CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1931

Heard at Montreal, Wednesday, 12 July 1989

Concerning

CANADIAN PACIFIC LIMITED

And

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Removal from service of Ms. D. Bailey, Extra Gang Labourer for alleged cause.

BROTHERHOOD'S STATEMENT OF ISSUE:

Ms. D. Bailey, Extra Gang Labourer received notification on July 31, 1987, that she was released from the employment of Canadian Pacific Railway as a probationary employee for reasons of alleged "cause".

The Union contends that: **1.)** The Company supervisor acted in a discriminatory manner in comparison with regular practices regarding the treatment of fellow Extra Gang Labourers; and **2.)** The employer's dismissal of Ms. Bailey was inconsistent with regular practices, unreasonable and unjustified.

The Trade Union requests that Ms. Bailey be returned to work forthwith with full seniority and compensated for all lost wages and expenses thereof.

The Company denies the Trade Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD) M. L. MCINNES
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

B. Mittleman	– Counsel, Montreal
L. J. Guenther	– Assistant Supervisor, Labour Relaitons, Vancouver
J. D. Huxtable	– Assistant Supervisor, Labour Relations, Vancouver
L. G. Winslow	– Labour Relations Officer, Montreal
B. Thompson	– Witness
G. Martin	– Witness

And on behalf of the Brotherhood:

M. Gottheil	– Counsel, Ottawa
M. L. McInnes	- System Federation General Chairman, Vancouver
R. Green	– Witness
D. L. Bailey	– Grievor

AWARD OF THE ARBITRATOR

The grievor, Ms. D. Bailey, was employed for a period of some six weeks as an extra gang labourer. On July 31, 1987 her employment was terminated on the basis that she was judged unsuitable for permanent employment.

The merits of Ms. Bailey's grievance must be determined on the basis of Section 4.1(a) of the Collective Agreement which provides as follows:

> 4.1(a) The seniority of an extra gang labourer shall be confined to the System or Superintendent's Division and shall commence from the date of entry into the service as an extra gang labourer covered by this Agreement.
>
> A new employee shall not be regarded as permanently employed until after 3 months' service which service must be accumulated within the preceding 24 months on the Railway on which employed. Within such 3-month period he may, without investigation, be removed for cause which in the opinion of the Company renders him undesirable for its service.

The evidence establishes that after some two days of employment Ms. Bailey suffered a severe cut and fracture to a finger which required some nine stitches. For a time between the accident, which occurred on June 19, 1987, and her return to full duties on July 9, she was assigned to those tasks of a rail changeout (R.C.O.) gang which are considered lighter work. She returned to full duties on July 9, as a result of a written certificate of a physician confirming that she was fit to return to full duties. Ms. Bailey does not maintain that she was unfit for full duties at that time, although she states in her evidence that she still felt some tenderness in her finger, something which she maintains she communicated to Assistant Roadmaster Brian Martin as well as Roadmaster Glen Thompson when she returned with the doctor's clearance.

The principal direct evidence with respect to the grievor's work performance given at the hearing came from Mr. Martin and Mr. Thompson. Mr. Martin states that during the first two days of her employment, prior to her injury, Ms. Bailey was working under his supervision on the RCO unit placing plates on the ties. According to his evidence a period of two to three hours' familiarization should have been sufficient for the adequate performance of that task. In the grievor's case, however, Mr. Martin states that she was not able to perform the job at an acceptable rate of speed even after two days. Mr. Thompson states that he observed Ms. Bailey's work over the entire period of her employment. He testifies that she did not work at an acceptable rate of speed, and had a tendency to engage unduly in conversation with other employees, which caused a slowing of general productivity. He relates that he received a number of complaints to the same effect from several crew foremen on the job. Mr. Thompson specifically recalls that he told Ms. Bailey that she would have to speed up her pace of work, although he concedes that he never specifically warned her that she would be terminated if there was not improvement.

The thrust of Ms. Bailey's evidence is that she felt that she was doing the job adequately, but that even after her return to full duties she was hampered by the injury to her finger, which did cause her some difficulty in accomplishing certain tasks. On the whole she feels that her termination was unfair, and that she was not given a reasonable opportunity to demonstrate her abilities.

The evidence confirms that during her probationary period Ms. Bailey did not work at a satisfactory rate of speed. The evidence of Mr. Rod Green, a foreman on the RCO Gang who supervised the grievor for a time, confirms that in his opinion Ms. Bailey was slow when working on the scrap loader, a job consisting of picking scrap metal off the ground and placing it on a conveyor belt. He testified without contradiction that she was more efficient at other tasks, notably working the claw bar.

The standard of review of a decision by the employer to terminate a probationary employee in accordance with the terms of 4.1(a) is relatively narrow. As this Office said in respect of the termination of a probationary employee under another collective agreement in **CROA 1568**:

> It is sufficient to say that, at a minimum, the Company's decision to terminate a probationary employee must not be arbitrary, discriminatory or in bad faith. It must be exercised for a valid business purpose, having regard to the requirements of the job and the performance of the individual in question.

(*See also* C**ROA 1761, 1481** *and* **821**.)

Where, as in the instant Collective Agreement, the standard of decision is based upon removal for cause predicated upon the opinion of the Company that an individual is undesirable for service, the process of decision is obviously subjective. If the Company can establish that it reached a decision based on an honest opinion, and in accordance with the general standards expressed in **CROA 1568**, even if an arbitrator should disagree with that opinion, its decision cannot be disturbed as being in violation of the terms of the Collective Agreement.

What does the application of those principles suggest on the basis of the evidence in the instant case? It is confirmed beyond any controversy that Ms. Bailey worked at an unacceptably slow rate of speed both before and after her injury. As of July 9, 1987 she was returned to full duties based on the written opinion of a doctor, communicated to the Company. It is common ground that Ms. Bailey did not request an extension of light duties, and beyond the possibility of a brief comment to her supervisors that she felt some tenderness in her finger, took no steps to advise them that the injury to her hand continued to make it impossible to work at a normal rate of speed or to perform the full range of job functions normally assigned to an extra gang labourer. The largely uncontradicted evidence is that Roadmaster Thompson formed the opinion, based on his own observations and reports to him by a number of foremen, that Ms. Bailey demonstrated the double failing of talking too much while at work and working too slowly. I am compelled to conclude that he arrived at that opinion honestly, and did not do so in a way that was arbitrary, discriminatory, or in bad faith. While the Brotherhood sought to adduce evidence of two incidents of confusion or change in the orders addressed to the grievor with respect to where she should report, I cannot find those incidents, even if proved, would constitute proof of bad faith or, as suggested by Counsel for the Brotherhood, of adverse working conditions that hampered the grievor's ability to perform.

On the whole of the evidence the Arbitrator must accept that the Company removed Ms. Bailey for cause which in its opinion rendered her undesirable for permanent service. The opinion of her supervisors was arrived at in a manner that was not arbitrary, discriminatory or the product of bad faith aimed at Ms. Bailey.

For the foregoing reasons the grievance must be dismissed.

July 14, 1989

(Sgd.) MICHEL G. PICHER
ARBITRATOR