

CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4167

Heard in Montreal, January 8, 2013

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

UNITED STEELWORKERS, LOCAL 2004

DISPUTE:

The discharge of Mr. Nolan B. Flanagan effective April 12, 2012, for his conduct and verbal abuse towards a supervisor during his shift on March 28, 2012.

JOINT STATEMENT OF ISSUE:

The Union submitted an appeal contending that the discipline assessed was excessive and discharge was unwarranted given the circumstances. The Union's appeal requested that Mr. Flanagan be immediately reinstated to his position without loss of seniority, and assessed 20 demerit marks instead of the discharge, and that he be made whole for all lost earnings and benefits including pension benefits. The Company disagrees with the Union's contentions and has declined the Union's request.

FOR THE UNION:
(SGD.) P. JACQUES
CHIEF STEWARD

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

There appeared on behalf of the Company:

B. Laidlaw	– Manager Labour Relations, Winnipeg
S. Grou	– Senior Manager Labour Relations, Montreal
G. Percheson	– Supervisor Rail Grinding, Edmonton
J. Robinson	– Senior Manager Track Services, Edmonton

There appeared on behalf of the Union:

P. Jacques	– Chief Steward Mountain Region, Edmonton
M. Piché	– USW Staff Representative, Toronto
R. Koch	– President USW Local 2004,
G. Coll	– Chief Steward Prairie Region,
N. Flanagan	– Grievor

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor did engage in insubordinate conduct and verbal abuse of his supervisor. On March 28, 2012 the grievor was working as a thermite welder whose Gang was assigned to the South Track at mile 33.2 on the Edson subdivision. When the work site was visited by supervisor Gary Percheson, the grievor was not immediately visible. When Mr. Percheson asked about Mr. Flanagan's whereabouts he was told that he was in the welding truck. According to Mr. Percheson's report he approached the truck where he saw the grievor sitting. When the grievor opened the door of the truck Mr. Percheson asked him what he was doing to which he says Mr. Flanagan replied that he was cold and was warming up. Mr. Percheson then states that he replied: "I told him to get out of the truck, a weld has just been poured, go stand by the thermite weld if your (sic) cold or try to do some work, you may even work up a sweat."

Mr. Percheson's account of events includes the following, which occurred immediately thereafter: "Nolan exited the welding truck and while walking by me said, 'Fuck you, I have a cold and I go to the welding truck to warm up for 30 seconds and you come unglued, fuck you'."

It appears that shortly thereafter Mr. Percheson asked foreman Walter Ferlayko how long Mr. Flanagan had been in the truck, to which Mr. Ferlayko responded that he did not know that in fact that he was in the truck. Overhearing that conversation, the grievor began to laugh. When Mr. Percheson asked him whether he thought it was

funny the grievor responded "...it's fucking hilarious". The supervisor then approached Mr. Flanagan and told him that this was his last day working out of Stony Plain and that he was out of service. In the face of that the grievor became extremely agitated and yelled "Fuck you, who the fuck do you think you are ?" when Mr. Percheson responded that he was the track supervisor Mr. Flanagan yelled again: "Fuck you, I have rights, I have a fucking union, bitch." It appears that shortly thereafter when Mr. Percheson made a comment to the grievor that a disciplinary investigation would take place Mr. Flanagan again responded, "Fuck you".

The Arbitrator is satisfied that the incident in question clearly discloses an unacceptable level of behaviour by the grievor. The only issue of substance in this grievance is the appropriate disciplinary response. While I can understand the Company's reaction to the utterances of Mr. Flanagan, there are some mitigating factors which bear consideration. Firstly, as noted by the Union's representative, the grievor was suffering from a cold at the time of the incident. While his supervisor was not aware of it, it appears that he had not been in the truck for more than a minute, and that he had gone there to get a lozenge. Nor is the Arbitrator impressed by the tone utilised by Mr. Percheson when he addressed the grievor. By his own account Mr. Percheson concluded his remarks by saying to Mr. Flanagan "...try to do some work, you may even work up a sweat." While I do not think that those words justified the grievor's reaction, they were, in my view, such as to have a provoking edge to them, suggesting that the grievor was in fact motivated by laziness. The grievor's initial reaction to Mr. Percheson's comment appears to have been a heat of the moment reaction, as was his

reaction when the supervisor advised Mr. Flanagan that he was being taken out of service.

During the course of the ensuing disciplinary investigation the grievor admitted his error, albeit only in the last question and answer when he stated: "I should have handled it in a more professional manner."

The grievor has 4 years of prior service to the Company. While his disciplinary record is not clear, he has never previously been disciplined for similar conduct. Moreover, while he did attempt to deny having been discourteous to Mr. Percheson during the course of the disciplinary investigation, he did subsequently file a written apology, "... for my attitude and lack of respect towards a supervisor on March 28, 2012."

While the Arbitrator agrees with the Company that the grievor's conduct during his short encounter with Mr. Percheson was clearly unacceptable and did make him liable to the most serious degree of discipline, I am satisfied that it is appropriate to consider an outcome other than discharge.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages or benefits lost.

January 14, 2013

(signed) MICHEL G. PICHER

ARBITRATOR