CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2756

Heard in Montreal, Wednesday, 10 July 1996

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS [UNITED TRANSPORTATION UNION]

EX PARTE

DISPUTE:

Appeal the discharge of Traffic Coordinator A. Bergeron of Montreal, Quebec, effective 16 November 1994.

EX PARTE STATEMENT OF ISSUE

On November 15 and 16, 1994 the grievor was directed to attend a random drug testing which he failed to attend. As a result, effective November 16, 1994, the employee was dismissed.

When the Union learned of the Company's action they immediately advised that the Company should hold an investigation, regardless of the supposed agreement, as the reasons for failing to attend would explain his absence.

The Company chose to dismiss the grievor.

Thereafter the Union appealed the dismissal as the Company had failed to follow the requirements of Article 17 of Agreement 4.2 and by so choosing failed to determine whether the grievor's absence was for *bona fide* reasons.

The Company declined the Union's appeal.

FOR THE COUNCIL:

(SGD.) W. G. SCARROW
GENERAL CHAIRMAN

There appeared on behalf of the Company:

J. Vaasjo	– Labour Relations Officer, Toronto
J. D. Pasteris	– Manager, Labour Relations, Montreal
C. Perras	– Superintendent, Transportation, Montreal
Dr. M. Desjardins	– Witness

And on behalf of the Council:

W. G. Scarrow	– General Chairman, Sarnia
G. Marcoux	– Local Chairman – Yard Coordinators, Montreal
A. Bergeron	– Grievor

AWARD OF THE ARBITRATOR

It is not disputed that the grievor was discharged for failing to attend a random drug test on November 15 and 16, 1993. The requirement to attend such a test, at the discretion of the Company, is contained in a reinstatement "contract" dated September 13, 1993, signed by Mr. C. Perras, Superintendent of Terminal Facilities, as well as the grievor and Mr. François Garant, Local Chairperson of the Union.

The principal objection taken by the Union is that the grievor was terminated without the benefit of a disciplinary investigation, in accordance with article 17 of the collective agreement. Article 17.1 provides, in part, as follows:

> **17.1** No employees will be disciplined or dismissed until the charges against them have been investigated; the investigation to be presided over by the employee's superior officers. ...

The Company seeks to rely on the contract of reinstatement, which contains a number of conditions, including the conditions that the grievor abstain from the use of illegal drugs and alcohol, and that he be subject to random drug and alcohol testing "at any time and without prior notice". That contract also provides:

> **8.** If for any reason, one or several of the conditions specified above are not met, you will be dismissed from your duties without an investigation.

The Union's representative submits that the grievor could not, in the circumstances, be deprived of his right to a fair and impartial investigation under the provisions of article 17 of the collective agreement. In this regard, he argues that Local Chairperson Garant was without any authority to waive or amend the provisions of the collective agreement as they apply to Yardmaster Bergeron, and draws the Arbitrator's attention to the limiting provisions of article 85.4 of the collective agreement, which provides as follows:

> **85.4** No local arrangements which conflict with the generally accepted interpretation of the provisions of this Agreement will be entered into unless first approved by the General Chairperson affected and the proper Officer of the Company.

The Union's representative, who is in fact the General Chairperson, submits that Union policy, and to his knowledge practice, requires that any contracts of reinstatement of the kind offered to Mr. Bergeron, which may contain conditions more stringent than exist under the terms of the collective agreement, and which indeed may waive provisions of the collective agreement, can only be made with the approval of the Union's General Chairperson. In this regard he points to examples of other such reinstatement agreements made with such approval. He submits that on that basis the Company cannot assert, based solely on the agreement of Local Chairperson Garant to the reinstatement contract, that the grievor was liable to be discharged without the benefit of an investigation, contrary to article 17 of the collective agreement.

While this would appear to be a matter of first impression, bearing in mind that a number of such contracts have been considered by this Office before without the issue having been raised, the Arbitrator is compelled to acknowledge the merit of the position argued by the Union, insofar as the issue of the interpretation of the collective agreement is concerned. As a signatory to the collective agreement the Company and its officers must be taken to be aware of the constraints imposed by article 85.4. By the Company's agreement, they are not at liberty to make arrangements either with individual employees or with local representatives of the Union, the substance of which may be at variance with the collective agreement, without first obtaining the approval of the Union's general chairperson. That is reflected in the clear language of article 85.4 of the collective agreement. On that basis the Arbitrator is satisfied that the position argued by the Union's representative is correct.

That does not entirely dispose of the merits of this case, however. The fact remains that, apparently pursuant to a general local practice, Local Chairperson Garant, acting in his capacity as a Union representative, ostensibly approved the reinstatement contract offered to Mr. Bergeron. I can attach little weight to his suggestion, made following the grievor's discharge, that he only signed the document as a "witness". I am satisfied, on the balance of probabilities, that he involved himself in the process in such a way as to represent to the Company that the document had the approval of the Union. While I am not prepared to conclude that the circumstances are tantamount to an estoppel, as it is debatable whether Mr. Garant could be taken to have authority to bind the Union in that sense, I am clearly of the view that the equities would not justify a conclusion that the dismissal of Mr. Bergeron is necessarily void *ab initio* for failure of the Company to conduct an investigation prior to terminating the grievor, in accordance

with the provisions of article 17 of the collective agreement. In my view the proper resolution is to place the parties in the position they would have been in but for the misunderstanding as to the real or ostensible authority of Mr. Garant, and to direct that the Company proceed forthwith to conduct the investigation, which the Union submits is the grievor's right. I am further satisfied that, in the circumstances, it is equitable to conclude that any entitlement which the grievor may have to compensation, or his disentitlement to such compensation, should be held in abeyance pending the outcome of the investigation and the Company's ultimate decision as to the appropriate measure of discipline in light of the findings of that investigation.

The matter is therefore remitted to the parties, with the direction that the Company proceed forthwith to the taking of a disciplinary investigation, with Mr. Bergeron to remain out of service pending its conclusion.

July 12, 1996

(signed) MICHEL G. PICHER
ARBITRATOR