

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2702

Heard in Montreal, Wednesday, 14 February 1996

concerning

CANADIAN PACIFIC LIMITED

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The arbitrability of the dismissal of Mr. Paul Berryman.

JOINT STATEMENT OF ISSUE:

Mr. Paul Berryman was dismissed from Company service on November 18, 1994, for improperly including non-adherence to several procedures and fabrication of documentation.

At the time of his dismissal, Mr. Berryman was occupying the position of Relief Supervisor Dispatch.

The Union maintains that Mr. Berryman was a scheduled employee under the protection of the collective agreement and should have been afforded the protection of article 27 (Investigation and Discipline) of the collective agreement.

The Union has progressed a grievance requesting that Mr. Berryman be returned to duty with no loss of wages, benefits, or seniority and for his legal expenses to be paid.

The Company maintains that at the time of his dismissal, Mr. Berryman was not subject to the terms and conditions of the collective agreement. The Company has denied the Union's grievance.

FOR THE UNION:

(SGD.) P. J. CONLON

FOR: EXECUTIVE VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) D. J. DAVID

FOR: GENERAL MANAGER, INTERMODAL OPERATIONS

There appeared on behalf of the Company:

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| D. J. David | – Labour Relations Officer, Montreal |
| K. J. Ranger | – Manager, Intermodal Operations, Eastern Canada |
| C. M. Graham | – Labour Relations Officer, Montreal |

And on behalf of the Union:

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| P. J. Conlon | – Assistant Divisional Vice-President, Toronto |
| P. Berryman | – Grievor |

PRELIMINARY AWARD OF THE ARBITRATOR

The sole issue to be resolved in this preliminary award is the arbitrability of the grievance. The Company takes the position that Mr. Berryman was employed in a managerial capacity, and not as an employee under the terms of the collective agreement, at the time of the actions for which he was discharged. On that basis it submits that he cannot have the protections of the collective agreement.

Upon a close examination of the facts the Arbitrator has some difficulty with that submission. It is true that Mr. Berryman was temporarily promoted to the position of Relief Supervisor Dispatch at the Vaughan Intermodal Terminal commencing in August of 1994. However, the evidence further discloses that he was returned to bargaining unit ranks at or about Labour Day, following the return from vacation of the person he was replacing. It appears that approximately a week thereafter the Company advised Mr. Berryman that he would be continued in a supervisory position for three days a week, being Monday, Tuesday and Wednesday, and that on Thursdays and Fridays he would perform bargaining unit work. The grievor's unchallenged representation is that the incident for which he was apparently discharged in fact occurred during the course of a Thursday when he would normally have been performing work as a member of the bargaining unit. In fact, it seems, he may have been asked to perform some duties on that day which were arguably of the nature of the supervisory duties which he normally performed on the first three days of the week. Also, it is clear that during the course of his period of temporary promotion the grievor continued to have Union dues deducted, and retained seniority and other rights under the collective agreement.

In my view, at best, the circumstances falls within a gray area. On balance, however, I have difficulty concluding that the grievor can be said to have been without the protections of the collective agreement for events which occurred on a day during which he performed bargaining unit work, and presumably was otherwise treated as a person with the protections of the collective agreement. I have some difficulty with the implicit suggestion of the Company, that the grievor's status could change from hour to hour, or perhaps from minute to minute, depending upon the precise nature of the assignment that he may have been given on that day. In the result, I find that the instant grievance is arbitrable. The General Secretary is directed to list this matter for hearing on its merits.

It should be stressed, however, that in the circumstances of this case the Arbitrator's conclusions as to arbitrability should not be taken as any comment on the consequences which might flow from the fact that the Company did not follow the disciplinary investigation procedure within the collective agreement, in the unique circumstances of this case. The merits and equities of that issue may be spoken to in due course.

February 16, 1996

(signed) MICHEL G. PICHER
ARBITRATOR

Prior to the arbitration hearing on 11 April 1996, the parties submitted the following separate statements of issue.

DISPUTE - UNION:

The dismissal of Intermodal Clerk Paul Berryman from his employment without the benefit of Article 27 on Investigation and Discipline.

UNION'S STATEMENT OF ISSUE:

In November, 1994, Mr. Berryman was held out of service. The period he was held out of service exceeded five days. On January 5, 1995, Intermodal Clerk Paul Berryman was dismissed from his employment for disciplinary reasons. There was no fair and impartial investigation as mandated by Article 27.

