CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2641

Heard in Montreal, Tuesday, 13 June 1995

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Claim on behalf of Extra Gang Labourer Mr. D. Larose.

BROTHERHOOD'S STATEMENT OF ISSUE:

The grievor worked for the Company from December 3-16, 1993 [sic]. On February 16, 1994, he received a letter that stated that in view of the fact that his performance as an Extra Gang Labourer was unsatisfactory, he would not be called back and that his employment with CN was terminated.

The Union contends that : **1)** no just cause existed for the grievor's dismissal; **2)** the Company has violated Article 4.1 of Agreement 10.13 as well as any other applicable provision of the collective agreement; **3)** the grievor has been unjustly dealt with pursuant to Article 18.6 of Agreement 10.1

The Union requests that the grievor be reinstated forthwith without loss of seniority and that he be compensated for all wages, benefits and expenses lost as a result of this matter.

The Company denies the Union's contentions an declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) R. A. BOWDEN
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

J. C. McDonnell	– Counsel, Toronto
M. E. Hughes	– System Labour Relations Officer, Montreal
N. Dionne	– Manager, Labour Relations, Montreal
R. Baker	– Program Coordinator, Production - East, Montreal
D. Cromwell	– Extra Gang Foreman, Belleville

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
R. A. Bowden	– System Federation General Chairman, Eastern Lines, Ottawa
G. Schneider	– System Federation General Chairman, Western Lines, Winnipeg
A. Trudel	– Federation General Chairman, Montreal

AWARD OF THE ARBITRATOR

The instant dispute concerns the termination of a probationary employee. Mr. Larose worked as an extra gang labourer for the Company from September through December of 1993, in part at MacMillan Yard, in Toronto. Following his release at the end of the working season, in February of 1994, he was advised by letter dated February 16, 1994 that his "... performance as an extra gang labourer has not been satisfactory", and that he would not be called back to work, as his employment was terminated.

The standard to be applied in respect of the termination of a probationary employee has been considered in prior awards of this Office. In **CROA 1568** the following comment appears:

> It is common ground that the standard of proof required to establish just cause for the termination of a probationary employee is substantially lighter than for a permanent employee. The determination of "suitability" obviously leaves room for a substantial discretion on the part of the employer in deciding whether an employee should gain permanent employment status. By the same token, however, under the instant collective agreement that discretion is not unreviewable. That is plain from the language of article 58.1 of the collective agreement, which expressly permits an appeal against the dismissal of a probationary employee. While the parties addressed argument to the appropriate standard of review in such cases, it is not necessary to exhaustively recount or resolve that debate for the purposes of the instant case. 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.

The evidence before the Arbitrator indicates that reports provided to the Company by the grievor's immediate supervisors gave rise to legitimate concern. Mr. David Cromwell, the Extra Gang Foreman who supervised the grievor for a period of several weeks during the fall of 1993 gave evidence under oath at the hearing with respect to his performance. According to Mr. Cromwell, whose evidence the Arbitrator accepts as being fair and accurate, Mr. Larose often worked in a dangerous manner, creating a hazard both to himself and to other employees. Mr. Cromwell relates, for example, that on at least one occasion he was physically struck by Mr. Larose while working in proximity to him. Mr. Cromwell further relates that Mr. Larose was difficult to train in the use of tools, and that he was abrupt and disrespectful in his replies to Mr. Cromwell when he attempted to instruct or correct the grievor. Further, Mr. Cromwell stresses that Mr. Larose was late for work on an almost daily basis. On the basis of all of the foregoing considerations, with particular regard to what Mr. Cromwell described as the grievor's inability to learn and demonstrate an interest in the job, he felt compelled to assign him to work which involved close supervision and little danger to himself or others. Ultimately, based on his observations of the grievor, Mr. Cromwell recommended to Program Supervisor M.G. White that Mr. Larose not be taken on as a permanent employee.

In the Arbitrator's view the evidence of Mr. Cromwell is more than adequate to discharge the burden which is upon the Company in the case at hand. Article 4.1 of supplemental agreement 10.13 governs the instant grievance and provides as follows:

> **4.1** The seniority of an Extra Gang Labourer shall be confined to the Region or Area and shall commence from the date of entry into the service as an Extra Gang Labourer covered by this Agreement.
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> 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 with the Company. 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 Arbitrator is satisfied, on the basis of the evidence adduced, that the Company had cause to form the opinion that Mr. Larose was undesirable for permanent service, as reflected in the testimony of Mr. Cromwell. The concerns of the Brotherhood, with respect to possible reprisals for on-the-job injuries incurred by the grievor, as well as other extraneous considerations apparently raised during the course of grievance correspondence, are understandable. However, the case must, in the end, be judged on its merits. There appears to be little dispute that the decision taken by Mr. White in February of 1994 was based upon information and recommendations provided to him by Mr. Cromwell. For the reasons touched upon above, Mr. Cromwell's assessment of the grievor, a member of the same bargaining unit, is accepted as accurate. In the circumstances I am satisfied that the Company had ample basis for its decision to consider Mr. Larose undesirable for service and to terminate his services, as contemplated under the

provisions of article 4.1 of supplemental agreement 10.13. It did so in good faith, and without discrimination or arbitrariness, and did not deal unjustly with the grievor.

For all of the foregoing reasons the grievance must be dismissed.

16 June 1995

(signed) MICHEL G. PICHER
ARBITRATOR