CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 290

Heard at Montreal, Tuesday, June 8th, 1971

Concerning

CANADIAN NATIONAL RAILWAYS

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

DISPUTE:

The Brotherhood claims that the Company violated Articles 24.1 and 24.2 of Agreement 5.1 when the employment of Mr. P.W. Crossley and Mr. G.P. Clarke was terminated July 7, 1970 and the employment of Mr. R. MacKinnon was terminated on July 20, 1970 without an investigation having been held.

JOINT STATEMENT OF ISSUE:

After completing their normal hours of work, Messrs. Crossley, Clarke and MacKinnon had someone telephone the Master Control Office at Toronto where they were employed, and report them sick. As is the practice, the Staff Supervisor attempted to telephone them to ascertain the reason for their absences. When these attempts were unsuccessful, registered letters were forwarded to their homes informing them that if they did not produce evidence of *bona fide* illness or return to work within ten days, they would be recorded as having resigned without notice. When they failed to respond within the time limits, they were staffed out of service.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD). J. A. PELLETIER	(SGD.) K. L. CRUMP
NATIONAL VICE-PRESIDENT	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company.

D. O. McGrath	– System Labour Relations Officer, Montreal
W. J. Kerr	– Staff Supervisor, Toronto
G. Sears	– Assistant Staff Supervisor, Toronto

And on behalf of the Brotherhood:

J. D. Hunter	– Regional Vice President, Toronto
A. Rudd	– Local Chairman, Toronto

From the material before me, it appears that the grievors did not in fact receive the notices which the company sent to them advising that they would be considered to have resigned if they did not provide justification for their absence within the time specified. When the grievors were deemed to have resigned, they were, it seems, quite unaware of the matter. It was, of course, open to the grievors to resign, and if they had done so, they could have no valid complaint against the company's refusal to re-hire them. Here, however, the grievors did not in fact resign. When the employer says that they will be deemed to have resigned, what it is saying in substance that their employment has terminated. In this sense, any employee who gives cause for discharge could be said to have resigned, since it was his own misconduct which was, in the final analysis, the cause of his loss of employment. This is not, however, the proper use of the term, any more than it is effective for the discharged employee himself to say, "you can't fire me; I quit".

In the instant case it was the company, which, concerned over the grievors' absence from work, initiated and concluded the proceedings which resulted in the termination of the grievors' employment. What this really means, in realistic terms, is that it discharged the grievors. The very act of "deeming an employee to have quit" is a managerial action. In some cases, as in the instant case, it is in fact indistinguishable from discharging an employee. In the instant case, in any event, the grievors did nothing to indicate that they wished to terminate their employment. That their conduct may have justified their discharge is a very different matter.

In fact, as I find, the company discharged the grievors. The requirements of the collective agreement in this regard are as follows:

> **24.1** An employee, who has completed his probationary period, will not be disciplined or discharged without an investigation.
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> **24.2** Investigations in connection with alleged irregularities will be held as quickly as possible. An employee may be held out of service for investigation (not exceeding three (3) working days). He will be given at least one (1) day of the investigation and notified of the charges against him. This shall not be construed to mean that a proper officer of the Company, who may be on the ground when the cause for investigation occurs, shall be prevented from making an immediate investigation. An employee may, if he so desires, have the assistance of one (1) or two (2), fellow employees, or accredited representatives of the Brotherhood, at the investigation. Upon request, the employee being investigated shall be furnished with a copy of his own statement, if it is made a matter of record at the investigation. The decision will be rendered within twenty-one (21) calendar days from the date the statement is taken from the employee being investigated. An employee will not be held out of service pending the rendering of a decision, except in the case of a dismissible offence.

The company did not follow the procedure set out in the above provisions of the collective agreement. While it may be noted that the grievor appear to have been guilty of rather flagrant misconduct, and while it may well be that their discharge was well justified, what is important for this case is that the facts of the matter were never established, and that the employees did not have the benefit of the provisions of the agreement in that regard. The matter of their misconduct is not in issue in this case, and I make no finding with respect to it.

In **Case No. 127**, where discipline was imposed without an investigation as contemplated, it was held that the discipline was not proper. Again, in **Case No. 216**, where no union representative was allowed at an investigation it was said that there was no proper investigation, although in this case the grievor, being a probationer, was not entitled to that benefit.

The requirement of compliance with Article 24 is no mere technicality. The grievors were, in fact deprived of the opportunity to have their cases heard, their employment was, in fact, terminated on the basis of presumptions of which they had no notice. Because of non-compliance with the mandatory provisions of Article 24, the discharge of the grievors must be held to have been a nullity. The grievors are therefore entitled to be reinstated in employment without loss of seniority or other benefits, and to be compensated for actual loss of earnings.

In connection with the company's view that the grievors had resigned, mention was made of the case of a fourth employee, one Drury, who, several days after the expiry date set in the company's letter to him, furnishing an explanation of his absence, which was accepted. While this is no doubt a token of the company's good faith in the

matter, it must be observed that if Mr. Drury had by that time "resigned" – and that is the company's whole theory of the case then the company had no right to consider his explanation for his absence, except perhaps in the course of hiring him as a new employee. What this really shows is that the company's theory of the matter was not correct. Neither Mr. Drury nor the three grievors resigned. Drury's case was considered and no discipline imposed. The grievors (justifiably or otherwise), were discharged. Since there was no investigation pursuant to Article 24, the discharge cannot stand, and the award must be as above set out.

For the foregoing reasons the grievance is allowed.

(signed) J. F. W. WEATHERILL
ARBITRATOR