CANADIAN RAILWAY OFFICE OF ARBITRAT?ON

CASE NO. 1393

Heard at Montreal, Wednesday, July 10, 1985

Concerning

CANADIAN NATIONAL RAILWAY COMPANY
(CN Rail Division)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Appeal of discipline assessed the record of Welding Gang Foreman G. Ernst, 20 August 1984.

JOINT STATEMENT OF ISSUE:

On 10 June 1984 Supervisor Bloomfield arrived at the work site of Welding Gang No. 10, which was under the direction of Welding Gang Foreman Ernst, in order to monitor the gang.

Following an investigation of the incident Mr. Ernst was assessed 15 demerit marks for directing employees under his supervision to display a disrespectful attitude towards a Company officer and for disrespect of authority of a Company official and a rebellious attitude towards Welding Supervisor D. Bloomfield.

The Brotherhood contends that the discipline assessed was unwarranted.

The Company has denied the Brotherhood's contention.

FOR THE BROTHERHOOD:	FOR THE COMPANY:
(SGD.) PAUL A. LEGROS	(SGD.) J. R. GILMAN
System Federation	FOR: Assistant
General Chairman	Vice-President
	Labour Relations

There appeared on behalf of the Company:

T. D. Ferens - Manager Labour Relations, CNR, Montreal
J. Russell - Labour Relations Officer, CNR, Montreal
S. Williams - Labour Relations Officer, CNR, Winnipeg
D. J. Bloomfield - Welding Supervisor, CNR, London
R. R. Hannah - Welding Supervisor, CNR, Toronto
J. W. Sims - Welding Supervisor, CNR, Montreal

And on behalf of the Brotherhood:

Paul A. Legros - System Federation General Chairman, BMWE,

Ottawa

R. Y. Gaudreau - Vice-President, BMWE, Ottawa
W. Montgomery - General Chairman, BMWE , Belleville

AWARD OF THE ARBITRATOR

Because the two grievances in CROA Cases #1392 and #1393 are closely related I have decided to consolidate them in the one decision.

Prior to the commencement of the hearing (and indeed before the company representative had arrived) the grievor presented me with two briefs for me to consider with respect to the defence he had prepared in both cases. I indicated to the grievor I could not consider them unless his trade union representative agreed to make the two documents a part of its own briefs. The two briefs were returned to the grievor. Mr. Ernst thereupon removed himself from the hearing room and took his briefs with him.

At 2:30 P.M., (one-half hour after CROA Case #1392 commenced) the proceedings were interrupted by Miss Olga Alamchuk, CROA'S General Secretary, for the purpose of delivering a letter from the grievor with the two briefs attached. The letter requested that I notify the grievor within 28 days if I should fail to consider the briefs in my disposition of the two grievances.

I requested the trade union's advice as to whether they wished me to consider the grievor's briefs as a part of their presentation The trade union replied that it had prepared its own briefs in preparation of the grievor's defence and therefore requested that I not consider the grievor's briefs. In having regard to the trade union's request I advised the parti es that I would not consider the grievor's briefs in the disposition of CROA Cases #1392 and #1393. The trade union then undertook to advise Mr. Ernst of my ruling in due course.

It is of some relevance to note that a greivance referred to CROA is the trade union's grievance. Save to the extent that the trade union must treat the grievor's complaint in accordance with the statutory standard of the duty of fair representation, it has complete control over the manner it will present a case on a grievor's behalf at arbitration. Only the employer and trade union are parties to the arbitral process. A grievor is not. I am obliged by the rules of CROA to acknowledge and respect the wishes of a particular party as to how it chooses to present its case. It clearly is not the place of a grievor (who is not a party) represented by the trade union to dictate the manner in which a case is to be presented. For better or for worse the fate of a grievor's complaint is tied to the manner in which the trade union has elected to advance its case. And, in this particular case, the trade union party has expressed confidence in

the efficacy of its own briefs in achieving success on the grievor's behalf. As a result, in accordance with Rule 9 of the rules and regulations governing CROA I rejected the admissability of the gri=vor's briefs and will solely consider in resolving this dispute the briefs prepared on the grievor's behalf by the trade union. Rule 9 reads as follows:

> "9 The Arbitrator shall not decide a dispute without a hearing. At the hearing each party shall submit to the Arbitrator a written statement of its position together with the evidence and argument in support thereof." (emphasis added)

Another matter should be dealt with in a preliminary manner. In both trade union briefs there is contained allegations that the formal investigations that preceded the company's decision to impose discipline on the grievor had not complied with the standard of fairness and impartiality required by Article 18 of the collective agreement. More particualrly, innuendo is contained in the briefs that suggested that the grievor was denied the opportunity at the formal investigation to cross-examine witnesses that presumably would have bolstered his defence.

The joint statement of issue shows no allegation that the company indeed violated the standard of fairness and impartiality that is implicit under Article 18 in the process of conducting the formal investigations. As a result, the company prepared no defence with respect to that allegation. And, indeed, in accordance with Rules 5 and 8 of the Rules and Regulations governinJ CROA there would have been no need for the company to have prepared an answer to any such charge. And, for that reason, I am not prepared to consider (nor am I jurisdictionally required to consider) allegations that have not been incorporated in the joint statement of issue. Rules 5 and 8 read in part as follows:

> "5 A request for arbitration of a dispute shall be made by filing notice thereof with the Office of Arbitration not later than the eighth day of the month preceding that in which the hearing is to take place and on the same date a copy of such filed notice shall be trans-mitted to the other party to the grievance. A request for arbitration respecting a dispute of the nature set forth in Section (A) of Clause 4 shall contain or shall be accompanied by a Joint Statement of Issue."

