CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 3335

Heard in Montreal, Wednesday, 14 May 2003

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE EMPLOYEES

EX PARTE

DISPUTE:

Dismissal of Mr. G. Isabel.

BROTHERHOOD'S STATEMENT OF ISSUE:

The grievor was dismissed from Company service in early 2001 for his alleged violation of section 15.7 of Wage Agreement No. 41. More specifically, the Company closed the grievor's record when, in the Company's opinion, the grievor illegitimately failed to accept recall and thereby violated section 15.7. In response to this, a grievance was filed.

The Union contends that: **(1.)** Section 15.7 provides that an employee may refuse recall if "satisfactory reasons are given"; **(2.)** The grievor had refused recall the year before without incident. The reasons for refusing recall were identical in both years. The reasons were obviously "satisfactory" in the first year but, for some inexplicable reason, were not "satisfactory" in the second year. This is not only contradictory and unfair but has prejudiced the grievor in the extreme; **(3.)** Other mitigating factors existed that were not taken into consideration; **(4.)** The dismissal of the grievor was illegitimate and in violation of section 15.7 of Wage Agreement No. 41.

The Union requests that the grievor be reinstated into Company service forthwith without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

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

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

Ron Hampel	– Labour Relations Officer, Calgary
E. MacIsaac	– Manager, Labour Relations, Calgary

And on behalf of the Brotherhood:

J. J. Kruuk	– System Federation General Chairman, Ottawa
D. W. Brown	– General Counsel, Ottawa
P. Davidson	– Counsel, Ottawa
R. Tirrelli	– General Chairman, Montreal

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that on or about December 22, 2000 Service Area Manager J.F. Boisvert sent the grievor, Mr. G. Isabel, a letter recalling him to a Group II Machine Operator position at Montreal. The letter explained, in part, that under the terms of article 15.7 the grievor had fifteen days to respond, and that a failure of response would result in the severance of his employment. It is common ground that on or about January 5, 2001, Mr. Isabel responded that he would not be returning to work, as he was then working in a hospital in Sherbrooke during the winter season. It appears that two further communications were issued by Mr. Boisvert, the first on January 23, and a follow-up letter, again advising the grievor that if he did not respond to the recall his employment relationship would be terminated.

The material discloses that Mr. Isabel appears to have been under some uncertainty as to the impact of the failure to respond to his recall. On March 8, 2001 he wrote asking for clarification of the meaning of the severance of employment referred to by Mr. Boisvert. It appears that the grievor was under the impression that he might simply suffer the loss of his seniority as machine operator should he fail to respond to the recall. It is also not disputed that in the year previous Mr. Isabel had been subject to a similar recall and had at that time also declined to return to work. There was, however, no consequence to him at that time, and he subsequently was recalled to work again in the spring of 1999.

The first issue is the application of article 15.7 of the collective agreement to the facts at hand. That article provides as follows:

> **5.7** Except as provided in Clause 15.8, when staff is increased or when vacancies of forty-five days or more occur, laid off employees shall be recalled to service in seniority order in their respective classifications by registered mail. Failure to respond to such recall within fifteen days of the date the registered letter was sent to the employee's last known address, shall result in severance of employment relationship, unless satisfactory reasons are given.

With respect to the interpretation and application of the foregoing article the Arbitrator must sustain the position of the Company. Article 15.7 obviously address the need of the employer to have reliable access to the services of employees who are on layoff and who have been trained for productive service. As a condition of continued employment such individuals are required to respond to their recall to vacancies of forty-five days or more. The only exception to that obligation is where "satisfactory reasons are given."

However, there are in the case at hand, mitigating factors which must be considered. It is well established that the administration of a collective agreement, and in particular the application of provisions dealing with seniority and an individual's job security, must be done in a manner which is consistent and not arbitrary. In the instant case it is not disputed that the grievor, who is a long service employee with a good record, was not given any negative treatment for his failure to respond to a similar recall in the winter of 1999. While the Company argues that it simply made a mistake on that occasion, and that it is entitled to correct mistakes, that does not speak to the equities of the case at hand. In the Arbitrator's view it is fair to conclude, on the balance of probabilities, that the earlier treatment of the grievor lulled him into a false sense of security with respect to the consequences which might flow from his not responding to the recall in January of 2000. That, it seems, was compounded by his own belief to the effect that the most he would lose would be his seniority as a machine operator, apparently based on his reading of the provisions of article 3 of the collective agreement governing the working conditions of operators.

In the circumstances, although the Arbitrator must agree with the Company with respect to the interpretation of article 15.7 as a matter of general application, there is reason to conclude that it would be inequitable for the employer to rely on the strict application of that provision in the specific circumstances facing Mr. Isabel in January of 2001. Nevertheless, considering that the grievor was to some degree the author of his own misfortune, this is clearly not a case for any order of compensation.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages or benefits lost.

May 16, 2003

(signed) MICHEL G. PICHER
ARBITRATOR