CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 346

Heard at Montreal, Tuesday, April 11th, 1972

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

UNITED TRANSPORTATION UNION (T)

DISPUTE:

Grievance involving former Yardman T.I. Cullen, Windsor, Ontario.

JOINT STATEMENT OF ISSUE:

Mr. T.I. Cullen, who made application for employment as yardman commenced working as a yard helper on June 28, 1969. Pursuant to Article 125 of Agreement 4.16, the Company wrote to the grievor on September 17, 1969 advising him that his application for employment was not satisfactory and was rejected, his services were accordingly dispensed with.

The Union subsequently submitted a grievance contending that the Company had violated that portion of Article 121, reading. "No employee will be disciplined or dismissed until the charges against him have been investigated", and requested that Mr. Cullen be re-instated in the service. With all monies due him.

The Company declined the grievance.

FOR THE EMPLOYEES:	FOR THE COMPANY:
(SGD.) G. E. McLELLAN	(SGD.) K. L. CRUMP
ASSISTANT GENERAL CHAIRMAN	ASSISTANT VICE-PRESIDENT, LABOUR RELATIONS

There appeared on behalf of the Company:

A. J. DelTorto	– System Labour Relations Officer, Montreal
M. A. Matheson	– Labour Relations Assistant, Montreal
J. E. Garrity	– Superintendent, Moncton

And on behalf of the Union:

G. E. McLellan	– Assistant General Chairman, Toronto
K. C. Hillgartner	– Local Chairman, Yard, Windsor

AWARD OF THE ARBITRATOR

The grievor's employment with the Company first began on February 17, 1969, when he commenced work as a deck hand on the car ferries operating out of Windsor, Ontario. While he was so employed, he made application for employment as a yard helper. He was offered such work, and commenced work as a spare yard helper on June 28, 1969. In this work, he was subject to the terms and conditions of the collective agreement covering conductors, baggagemen brakemen and yardmen on the Company's Atlantic and Central Regions. His previous service with the Company is irrelevant to this matter, and his position was that of a new employee. It is the Company's position that he was, as such subject to a ninety-day probation period, and for this it relies on Article 12 of the collective agreement which was in effect at the material times. That article provided as follows:

> **Article 125 – Application for Employment:**
>
> Application for employment if not satisfactory will be rejected within ninety (90) days after first service, or applicant will be considered accepted.

The grievor's employment was terminated on September 17, 1969, which was within ninety days of his "first service" under the collective agreement. It was not alleged that he had committed any offence for which he could be subject to discharge or discipline. He was, however, "discharged" within the broad meaning of that term, in that his employment was terminated. In general he would, like any other employee in the bargaining unit, be entitled to the benefit of Article 121 of the collective agreement which calls for an investigation. This assumes some "charges" to be investigated, and it may be said that an employee who had passed his probationary period could not be discharged without such charges being established. If, however, the Company is entitled, in its discretion, to reject employees on probation, the formulation and investigation of charges would not be appropriate unless it were a matter of establishing the facts of some particular incident, as is suggested in the cases referred to later in this award.

While it may be that Article 125, as it stood at the material times, did not express this purpose well, it is my view that it was intended to provide for a ninety-day probationary period for new employees. It was not merely, as the Union contended, a provision allowing a ninety-day period for verification of the application form filled in by persons seeking employment. By the terms of Article 125, unless an application was rejected within ninety days of first service, the applicant was to be considered as accepted for employment. Of course he was, strictly speaking, an "employee" from the time of first service. But the article plainly contemplates that it was open to the Company to accept or reject him within the ninety day period. Rejection of an employee on probation is not necessarily a matter of discipline.

That probationary employees (unless specifically excluded) come within the bargaining unit and are entitled to the benefits of the grievance procedure was held in the **Tecumseh Products Case**, 20 LAC 355, where the cases on the subject are reviewed. It was held, following the views expressed in most of the earlier cases, that a probationary employee is one who is required, within the limits set out in the collective agreement, to prove himself. Where an employer makes the determination that a probationary employee is not satisfactory, it is not for an arbitrator to say whether the Company made the correct decision or not, although there might be cases where even the merits of the discharge of a probationary employee could be considered in arbitration proceedings, as for example where a probationer was discharged for some specific cause. The question would simply be, however, whether the "cause" in fact occurred. There might also be a right to arbitration in the case of an alleged discharge of a probationer contrary to the rules against discrimination: see the **Polymer Case**. 15 LAC 345, at p. 346–7.

The instant case, however, is simply an example of the rejection of a probationary employee within the period set out in the collective agreement. Such action by the Company is within the contemplation of the agreement which qualifies to this extent the general rights conferred by Article 121. It is not a case in which charges have been laid which would require to be investigated, and it is not one in which charges are necessary, as would be the case had the grievor passed his probationary period. The Company exercised a discretion which was open to it, and there has been no violation of the collective agreement.

For the foregoing reasons the grievance must be dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR