CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2025

Heard at Montreal, Thursday, 10 May 1990

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED TRANSPORTATION UNION

DISPUTE:

Dismissal of trainman Mario Bernier for conduct incompatible with his duties at St. Albans, Vermont.

JOINT STATEMENT OF ISSUE:

On June 30, 1989, Mario Bernier was assigned as Front Trainman on Train No. 447 and injured his right hand while repairing a dome light in the locomotive at St. Albans, Vermont.

A trainmaster for Central Vermont Railway Inc. required Mr. Bernier to submit a urine sample in order to have a test done for drug and alcohol.

After some discussions, Mr. Bernier submitted urine samples at Northwestern Medical Center in St. Albans, Vermont and to the CN Medical Clinic in Montreal.

Both samples were tested and were allegedly found to be positive for marijuana.

Following the investigation, Mr. Bernier was dismissed by the Company.

The Union contends that the dismissal of Mr. Bernier was unwarranted and, in the alternative, if some discipline is warranted, discharge is too severe. The Union contends that the Company has not proven conduct incompatible with his duties. The Union further contends that the trainmaster of Central Vermont Railway Inc. had no right to request a urine sample from Mr. Bernier and that the Company had no right to use the results of the tests. Furthermore, the results of the tests are not conclusive of impairment by drugs while on duty or subject to duty.

The Union also contends that Mr. Bernier did not receive the benefit of a fair and impartial hearing into the Company allegations against him.

The Company contends that the discipline issued was warranted

| FOR THE UNION: | FOR THE COMPANY: |
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| (SGD) G. BINSFELD | (SGD) M. DELGRECO |
| for: GENERAL CHAIRPERSON | for: ASSISTANT VICE-PRESIDENT<br>LABOUR RELATIONS |

There appeared on behalf of the Company:

J. Luciani -- Counsel, Montreal
J. B. Bart -- Manager, Labour Relations, Montreal
M. Hughes -- System Labour Relations Officer, Montreal
M. S. Fisher -- Co-Ordinator, Transportation, Montreal
J. Pasteris -- Manager, Labour Relations, St. Lawrence Region, Montreal
P. Blanchette -- Superintendent, Montreal
G. Levigne -- Trainmaster, St. Lambert

And on behalf of the Union:

R. Cleary -- Counsel, Montreal
T. G. Hodges -- General Chairperson, St. Catharines
B. Leclerc -- General Chairperson, Quebec
G. Binsfeld -- Secretary, GCA, St. Catharines
G. Bird -- Local Chairperson, Montreal
P. Ethier -- Vice-Local Chairperson, Montreal
F. Garant -- Vice-General Chairperson, Montreal
M. Bernier -- Grievor

## AWARD OF THE ARBITRATOR

As an employee of CN assigned to work over the road of a railway in the United States, Mr. Bernier was governed by the regulations of the Federal Railroad Administration (FRA). One of these regulations provides for a procedure for the administration of urine and blood tests to detect drugs. This regulation, which the Company is obliged to adopt, forms part of the Company's General Operating Instructions, with which all employees are required to be familiar. Section 19 of the General Operating Instructions reads, in part, as follows:

FEDERAL RAILROAD ADMINISTRATION (FRA) REGULATIONS, CONTROL OF ALCOHOL AND DRUG USE

CN employees working in the United States are subject to Federal Railroad Administration (FRA) Regulations, (Part 219 - Control of Alcohol and Drug Use), which require CN to;

(a) prohibit on-duty alcohol and drug use,

(b) prohibit employees from reporting to work or working under the influence of alcohol or drugs,

(c) conduct post-accident toxicological tests following certain accidents or fatalities, and

(d) report incidents of alcohol and drug use to the FRA.

Employees should make themselves familiar with the following requirements of the Regulations;

(1) An employee may be required to provide a urine sample after certain accidents and incidents or at any time an officer of the company reasonably suspects an employee may be under the influence of, or impaired by, alcohol or drugs while on duty. Because of its sensitivity, the urine test may reveal whether certain drugs have been used in the recent past, (in a rare case, up to sixty days before the sample is collected). As a general matter, the test cannot distinguish between recent use off the job and current impairment. However, the Regulations provide that if only the urine test be available, a positive finding on that test will support a presumption that there was impairment at the time the sample was taken.

(2) An employee can avoid this presumption of impairment by demanding to provide a blood sample at the same time the urine sample is collected. The blood test will provide information pertinent to current impairment. Regardless of the outcome of the blood test, if an employee provides a blood sample there will be no presumption of impairment from a positive urine test.

(3) If an employee has used any drug off the job, (other than a medication which was obtained lawfully), in the sixty days prior to testing, it may be in his interest to provide a blood sample. If an employee has not made unauthorized use of any drug in the prior sixty days, he can expect that the urine test will be negative, and he may not wish to provide a blood sample.

(4) An employee is not required to provide a blood sample at any time, except in the case of certain accidents and incidents subject to Post-Accident Toxicological Testing, (Part 219, Subpart C of the Regulation).

An employee who refuses to cooperate in providing a blood or urine sample following an accident or incident, where testing is mandatory under the Regulation, shall be withdrawn from service and shall be disqualified for service for a period of nine months.

Employees who must use or possess a drug, on the authorization or prescription of a medical practitioner, must notify the proper Company authorities or obtain prior approval for such use.

(emphasis added)

It is important to understand that the Company and its employees are subject to the American regulation as a precondition for operating the employer's railway within the United States.

The Arbitrator cannot accept the Union's contention that the Company could not utilize the results of Mr. Bernier's urine tests because of the alleged illegality of those tests.  Even if, as is claimed by

Counsel for the Union, the trainmaster for the Central Vermont Railway Inc. administered the rule in an erroneous fashion in the first place in requiring Mr. Bernier to provide a urine sample (a question on which the Arbitrator makes no finding), it remains that the two urine tests, of which the second was done in Montreal by the Company at the request of Mr. Bernier, proved to be conclusively positive. This is not a criminal proceeding which could justify the exclusion of evidence obtained in an abusive manner. In the Arbitrator's view, the trainmaster, who is not a lawyer, administered in good faith a regulation which is open to a number of interpretations. If a police force abuses the rights of an employee to the point where evidence obtained is not admissable for the purposes of criminal prosecution, is an employer equally required to ignore this evidence for the purposes of assessing discipline? I do not believe so. As a railway, the employer is obliged to ensure the security of its employees, as well as that of the public. It surely has the right, if not the obligation, to take the necessary steps in such a circumstance.

The Arbitrator does accept, however, that it is incumbent upon the employer to publish and clearly communicate to its employees all the rules which could affect their employment (Re K.V.P. Co. Ltd. (1965) 16 LAC (Robinson)). In the instant case, it seems to me that the regulation in Section 19 of the General Operating Instructions is not sufficient to communicate to an employee in the position of Mr. Bernier that violation of the American regulation could result in the termination of his services, not only in the United States but also in Canada. That is not evident in the wording of the regulation. In reading that part of the General Operating Instructions, an employee could reasonably conclude that it was merely an explanation of the American procedure and that an employee who did not satisfy the requirements of the regulation would be prohibited from working in the United States. It is not clear, however, that an employee would be given to understand that the standard for the American regulation would equally apply to his employment with the Company in Canada.

It should be noted that there is no federal regulation in Canada regarding the detection of drugs in the railway industry. Furthermore, to date the Company has issued no internal regulation on this subject. The presumption of impairment, invoked in the American regulation by a positive urine test, has no basis in logic or in science. It is admitted that this test demonstrates only the use of a drug during the sixty days prior to the taking of the sample. It provides no precise information concerning when, where or in what quantity the drug was taken. Therefore, the presumption of impairment is a legal construction decreed for the particular purposes of the American regulation. This same regulation also allows the employee to take advantage of a blood test to refute the presumption that he, or she, was working while under the influence of drugs. In sum, this is a question of a very specialized and extraordinary regulation in the field of working conditions.

There is nothing similar in the Company's regulations in Canada for the purposes of discipline in general. In the Arbitrator's view, in the absence of a regulation which explains clearly to employees who violate the American regulation that not only could they be forbidden to work in the United States but could also be discharged from the

Company in Canada, it is difficult to justify the dismissal of an employee for this reason alone.

The Company bears the burden of proof. It discharged the grievor "... for conduct incompatible with the performance of the duties required in a position where safety is essential while you were employed as a brakeman on Train No. 447 at St. Albans, Vermont, 30 June 1989 ..." (emphasis added). The only concrete evidence which the Company presented to the Arbitrator is the positive result of Mr. Bernier's two urine tests. These tests do not prove that the grievor was under the influence of a drug while at work on June 30, 1989. The evidence does establish that Mr. Bernier knew, or reasonably should have known, the rules regarding the detection of drugs which govern the Company and its employees when they are working in the United States. In the eyes of the American authorities, in submitting a positive urine test, and at the same time refusing a blood test, the grievor rendered himself liable to be removed from service on the railroads situated in the United States. In as much as the Company is obliged to respect the American regulations in order to maintain its operations across the border, it must have the ability to take the disciplinary measures necessary for that purpose. If the evidence does not justify the conclusion that Mr. Bernier was under the influence of a drug at work, it does, nevertheless, establish that the Company had just cause to impose a measure of discipline for his having violated the standards of the American regulation.

For these reasons the Arbitrator finds that the Company had just cause for the imposition of a disciplinary penalty against the grievor for his actions which could render him unable to work in the United States. For the reasons mentioned above, however, I am of the view that, in the absence of a clear and precise regulation, the Company could not invoke the American presumption of impairment in deciding that a positive urine test was sufficient to prove that he was working under the influence of a drug in order to justify his dismissal in Canada.

Furthermore, in light of the evidence, the Arbitrator cannot accept the claim of the Union to the effect that the Company's investigation did not meet the requirements of the Collective Agreement. It is not disputed that all of the pertinent documents in the possession of the employer at the time of the investigation were made available to the Union.

The Arbitrator considers that the short duration of the grievor's service, his prior discipline record, as well as his medical history, submitted to the Arbitrator by the Company subject to the objection of the Union, all become pertinent for the purposes of deciding the appropriate measure of discipline. Mr. Bernier had forty demerits on his file and had previously undergone treatment in a detoxification centre. However, the evidence does not demonstrate that the grievor was under the influence of drugs at work. The conduct for which he could be disciplined was his failure to meet the standards of the FRA regulation at St. Albans, Vermont, June 30, 1989.

In light of these factors, the Arbitrator orders that Mr. Bernier be reinstated into his employment, with forty demerits on his file,

without compensation for loss of wages and benefits, and subject to the following conditions:

1. Mr. Bernier will be forbidden to work in the United States unless the American authorities permit it and unless the Company, at its sole discretion, allows him to do so.

2. Mr. Bernier is to sign an agreement which allows the Company to have him undergo, for a period of three years, random urine tests, blood tests or such other tests capable of detecting the use of alcohol or drugs, provided only that these tests are not of undue frequency.

May 11, 1990 (Sgd.) MICHEL G. PICHER
ARBITRATOR