CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3115

Heard in Montreal, Tuesday, 13 June 2000

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS (RAIL CANADA TRAFFIC CONTROLLERS)

DISPUTE:

The closure of Probationary RTC Trainee A. Minue's employment record on March 17, 1999.

JOINT STATEMENT OF ISSUE:

On March 17, 1999, within the probationary period, the Company informed RTC Trainee Mr. Minue by letter that his employment record was closed as his performance to date was less than acceptable.

As a preliminary issue, the Company submits that the Union is estopped from advancing this grievance. This marked the second time that Mr. Minue's employment record as an RTC Trainee had been closed during the probationary period. It was only due to the special intercession of the Union, that the Company agreed to provide Mr. Minue with one last opportunity to qualify as an RTC after closing his record. As a condition of his reinstatement into the training program, Mr. Minue had agreed, through his Union representative, to waive any entitlement to challenge or grieve any subsequent closure of his record for failing the RTC program. Accordingly, the Company submits the closure of Mr. Minue's record is not arbitrable.

The Union agrees that Mr. Minue's record was closed within his probationary period, however, the Union contends that he was dismissed without cause. Notwithstanding the Union's agreement of the conditions allowing for Mr. Minue's reinstatement, the Union has grieved this record closure and requested that Mr. Minue be returned to the RTC Trainee program without loss of seniority and with full compensation for time lost since the closure of his record.

The Company has declined the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. RUDDICK
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) R. HAMPEL
FOR: GENERAL MANAGER, NMC

There appeared on behalf of the Company:

R. Hampel – Labour Relations Officer, Calgary

And on behalf of the Union:

J. Ruddick – General Chairman, Burlington
R. Dyon – General Chairman, BLE, Montreal

AWARD OF THE ARBITRATOR

The Company raises a preliminary objection as to the arbitrability of this grievance. It is common ground that the grievor, Mr. A. Minue, was a probationary employee at the time of the closing of his file. He was then in fact subject to a conditional reinstatement, having been previously terminated as a probationary employee for failing to pass the qualifying examinations for the position of rail traffic controller. The terms of agreement upon which he was reinstated, which were accepted by the employee and his bargaining agent, are reflected in a letter of understanding dated December 22, 1998. That agreement reads, in part, as follows:

> It is agreed that without precedence or prejudice, that on compassionate grounds Mr. Minue will be reinstated into the next RTC training program to be offered on, or about, January 11th, 1999.
>
> The following conditions will apply:
>
> 1. Mr. Minue must successfully pass a new Company medical to be arranged by the Company and reasonable notice given to Mr. Minue of this medical appointment. In the event Mr. Minue fails to pass this medical this record will be closed and no further grievance action will be filed.
> 2. Mr. Minue will return to work on the first day of the RTC training program tentatively scheduled for January 11, 1999. His pay-rate will be 85% of Interlocking RTC rate in effect at the time of his return to work, and will continue to progress as per the Collective Agreement.
> 3. Mr. Minue will retain his original seniority date of November 24, 1997.
> 4. It is also agreed that Mr. Minue must successfully complete all requirements of the RTC training program to continue his employment with CPR. In the event of his failure in the RTC training program Mr. Minue's record will be closed and no further grievance filed.

It is agreed that Mr. Minue's employment record was closed following a cardinal rules violation in which he was involved during the on-the-job training portion of his probation. On March 11, 1999 the grievor was assigned to the Moose Jaw Branch Desk, under the training direction of RTC G. Andrews. During the course of his tour of duty, in issuing clearance no. 548 to engine 9608 south Mr. Minue instructed the conductor to proceed to "north siding switch Pitman" leaving the switch at that location in reversed position. In fact, the conductor heard and repeated "Ibsen" rather than Pitman, and the error in repetition was not caught by Mr. Minue, nor in fact by Mr. Andrews. In the result, a cardinal rules violation was committed, contrary to Rule 140 of the CROR, and the train in question was set on a possible collision course. It was only upon hearing another radio communication to a separate train that the conductor from engine 9608 south realized that an error may have occurred, and contacted the RTC desk by radio. Fortunately that intervention corrected the cardinal rules error, an error it is agreed would otherwise have resulted in a head-on collision of train 9608 south with train 8565 north.

Based on the foregoing, and its view of the grievor's performance in other aspects of the training program, his file was closed. The Company submits that in the circumstances the memorandum of agreement of December 22, 1998 forecloses any grievance being filed with respect to the grievor's termination of service.

