CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 1621

Heard at Montreal, Wednesday, February 11, 1987

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Appeal of discipline assessed to Mr. J. P. Grogan in the form of 25 demerit marks for unauthorized leave of absence.

BROTHERHOOD'S STATEMENT OF ISSUE:

On July 8, 1985, Mr. Grogan was assessed 15 demerit marks for the alleged unauthorized leave of absence commencing July 1, 1985, and on August 8, 1985, Mr. Grogan was assessed another 25 demerit marks for his continued unauthorized leave of absence.

The Brotherhood contends that Mr. Grogan refused to work because of a combination of a number of unsafe working conditions which made it unsafe for him to continue to work. These unsafe conditions were brought to the Company's attention by Mr. Grogan, but were not addressed until September of 1985. In the circumstances, Mr. Grogan was entitled to refuse to work.

The Brotherhood contends that the Company has been motivated by a vindictive attitude toward Mr. Grogan. Even after he indicated that he was prepared to return to work, it refused to permit him to do so and continued to discipline him on this basis.

The Company disagrees with the Union's contention.

FOR THE BROTHERHOOD:

(SGD.) G. SCHNEIDER
SYSTEM FEDERATION GENERAL CHAIRMAN.

There appeared on behalf of the Company:

T. D. Ferens	– Manager Labour Relations, Montreal
J. Dunn	– System Labour Relations Officer, Montreal
E. R. Posyniak	– Track & Roadway Engineer, Witness, Kamloops
M. Vaillancourt	– Co-ordinator, Special Projects, Engineering, Montreal

And on behalf of the Brotherhood:

G. Schneider	– System Federation General Chairman, Winnipeg
R. Y. Gaudreau	– Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The sole issue before the Arbitrator is whether the assessment of 25 demerits against the grievor for his absence from work between July 15 and August 8, 1985, is a justified disciplinary measure.

The material confirms that in the early summer of 1985 Mr. Grogan developed a number of concerns about Company practices, some relating to safety and others having to do with matters other than safety, including seniority and assignments. It appears that on at least one prior occasion the grievor had brought a safety concern about the need for dust masks to the attention of the Company, and corrective action was taken. During the summer of 1985, however, Mr. Grogan was plainly not familiar with the procedures to be taken under Part IV of the **Canada Labour Code** in the event of perceived imminent peril because of an unsafe condition. Rather than follow those procedures, he simply stayed away from work, making it clear that he would not return until his concerns, including concerns about issues other than safety, were fully satisfied.

It is well established that an employee may refuse to perform a specific assignment if to do so causes him or her a genuine and reasonable fear that it is unsafe (*see* **Steel Company of Canada Limited** *(1973 4LAC (2d) 315) and* **CROA 50**). The Arbitrator is not aware, however, of any prior case in which an employee has withheld his services generally, in protest against a number of allegedly unsafe practices or conditions, coupled with concerns over issues unrelated to safety, having to do with the administration of the collective agreement and the general management of the employer's enterprise.

From at least July 8, 1985, the Company was made aware of a number of safety concerns which the grievor had, including the alleged insufficient use of yellow flags in work areas, inadequate lighting for work crews in tunnels, inadequate training and first-aid for personnel, and the failure to maintain proper first-aid kits in motor cars and Company trucks, among other things. He also explained to the Company on that date that he would continue to refuse to work until corrective action was taken in respect of repeated breaches of the seniority list, additional personnel were assigned to work in his area and what he alleged to be a lack of integrity on the part of Company officials was corrected. These latter concerns, generally unrelated to safety, are the kinds of issues that would normally be the subject of grievances, to be resolved pursuant to the provisions of the collective agreement. It appears, however, that Mr. Grogan made no attempt to initiate any action in that regard by the Union.

Insofar as the non-safety issues are concerned, the Arbitrator must conclude that the grievor was bound to abide by the principles of the well established "work now – grieve later" rule. His concerns about the application of the seniority provisions of the collective agreement, the complement of employees in Valemont and the integrity of the Company in the administration of the collective agreement could plainly be dealt with in due course by the grievance and arbitration provisions of the collective agreement, without prejudice or irreparable harm to himself. As a general matter, however, the same cannot be said about Mr. Grogan's concerns for his safety. Arbitrators have recognized the legitimacy of an employee refusing to perform work where he or she has a reasonable belief that to do so is unduly hazardous. That is a clear exception to the "work now – grieve later" rule.' The issue remains, therefore, whether he was entitled to refuse to work for that reason, and was improperly disciplined.

