

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 3908

Heard in Edmonton, Wednesday, 9 June 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED STEELWORKERS UNION – LOCAL 2004

DISPUTE:

Appeal of the 45 demerits assessed to Greg Hasell for failure to comply with supervisor's instructions on August 18, 2009.

JOINT STATEMENT OF ISSUE:

On August 18, 2009 Mr. Hasell was working as a welder on the Yale Subdivision. At the commencement of the shift Supervisor Ted Berlin asked Mr. Hasell to do welding work at Hydro at Mile 101.51 on the Yale Subdivision. Mr. Hasell refused to the supervisor's request on the basis that Welding Foreman Victor Rezends was occupied elsewhere and could not assist him at the work site.

Supervisor Berlin offered to assign another employee to work with Mr. Hasell to take track protection while Mr. Hasell performed the work but he continued to refuse to do the welding. He was assessed with 45 demerits as a result of this incident.

The Union contends that the Company should have referred this matter to a Health & Safety Representative to investigate and thereby violated Section 128(1) of the Canada Labour Code by not doing so. The Union contends that the discipline to Mr. Hasell was unjust and unwarranted and out to be expunged.

The Company disagrees with the Union's position and has denied the Union's contentions.

FOR THE UNION:
(SGD.) R. GATZKA
NATIONAL REPRESENTATIVE

FOR THE COMPANY:
(SGD.) B. LAIDLAW
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

B. Laidlaw	– Manager, Labour Relations, Winnipeg
D. Brodie	– Manager, Labour Relations, Edmonton
E. Berlin	– Track Supervisor, Chilliwack
E. Reid	– Sr. Engineering Officer, Edmonton

There appeared on behalf of the Union:

P. Jacques	– Vice-President, Edmonton
R. Gatzka	– Staff Representative, Edmonton
G. Hasell	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor refused a direction to proceed to Hydro, on the Yale Subdivision, to perform a welding repair on the frog of the East Crossover Switch at Mile 101.51. The Arbitrator accepts that the grievor's concern was that he would be without the assistance of his welding foreman, Victor Rezends. He wanted Mr. Rezends to hold the track occupancy permit and serve as his "eyes and ears" while he performed the work in what is not disputed to be relatively busy rail traffic territory with a number of lines and crossovers at Hydro. I am also satisfied that Mr. Berlin then told the grievor that although Mr. Rezends had to be assigned elsewhere, he could take any person of his choice with him to hold the track occupancy permit, and that Track Maintenance Foreman Mike Johnson could fulfill that role.

The record discloses that the grievor nevertheless refused to go. It appears that the grievor then did other track maintenance work for the day and in fact the job was not completed until the next day.

During the course of the hearing the Union asserted that the grievor had communicated both to Mr. Rezends and to Assistant Track Supervisor Tony Medeiros that he would invoke his protections under the right to refuse unsafe work pursuant to section 128 of the **Canada Labour Code**. The Arbitrator has some difficulty with admitting that evidence. It appears that it was never put forward by the Union during the course of the disciplinary investigation which was conducted by the Company in relation to the grievor's conduct. Until the time of the arbitration hearing the Company was aware of no communication from Mr. Hasell to anyone other than Mr. Berlin, who was present at the hearing. Mr. Medeiros obviously was not. In the circumstances I consider it prejudicial to admit that aspect of the evidence tendered by the Union at this late date.

In fact, I am satisfied that the grievor did not formally invoke the provisions of the **Canada Labour Code**, although he did have obvious safety concerns. The issues is whether those concerns were reasonable in all of the circumstances, and justified his refusal to perform the assignment given to him.

In that regard the Arbitrator accepts the position of the Company. Mr. Hasell was not being asked to work alone, nor was he being asked to work without track occupancy protection. Most importantly, he was not being asked to work without being accompanied by a qualified person who would hold the track occupancy permit and could serve as his eyes and ears while he performed the welding task in an obviously hazardous area. There is nothing in the **Canada Labour Code**, nor in the collective agreement, of which the Arbitrator is aware which would give to the grievor the right to insist upon who would hold the track occupancy permit at Hydro and who would accompany him while he performed his work, to protect him in the event of any track movement. He could not insist that he would only perform the work if his welding foreman, Mr. Rezends, was also present. I am satisfied that the Company acted reasonably, and communicated to Mr. Hasell that he could have the protection of any other person of his choice, including a track maintenance foreman.

The issue then becomes the appropriate measure of discipline. With an initial service date of 1982, Mr. Hasell was an employee of some twenty-seven years on the date of the incident in question. While he does have prior discipline on his record, including a written reprimand and demerits assessed against him in 1989 for insubordination and unbecoming behaviour, it appears that that conduct arose during a period of time when the grievor was experiencing substance abuse difficulties. For some twelve years that has no longer been an issue. In all of the circumstances, I am satisfied that the grievor was liable to a serious degree of discipline for his refusal to perform work in what I am satisfied were conditions which an experienced and reasonable employee would consider to be safe and which would not involve any violation of his rights under the **Canada Labour Code**. However, I am of the view that the assessment of forty-five demerits is excessive in the circumstances. In my view

thirty demerits would have sufficed to communicate to the grievor the seriousness of his actions.

The grievance is therefore allowed, in part. The Arbitrator directs that the discipline assessed against the grievor be reduced to thirty demerits.

June 18, 2010

(signed) MICHEL G. PICHER
ARBITRATOR