CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2656

Heard in Montreal, Thursday, 14 September 1995

concerning

CANADIAN PACIFIC RAILWAY LIMITED

and

TRANSPORTATION COMMUNICATIONS UNION

EX PARTE

DISPUTE - UNION:

The dismissal of Cindy Peppel, employee #544635, a Utility Clerk from Cranbrook, B.C.

DISPUTE - COMPANY:

The closure of Cranbrook Utility Clerk Cindy Peppel's employment record effective June 24, 1994, as a result of her failure to maintain an acceptable level of attendance at work.

UNION'S STATEMENT OF ISSUE:

On June 17, 1994, Ms. Peppel was advised, in accordance with article 27.2, that her attendance was required at an investigation, to be conducted on June 20 at 1300. This investigation was with respect to her tour of duty on April 21, 1994.

On the morning of June 20, 1994 Ms. Peppel booked sick, and provided a note from her doctor, Dr. Keith Lowden, dated June 20, 1994.

As a result of Ms. Peppel booking sick, her investigation was postponed until June 23, 1994.

On June 21, 1994 the Company further advised Ms. Peppel that her attendance was required for another investigation on June 23, 1994 with respect to her tour of duty of June 12, 1994 in which she had booked sick.

Ms. Peppel therefore was scheduled for two investigations on June 23, 1994, one at 1100 and the other at 1300.

One June 22, 1994, Local Chairman Mr. Dennis Paulson wrote the Investigating Officer, Mr. Bill Smaeff, asking for a postponement as Ms. Peppel was under doctor's care. However, Mr. Paulson's letter wasn't answered.

On June 24, 1994, M. J.H. McFarlane sent a double registered letter to Ms. Peppel, informing her that she had been dismissed for failure to attend the Company's formal investigation on June 23, 1994 and her failure to maintain an acceptable level of attendance at work, and accordingly "your employment record with C.P. Rail is being closed immediately".

The Union views that Ms. Peppel should have been given the opportunity to her rights under article 27 of the collective agreement and that she was dismissed without a fair or impartial investigation as required in article 27.1.

Further, the Union views the discipline as inappropriate and excessive.

The Union submitted a grievance requesting reinstatement of employment without loss of seniority, wages or benefits.

The Company declined the Union's grievance.

COMPANY'S STATEMENT OF ISSUE:

Ms. Peppel entered Company service on September 24, 1981 in Coquitlam. She transferred to Cranbrook on March 31, 1988. Ms. Peppel's work record reveals that she has maintained an exceedingly high level of absenteeism from work and that she has been advised on numerous occasions that her attendance at work would have to improve or her employment relationship with the Company would be in jeopardy.

Ms. Peppel's absenteeism record indicates that she was sick or on leave of absence 28 days in 1988; 113 days in 1989; 68 days in 1990; 150 days in 1991; 153 days in 1992; 61 days in 1993; and 16 days in 1994. She has offered varying reasons for her absenteeism. The matter of her contractual obligations to report for work when scheduled and/or required has been discussed with her on numerous times and many investigations have been held with her in an attempt to impress upon her the seriousness of her unacceptable attendance record.

On June 17, 1994, Ms. Peppel was advised that her attendance was required at an investigation to be conducted on June 20 at 1300. This investigation was with respect to her tour of duty on April 21, 1994, specifically a trip she took with T. Penitch to Fort Steele on that day. On June 20, 1994, Ms. Peppel advised she was booking off sick and that she would be visiting her doctor. The investigation was postponed until June 23, 1994. Another outstanding matter (in respect of her booking sick from her 0700 to 1500 Utility Clerk position on June 12, 1994) was also scheduled for investigation on June 23, 1994.

Ms. Peppel did not appear for either of the investigations scheduled for June 23, 1994. One June 24, 1993, Mr. J.H. McFarlane sent a double registered letter to Ms. Peppel advising her that her employment record with CP Rail System was being closed. A review of Ms. Peppel's file indicated that her absenteeism record was such that the Company had no basis on which to conclude it would ever improve, the culminating absence being her failure to report for the investigations scheduled for June 23, 1994.

The Union views that Ms. Peppel should have been given the opportunity to her rights under article 27 of the collective agreement and that she was dismissed without a fair and impartial investigation as required in article 27.1.