> "8 The Joint Statement of Issue referred to in Clause 5 hereof shall contain the facts of the dispute and reference to the specific provision or provisions of the collective agreement where it is alleged that the collective

agreement has been misinterpreted or violated."

Both CROA Cases #1392 and #1393 pertain to the ongoing saga of the grievor's continued conflict with representatives of management in the conduct of his duties as a Welding Gang Foreman.

In CROA Case #1392 the grievance pertains to the assessment of 15 demerit marks with respect to the grievor's insubordination for his refusal to obey an order to refrain from using the company's radio communication system to convey his personal disputes with his superiors to upper management. Rather, it was stressed that the more conventional means should be resorted to in order to relay any such information.

And so, on June 12, 1984, when Supervisors Bloomfield and Sims arrived at the grievor's work site to take pictures of equipment for a presentation for the company's engineering department, the grievor complained that these Supervisors represented a disruption to his crew's orderly flow of work. It is not without significance that Mr. Bloomfield reminded the grievor of a direction of management to refrain from using the radio system to communicate his personal concerns about his superior officers.

Mr. Bloomfield's direction obviously triggered the grievor to do exactly what he was asked not to do. After he had directed Supervisors Bloomfield and Sims to refrain from talking to his crew and after he had directed the members of his crew to refrain from talking to Messrs. Bloomfield and Sims (on pain of a loss of an overtime opportunity), the grievor proceeded to use the radio coxmunication system to relay his alleged complaint that these Supervisors were disrupting his work crew.

This case is .very similar to CROA Case #1381 where the grievor in a like manner refused an order of a superior officer to refrain from using company property for purposes for which it was not designed. In a like manner, the use of the radio communication system was not intended as amedium for transmitting employee complaints with respect to the alleged actions of their supervisors. Rather, the radio is intended to be used by the dispatchers for communicating and receiving train schedule and changes with respect thereto to and from the interested parties who must use such information in the process of doing their work duties.

Again, the grievor challenged that directive under the guise of performing a work-related function. Indeed, his camaflouge of using an ostensible work concern with respect to the productivity of his crew in order to carry on his battle with his superiors did not fool the company's management. Nor has it fooled me.

Nothing that I have said in CROA Case #1381 can be added herein to explain my conclusions with respect to the grievor's clear and patent insubordination. No amount of lecturing on the obey now, grieve later rule was about to deter the grievor from his ultimate objective of embarassing his superiors. As a result, in light of the grievor's previous record, I have had no cause given me for altering the 15 demerit mark penalty assessed the grievor. That grievance is accordingly dismissed.

On June 10, 1984 the grievor was approached at his work site by Supervisor Bloomfield to monitor the work activities of his crew. It appeared from the evidence that the assignment of Mr. Bloomfield to perform that function emanated directly from the grievor's complaint that the work production of his crew was being prejudiced by the company's refusal to provide him with a truck. When Mr. Bloomfield arrived at the work site he advised the grievor of his assignment.

In due course, Mr. Ernst enjoined Mr. Bloomfield from speaking to the members of his crew without his permission and enjoined his crew from speaking to Mr. Bloomfield. It is not irrelevant to point out that Mr. Bloomfield holds the position of Welding Supervisor and as such is a company official whose status is higher on the managerial scale than the grievor's position of Regional Welding Gang Foreman. Indeed, unlike Mr. Ernst, Mr. Bloomfield holds the status of an excluded employee because of the very managerial duties and responsibilities that he exercises. Again the grievor's remonstrance enjoining Mr. Bloomfield from talking to his crew was couched in the ostensible concern that the work of his crew members would otherwise be disrupted and, from his perspective, Mr. Bloomfield recognized that his functions in monitoring the crews' work performance required the exercise of some discretion on his part. He acknowledged that any work-related problem that he might encounter should be communicated to the members of the crew through Mr. Ernst. Nevertheless, the U.C.0.R. Rules were relied upon to support the grievor's unassailable "autonomy" in dealing directly with his work crew as a defence to the company's allegation of conduct unbecoming a foreman.

Of course, the grievor's autonomy was never at risk. Mr. Bloomfield was equally conversant in the UCOR Rules as the grievor. However as a member of management he was not prohibited by those UCOR Rules from talking to members of the grievor's work crew. Moreover, as a company official he ought to have been afforded the luxury of performing his assigne duties free from the humiliation and embarrassment of an employee who held an inferior position and ought to have known better.

Accordingly, the grievor, presumably under the ostensible guise of operating in the company's best interests, exploited an opportunity to score additional points in his ongoing conflict with this superior office His strategy was clear and unconscionable. For my purposes his misconduct was established and the fifteen demerit marks resulting in his termination was warranted.

Quite frankly, it appeared to me that the grievor, from my observations of him during his brief appearances at the hearings and from reviewing the material contained in the briefs, seems to be a disturbed individual who has somehow misconstrued or misinterpreted his authority as a Gang Welder Foreman. For an instant, I considered the feasibility of substituting the grievor's permanent demotion to a welder's position in lieu of the more drastic penalty of discharge. Indeed, I have had no reason to impugn the grievor's qualifications

as a tradesman. Unfortunately, in the exercise of my judicial discretion I cannot be seen to be making decisions based on impressions. What I can do however is recommend to the company that a more humane solution may still involve the grievor's reinstatement to the welder's position.

But insofar as the formal exercise of my discretion is concerned I have no basis to direct that the company do what the evidence has not established.

For all the foregoing reasons the grievances are dismissed.

DAVID H. KATES,
ARBITRATOR.