

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
CASE NO. 3413**

**Heard in Calgary, Wednesday, 10 March 2004**

**concerning**

**CANADIAN PACIFIC RAILWAY**

**and**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**

**EX PARTE**

**DISPUTE:**

Claim on behalf of Mr. D. Gryszczyński.

**BROTHERHOOD'S STATEMENT OF ISSUE:**

On July 10, 2002, the grievor was laid off temporarily from his foreman's position at the Chemetron facility in Surrey, BC. Then, on September 19, 2002, the Company notified the Union that the grievor's layoff was now permanent. The Brotherhood grieved.

The Union contends that: **(1)** The position of Foreman is a necessary one that, prior to the permanent lay off, was filled and worked since the Surrey facility opened. **(2)** The duties of foreman were wrongly taken over by non-union personnel. **(3)** The Company is in violation of article 32.2 and Appendix B-18 of Agreement No. 41.

The Union requests that the Company rescind the permanent lay-off notice and compensate the grievor for any and all losses incurred by him as a result of this matter.

The Company denies the Union's contentions and declines the Union's request.

FOR THE BROTHERHOOD:

(SGD.) J. J. KRUK

SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

M. Moran - Labour Relations Officer, Calgary

E. J. MacIsaac - Manager, Labour Relations, Calgary

L. Thomas - Facility Manager, Chemetron

D. Guerin - Labour Relations Officer, Calgary

R. Wolsey - General Manager, Progress Rail  
I. DiBattista - Contract Logistics Specialist

And on behalf of the Brotherhood:

P. Davidson - Counsel, Ottawa  
J. J. Kruk - System Federation General Chairman, Ottawa  
D. Brown - Sr. Counsel, Ottawa  
D. McCracken - Federation General Chairman/ Secretary  
Treasurer, Ottawa  
H. Helfenbein - Pacific Region General Chairman,  
D. Gruszczyński - Grievor

#### **AWARD OF THE ARBITRATOR**

The Brotherhood alleges that the Company has improperly transferred the work of a bargaining unit employee into the hands of persons in a supervisory capacity who in fact work for another company. The grievance concerns the layoff of Production Plant Foreman Dan Gruszczyński from the Surrey facility of Chemetron. That company oversees the performance of butt welding for the production of continuous welded rail at its plant in Surrey, British Columbia. The arrangement by which Chemetron came to be responsible for the managerial aspects of the operation, with the labour being performed by bargaining unit employees, was reviewed by this Office in **CROA 3086**.

In the case at hand the Brotherhood alleges a violation of article 32.3 and Appendix B-18 of the collective agreement which provide, respectively, as follows:

**32.3** Except in cases of emergency or temporary urgency, employee outside of the maintenance of way service shall not be assigned to do work which properly belongs to the maintenance of way department, nor will maintenance of way employees be required to do any work except such as pertains to his division or department of maintenance of way service.

#### **APPENDIX B-18**

During negotiations, your union expressed concern about supervisors performing work normally performed by employees covered by the collective agreements between CP Rail and the BMWE.

The Company is prepared to investigate any complaints in this regard brought to the attention of the Manager, Labour Relations. When warranted corrective action will be taken.

This understanding does not preclude the Union exercising their rights to final determination under the disputes resolution procedures of the applicable collective agreement.

The record reveals that in December of 1999 the job of Permanent Production and Maintenance Foreman was bulletined for the Surrey facility. The bulletin read, in part, as follows:

The successful applicant will be responsible to supervision [sic] to ensure employees receive proper training in work methods and perform their duties in a safe and orderly manner. Successful applicant should be able to direct operation and maintenance of the plant to achieve maximum utilization of employees and equipment under the direction of the Supervisor. Successful applicant should be thoroughly familiar with loading rail, Continuous Welded Rail (CWR) and OTM, and the proper methods of securing same for shipment. Successful applicant must be able to keep accurate records of all plant employees, bins and material transactions on forms provided. Awards will be made as per Clauses 2.2, 2.3 and 2.4 of Supplemental to Wage Agreement No. 41.

Surrey is one of two locations at which the Company's employees work in continuous welded rail production for Chemetron, the other being Transcona in Winnipeg. It appears that Surrey functioned with a single foreman while at Transcona two foreman positions exist, one being assigned to the butt welding operation and the other being in charge of the rail yard which, it appears, has additional types of product refinements to perform. The duties listed within the job description for the position of production and maintenance foreman at Surrey are as follows:

1. To ensure all employees perform their duties safely and correctly, according to the specifications in welding CWR (continuous welded rail) and quality control.
2. To ensure all maintenance and repairs are done safely and correctly.
3. Work with John Molinski (Staff Coordinator) and Larry Thomas (Contract Manager) to ensure the plant and yard have proper staffing.
4. Ensure all clerical work is processed for the plant and the yard: payroll, holidays and staffing, daily job briefs, injury reports and problems with extended benefits.

5. Break joints (stop and start new CWR strings on rail train 5 times daily): return bars to welder op., adjust and move 6 rail stands for the loading of CWR strings, ensure and assist plant helper with single shoe and securing strings. These duties take approximately 2 hours per day.
6. Inspect rail trains: running gear, pins and knuckles, wife train (pin handle), air hoses, secure strings.
7. Inspect crowns (advise inspector of findings).
8. Work with safety committee and HRDC to ensure the plant and yard are safe and a healthy environment.
9. Supervise and assist unloading rail cars (usually on overtime when required).
10. Assist incoming and outgoing trains.
11. Ensure all employees are represented with any concerns with our parent company Canadian Pacific Railway Co. Ltd.

