

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

CASE NO. 3909

Heard in Edmonton, Wednesday, 9 June 2010

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED STEELWORKERS UNION – LOCAL 2004

DISPUTE:

Appeal the 50 demerits assessed to Mr. Greg Hasell for failing to comply with the foreman's instructions and for conduct unbecoming towards the foreman on December 22, 2009. This resulted in Mr. Hasell's discharge on January 5, 2010 for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

On December 22, 2009, Welder George Hasell was working with Welding Foreman Victor Rezends and at the beginning of the shift Foreman Rezends asked Mr. Hasell to replace the oxy tanks in the work truck which were required for torch cutting. Mr. Hasell refused Foreman Rezends' instructions by stating that he was tired of doing everything himself. Foreman Rezends made the request a second time to Mr. Hasell but he again refused.

After approximately 30 minutes Foreman Rezends asked Mr. Hasell a third time to replace the oxy tanks but he still refused. Foreman Rezends then reported the incident to Supervisor Ted Berlin and after the call Mr. Hasell made inappropriate comments to Foreman Rezends. Foreman Rezends completed the work himself that Mr. Hasell had refused to do. Mr. Hasell was assessed with 50 demerits which resulted in his discharge for accumulation of 95 demerits.

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 further contends that the Company was in violation of the GOI, Section 8, Safety Rules because Mr. Hasell was not qualified to operate the welding truck. The Union contends as well that Mr. Hasell had complained of a sore back that prevented him from doing the work but was ignored.

The Union's position is that the discipline is unjust and unwarranted and should 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 record before the Arbitrator discloses that on Tuesday December 22, 2009 Mr. Hasell refused the instruction of his foreman, Mr. Victor Rezends, to take the welding truck to a filling depot to exchange two empty welding tanks for two full tanks of oxygen and acetylene. According to Mr. Rezends account, the grievor first refused by complaining that “I will wait until you’re done, I am tired of doing everything by myself.” It appears that Mr. Rezends threatened to call the supervisor, but waited a half hour and then asked the grievor again. During the disciplinary investigation Mr. Rezends responded to questions by the Union’s representative stating that on the second occasion, which he then assessed being perhaps ten minutes later, Mr. Hasell stated “... that his back was sore every time he lifts the tanks.”

It appears that the confrontation between Mr. Hasell and Mr. Rezends spilled over to Supervisor Ted Berlin. It seems that initially Mr. Rezends phoned Mr. Berlin to tell him that the grievor was declining to take the welding truck to exchange the oxy-acetylene tanks, accusing Mr. Rezends of being lazy. It appears that Mr. Berlin simply responded that he did not then have time to deal with it and that Mr. Hasell should be again instructed to change the tanks. It seems that Mr. Hasell then called Mr. Berlin within a few minutes asking why he could not wait for Mr. Rezends to accompany him, or why someone else might not do so. It appears that Mr. Berlin then responded to the

grievor that he didn't have time for such arguments and that he should simply go and fill the tanks.

It does not appear disputed that the grievor continued to refuse to change the tanks alone. As he had threatened to do, Mr. Rezends then called Mr. Berlin once again to report the grievor's refusal to work. It does not appear disputed that that action on the part of Mr. Rezends precipitated great anger on the part of Mr. Hasell who then loudly uttered negative statements towards him, calling him "a piece of shit." Mr. Rezends then once again called Mr. Berlin, whose patience was severely tried, and upon being advised of the exchange simply told Mr. Rezends that he was busy inspecting track, did not have time for this conflict and that they should get to work and that he would deal with them later. It would appear that after that point Mr. Rezends left Mr. Hasell and went off himself with the truck and crew to exchange the tanks and begin the day's work. When Mr. Hasell reported that to Mr. Berlin by telephone, he instructed him to discuss the matter with him the next day. It appears that subsequently Mr. Berlin was advised that the grievor had proceeded to see his physician.

During the course of the hearing the Union raised issues with respect to the grievor's qualifications to drive the welding truck. In the Arbitrator's view that is an ex post facto issue, not raised within the disciplinary investigation of Mr. Hasell, and indeed not raised by himself when he refused to obey the direction given to him by his foreman. I therefore do not consider it germane to the merits of this grievance.

The issue is whether the grievor was deserving of discipline for having refused the assignment given to him by his foreman, and for having been disrespectful in his language towards him. I am satisfied that in fact Mr. Hasell did conduct himself in such a way as to be deserving of discipline.

I accept the grievor's evidence that he did have concerns about handling the oxy-acetylene tanks on his own, given that he did advise his foreman that he had previously suffered back pain when doing so. At no time, however, did Mr. Hasell ever

communicate that concern to Supervisor Berlin. There was not, in other words, any responsible expression on the part of the grievor to a Company officer that he was refusing work because it was unsafe. Additionally, he obviously allowed matters to get out of hand, using abusive language towards his immediate foreman, a bargaining unit member, to the point where the latter reported him to Supervisor Berlin.

The issue is whether the assessment of fifty demerits was appropriate in all of the circumstances. Having regard to certain mitigating factors, the Arbitrator is satisfied that a substitution of penalty is appropriate, although I do not consider this to be a case for awarding compensation. One mitigating factor is that Mr. Hasell did communicate to his foreman that he had concerns about possible back pain if he were required to handle the oxy-acetylene tanks alone. However, from the record before the Arbitrator, it is far from clear that he ever gave any such explanation to Supervisor Berlin. Additionally, his obvious outburst and unacceptable conduct towards his foreman is an aggravating factor, which could not be justified in the circumstances. The grievor's twenty-seven years of service must also be taken into account.

In the Arbitrator's view a substitution of penalty is appropriate. The Arbitrator directs that the fifty demerits assessed against the grievor be removed from his record, and that he be reinstated forthwith into his employment without compensation for any wages and benefits lost and without loss of seniority. The period between his termination and reinstatement shall be recorded as a suspension for the events of December 22, 2009. In light of this incident and the facts reviewed in **CROA&DR 3908**, the grievor must appreciate that, even allowing for certain ongoing medical conditions which appear to be under control, any recurrence of insubordination in the future may have the most serious of consequences.

June 18, 2010

(signed) MICHEL G. PICHER
ARBITRATOR