The Union submitted a grievance requesting reinstatement of employment without loss of seniority, wages or benefits.

The Company declined the Union's request.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) D. JAMES KENT	**(SGD.) CAROL GRAHAM**
DIVISION VICE-PRESIDENT	**FOR: GENERAL MANAGER, OPERATION & MAINTENANCE**

There appeared on behalf of the Company:

C. Graham	– Labour Relations Officer, Montreal
D. David	– Labour Relations Officer, Montreal

And on behalf of the Union:

D. J. Kent	– Division Vice-President, Winnipeg
R. Pagé	– Executive Vice-President, Montreal
N. LaPointe	– Division Vice-President, Montreal

AWARD OF THE ARBITRATOR

The employment of the grievor, Ms. Cindy Peppel, was terminated by the Company for reasons of innocent absenteeism effective June 24, 1994. The Union alleges that the grievor should have been given the benefit of a disciplinary investigation under the provisions of article 27 of the collective agreement prior to her severance from employment, and seeks her reinstatement into employment with full compensation for wages and benefits lost. The Company asserts that the record discloses a pattern of absenteeism which is unacceptable, with no reason to conclude that that pattern should improve in the future. On that basis it maintains that it was entitled to terminate the grievor's services for non-disciplinary reasons, and that there has been no violation of the requirements of the collective agreement.

The facts concerning this grievance are not in dispute. The grievor was hired in September of 1981 as a clerk/keypunch operator in Vancouver. She remained at that location until March of 1988, when she transferred to Cranbrook. At the date of her termination Ms. Peppel was a spare crew clerk in Cranbrook.

The record before the Arbitrator discloses that Ms. Peppel registered an extraordinarily high degree of absenteeism over the entire period of her employment. Her rate of absenteeism from the time of her transfer to Cranbrook until her termination, expressed in days per year, is as follows:

1988	28	days
1989	113	days
1990	68	days
1991	150	days
1992	153	days
1993	61	days
1994	16	days (to date of termination, 24 June 1994)

The record discloses that the grievor became the subject of a scheduled disciplinary investigation concerning events which transpired in the course of her tour of duty on April 21, 1994. That investigation was scheduled for June 20, 1994, and was apparently delayed because Ms. Peppel was absent from work for medical reasons from May 2 to June 10, 1994. On the day of the scheduled investigation the grievor provided a doctor's note indicating that she was "off work for medical reasons". This caused the rescheduling of the investigation for June 23, 1994. It appears that that date was also to be utilized for the investigation of a separate incident involving the grievor's absence from work on June 12, 1994. It is common ground that the grievor did not appear for the investigations scheduled for June 23rd. The next day the following letter was sent to her by Superintendent J.H. McFarlane

> You were required to attend an investigation June 23, 1994, in the Company Offices at Cranbrook, B.C., but you failed to appear.
>
> A review of your file indicates a totally unacceptable attendance record, a circumstance which has been brought to your attention for correction on numerous previous occasions. With your failure to attend as requested I can only conclude that you are unwilling to maintain an acceptable level of attendance at work and, accordingly your employment record with CP Rail System is being closed immediately.
>
> In due course you will be receiving information with respect to your pension and other benefits and the options available to you in that regard.

There can be little doubt that the grievor's failure to be available for the rescheduled investigation of June 23, 1994 was a source of some frustration to the Company's supervisors. The record discloses that over the period of her employment at Cranbrook Ms. Peppel had caused disciplinary investigation meetings concerning her performance to be rescheduled on thirteen separate occasions because of her unavailability. As many of those investigations apparently concerned the Company's concerns over her absenteeism, the employer obviously viewed the inability to attend investigations as compounding an already serious problem.

There can be little doubt that the grievor was made aware, over the years, of the employer's view that her rate of absenteeism was unacceptable, and that failure to correct it could result in the termination of her employment. For example, on June 16, 1992 a letter was sent to her by Assistant Superintendent Munroe reminding her of her poor attendance record and stressing that continued chronic absenteeism would place her employment security at risk. On December 4, 1993 the grievor was interviewed, as reflected in the following notation which appears in the Company's brief to the Arbitrator:

> At 1300, Ms. Peppel was interviewed by Assistant Supervisor, Operations, Bompas. Her attendance record was reviewed and a copy of her 1993 work history was given to her. It was explained to her that it was her responsibility to report for work and that OLA, although granted by the Company, was counted as absenteeism. She was also informed that appointments and other personal matters were expected to be dealt with during her off hours and on rest days. She was informed that her absenteeism rate of 27.6% was not acceptable and would not be tolerated. Ms. Peppel responded that she understood.

What has caused Ms. Peppel's problems with attendance at work? The instant case does not disclose a single medical condition or disability which has contributed to the pattern of absenteeism registered by the grievor. Nor is there in the evidence any single non-medical problem, such as a family circumstance, which can be said to be responsible for that pattern. While most of her absences are due to illness, they appear to have been prompted by a wide variety of ailments generally of a relatively short duration, none of which appear to represent a chronic or recurring condition. The grievor's absenteeism is also substantially contributed to by the taking of leaves of absence for personal reasons. Again, in respect of those there is no basis to identify a single factor as being predominant. In the result, the grievor's entire record of employment at Cranbrook is marked with an extremely high rate of absenteeism occasioned by a wide range of factors, with various kinds of illnesses being the predominant, but not the exclusive, reason for the grievor's difficulties.

The first issue to be addressed is the position of the Union, to the effect that the Company denied the grievor the application of article 27.1 of the collective agreement, and that on that basis her discharge must be deemed to be null and void. Article 27 of the collective agreement which is entitled "Investigation and Discipline" provides as follows:

> **27.1** 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 by assessing the evidence produced and the employee will not be required to assume this responsibility in his statement. An employee is not to be held out of service unnecessarily in connection with an investigation but, where necessary, the time so held out of service shall not exceed five working days and he will be notified in writing of the charges against him.
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> **27.2** An employee subject to investigation will be given a minimum advance notice of twenty-four (24) hours when an investigation is to be held, and each employee whose presence is desired will be notified of the time, place and subject matter of the investigation.
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> **27.3** An employee may be accompanied by a fellow employee or accredited representatives of the Union to assist him at the investigation.
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> **27.4** An employee is entitled to be present during the examination of any witness whose testimony may have a bearing on his responsibility, or to read the evidence of such witness, and offer rebuttal thereto.
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> **27.5** An employee shall be given a copy of his statement and a transcript of evidence taken at the investigation or, on the appeal, shall be furnished on request to the employee or his representative.
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> **27.6** A decision shall be rendered within 21 calendar days following the date of completion of the investigation, unless otherwise mutually agreed.
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> **27.7** If the employee considers the decision rendered is unjust, an appeal may be made, commencing with Step 2 of the grievance and arbitration procedure.
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> **27.8** If, in the final decision, the charges against an employee are not sustained, his record shall be cleared of the charges; if suspended or dismissed, he shall be returned to his former position and reimbursed for wages lost, less any earnings derived from outside employment during the period so compensated; if the investigation was away from home, he shall be reimbursed for reasonable travel expenses upon presenting receipts.

A threshold question is whether the above article is intended to apply to the termination of an employee for non-disciplinary reasons, including reasons of innocent absenteeism. The position which the Company advances is that the instant case was not one in which an investigation was required by the collective agreement, as there was no allegation of wrongdoing being made against Ms. Peppel by the employer. Rather, it argues, the employer came to the conclusion that, for reasons apparently beyond her control, she has been and will continue to be unable to provide regular attendance at work to a level commensurate with the normal contract between employer and employee. The Union submits that what transpired was effectively the grievor's dismissal, and argues that the language of article 27 should be construed as requiring an investigation by the Company prior to the termination of an employee, even if it is for non-culpable conduct.

After careful consideration, the Arbitrator is satisfied that the position of the Company with respect to the purpose and scope of article 27 of the collective agreement is correct. As noted, the article is headed "Investigation and Discipline", a title which imparts a process dealing with the correctable conduct of an employee or, to put it differently, culpable conduct. Moreover, the language of the various articles of the provision tends to support that interpretation. Article 27.1 speaks in terms of "... the employee's responsibility" being established. The same reference to responsibility recurs in article 27.4. Perhaps most tellingly, article 27.8 speaks in terms of what occurs if "... the charges against an employee" are not established. In the Arbitrator's view the whole of the article, so understood, reflects the mutual understanding of the parties that a disciplinary investigation must take place before any employee is made the subject of any disciplinary penalty for culpable conduct, up to and including dismissal. It does not, in my view, speak to the ability of the Company to terminate the services of an employee for non-culpable or non-disciplinary matters.

The distinction between disciplinary penalties and the termination of employees for non-culpable absenteeism, sometimes referred to as innocent absenteeism, is well recognized in Canadian jurisprudence. Those principles were expressed in the following terms by the arbitrator in **Re Canadian Pacific Limited and the International Brotherhood of Firemen and Oilers** (grievance of S.S. Nagra), an unreported award dated November 23, 1989 where the following appears at pp. 4-5:

> It is generally accepted that for an employer to be entitled to invoke its right to terminate an employee for innocent absenteeism it must satisfy two substantive requirements, namely that the employee has demonstrated an unacceptable level of absenteeism as compared with the average of his or her peers over a sufficiently representative period of time, and, secondly, that there is no reasonable basis to believe that his or her performance in that regard will improve in the future.

In the course of the same award the Arbitrator had cause to reflect on the issue of whether, in the context of a non-culpable discharge, there should nevertheless be some burden of prior warning upon the employer. In that regard he referred to the following passage from the award in **Automatic Electric (Canada) Ltd. and International Union of Electrical Radio and Machine Workers, Local 526** where the following was said:

> We turn to the question of adequate warning. There is something of an anomaly in suggesting that an employee should be warned that further absenteeism due to illness will result in his or her discharge. To the extent that the culminating medical problem is a *bona fide* illness beyond the power of the employee to prevent there is little or no use in a warning. But that will not always be the case. Sometimes a warning will be appropriate, particularly where absenteeism due to illness is based in part on the failure of an employee to exercise due precaution or obtain the medical attention that will correct his or her problem or prevent its recurrence. Moreover, not all employees have the same will power to work with the discomfort of certain minor illness. The discomfort may be made more or less tolerable through medication or through extra personal fortitude. Thus, a warning is appropriate in that it will allow an employee in certain circumstances to improve his or her attendance record by exercising greater precaution, obtaining the proper medication or choosing to tolerate certain minor illness or discomforts which might otherwise have kept them home.
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> Lastly, apart from the practical value of a warning, there is a valid equitable consideration to justify the requirement of a warning when management is contemplating the discharge of an employee for blameless absenteeism. In so far as absenteeism for medical reasons can be controlled or mitigated by an employee, it would be unfair for management to allow an employee to be lulled into a false sense of security by management's continued failure to deal with the employee's absenteeism extended continuously over the course of several years.

I turn to consider the application of the foregoing principles to the case at hand. Firstly, it is undeniable that Ms. Peppel has registered a rate of absenteeism, on a consistent basis, that is substantially above the norm or the average for the employees in the bargaining unit. The record discloses that in the six year period between 1988 and 1993, inclusive, Ms. Peppel registered an average annual rate of absenteeism, on account of illness or personal leave, of ninety-five days per year. Considering that 250 working days are allowed for a year, that is clearly an unacceptable rate. As noted above, the record does not disclose a single cause for her absences, whether medical or otherwise. For

reasons which she best appreciates, she appears to be a person who has difficulty, for many reasons, attending at work on a regular and sustained basis.

Although the Union tendered in evidence a medical note from Ms. Peppel's physician suggesting that much of her prior absenteeism was due to stress related illness occasioned by her job, there is in that document no substantial basis to conclude that a return to her job will substantially alleviate the same stresses, or that there is any responsible basis for predicting an improvement in her habits of attendance and absenteeism. In the result, the record discloses an unacceptable level of absenteeism, without any substantial or meaningful prognosis for improved performance in the future. In the result, I am satisfied that the employer has discharged the fundamental requirements of a termination for non-culpable absenteeism.

I am also of the view that the record discloses extensive efforts to communicate to the grievor the importance of regular attendance at work, over a period of several years, coupled with the warning that a continuation of the same pattern would jeopardize her ongoing employment. There is, in these circumstances, no suggestion of inequity or unfairness towards Ms. Peppel. On the contrary, in the Arbitrator's view unfairness would be suffered by the employer if, on the record before me, the grievor should be reinstated into employment without any responsible basis to expect an improvement in her performance.

For all of the foregoing reasons the grievance must be dismissed.

September 15, 1995 **(signed) MICHEL G. PICHER**
ARBITRATOR