CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 821

Heard at Montreal, Tuesday, April 14, 1981

Concerning

CANADIAN PACIFIC EXPRESS LIMITED

and

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES

EX PARTE

DISPUTE:

The dismissal of employee M. MacLean, Vancouver, British Columbia.

EMPLOYEES' STATEMENT OF ISSUE:

Employee M. MacLean was dismissed from Company Service and his record was closed for transporting an unauthorized passenger in a Company Vehicle.

The Brotherhood contends the penalty imposed is totally unwarranted, improper and unacceptable in that the Company attempted to deny this employee the right to grievance procedure and that they failed to show just cause as to his being undesirable for it's service as a future seniority rated employee.

The Brotherhood demand full reinstatement of this employee into Company Service and full wages for all time lost while being held out of Service.

The Company declined the Brotherhood's request.

FOR THE EMPLOYEES:

(SGD.) J. J. BOYCE
GENERAL CHAIRMAN

There appeared on behalf of the Company:

D. R. Smith	– Director Industrial Relations, Personnel & Administration, Toronto
B. D. Neill	– Manager, Labour Relations, Toronto
R. A. Colquhoun	– Labour Relations Officer, CP Rail, Montreal

And on behalf of the Brotherhood:

J. J. Boyce	– General Chairman Toronto
G. Moore	– Vice-General Chairman, Moose Jaw
F. W. McNeely	– General Secretary-Treasurer, Toronto
J. Crabb	– Vice-General Chairman, Toronto

AWARD OF THE ARBITRATOR

The grievor was hired by the Company on July 31, 1980, beginning service on August 5th as a driver. On August 22nd, following a customer complaint with respect to his "helper", the grievor was interviewed by a Company officer. The "helper" was in fact an unauthorized passenger in the vehicle, as the grievor acknowledged. The grievor was then released from service. No investigation of the sort contemplated by Article 8 of the Collective Agreement was held.

At the time of his discharge, the grievor was a probationary employee. Although that term is not used, his seniority status and his probationary status are dealt with in Article 6.2.4 of the Collective Agreement, which is as follows:

> **6.2.4** A new employee shall not be regarded as permanently employed until completion of 65 working days cumulative service. In the meantime, unless removed for cause which in the opinion of the Company renders him undesirable for its service, the employee shall accumulate seniority from the date first employed on a position covered by this Agreement.
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> An employee with more than 65 working days cumulative service shall not be discharged without being given a proper investigation as provided in Article 8 of this Agreement.

While he was a probationer, the grievor was nevertheless an employee. The **Canada Labour Code** requires that Collective Agreements contain a provision for final settlement "by arbitration or otherwise" of all differences between the parties to or employees bound by the Collective Agreement, concerning its interpretation, application, administration or alleged violation. The parties to this case have provided for a grievance and arbitration procedure in their Collective Agreement. Nothing in that procedure prevents probationary employees from filing grievances and proceeding to arbitration, as has been done in the grievor's case, and it is not suggested that the instant grievance is not arbitrable.

The grievance is, therefore, properly before me, and the issue is whether or not the Company violated the Collective Agreement by discharging the grievor. As to the claim that the Company attempted to deny the grievor the right to the grievance procedure, while it may be that the Company's initial (and wrong) response was that no grievance was possible, that view has been corrected and the matter has, as I have noted, proceeded to arbitration without objection.

There are two questions of substance which must be dealt with. One is as to the necessity of an investigation under Article 8 in cases of probationary employees. The other is as to existence of proper cause for the action taken by the Company.

Article 8 deals with investigations and discipline and Article 8.1 provides that an employee shall not be disciplined or dismissed until after a fair and impartial investigation has been held and the employee's responsibility is established. That is a general provision and would, as a general matter, apply in the case of any employee. Article 6.2.4, however, deals specifically with probationary employees, and makes particular provision with respect to their discharge. This appears clearly from the second paragraph of that Article, which expressly provides that employees with more than 65 working days' cumulative service (that is, those who have passed their probationary period and have become permanent employees), shall not be discharged without investigation pursuant to Article 8. The direct implication of this is that that stricture does not apply in the case of probationary employees. That such an implication is a necessary one is clear from the fact that the requirement of an investigation in the case of permanent employees is made in any event by the general provision of Article 8 (although Article 8 deals with discipline generally as well as with discharge matters). The effect of the second paragraph of Article 6.2.4, then, is to create, in the case of probationary employees, an exception to the general provisions of Article 8. A probationary employee may be discharged without being given the investigation contemplated by Article 8.

The grievor was a probationary employee, and while he was not given the investigation contemplated by Article 8, that was not a violation of the Collective Agreement. Nor, in my view, does it appear in the circumstances to have been a violation of any other rights the grievor might enjoy or of any provision of the **Canada Labour Code**, although of course I make no determination of any issues of that sort.

The Collective Agreement, by the first paragraph of Article 6.2.4, contemplates that a probationary employee may be removed "for cause which in the opinion of the Company renders him undesirable for its service". The issue

of substance which arises in this grievance is whether or not such cause existed. Such an issue has two aspects. First, there is the question whether or not, as a matter of fact, any "cause" for Company action existed. Second, there is the question of the Company's opinion of such cause, that is whether or not it was one which rendered the employee undesirable for its service. Such a provision gives the Company a broad discretion, but not a license to act arbitrarily or in a discriminatory manner. The "removal for cause" of a probationary employee under this provision should not, I think, be confused with the requirement that there be "just" or "proper" cause for the discharge of a permanent employee. An employer has a real and important discretion – and responsibility to exercise in deciding whether or not to retain a probationer as a permanent employee.

In the instant case there was in fact a particular "cause" for the grievor's removal. He had, as he acknowledged, carried an unauthorized passenger on a Company vehicle. This was contrary to explicit rules of which he was, or ought to have been, aware, and even without any express rule would certainly have been improper. Such a practice is a dangerous and undesirable one in a number of respects, and could subject the Company to serious liabilities. As to the exercise of the Company's discretion, it was not, in my view, either arbitrary or discriminatory for it to form the opinion that such conduct rendered the grievor undesirable for its service. It may be, as a general matter, that carrying an unauthorized passenger would not by itself constitute "just cause" for the discharge of a permanent employee. That is not, however, the issue in the instant case. Here, the question is whether or not the Company was in violation of the Collective Agreement in being of the opinion that the grievor's conduct rendered him undesirable for its service. In my view, the Company was not in violation of the Collective Agreement. There was proper occasion for it to exercise the discretion provided for in Article 6.2.4 and to form the opinion it did. Its decision was not arbitrary, and there is nothing to show any sort of improper discrimination against the grievor.

For all of the foregoing reasons, the grievance is dismissed.

(signed) J. F. W. WEATHERILL
ARBITRATOR