CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 926

Heard at Montreal, Tuesday, April 13, 1982

Concerning

CANADIAN PACIFIC LIMITED

and

UNITED TRANSPORTATION UNION

EX PARTE

DISPUTE:

The dismissal of Conductor H.F. Bryk, account accumulation of demerit marks, effective March 17, 1980.

EMPLOYEES' STATEMENT OF ISSUE:

Following an investigation on March 10, 1980, the Company effective March 17, 1980, dismissed Mr. Bryk from the service of the Company for accumulation in excess of 60 demerits.

Further on March 24, 1980, the Company assessed Mr. Bryk thirty (30) demerit marks, "Failing to protect his assignment on the Third Creighton Roadswitcher at 001, March 7, 1980 at Sudbury".

The Brotherhood contends Mr. Bryk was dismissed on an improper procedure and the discipline of thirty (30) demerit marks was excessive and severe.

The Organization further requests that Mr. Bryk be restored to Company Service with full Seniority.

FOR THE EMPLOYEE:

(SGD.) B. MARCOLINI
GENERAL CHAIRMAN

There appeared on behalf of the Company:

L. A. Clarke	– Supervisor, Labour Relations, Toronto
B. P. Scott	– Labour Relations Officer, Montreal

And on behalf of the Employee:

B. Marcolini	– General Chairman, Toronto
J. Sandie	– Vice-President, Sault Ste. Marie

INTERIM AWARD OF THE ARBITRATOR

The Company has raised a preliminary objection to the arbitrability of this matter, and the case was heard on that issue only.

The grievor was advised by letter dated March 17, 1980, that he had been assessed thirty demerits for failure to protect his assignment and as a result was dismissed for accumulation of more than sixty demerits. A grievance with respect to that, asserting that the penalty was too severe and requesting reinstatement was filed by letter dated April

18, 1980. The grievance was denied by letter dated April 25. A further appeal was made by the General Chairman by letter dated June 10, 1980, and this was denied on July 21, 1980. The matter might then have been referred to arbitration, and it is not suggested that there could have been any valid objection at that time.

The matter was not, however, sought to be referred to arbitration until February 17, 1982, some seventeen months later. Such action would be beyond the time limits specified in most collective agreements and if there were no time limit specified, it would be my view that an unreasonable delay had occurred and that the matter was no longer arbitrable. The instant case, however, is governed by Article 39 (c), Step 2 of the Collective Agreement, which provides as follows:

> **STEP 2 - APPEAL TO GENERAL MANAGER**
> Within 60 calendar days from the date decision was rendered under Step 1, the General Chairman may appeal the decision in writing to the General Manager, whose decision will be rendered in writing within 60 calendar days of the date of the appeal. The decision of the General Manager shall be final and binding unless within 60 calendar days from the date of his decision proceedings are instituted to submit the grievance to the Canadian Railway Office of Arbitration for final and binding settlement without stoppage of work, except than an appeal against the dismissal of an employee which does not involve a claim for payment for time lost, may be submitted to the Canadian Railway Office of Arbitration at any time within 2 years from the date of dismissal.

In the instant case more than 60 days passed following the decision of the General Manager, before the matter was sought to be referred to arbitration. Under the general provisions of this article, then, the reference to arbitration would be untimely. The union's position, however, is that since this is a case involving the dismissal of an employee, and since it does not involve a claim for payment for time lost, it comes within the exception set out in the article, and may be submitted to this office at any time within two years from the date of dismissal, that is, until March 17, 1982.

It is the Company's position that while this case is one which might in fact have come within the exception, it does not do so because it was not "submitted" to the Office of Arbitration within the time contemplated.

The decision in this matter turns upon the meaning to be given to the term "submitted" as it appears in Article 39 of the Collective Agreement. It is the Company's position, essentially, that the submission to arbitration is the actual presentation of their cases to the Arbitrator by the parties. There is certainly support for that usage. At a hearing, the parties' presentations are often referred to as their "submissions" and the terms "submission" or "representation" are often used interchangeably in this context.

Further, it is to be noted that whereas in most cases the act of referring a matter to arbitration – invoking the arbitration process as a method of final resolution of a dispute – is described, in this collective agreement, as "instituting proceedings to submit the grievance" to arbitration (this is the case in Step 3 of the regular grievance procedure under Article 39 (b), and in Step 2 of the discipline grievance procedure, Article 39 (c), set out above), in the case of the particular-exception in issue here the agreement does not speak of "instituting proceedings to submit" but rather of "submitting" the grievance to arbitration.

Finally, support for the Company's view as to the meaning of the term used is said to be found in certain pension plan provisions with which it would be consistent. An employee who is reinstated in service within two years may, it is said, retain his former service for pension purposes.

If, as the Company contends, the "submission" to arbitration means the actual presentation of the case at the hearing, then its objection will succeed. The Union sought to refer the matter to arbitration on February 17, 1982, by which time it was too late for the matter to be heard (under the rules of the Canadian Railway Office of Arbitration) before the April sittings.

