CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2682

Heard in Montreal, Tuesday, 12 December 1995

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Dismissal of Ms. D. Dunkley.

BROTHERHOOD'S STATEMENT OF ISSUE:

The grievor began working for the Company as an Extra Gang Labourer in July, 1994. In October 1994, the grievor, still a probationary employee, was terminated by the Company.

The Union contends that: **1.)** The grievor was fired without legitimate cause; **2.)** The Company is in violation of Article 4.1 of Agreement 10.13 and has unjustly dealt with the grievor in violation of Article 18.6 of Agreement 10.1.

The Union requests that: The grievor be returned to her employment forthwith without loss of seniority and with full compensation for benefits and wages lost as a result of this matter.

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

FOR THE BROTHERHOOD:

(SGD.) R. A. BOWDEN
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

J. C. McDonnell	– Counsel, Toronto
N. Dionne	– Manager, Labour Relations, Montreal
R. Baker	– Program Coordinator, Montreal
K. Bromley	– Program Supervisor, Hornepayne
J. Little	– Coordinator Engineering, Montreal

And on behalf of the Brotherhood:

D. B. Brown	– Sr. Counsel, Ottawa
R. A. Bowden	– System Federation General Chairman, Ottawa
P. Davidson	– Counsel, Ottawa
D. Dunkley	– Grievor

AWARD OF THE ARBITRATOR

The Brotherhood grieves the decision of the Company to terminate the services of Ms. D. Dunkley, a probationary employee working as an extra gang labourer at the time of her termination. In **CROA 1568** the following comment was made with respect to the standard of review applied by this Office in such a case:

> It is common ground that the standard of proof required to establish just cause for the termination of a probationary employee is substantially lighter than for a permanent employee. The determination of "suitability" obviously leaves room for a substantial discretion on the part of the employer in deciding whether an employee should gain permanent employment status. By the same token, however, under the instant collective agreement that discretion is not unreviewable. That is plain from the language of article 58.1 of the collective agreement, which expressly permits an appeal against the dismissal of a probationary employee. While the parties addressed argument to the appropriate standard of review in such cases, it is not necessary to exhaustively recount or resolve that debate for the purposes of the instant case. 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* **CROA 821, 1427, 1761, 1931** *and* **2641**.)

The evidence establishes that during August, September and October of 1994 the grievor worked as part of Extra Gang 24. The gang, comprised of some twenty-six employees and three foremen, worked in a number of locations in Northern Ontario under Supervisor Keith Bromley. There were six probationary employees on the gang, including the grievor, all of whom were women. Mr. Bromley's evidence confirms that four of the six female employees were ultimately confirmed at permanent employees. Two persons, including the grievor, did not achieve that status.

In a report prepared on September 9, 1994 Mr. Bromley expressed the recommendation that the grievor not be retained in service. The form on which that recommendation appears also contains a more specific evaluation section with ratings of "good", "fair" and "poor". Mr. Bromley rated Ms. Dunkley as fair in safety, punctuality, manual dexterity and constructive criticism. He rated her poor under the headings job enthusiasm, general aptitude and progression. In his testimony he related that he observed Ms. Dunkley over a substantial period of time. In his opinion she had difficulty performing tasks such as heavy lifting, and doing routine tasks such as driving spikes with a hammer. He states that, as with other probationary employees, he instructed her in how to perform the work and, on one occasion, made it clear to the grievor that if she did not improve her skills and output she would not be confirmed as a permanent employee.

The thrust of the Brotherhood's case is that the grievor was not given a reasonable opportunity to develop her skills, and that her treatment at the hands of her supervisors was arbitrary and discriminatory. The Brotherhood argues that the fact that Ms. Dunkley was sometimes placed on a section of the crew composed entirely of the women, to perform lighter and sometimes more menial tasks confirms that she was not given a fair opportunity to develop her skills and progress to permanent employment. The Brotherhood also suggests that the general treatment which the grievor received at the hands of other employees is supportive of the general view that she was made the subject of discrimination.

The evidence before the Arbitrator confirms that Ms. Dunkley was extremely unhappy as a member of Extra Gang 24. A daily diary which she kept during the period in question, filed in evidence by the Brotherhood, discloses that she had an extremely low opinion of many of the employees with whom she was working, both male and female. Words used to describe the people with whom she lived and worked include "obnoxious, inconsiderate, immature, stupid, ignorant, boor, beneath contempt, moron and scum".

