

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2803

Heard in Montreal, Wednesday, 11 December 1996

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)**

EX PARTE

DISPUTE – COUNCIL:

Improper dismissal of Traffic Coordinator, A. Bergeron, of Montreal, Quebec.

DISPUTE– COMPANY:

Refusal to reinstate Traffic Coordinator A. Bergeron, PIN 829296 of Montreal, Quebec, who was discharged effective November 22, 1994.

COUNCIL'S STATEMENT OF ISSUE:

Subsequent to an arbitration hearing, on July 10, 1996 the Company held an employee investigation on July 25, 1996 to determine the circumstances surrounding the employee's failure to attend a random alcohol/drug test. At the hearing the grievor advised that he was under significant stress at the time, due to personal family related reasons, and as well that he was under doctor's care. Medical report confirmation was provided to the Company, at the investigation.

The Company chose to dismiss the grievor. Thereafter, the Union appealed the discipline on the grounds that the dismissal was improper, discriminatory, unfounded, unjustified, and in violation of article 17 and was based solely on an assumption that was incorrect, even though the employee has provided the results of a drug screening test which clearly establish that he was free of illegal substances.

COMPANY'S STATEMENT OF ISSUE:

On September 13, 1993, Traffic Coordinator A. Bergeron signed a conditional reinstatement agreement with the Company to the effect that he would subject himself indefinitely to scheduled and random testing for the purposes of the detection of the ingestion of prohibited substances into his person.

On November 16, 1994, Traffic Coordinator Bergeron failed to attend an appointment where he was scheduled to provide samples for testing, as described heretofore. Consequently, the Company summarily discharged Traffic Coordinator Bergeron effective November 22, 1994, for his failure to comply with the terms and conditions of his conditional reinstatement agreement of September 13, 1993, in particular item 5 thereof, which reads: "*Vous devez accepter de vous soumettre à la demande d'un officier de la Compagnie et ceci, en tout temps et sans préavis.*"

As a result of the Arbitrator's award in Canadian Railway Office of Arbitration Case 2756 of July 10, 1996, concerning the appropriateness of summary discharge in this matter, on July 25, 1996, a hearing was conducted into Traffic Coordinator Bergeron's behaviour November 16, 1994, pursuant to article 17 of Agreement 4.2.

Traffic Coordinator Bergeron's discharge of November 22, 1994 was maintained, consequent upon the findings of the investigation of July 25, 1996.

The Union has appealed the discharge of Traffic Coordinator Bergeron and demanded his reinstatement to service on the basis that his discharge was improper.

The Company has declined the Union's appeal.

FOR THE COUNCIL:

(SGD.) W. G. SCARROW
GENERAL CHAIRMAN

FOR THE COMPANY:

(sgd.) A. E. HEFT
FOR: SENIOR VICE-PRESIDENT, CN EAST

There appeared on behalf of the Company:

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| H. Koberinski | – Labour Relations Contractor, Toronto |
| O. Lavoie | – Transportation Officer, Champlain District, Montreal |
| P. Déry | – Assistant Superintendent, Belleville |

And on behalf of the Council:

- | | |
|-------------|-----------------------------------|
| R. Long | – Vice-General Chairman, Brampton |
| G. Marcoux | – Local Chairman, Montreal |
| A. Bergeron | – Grievor |

AWARD OF THE ARBITRATOR

It is not disputed that the grievor failed to attend a scheduled drug screening test in November of 1994. The test was to be conducted pursuant to a return to work contract negotiated between the Company and the grievor on September 13, 1993. That contract provided, in part, as follows:

3. Before your return to work, you must agree to submit to a medical examination, including drug and alcohol screening.
4. You must also agree to submit to screening every three months for a period of two years from the date of your return to work, and to be examined by the Company physician as required.
5. You must also agree to submit to drug and alcohol testing upon request by a company officer at any time and without prior notice.
6. You must report to the medical clinic designated by the Company on the day and time indicated.
7. You must fulfill all requirements of rule G as part of your employment conditions, including abstinence from illegal drugs. You must also abstain from alcohol.
8. If, for any reason, one or several of the conditions specified above are not met, you will be dismissed from duties without investigation.

[translation]

In **CROA 2756** this Office sustained the position of the Council that the grievor's summary termination, without disciplinary investigation, following his failure to attend at the drug screening test, was in violation of the collective agreement. Specifically, it was found that the Company could not purport to contract out of the terms of the collective agreement, including the provisions respecting disciplinary investigations, without the approval of the Council's general chairperson, as provided under article 85.4 of the collective agreement. Consequently, the matter was remitted for the holding of a disciplinary investigation, following which the grievor was discharged, and the matter has now progressed to adjudication on its merits.