The Union progressed a step one grievance that Mr. Berryman had been held out of service in excess of five days, and claimed all back wages to the sixth day held out of service. The Company failed to meet time limits in responding to this grievance, whereby the Union claimed the wages notwithstanding the merits as a wage dispute.

After the dismissal, the Union progressed a grievance, arguing that the requirements of Article 27 had not been met, that the discipline should be declared void *ab initio*, and that Mr. Berryman should be returned to duty with all wages, benefits and seniority restored, and for his legal expenses to be paid. The Company denied the grievance.

DISPUTE - COMPANY:

The dismissal of Intermodal employee Mr. Berryman.

COMPANY'S STATEMENT OF ISSUE:

On November 18, 1993, Intermodal employee Mr. P. Berryman was held out of service pending completion of an investigation into suspected improprieties in the Vaughan Terminal involving himself, a contractor and some truck drivers.

On January 5, 1995, Mr. Paul Berryman was advised that his employment with Canadian Pacific had been terminated as a result of the evidence found of impropriety, including non-adherence to several procedures and fabrication of documentation to support invoices.

The Union progressed a grievance alleging that Mr. Berryman had not been afforded the protection of Article 27 of the collective agreement and requested that he be reinstated with full compensation for time held out of service in excess of five calendar days, all benefits and seniority. The Union also requested that the Company pay all legal expenses incurred by Mr. Berryman as a result of his termination.

The Company has declined the Union's grievance.

FOR THE UNION:

(SGD.) P. J. CONLON

FOR: EXECUTIVE VICE-PRESIDENT

FOR THE COMPANY:

(SGD.) C. GRAHAM

FOR: GENERAL MANAGER, INTERMODAL OPERATIONS

On Thursday, 11 April 1996, there appeared on behalf of the Company:

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| C. M. Graham | – Labour Relations Officer, Montreal |
| K. J. Ranger | – Manager, Intermodal Operations, Eastern Canada |
| S. Moutino | – Labour Relations Officer, Montreal |
| M. Hallam | – Employee Relations Officer, Montreal |

And on behalf of the Union:

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| P. J. Conlon | – Assistant Divisional Vice-President, Toronto |
| R. Pagé | – Executive Vice-President, Montreal |
| H. Devlin | – Local Representative, Winnipeg |

AWARD OF THE ARBITRATOR

The Arbitrator is satisfied, on the basis of the record, that the grievor did not in fact undergo a disciplinary investigation within the terms of article 27 of the collective agreement. On that basis, the Union argues that in the instant case the discipline assessed against him, discharge for fraud and the falsification of documents, must be viewed as void *ab initio*.

The Arbitrator cannot agree. While the general principles pleaded by the Union are correct, each case must be determined on its own particular facts. The instant case is unique in that, as reflected in the preliminary award herein dated February 16, 1996, the actions which led to the grievor's dismissal were performed in relation to his responsibilities as a relief supervisor, even though the events may have occurred on a day which, for payroll purposes, he was treated as a bargaining unit employee. While I am satisfied that the Company was under an obligation to conduct a disciplinary investigation, in these particular circumstances I am not of the view that it is appropriate to conclude that a failure to afford the grievor the investigation contemplated for bargaining unit employees should render the Company's decision null and void. As the record discloses, the grievor himself represented to investigating police officers that he was acting in a management capacity as regards the incidents for which he was eventually discharged and, it appears, was also made the subject of charges under the **Criminal Code of Canada**. The Company at all times acted in good faith in reliance on the fact that Mr. Berryman's alleged misconduct was an abuse of his management responsibilities. This is not, in my view, a circumstance in which it is appropriate to apply the general principles which have evolved in relation to the failure to provide a bargaining unit employee the disciplinary procedures contemplated within the collective agreement. There has been no substantial

prejudice to the grievor in the case at hand, and it would be inappropriate to direct his reinstatement in the circumstances disclosed. In my view, the equitable result is for the grievor to now be given the opportunity of a disciplinary investigation, with the period from his original removal from service to the conclusion of the investigation being treated as time held out of service, with any right to compensation for that period to depend on the ultimate merits of his case.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be treated as continuing to hold the status of an employee, that his discharge be revoked pending an investigation generally in keeping with article 27 of the collective agreement, and that he be deemed held out of service pending the outcome of that investigation.

April 12, 1996

(signed) MICHEL G. PICHER
ARBITRATOR