The Arbitrator has little doubt that the experience of working on Extra Gang 24 was unpleasant for Ms. Dunkley. It was aggravated still more by the fact that she injured her elbow in a fall, although she did not report the accident to her foreman. She says that she was afraid to do so, as she was intimidated by him. In the result, she eventually was released for treatment and therapy for a period of nine days. According to Mr. Bromley's evidence, however, even then she did not explain to him that her sore elbow was the result of an accident on the job.

The evidence does not confirm that the Company's supervisors knowingly allowed sexual discrimination to be visited upon female employees by the male majority of Extra Gang 24. Specifically, when another employee made negative remarks about the female employees during the course of a meal, resulting in a complaint to Mr. Bromley,

the supervisor convened a meeting of all employees to deal with the problem and to make it clear that such conduct would not be tolerated.

There is no evidence before the Arbitrator, even out of the grievor's own mouth, to establish that she did in fact meet the necessary standards of skill and productivity during the course of her probationary period. It further appears, however, that other probationary female employees were able to achieve that standard. As Ms Dunkley's own evidence indicates, moreover, the female employees were, for substantial periods of time, integrated with male employees during work projects, although they were sometimes put together to perform more menial tasks. It is difficult to ascribe great weight to that evidence, however. It would be normal to expect probationary employees to be given some of the least appealing jobs to do, many of which involve helping other employees. In the instant case, as there were no male probationary employees on the crew, it is less than clear that the more menial assignments given to the female employees were other than tasks normally assigned to newer employees.

In the instant case the burden of proof is upon the Company, and it is not a substantial burden in light of the wording of article 4.1 of the supplemental agreement 10.13, which provides as follows:

> **4.1** The seniority of an Extra Gang Labourer shall be confined to the Region or Area 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 90 working days' service which service must be accumulated within the preceding 24 months with the Company. Within such period he may, without investigation, be removed for cause which in the opinion of the Company renders him undesirable for its service.

The language of the foregoing provision plainly vests in the employer a degree of discretion; the words "in the opinion of the Company" suggest a subjective standard whereby the Company's decision should be unreviewable, absent arbitrariness, discrimination or bad faith or a decision made without reference to any valid business purpose. In the case at hand the evidence of Mr. Bromley is that the grievor was simply unable to perform the routine tasks normally assigned to an extra gang labourer with a reasonable degree of skill, efficiency and productivity. The evidence further discloses that the grievor was instructed in how to work and was clearly given to understand that her level of performance was not satisfactory. That, moreover, is amply reflected in her own diary. On October 12 she notes "I must say I feel like the condemned woman waiting for the axe to fall."

It is regrettable that the grievor's experience as a member of Extra Gang 24 was so negative. Her discomfort with the crude manners of some of the labourers with whom she was in daily contact obviously made things difficult for her. That evidence does not, however, of itself establish that she was terminated by the Company for arbitrary or discriminatory reasons, or for reasons unrelated to the requirements of her job and her work performance. Indeed, the grievor's own diary is devoid of any notation to the effect that she was, in her own opinion, performing the job well, satisfying her supervisors and co-workers or making good progress.

On the whole of the evidence the Arbitrator is satisfied that the Company did give proper consideration to the work performance of the grievor as a probationary employee, that her assignments as a probationary employee were not arbitrary or discriminatory, and that, like the other female employees in her gang, she was given a reasonable opportunity to learn the skills necessary to adequately perform the work of an extra gang labourer. The judgment of the Company with respect to the unsatisfactory level of her performance is honestly held, and is not tainted by arbitrariness, discrimination or bad faith. There is, moreover, no evidence to support the assertion of the Brotherhood that the grievor was unjustly dealt with, assuming, without finding, that that issue would in any event be arbitrable (see **CROA 2363**). If the evidence before the Arbitrator establishes anything, it is that Ms. Dunkley, who is an obviously bright and articulate person, was highly unsuitable for permanent employment as an extra gang labourer.

For the foregoing reasons the grievance must be dismissed.

December 15, 1995

(signed) MICHEL G. PICHER
ARBITRATOR