As an initial position, the Council further submits that the contract of September 13, 1993 cannot be valid, to the extent that it would deprive the grievor of the just cause protections contained within the collective agreement. I find it unnecessary to deal with that argument. In the Arbitrator's view, even on its face, the contract of September 13, 1993 cannot reasonably be taken as an agreement that Mr. Bergeron could be terminated for any reason which is unrelated to the purposes of the contract, or the legitimate business interests of the Company, with respect to his failure to attend at a scheduled drug screening test. In other words, I am satisfied that paragraph 8 of the contract must be construed as implicitly contemplating that the grievor should not be dismissed for arbitrary or irrational reasons in the event of his failure to attend a drug screening test. If, for example, the grievor had been hospitalized and thereby unable to attend, it is doubtful that the Company could invoke a draconian reading of paragraph 8 to sustain his automatic discharge. The parties should not be taken to have agreed to a standard of arbitrariness in the drafting of their contractual conditions and, absent language to the contrary, they must be taken to have intended that the expression "for any reason" should contemplate reasons which relate properly to the legitimate business interests of the Employer. If I am incorrect in that analysis, I would, in any event, be inclined to support the argument of the Council that the grievor's rights under the just cause provisions of the collective agreement could not be so altered without the approval of the Council's general chairperson, for the reasons related in the prior award.

The evidence discloses that Mr. Bergeron is a drug addict who underwent in-patient rehabilitative care on two separate occasions, in February of 1991 and August of 1993. It is following the latter treatment that the conditions within the letter of September 13, 1993 were negotiated. It appears that Mr. Bergeron worked and complied with the terms of the letter without incident until November of 1994. At approximately 10:30 a.m. on the morning of November 14, the grievor was advised by telephone, while at work, that he was to attend for a drug screening test the following day. He indicated that he would attend without any problem. Shortly thereafter, at 12:45 p.m. he received a telephone call from his wife. She advised that she was leaving him and that their marriage was at an end. In light of their prior difficulties, Mr. Bergeron knew that she was serious and, indeed, they have remained apart until the present.

The call from the grievor's wife was shattering to Mr. Bergeron, and caused him to leave work prior to the end of his tour of duty. That afternoon he consulted his family physician who prescribed the anti-depressant drug Ativan and directed him to remain off work because of stress until December 2nd. The following day Mr. Bergeron did not attend at the scheduled drug screening test. When he was called at home by his supervisor, Mr. Perras, on November 16, 1994 who inquired as to why he had failed to attend the drug screening test, Mr. Bergeron explained that his wife had left him, and that he could not find a baby-sitter. He also indicated to Mr. Perras that he was then under the care of his physician, with authorization to be off work.

Undeterred, Mr. Perras insisted that the grievor should attend that same day to undergo the drug screening test, and advised the grievor he would be at peril if he did not. Later the same day, when Mr. Perras called again, asking the grievor whether he would attend at a drug test, Mr. Bergeron advised him that he could not. Mr. Bergeron, who filed in evidence before the Arbitrator a medical certificate of his own physician authorizing his absence from work from November 14 to December 2, 1994, for "situational anxiety" requiring complete rest, took no further action to respond to Mr. Perras' insistence that he undertake a drug screening test. On November 28, 1994 he received a notice from the Company advising him that he was discharged.

Subsequently, upon advice from the Union, the grievor proceeded to have a drug screening test taken at the Hôtel Dieu Hospital in Montreal on December 30, 1994. The results of that test were negative. It does not appear disputed that during the course of the subsequent disciplinary investigation, resulting from the Arbitrator's earlier award, the Company's investigating officer made no attempt to inquire into the personal circumstances surrounding Mr. Bergeron's failure to attend at the drug test. It should also be noted, however, that it appears his Union representative failed to ask him any detailed questions with respect to his personal and medical circumstances at that time. Although the record of the investigation indicates that the Council's representative asked the grievor if he had proof that he was under medical care at the time, to which he replied yes, it is not clear that the medical certificate which is in evidence before the Arbitrator was then presented to the Company.

On the whole of the material, the Arbitrator is satisfied that the grievor did fail to give a sufficient documented explanation to the Company with respect to the circumstances which caused him to fail to attend the drug screening test scheduled for him on November 15, 1994, and further required by his supervisor on November 16, 1994. As noted above, his life was then gravely disturbed by the departure of his wife, announced to him by telephone at work on November 14th. There is no dispute that on that day the grievor saw his personal physician, was prescribed an anti-depressant drug, and was authorized to remain away from work until December 2nd. In the Arbitrator's view that circumstance mitigates the grievor's actions, although it appears that he failed to adequately communicate to his employer, at the material time, what his precise personal and medical circumstances were. On the whole, I am satisfied that the Company did not have proper cause, even within the terms of the contract of September 13, 1993, to terminate the grievor's services in the circumstances. He was, however, deserving of some discipline for his failure to be more forthcoming with an explanation regarding his medical situation.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment, without loss of seniority and with compensation for wages and benefits lost, to be calculated from the date the Company first received the medical certificate from the grievor's physician authorizing his absence from work from November 14 to December 2, 1994 to the date of his reinstatement. As a condition of reinstatement, however, Mr. Bergeron must agree to honour the same conditions as those contained in the letter of understanding of September 13, 1993, the terms of which now become a part of this award.

December 16, 1996

(signed) MICHEL G. PICHER
ARBITRATOR