

**CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3357**

Heard in Edmonton, Wednesday, July 9, 2003

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

**UNITED TRANSPORTATION UNION
EX PARTE**

DISPUTE:

Dismissal of Calgary, Alberta Conductor R.F. Mater.

UNION'S STATEMENT OF ISSUE:

On April 26, 2001, Mr. Mater entered into a Continuing Employment Contract with the Company. He complied with all terms and conditions of the contract. Mr. Mater attended a scheduled appointment, under the terms of the contract, on January 3, 2002. During this appointment, a requisition for blood testing was given to Mr. Mater. Due to scheduling conflicts, Mr. Mater provided the blood sample on January 7, 2002. CN had not received the test results by January 17, 2002 and Mr. Mater was contacted by the Company and advised he was being removed from service. Mr. Mater submitted to a second test on January 17, 2002, the results of which were received by the Company on January 23, 2002 and were negative. Nonetheless Mr. Mater was terminated.

It is the Union's position that Mr. Mater complied with the provisions of his Continuing Employment Contract and should not have been terminated.

The Company disagrees.

FOR THE UNION:

(SGD.) R. HACKL

FOR: GENERAL CHAIRMAN

There appeared on behalf of the Company:

A.M. Cuglietta – Manager, Human Resources, Edmonton

S. M. Blackmore – Human Resources Manager, Edmonton

D. Kruk – Legal Counsel, Montreal

R. Reny – Senior Human Resources Manager, Vancouver

D. VanCauwenburgh – Human Resources Manager, Winnipeg

R. Shulha – General Supervisor, Transportation, Edmonton

And on behalf of the Union:

D. Ellickson – Counsel, Toronto

R. Hackl – Vice-General Chairperson, Edmonton

A. W. Franko – Vice-General Chairperson, Edmonton

K. Rathwell – Witness

AWARD OF THE ARBITRATOR

Upon a careful review of the evidence the Arbitrator is satisfied that Mr. Mater did violate the terms of his continuing employment contract. It is common ground that he was directed, on or about January 3, 2002, to provide a blood sample. By January 17, 2002 the Company had received no such sample from him, and had no indication that he had complied with the request made by the physician overseeing his case, Dr. Bradley, on January 3, 2002. When he was removed from service on January 17, 2002 he then did provide a blood sample.

During the course of his disciplinary investigation Mr. Mater asserted that he had provided a blood sample by attending at a clinic on January 7, 2002. He produced no documentation, nor any witness, to substantiate his assertion in that regard. It also appears that the Company made inquiries of laboratories in Calgary and could find no evidence of his having attended at any of those it verified.

Unfortunately the grievor passed away between the date of the grievance and its hearing at this arbitration. The Union's submission states that following his dismissal he had a recurrence of his alcoholism and an ensuing "downward spiral".

The narrow issue in the case at hand is one of fact. Did the grievor fail to provide a blood sample in a timely fashion, as required on January 3, 2002. The only evidence to the effect that he did so by attending at a clinic on January 7, 2002 is Mr. Mater's own statement during the course of his disciplinary investigation, unsubstantiated by any documentation and uncorroborated by any other witness. At the arbitration hearing the Union presented the evidence of his widow. She states that she drove him to a clinic on January 7, in her own vehicle, as his car insurance was then no longer valid. She relates that she waited outside the clinic while he gave a blood sample, and drove him to his residence afterwards. It appears that the couple were then separated.

The Arbitrator has some difficulty with that evidence. Firstly, when the grievor knew, or reasonably should have known, that he was facing the probable consequence of a discharge at the time of his disciplinary investigation, that evidence was not brought forward. In fact it appears to have emerged only eleven months later, in November of 2002 in the form of a note addressed to the Union by the grievor's widow, Ms. Karen Rathwell. Given Ms. Rathwell's interest in the outcome of these proceedings, and any resulting order of compensation, the written note from her, tendered in evidence before the Arbitrator, is *ex post facto* self-serving evidence.

The account put forward on behalf of the late grievor is also to some degree undermined by his own failure. During the course of the investigation Mr. Mater indicated that he would take steps to obtain confirmation from the clinic which said he attended on January 7, 2002, to support his claim. He obviously failed to do that, and obviously failed to call upon his wife to give any supporting account at the time most critical to the determination of the merits of his discipline.

On the whole the Arbitrator is not satisfied that the evidence tendered on behalf of the late grievor is compelling. I am also satisfied that his apparent failure to have provided the blood sample within a reasonable period of January 3rd, is problematic. A note from Dr. R.C. Rud, dated July 4, 2003, expresses the view that a delay of fourteen days in providing a blood sample can effectively reduce GGT reading levels in a person's liver. In other words, a delay in providing a blood sample following a period of alcohol toxicity could reduce what would otherwise be an elevated GGT level.

On the whole, the Arbitrator is satisfied that the Company did have reasonable grounds to conclude that Mr. Mater failed to respect the strict obligation which he undertook as part of his continuing employment contract, and that he did fail to provide a timely blood sample as directed on January 3, 2002. In the result, I am compelled to conclude that his termination was justified. The grievance must therefore be dismissed.

July 14, 2003

(signed) MICHEL G. PICHER
ARBITRATOR