In recent years the obligations of an employee who asserts a concern about health and safety as a reason to refuse work has come to be governed by specific health and safety legislation enacted both provincially and federally. Part IV of the **Canada Labour Code** contains elaborate procedures to be followed when an employee forms the subjective view that a particular working condition poses a safety hazard to himself or herself or to others. While Part IV of the **Code** has recently been amended, during the summer of 1985 section 82.1, which gave to an employee the right to refuse unsafe work, imposed certain procedural obligations upon an employer. Among other things, being notified of the refusal to work, Sub-paragraph 3 obligated the employer to investigate the employee's report of an unsafe condition, in conjunction with at least one member of the Safety and Health Committee and an authorized Union representative. If the dispute persisted beyond that point Sub-paragraph 5 required the employer to notify a safety officer of **Labour Canada** empowered to investigate and make findings upon the disputed allegations. These provisions were plainly intended to promote the prompt resolution of health and safety concerns with a minimum of adversarial confrontation. It is common ground that none of these procedures was pursued by the Company at any time after July 8, 1985, when it was made aware of Mr. Grogan's concerns. It should be noted, however, that Sub-paragraph 5 of Section 82.1 of the **Canada Labour Code** as it then stood imposed a co-equal obligation on the employee to notify a government safety officer of an on-going dispute over an alleged hazard where the employee refuses to work. This Mr. Grogan did not do. Nor, it appears, did his Union.

In the Arbitrator's view it is reasonable to conclude that the parties must be taken to have intended the just cause provisions of the collective agreement to be applied and interpreted in a manner consistent with their respective rights and obligations under the **Canada Labour Code**. The issue then becomes whether the imposition of 25 demerits against the grievor is justified when neither he nor the Company complied with the obligations under that Act, as a result of which he remained out of service for some three weeks. It appears clear to the Arbitrator that if Mr. Grogan had been more particular in his identification of his safety concerns, providing the Company with specific references to incidents, times and places, the issue would have been more speedily joined and, perhaps, resolved. The filing of a complaint by the grievor with a safety officer of **Labour Canada** might also have had a mitigating effect. To that extent at least, the grievor is, in part, the author of his own misfortune.

By the same token, had the Company adhered to the requirements of the **Canada Labour Code**, the legitimacy of the grievor's claims could have been more speedily identified and, where appropriate, corrective measures might have been taken. This is not an entirely speculative observation, as it appears that Mr. Grogan's concerns about tunnel lighting did lead to some eventual improvements. While Mr. Grogan's actions may have placed the Company in a sensitive position, it was clear at least from July 8, 1985 that he had certain specific concerns about health and safety. The fact that these were mixed with other complaints that would not constitute a lawful justification for his refusal to work does not diminish his rights in respect of those concerns dealing only with health and safety. In other words, the Company's statutory obligations towards the grievor could not be abrogated by his ill-advised violation of the "work now – grieve later" rule respecting his non-safety concerns such as seniority and staffing.

In the circumstances of this case, I am satisfied that Mr. Grogan's refusal to work for reasons entirely unrelated to safety gave the Company just cause for the imposition of some discipline. Having regard to all of the facts, however, including the failure of the Company as well as the grievor to follow statutory directives for the resolution of their dispute over safety, I cannot find that the imposition of discipline in the amount of 25 demerit points was justified. I am not, on the other hand, able to accept the argument of the Union that Mr. Grogan should be compensated for his loss of earnings and benefits over the three week period that he withheld his services. At all material times he represented to the Company that he would not return to work until a number of his personal concerns, having nothing to do with safety, such as staffing and seniority, were corrected to his satisfaction. A threat or action of that kind on the part of an employee plainly violates the "work now – grieve later" rule and cannot be countenanced in any ordered workplace.

In the circumstances, I deem it appropriate to order the removal of the 25 demerit marks registered against the grievor's record, and substitute a suspension for the period between July 15 and August 8, 1985, for Mr. Grogan's failure to observe the "work now – grieve later" principle in respect of his protest against the actions of the Company in matters unrelated to safety. I retain jurisdiction in the event of any dispute between the parties respecting the interpretation or implementation of this award.

(signed) MICHEL G. PICHER
ARBITRATOR