CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3290

Heard in Montreal, Wednesday, 9 October 2002

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION AND GENERAL WORKERS UNION OF CANADA (CAW-CANADA)

DISPUTE:

Termination of the employment of probationary employee W.F. Hingley, Labourer.

JOINT STATEMENT OF ISSUE:

On May 7, 2001, W.F. Hingley commenced service under agreement 5.1. Between that date and July 26, 2001, W. Hingley was employed as a labourer at the MacMillan Yard Locomotive Reliability Centre at MacMillan Yard, Ontario, and completed 56 days of cumulative compensated service prior to the termination of his employment.

On July 26, 2001, while still in his probationary period, and following a formal investigation as required by article 11.1, W. Hingley was advised that his services had been found unsuitable and that as a consequence his employment was terminated.

The Union contends that the decision to terminate the services of W. Hingley was arbitrary, discriminatory and in bad faith.

FOR THE UNION:

(SGD.) R. JOHNSTON
PRESIDENT, NATIONAL COUNCIL 4000

FOR THE COMPANY:

(SGD.) R. BATEMAN
FOR: DIRECTOR, HUMAN RESOURCES
EASTERN DIVISION

There appeared on behalf of the Company:

J. E. Pasteris	– Manager, Human Resources, Montreal
R. N. Bateman	– Manager, Human Resources, Toronto
B. F. Tracey	– Shift Leader MacMillan Yard LRC
N. E. Hart	– Team Leader MacMillan Yard LRC

And on behalf of the Union:

J. Moore-Gough	– National Representative, Chatham

AWARD OF THE ARBITRATOR

Upon a review of the material the Arbitrator is compelled to conclude that the Company's decision to terminate probationary employee Fraser Hingley was not made in a manner that was arbitrary, discriminatory or in bad faith. The record discloses that Mr. Hingley was noted as having several deficiencies in his performance during the course of his probationary employment. Among them was leaving work early, on more than one occasion, notwithstanding explicit instructions from management at the time he was hired that he should not do so, as the Company was endeavouring to reverse a contrary tendency among employees to deal with a problem which had apparently arisen since the elimination of punch clocks. The evidence does disclose, beyond controversy, that on some occasions Mr. Hingley did leave work before his quitting time, apparently in circumstances when other employees were also doing so, in direct contradiction of the instructions he initially received when hired.

A second dimension of concern for the Company was what it described as the grievor's attitude. In that regard it points to an incident during a safety meeting when the grievor inquired as to when certain safety training would be provided to the new employees. When it was indicated to him that budgetary restraints had occasioned a delay in the scheduling of the training, which nevertheless was to occur, he responded that he did not see why the Company should be paying for pizza and chicken wings for the employees when it did not have funds for the prompt scheduling of safety training. The evidence before the Arbitrator confirms that at monthly safety meetings it was the Company's practice to provide snacks such as doughnuts, pizza or chicken wings to the employees to make the safety meetings more pleasant.

The Union's representative submits that the Company's response to the grievor's comments was tantamount to a bad faith interference with his rights and concerns in respect of workplace safety. The Arbitrator cannot agree. If the grievor had simply made an inquiry and registered his concern over the delay in safety training, and the Company had responded negatively on the basis of that comment the Union's case might be well made out. The concern which underlies the Company's response is plainly the sarcasm, if not contempt for management, reflected in the grievor's comments, registered openly, in front of other employees, by Mr. Hingley in the presence of management personnel. While it is debatable whether those comments, standing alone, would have constituted insubordination which would justify the discipline of a permanent employee who has the protection of the just cause provision of the collective agreement, that is not a matter that need be determined in this grievance. Significantly, the grievor was not a permanent employee, but was a probationary employee in respect of whom the Company was entitled to make an overall assessment as to his general suitability for continued service. The Arbitrator is satisfied that it was not the employee's concern for safety training, but rather his open expression of contempt for management which prompted the negative view of the incident taken by the Company.

A third aspect of the evidence concerns the allegation that the grievor removed himself from his work area on occasion, without authorization. I am satisfied that in some circumstances it was not unreasonable for the grievor to take a break from his work, particularly when working conditions were made difficult by severe heat. The evidence includes, for example, an incident when Mr. Hingley apparently went outside to a picnic bench to drink water for a period of approximately ten minutes, on what was not a scheduled break. While that action is not of itself of concern, in the Arbitrator's view it is not unreasonable for the Company to have expected the employee to first obtain permission from his supervisor, or at a minimum advise his supervisor that he was going to leave his work area to take a break because of the heat.

Finally, the evidence discloses, beyond controversy, that in the overall assessment of employees hired at the same time as the grievor, he scored lowest among the group, being described as "fair" as an employee, all factors considered.

In dealing with a grievance concerning the termination of a probationary employee a board of arbitration must give a degree of deference to the decision of the Company, even if the Arbitrator might have come to another conclusion with respect to the employability of the individual in question. The applicable principle was stated as follows 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 purpose, having regard to the requirements of the job and the performance of the individual in question.

The Arbitrator shares the view of the Union that it would be tantamount to bad faith, contrary to the above principles, to terminate a probationary employee because he or she sought to invoke or enforce his or her occupational health and safety rights, or those of other employees. I am satisfied that there was no such motive in the Company's decision not to continue the employment of Mr. Hingley beyond the term of his probation. The employer's opinion as to whether to continue the grievor in employment was, I am satisfied, made on the basis of its own opinion as to his suitability for employment, regard being had to the attitude he displayed towards management, to his failure comply with directives as to leaving work early, and the overall assessment of his work performance made by his supervisors. For all of these reasons the grievance must be dismissed.

October 11, 2002

(signed) MICHEL G. PICHER
ARBITRATOR