In my view, Article 39 (c) Step 2 of the Collective Agreement permits, in cases coming within the exception described, "submission to" arbitration within two years of discharge, and this means, not that the hearing itself must take place within that period, but that the reference to arbitration must be complete. That is, the party seeking arbitration must take every step open to it in order that the procedures of the Canadian Railway Office of Arbitration be complied with, within the period described. In the instant case, when the Company declined to join in a Joint Statement of Issue, the Union, on forty-eight hours' notice, submitted an "Ex Parte" application, which was received

in this office before the two-year exceptional time limit had expired. In my view the matter was then "submitted" to the Canadian Railway Office of Arbitration as contemplated by Article 39 (c) Step 2.

The use of the expression "submission to" arbitration must be distinguished from that of the expression "submission at" arbitration The submission to arbitration is made when the tribunal is seized with the dispute. That occurred in this case (by virtue of the provisions of the Collective Agreement and of the Memorandum establishing the Canadian Railway Office of Arbitration) when the Union's "Ex Parte" application was received. One makes submissions at an arbitration or to an arbitrator in respect of a matter which has been submitted to arbitration as a process of final determination of a dispute. Submission is certainly not synonymous with "hearing", even though submissions (not "submission") are made, in the sense of representations, at hearings. It is a submission, in the sense of reference (or request) rather than in the sense of some particular argument or representation, which is referred to in Article 39 (c) Step 2. Thus, in Article 10 of the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration we read that the parties to "a dispute submitted to the Arbitrator" may be represented by Counsel "at any hearing". Clearly, what is contemplated – and required – is that when a dispute is submitted there must then be a hearing.

While the Collective Agreement, as I have noted, does use the expression "instituting proceedings to submit a grievance to arbitration" in two instances where a "reference" to arbitration is contemplated, it is not a necessary implication of the use of the term "submitted" in the clause here in issue that something other than a "reference" to arbitration was intended. There was no necessity, in my view, to repeat the longer formula within the same clause, where the same arbitration procedure is being invoked.

As to the conformity of the two-year time limit with the provisions of the pension plan, that is a matter outside the Collective Agreement. It may be noted that even if the hearing were to take place within the two year period, there is no guarantee that the hearing would not be adjourned or prolonged, whether for reasons within the control of the parties or not, nor that the decision (which is certainly not part of the "submission") would be issued within the two-year period. This consideration, therefore, even if it were relevant, would not be convincing.

Accordingly, I find that this matter was submitted to the Canadian Railway Office of Arbitration within two years from the date of the grievor's dismissal, that it comes within the exception set out in Article 39 (c) Step 2, and that the matter is arbitrable.

(signed) J. F. W. WEATHERILL,
ARBITRATOR

On Tuesday, 8 June 1982, there appeared on behalf of the Company:

L. A. Clarke	– Supervisor, Labour Relations, Toronto
D. J. McMillan	– Assistant Superintendent, Sudbury
B. P. Scott	– Labour Relations Officer, Montreal

And on behalf of the Employee:

B. Marcolini	– General Chairman, Toronto
J. Sandie	– Vice-President, Sault Ste. Marie
H. F. Bryk	– Grievor

AWARD OF THE ARBITRATOR

Although the date of assessment of thirty demerits is shown as subsequent to the date of dismissal (as of which date the grievor had not accumulated sixty demerits), the fact is that the thirty demerits, and the consequent dismissal, were recommended at the same time, the wording of the assessment of demerits being changed before its issue. The grievor was advised of both at the same time, and following an investigation. The fact that the notice of dismissal is incorrectly dated does not invalidate it, and the grievor's employment had not in fact been terminated at the time the demerits were assessed.

The grievor booked off on an authorized leave of absence on March 1, 1980. He booked O.K. for duty on March 6. His assignment was as regular assigned conductor on the Third Creighton Roadswitcher Assignment, at 0001 on March 7. He was not available when called, and failed to protect the assignment. The only explanation the grievor had for this was that "I was sick and cheesed off with some things that had happened in Thunder Bay". That

was not a sufficient excuse, and there can be no doubt that the grievor was subject to discipline for failure to protect his assignment. The issue remaining is as to the extent of the penalty assessed.

Although he did not mention the matter at his investigation the grievor may have had a more substantial excuse for his failure than that given. At about noon on March 6, the grievor's wife was involved in an automobile accident. That would no doubt have been upsetting, although there is nothing to suggest – and the grievor did not suggest – that that would have prevented the grievor from carrying out his work on March 7.

There is some suggestion in the material before me that the grievor's failure to protect his assignment was related to drinking, and that this would be a violation of an undertaking given by the grievor on the occasion of an earlier reinstatement. That suggestion is denied by the grievor, and there is no reliable evidence to the contrary.

The grievor did fail to protect his assignment, and no substantial excuse was given. Having regard to all of the circumstances, it is my view that the assessment of thirty demerits for this offence was excessive, especially in view of the grievor's excellent attendance record during the previous year. I do not consider, however, especially in view of the grievor's record which includes a previous assessment of twenty demerits for a similar offence, that the penalty could properly be reduced below twenty demerits. The result is, in any event, the accumulation of sixty demerits, since the grievor's record stood at forty demerits. The grievor was, therefore, subject to discharge.

For the foregoing reasons, while the penalty for failure to protect the grievor's assignment should be reduced from thirty demerits to twenty, the grievance must in other respects be dismissed.

(signed) J. F. W. WEATHERILL,
ARBITRATOR