CANADIAN RAILWAY OFFICE OF ARBITRATION
CASE NO. 3073
Heard in Montreal, Wednesday, 13 October 1999
concerning
CANADIAN NATIONAL RAILWAY COMPANY
and
CANADIAN COUNCIL OF RAILWAY OPERATING UNIONS
(UNITED TRANSPORTATION UNION)
EX PARTE

DISPUTE:

The assessment of 30 demerits to London, Ontario employee Robert K. Fex for failure to follow the instructions of Supervisor B. Gilles, 15 May 1997.

COUNCIL'S STATEMENT OF ISSUE:

On May 15, 1997, Mr. Fex was called to work as a switch tender at the remote location of Pike. Mr. Fex requested that a taxi be provided for use as a shelter and for transportation, should it be required, to toilet or eating facilities. When his request was refused by the Company, Mr. Fex attempted to invoke his right to refuse unsafe work under Part Il of the Canada Labour Code. The Company failed to acknowledge the grievor's rights under the Code. Subsequent to the Company's investigation of the incident the grievor was assessed 30 demerits.

The Union submits that the Company has violated article 82 of agreement 4.16 by, 1.) failing to discipline the grievor within 28 days of the employee statement and 2.) failing to conduct the investigation in a fair and impartial manner. The Union further submits that the Company has violated sections of Part II of the Canada Labour Code and that, in any event, the discipline is too severe.

The Union requests that the discipline be removed from the grievor's record.

The Company has yet to respond to the Union's step 3 appeal.

FOR THE COUNCIL:
(SGD.) **R. J. LONG**
GENERAL CHAIRPERSON
There appeared on behalf of the Company:
F. O'Neill - Labour Relations Associate, Toronto
B. J. Gilles - Assistant Superintendant, N.O.D.
And on behalf of the Council:
R. J. Long - General Chairperson, Brantford
J. F. Orr - Secretary, General Committee, London

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes that on May 15, 1997 the

grievor declined a call to work as a switchtender when he was advised that a taxi would not be provided for use as a shelter in the conditions which then prevailed. It is common ground that Mr. Fex was assigned to handle crossover switches at Pike, located at mileage 21.55 of the Strathroy Subdivision, some two miles from the town of Strathroy. On the day in question it was raining and the grievor expressed concerns about being required to work in the rain, in circumstances where it was agreed he had no shelter, no toilet facility, no drinking water and no ready access to a place to take a meal break.

It appears clear that the Company's supervisor, Mr. B. Gilles, expected the grievor to take his own automobile and to utilize it as a form of shelter against the elements when he was not required to be operating the switches. It is clear, however, that the grievor was under no contractual obligation to utilize his own vehicle. Mr. Fex related during the course of the disciplinary investigation which ensued that his automobile insurance would not have covered him in the circumstances disclosed, although no documentary evidence has been produced to confirm that assertion.

As would appear from the record before the Arbitrator, Mr. Fex found himself faced with a situation of being compelled to work in the open, without shelter, in cold and rainy conditions for the entire working day. Mr. Gilles maintains that he indicated to the grievor that arrangements could be made for him to summon a cab to carry him to Strathroy for meal breaks and for access to washroom facilities. However, the record of the investigation presented by the Company contains no evidence to support that he made such a proposition to Mr. Fex. On the material before me I am compelled to conclude the he did not.

The record further discloses that some forty minutes after Mr. Fex indicated that he would require a cab to be on hand as a form of shelter, he and Mr. Gilles had a telephone conversation. It is clear that during that call Mr. Gilles advised the grievor that he was pulled out of service, and that Mr. Fex expressed to Mr. Giles his view that he was entitled to invoke the health and safety provisions of the Canada Labour Code as a basis for his refusal to work as directed. It is common ground that Mr. Fex remained out of service for only a short time, and lost no work opportunities as a result. Following a disciplinary investigation, however, he was assessed thirty demerits for insubordination arising out of his refusal to perform the work assigned to him.

Part of the Council's assertion is that the grievor was deprived of a fair and impartial investigation. It is clear that Mr. Fex told Mr. Gilles he felt he had a right to refuse to work, as mandated by the provisions of the Canada Labour Code. It does not appear, however, that when Mr. Gilles summarily rejected the grievor's claim in that regard that Mr. Fex made any effort to notify the appropriate individuals responsible for undertaking an investigation of a complaint properly made under the provisions of the Code. During the course of the disciplinary

investigation, however, when Mr. Fex attempted through his union representative to respond to questions as to his own belief in respect of his right to refuse unsafe work in the circumstances disclosed, the investigating officer repeatedly ruled such questions irrelevant, and did not allow them to be answered.

It is well established that the concept of an investigation contained within article 82 of the collective agreement implies the minimum standard of a fair and impartial investigation. At its most basic, that standard would require that the investigating officer listen to any explanation which the employee wishes to offer. (See **CROA 1858, 2073 and 2576.)** While the explanation may not be one which the Company finds acceptable, or even credible, it is difficult to reconcile the notion of a fair investigation with a refusal to listen to the employee's explanation for his or her actions. Unfortunately, that is what transpired in the case at hand.

The Arbitrator makes no determination as to whether Mr. Fex was entitled to refuse to work for safety related reasons in the circumstances which prevailed at Pike on May 15, 1997. It appears that the Company now provides a truck for employees so assigned. The fact remains, however, that during his conversation with Mr. Gilles the grievor raised safety concerns, and his rights under the Canada Labour Code, at the time he refused to perform the work without an adequate vehicle for shelter. In that circumstance, whether Mr. Fex was or was not entitled to invoke the Code, the Arbitrator has considerable difficulty with the refusal of the investigating officer to entertain questions relating to Mr. Fex's belief in that regard. At a minimum, it was incumbent upon the investigating officer to allow the grievor to express his belief and state of mind at the time of the incident, if only in mitigation of what would otherwise appear to be an act of insubordination.

This Office has had prior occasion to comment upon the relevance of an employee's belief as to his or her right to refuse unsafe work under the Canada Labour Code, even if the employee does not properly understand or apply the provisions of the **Code.** (See, e.g., **CROA 1621.)** While the Company was not required to accept the grievor's view, in the spirit of a fair and impartial investigation it was, at a minimum, obligated to hear them. The investigating officer's refusal to do so amounted, in my view, to a violation of the standard of investigation implicit in article 82 of the collective agreement. On that basis the Arbitrator has no alternative but to find that the discipline assessed against Mr. Fex was void, ab initio.

The grievance is therefore allowed. The Arbitrator directs that the thirty demerits assessed against Mr. Fex be struck from his disciplinary record.

October 19, 1999 MICHEL G. PICHER
ARBITRATOR