CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3792

Heard in Montreal, Wednesday, 15 July 2009

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of Mr. Craig Cox.

JOINT STATEMENT OF ISSUE:

In April 2008 the grievor, Mr. Cox, learned that his file had been closed by the Company. According to the Company the reason for the file closure was that the grievor failed to accept recall. A grievance was filed.

The Union contends that: (1) The grievor started a school course in his native Newfoundland on March 10, 2008. When he received the recall notice he immediately contacted Mr. E. Green and told him that he was in school and wished to return to work after his course was completed. The Company's response to the receipt of this information and the decision to dismiss the grievor was in violation of sections 13.10 and 11.9 of agreement no. 41. (2) No investigation was conducted prior to termination as required by (and in violation of) section 15.1 of agreement no. 41. (3) The dismissal of the grievor, an employee with fourteen years of service, was unjust and unwarranted in the circumstances.

The Union requests that the grievor be reinstated into Company service forthwith without loss of seniority and will full compensation for all wages lost as a result of the Company's actions.

The Company denies the Union's contentions and declines the Union's request. The Company advances a preliminary objection to the introduction of one new contention by the Union into this document, the alleged violation of section 15.1 of agreement no. 41.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) WM. BREHL	**(SGD.) K. HEIN**
PRESIDENT	LABOUR RELATIONS OFFICER

There appeared on behalf of the Company:

M. Goldsmith	– Labour Research and Budget Specialist, Calgary
D. Freeborn	– Manager, Labour Relations, Calgary
M. Thompson	– Labour Relations Officer, Calgary

And on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. Brown	– Counsel, Ottawa
A. R. Terry	– Vice-President, Lethbridge

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor, Mr. Cox, performed many years of Extra Gang work, normally working to the end of the work season and being recalled in the following spring. It does not appear disputed that between his layoff at the end of 2007 and the commencement of the 2008 work season he undertook a course at an industrial college near his home in Newfoundland. That course concerned comprehensive training in industrial scaffolding, a skill which could potentially be of use to the Company should the grievor ever work in the B&S Department.

The Arbitrator is satisfied that the Company acted at all times in good faith in eventually coming to the opinion that the grievor had effectively abandoned his employment when he did not in fact respond to the recall to work issued to him pursuant to a registered letter dated March 7, 2008. The letter in fact concluded with the following excerpt from the collective agreement reminding employees of the importance of responding to the recall:

> Section 4 – Clause 4.4 of Wage Agreement 42 states (in part), as follows:
>
> > … Failure to respond to such recall within 15 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.

Unfortunately, as the record discloses, it would seem that the grievor's union representative described to the Company in less than precise terms his intentions with respect to the training he was receiving. In effect, the description given to the Company was to the effect that the grievor was taking training to enable him to secure work outside the service of the Company, something which is not apparently the case. It is common ground that the grievor's eleven week course would have been concluded by the end of May and that he could have then resumed work with the Company, as was his intention.

At the hearing the Union withdrew its allegation of any violation of clause 15.1, acknowledging that the termination was not disciplinary in nature. It submits, however, that there was a disregard of the substance of the collective agreement with respect to the grievor's case, in a manner tantamount to arbitrariness. Essentially, its representatives submit that the fact that the grievor had paid in excess of $6,000 to take the course in question and was not willing to give it up does, in effect, comply with the requirement for "satisfactory reasons" for forgiving an employee's failure to respond to a recall. They also point to the provisions of section 13.10 of the collective agreement which read as follows:

> **Leave of Absence**
>
> **13.10** Employees shall be granted leave of absence in accordance with the current general regulations or practice of the Railway. The TCRC MWED Director will be notified when such leave is granted.

The Union's representatives submit that many educational and training leaves have been accorded without difficulty by the Company and that the closing of the grievor's employment file without considering the possibility of granting him that leave of absence, even retrospectively, reflects an element of arbitrariness which, they submit, stems from the fact that the Company, although not obligated to conduct a full blown disciplinary investigation, made no significant inquiry into the grievor's actual circumstances.

As noted above the Arbitrator readily understands the perspective of the Company. The Union's representatives themselves concede that the grievor acted in a manner that was naïve and ill-advised. However, when the entirety of the facts is reviewed, I am satisfied that there was an element of arbitrary treatment in the closing of the grievor's file, albeit some of it may well have been occasioned by the misinformation provided by the grievor's own union representative concerning the nature of the training which he was undergoing at his own expense. Had the Company known that he was taking training which could be of great value to it, and indeed parallels training which the Company itself provides to employees with respect to scaffolding, there may have been a very different outcome. In all of the circumstances the Arbitrator is satisfied that this is an appropriate case for reinstating the grievor into his employment relationship, albeit without any compensation for wages and benefits lost.

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

July 20, 2009

(signed) MICHEL G. PICHER
ARBITRATOR