The Company maintains that Chemetron became able to perform the work of the butt welding plant without the full complement of employees, and specifically that it was able to eliminate one helper position as well as the position of Production and Maintenance Foreman. Simply put, the employer's submission is that the supervisory dimension of the foreman's responsibilities was relatively limited, and could easily be taken over by one of the two on site management supervisors. For example, the timekeeping function, said to occupy perhaps ten minutes in the working day, is now handled by the supervisors. The Company further submits that other clerical activities on the part of the foreman were relatively limited and occasional. For example, the filing of injury reports and other safety reports concerning employees previously done by the grievor, is now performed by the employees themselves, apparently without any great difficulty.

The evidence before the Arbitrator indicates that there was a degree of overlap between the responsibilities of the production and maintenance foreman and the managerial supervisors of Chemetron, even prior to the abolishment of the position in question. Like the foreman, the two supervisors would perform a degree of on site supervision of the work being performed by the eight employees in the butt welding facility. It appears that

the assistant supervisor would in fact work with the tools, particularly in a relief capacity when it was necessary to do so, without any apparent objection by the Brotherhood.

The jurisprudence of this Office has confirmed that, absent clear collective agreement language to the contrary, it is within the prerogatives of management to redistribute or reassign the functions of a particular position so as to achieve greater efficiencies, even where to do so might involve the elimination of a bargaining unit position. In that regard the grievance in **CROA 3206** concerning the elimination of extra gang foreman positions, where certain supervisory tasks were assigned to BTMF foremen, the Arbitrator commented as follows:

It is, as stressed by the Company's representatives, well established within Canadian arbitral jurisprudence that the discretion to determine whether a vacancy exists rests with management, absent collective agreement language to the contrary. In that regard this Office made the following comment in **CROA 2274**:

... It is well established within Canadian arbitral jurisprudence that, absent contrary language in a collective agreement, in any particular case it is the prerogative of the company to determine whether a vacancy exists and is to be filled. In a number of awards this Office has sustained that approach, and has held that it is for the Company to determine whether it is necessary to fill a position which is temporarily unoccupied. (See **CROA 233, 570, 1287, 1336**) In a case not unlike the case at hand, in **CROA 2166**, this Office concluded that the Company was under no obligation to assign replacing yardmasters in the Saint-Luc Yard, at Montreal, when the regular yardmaster was not present. ...

See also **CROA 2006** and **2166**.

It is also true that, absent collective agreement language to the contrary, it is generally open to an employer to redistribute work so as to achieve the greatest efficiencies, and that it may do so across job classifications (**Re Gates Canada Inc. and URW Local 733** (1999), 6 L.A.C. (4th) 435 (I. A. Hunter)).

As noted above, the instant collective agreement does prevent the cross-classification assignment of work when it involves the work being transferred from one division of the maintenance of way service to another. That, for the reasons discussed above,

has not occurred in the case at hand. Therefore, even if it can be said that a job of work does exist, so as to justify the existence of a vacancy to be filled, the filling of that vacancy by the cross assignment of a section foreman, as has occurred in some of the circumstances described, would not constitute a violation of the collective agreement. Nor would the failure to assign a section foreman, or anyone else, to directly supervise the two operator surfacing crew of itself be a violation of the agreement if, as I am satisfied, the Company has made a judgement in good faith and for valid business purposes that such a supervisory assignment is not justified.

Counsel for the Brotherhood stresses that the case at hand is somewhat different from those considered in prior awards of this Office, arguing that they tend to involve the movement of work from one classification or category of employees within the company to another group within the same company. In the instant case he stresses that some of the work performed by the production and maintenance foreman has been taken over by supervisors of Chemetron, a distinct and separate company. While the Arbitrator appreciates that distinction, the merits of this case must in the end, turn on the words and meaning of article 32.3 and Appendix B-18 of the collective agreement. It is significant to note that the Brotherhood does not argue that there has been an improper contracting out of the work of the bargaining unit, and the provisions of the collective agreement relating to contracting out are not raised.

Having regard to the evidence, and in particular to the testimony of the grievor and the Chemetron supervisor in attendance at the hearing, the Arbitrator is not persuaded that the Brotherhood has discharged the burden of establishing a violation of either of the collective agreement provisions referred to above. It would appear that much of the work performed by the grievor in his capacity as production and maintenance foreman was discretionary and self-starting. For example, he referred to a number of situations where he would "take employees under his wing" with respect to providing advice or supervision of their activities. It is far from clear that all of the supervisory tasks he performed were in fact necessary or specifically assigned by management.

What the evidence reveals, on the balance of probabilities, is that Chemetron came to the ultimate view that it could perform the work of the butt welding facility without the functions of the production and maintenance foreman being assigned to a specific individual. It is significant to appreciate that those

functions now performed by the supervisor and assistant supervisor constitute a relatively minor fraction of the previous duties of the production and maintenance foreman. Based on the evidence before me I cannot conclude that the duties taken over by the supervisors would constitute the core duties of the foreman's function. On the contrary, it would simply appear that the bulk of the duties performed by the foreman were found to be unnecessary and are simply no longer assigned to anyone. While that may involve employees performing a greater degree in relation to their own documentation, and certain payroll and job briefing functions being handled by the assistant supervisor, the evidence falls well short of establishing that a bargaining unit position has improperly been transferred into the hands of management in any significant way. On the face of it, the Arbitrator does not find it arbitrary or discriminatory for the Company to conclude that in a work setting which involves the oversight of seven employees performing relatively routine functions there is a necessarily a requirement for a permanent foreman's position. In the case at hand I am satisfied that the decision made by the Company was taken in good faith, and without discrimination or arbitrariness, for valid business purposes.

For all of the foregoing reasons the grievance must be dismissed.

March 15, 2004

(signed) MICHEL G. PICHER  
ARBITRATOR