The thrust of the Brotherhood's submission is that the termination of Mr. Minue was arbitrary in the circumstances, and that there is nothing in the memorandum of agreement which would prevent him from brining a grievance for having been discharged for a reason that is arbitrary or discriminatory. On that basis it submits that this matter is in fact arbitrable, and indeed that the grievor can be said to come within the terms of the collective agreement on the basis of the language of article 5.01.05 which governs the probationary period. That articles reads as follows:

> **5.01.05** The probationary period for a new RTC hired from outside the Company, or from positions covered by another collective agreement is a period of 130 tours of duty after such employee has become qualified as RTC and has worked an RTC position on their own. The probationary period for employees qualifying as an RTC from a position within the bargaining unit shall be a period of 65 tours of duty after such an employee has become qualified as an RTC and has worked an RTC position on their own. In the meantime, unless removed for cause which, in the opinion of the Company, renders the employee undesirable for its service, the employee will be regarded as coming within the terms of this Agreement.

With respect to the issue of arbitrability the Arbitrator is inclined to agree with the Brotherhood. It would appear to the Arbitrator that the fourth paragraph of the memorandum of agreement would foreclose any grievance by the employee "in the event of his failure in the RTC training program". In my view those words must be construed, at a minimum, to involve the understanding that Mr. Minue could not be taken to fail the RTC training program for reasons which are in and of themselves arbitrary and discriminatory. He could not, for example, be terminated for the colour of his hair. If the parties had intended the Company to have an absolutely unreviewable discretion they could have chosen words to convey that intention. No such intention is in fact apparent on the face of the memorandum of agreement, and the Arbitrator must sustain the initial position advanced by the Brotherhood.

The issue of greater substance, therefore, becomes whether, in the circumstances, Mr. Minue was discharged as a probationary employee for reasons which were arbitrary, discriminatory or in bad faith. It is not disputed that he was within the probationary period described in article 5.01.05 of the collective agreement, and that the discretion of the Company to terminate an employee for unsuitability, subject only to its decision being made on the grounds that were not arbitrary, discriminatory or in bad faith is well established in the precedents of this Office, as well as Canadian arbitral jurisprudence generally (**CROA 1568, 2004, 2496** and **2725**).

The thrust of the Brotherhood's submission is that other RTCs had previously recorded difficulty in discerning the difference between "Pitman" and "Ibsen" in radio transmissions with conductors in the field. It appears that at least two prior such incidents were recorded, although in each case the RTC on duty caught the error made by the conductor in repeating the wrong name. The Brotherhood also stresses that the training RTC, Mr. Andrews, made the same error as the grievor.

With respect, while the Arbitrator understands the merits of the submission made by the Brotherhood, it is truly one which is appropriate in a hearing relating to a full standard of just cause, with regard to mitigating factors. The question in this grievance, however, is not whether the Company has satisfied the normal standard of just cause for the termination of the grievor's employment. The sole issue is whether the Company exercised its discretion on the basis of an opinion fairly related to legitimate business concerns, and in a manner that is not arbitrary or discriminatory as against Mr. Minue. The record discloses that Mr. Minue had previously failed the classroom portion of the training program. He was reinstated on compassionate grounds, apparently on the basis that he may have had difficulty by reason of eye problems which were since corrected by surgery. On that basis he was allowed to re-enter the program. While he did pass the classroom portion of the program, the record reveals that he did not perform well during a simulation exercise, and in fact was by a substantial margin the weakest of the candidates in his group on the occasion of that simulation. He nevertheless progressed to on-the-job training where, as the record above confirms, he committed a cardinal rule violation which created a circumstance of considerable peril.

The fact that RTC Andrews made the same error is not a defence to the grievor, who was being assessed for suitability as a probationary employee, subject to relatively stringent conditions as reflected in his letter of reinstatement into the program dated December 22, 1998. Whether the decision to close his file by the Company was harsh is not the issue before me. The issue is whether it was arbitrary or discriminatory, or taken in bad faith. I cannot find any rational basis upon which to find that that was so. The Company was faced with a cardinal rules violation, for which another employee has accepted discipline at the level of twenty demerits, as assessed against Mr. Andrews. No-one disputes that the circumstance created was extremely dangerous. Nor does it appear, notwithstanding prior documented concerns about the similarity in sound between "Pitman" and "Ibsen" in radio transmissions, that there had ever previously been an actual recorded miss which was not corrected by an RTC listening carefully to the acknowledgement.

Simply put, the Company had fair cause for concern as to the grievor's performance. That cause was reflected in certain of the remarks registered by those involved in his training, and culminated in the cardinal rules violation which he committed on March 11, 1999. In the circumstances the Company had reason to turn its mind to the grievor's suitability for the highly safety sensitive duties of an RTC, and the decision that he should no longer proceed in the probationary program was made on a considered basis which was plainly not arbitrary or discriminatory in the circumstances.

Based on those facts, the Arbitrator is without any discretion to overturn or modify the decision taken by the Company. Alternatively, if I had any such discretion, I would not be inclined to exercise it. The grievance must therefore be dismissed.

June 16, 2000

(signed) MICHEL G. PICHER
ARBITRATOR