CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2725

Heard in Calgary, Tuesday, 14 May 1996

concerning

CANADIAN PACIFIC LIMITED

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS (UNITED TRANSPORTATION UNION)

DISPUTE:

The closure of probationary employee L.J. Peebles' employment record.

JOINT STATEMENT OF ISSUE:

On December 30, 1994, within the probationary period, the Company informed Mr. Peebles that his employment record was closed.

The Council agrees that Mr. Peebles was within his probationary period. However, their position is that Mr. Peebles' employment was terminated without just cause. As a result, the Council has requested that Trainperson Peebles be returned to service without loss of seniority and with wages for all time lost since December 30, 1994.

The Company has declined the Council's request.

FOR THE COUNCIL:	FOR THE COMPANY:
(SGD.) L. O. SCHILLACI	(SGD.) R. E. WILSON
GENERAL CHAIRMAN	FOR: DISTRICT GENERAL MANAGER, PRAIRIE DISTRICT

There appeared on behalf of the Company:

R. E. Wilson	– Manager, Labour Relations, Calgary
L. J. Guenther	– Labour Relations Officer, Calgary
S. Seeney	– Labour Relations Officer, Calgary
J. Copping	– Labour Relations Research Officer, Calgary

And on behalf of the Council:

K. Jeffries	– Vice-General Chairman, Cranbrook
B. McLafferty	– Sr. Vice-General Chairman, Moose Jaw
D. Finnson	– Secretary/Treasurer, Saskatoon
S. Keene	– Vice-General Chairman, London

AWARD OF THE ARBITRATOR

This grievance involves the termination of a probationary employee. It concerns the application of article 35, clause (a) of the collective agreement which provides, in part, as follows:

> **35 (a)** A new brakeman shall not be regarded as permanently employed until after six months cumulative service from the date of making first pay trip, and, if retained, shall then rank on the master seniority list from the date and time he commenced his first pay trip. In the meantime, unless removed for cause, which in the opinion of the Company renders him undesirable for its service, the Brakeman shall be regarded as coming within the terms of this collective agreement.

The standard of proof which applies in a case of this kind was commented upon in the following terms in **CROA 1568**:

> 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 purposes, having regard to the requirements of the job and the performance of the individual in question.

When the above principles are applied to the case at hand, the grievance is of dubious merit. It is common ground that in the short period of his employment Mr. Peebles was involved in two separate accidents causing personal injury to himself. While the first did not occasion the loss of any working time, it did give the Employer concerns as to the care and safety which he brought to his work. The second incident, which involved a careless manner of raising himself onto a locomotive platform was more serious, and resulted in the grievor suffering an extensive period of absence for a work related injury in relation to which he received Workers' Compensation benefits. In the result, over the period of his probation, Mr. Peebles was absent from work for a total of 104 of 277 days.

Can it be said, in this case, that the Company arrived at its opinion in a manner that involves bad faith, discrimination or arbitrariness? I think not. The Arbitrator can ascribe little, if any, weight to the suggestion of the Council that the Company wished to avoid the liability of hiring an employee who might be "damaged goods" subject to future absenteeism and reoccurrences of his injury. That assertion is speculative at best, and is supported by no objective evidence whatsoever. There is, on the other hand, evidence of two incidents of carelessness which the Company took seriously in deciding that the grievor is not suitable for permanent employment. In the circumstances I am satisfied that it acted within its discretion as contemplated under the collective agreement.

For the foregoing reasons the grievance is dismissed.

May 17, 1996

(signed) MICHEL G. PICHER
ARBITRATOR