will not be retained in service under this Agreement. Such action will not be construed as discipline or dismissal, but may be subject to appeal by the General Chairman on behalf of such employee.

The first position taken by the Company is that Mr. Carroll did not become an employee within the scope of the collective agreement as he had not, in the employer's view, worked his first shift or tour of duty. Implicit in the Company's position is that training tours or trial trips would not constitute a first shift or tour of duty within the meaning of articles 48.4 and 84.1(e) of the collective agreement. The Union disputes that interpretation, and maintains that a tour of duty would involve work performed in the course of trial trips such as the eight trips which had been completed by Mr. Carroll. The Arbitrator has some difficulty with the assertion advanced by the Union, in light of the undisputed evidence that in fact persons in Mr. Carroll's position are not paid within the terms of the collective agreement, either in respect of wages or benefits, until such time as they have completed forty-five trial trips. I find in unnecessary, however, to resolve the grievance on that issue.

If the Arbitrator assumes, without necessarily finding, that the grievor could, as the Union asserts, be classified as a probationary employee within the terms of article 108.6 of the collective agreement, the case made on behalf of Mr. Carroll is still less than persuasive. Article 117.1 of the collective agreement provides as follows:

> **117.1** No employee will be disciplined or dismissed until the charges against him have been investigated; the investigation to be presided over by the man's superior officer. He may, however, be held off for investigation not exceeding 3 days, and will be properly notified, in writing and at least 48 hours in advance, of the charges against him.

I am satisfied that the purpose of the provisions in respect of probationary employees is to allow the employer a reasonable period of time to determine, in the broadest sense, whether a person is suitable for employment on a permanent basis, and to do so without the encumbrance of a grievance and arbitration process in relation to that determination. In that regard the discretion of the employer is broad, although it may not be exercised in a manner that is arbitrary, discriminatory or in bad faith (**CROA 1568**).

In the case at hand the Company turned its mind to the suitability of Mr. Carroll for continued employment, and it did so during the course of his training period. Upon realizing the extent of his prior disciplinary record and discharge from Company service in 1989, the employer determined that Mr. Carroll was not suitable for permanent employment and terminated his training and service. In my view it did so for a valid business purpose, and not in a manner that was arbitrary, as contended by Counsel for the Union. Nor can I accept Counsel's argument that the word "unsuitable" in article 108.6 of the collective agreement is confined to an employee's skill or capacity to perform the tasks and obligations of the job. I cannot accept, as argued by Counsel for the Union, that article 108.6 is merely intended to establish that the issue of unsuitability is not to be taken as disciplinary, and that cases such as that of Mr. Carroll, relating as they do to his prior behaviour or conduct, are disciplinary, and therefore would fall under the terms of article 117 of the collective agreement. The employer was entitled to make a good faith determination of the grievor's suitability based on a number of factors, including his prior disciplinary termination. In the result I cannot find that the action taken by the Company against the grievor is null and void for a failure to observe the provisions of article 117 of the collective agreement. For the reasons related above, I am satisfied that if it is assumed that Mr. Carroll was an probationary employee, the Company's actions in respect of him were not arbitrary, discriminatory or in bad faith.

For the foregoing reasons the Arbitrator sustains the preliminary objection of the Company as to the inarbitrability of the grievance. In the alternative, should the grievance be arbitrable, it could not succeed on its merits, as the Company possessed reasonable grounds for the termination of a probationary employee in the position of Mr. Carroll, having regard to his prior employment history with the Company. For all of these reasons the grievance must be dismissed.

June 22, 1994

(Sgd.) MICHEL G. PICHER

ARBITRATOR