

**IN RE ARBITRATION BETWEEN:**

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**UNITED STEELWORKERS, AFL, CLC, LOCAL 2002-09**

**and**

**LORAM MAINTENANCE OF WAY, INC.**

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**DECISION AND AWARD OF ARBITRATOR**

**FMCS CASE # 08-56177**

**JEFFREY W. JACOBS**

**ARBITRATOR**

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**December 18, 2008**

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DECISION AND AWARD OF ARBITRATOR  
FMCS CASE # 08-56177  
Ed Sakry grievance

Loram Maintenance of Way, Inc.

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**APPEARANCES:**

**FOR THE UNION:**

Keith Grover, Business Representative  
Ed Sakry, grievant  
Doug Schaal, Electrical Lead Man  
Kevin Klinkner, Maintenance Person  
Richard Kopka, Electrical Technician, Union Steward

**FOR THE EMPLOYER:**

Richard Dryg, Employer Representative  
Keith Johnson, Manufacturing Mgr.

**PRELIMINARY STATEMENT**

The hearing in the matter was held on October 30, 2008 at 10:00 a.m. at the Employer's Association office 9805 45<sup>th</sup> Ave. N. Plymouth, MN. The parties presented oral and documentary evidence at that time and submitted post-hearing Briefs on December 5, 2008 at which point the record was closed.

**CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement dated July 23, 2006 through July 22, 2009. The grievance procedure is contained at Article VII. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service. The parties agreed there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

**ISSUE**

The parties had slightly different views of the issue. The Union claimed that the issue was as follows: Did the Company violate the collective bargaining agreement's, CBA, just cause provision, Article VII, when it disciplined the grievant and whether using the grievant's yearly performance review as the vehicle to accomplish this is also a violation of the CBA? If so what shall the remedy be?

The Company asserted that the issue was whether the performance deficiencies documented in performance evaluations may be used in the administration of future discipline, although the documentation of performance deficiencies is not intrinsically discipline?

These are similar in nature and it was apparent from the evidence and argument here that the issue was whether the Company violated the CBA when it used information from the grievant's yearly performance evaluations as the basis for possible future discipline under the facts and circumstances presented in this case? If so what shall the remedy be?

### **COMPANY'S POSITION**

The Company took the position that no contract violation occurred and that management has an inherent right to conduct employee performance evaluations and that there is no obligation to negotiate such evaluations. In support of this position the Company made the following contentions:

1. The Company began their case by acknowledgement that the case was in effect a discipline case due to the nature of the performance allegations about the grievant's job performance. The Company argued that the grievant is a long time employee but that his performance has slipped considerably over time. The Company asserted that it has used the employment evaluations at issue in this case to document the deterioration of the grievant's job performance and to potentially use it as the basis for a disciplinary action against the grievant if his performance does not improve.

2. The Company argued most forcefully that it has an inherent and contractually guaranteed right to evaluate the performance of its employees. The Company asserted that the notations of poor performance can certainly be used as the basis for discipline even though the performance evaluations themselves are not intrinsically discipline. Certainly there is no contractual prohibition against using the employee evaluations to document poor performance or to use them to give direction to an employee whose performance warrants it.

3. The Company further argued that there were several instances of inattentiveness, such as when the grievant began operating a front-end loader without first assuring that the brakes were working properly. As a result he nearly drove the loader into a building when the brakes failed. Another occurred when the grievant was admonished to be more careful when using a weed whipper to cut grass near the building. He was using it in such a way as to throw rocks and gravel on the building, which came to the attention of the Company president who registered his displeasure about that.

4. The Company distinguishes between shop rules and the job evaluations. The shop rules can be used to administer discipline relating to conduct. The Company witnesses testified that the evaluations are to be used as a tool to try to “salvage” employees rather than merely a tool to build a case for discipline. The Company however asserted that the evaluations can be used as that and in fact may well be here.

5. The Company further noted that the grievant’s deteriorating performance is coupled with a deteriorating attitude as well. His comment made on one of the evaluations to the effect that “I enjoy being humiliated,” is but one example. It is clear that he does not like nor get along with his new supervisor and that the supervisor is documenting a performance record that after 42 years on the job is simply slipping to unacceptable levels.

6. The Company further argued that Mr. Johnson is a very experienced manager and knows the process for administering employee evaluations quite well. As such he is certainly competent and capable of evaluating these. He testified that he believes the employee was treated fairly and objectively in the evaluation process and that the supervisor’s comments were well founded given the grievant’s history and attitude. He further testified that there is no effort to somehow push the grievant out the door, since he is now 70 years old, or anything of that nature. His performance is slipping and this grievance is nothing more than an effort to divert attention from that issue.

7. The Company further argued that this case is little more than a re-hash of the grievant's age discrimination charge made before the EEOC, which was denied. The grievant filed an action with the EEOC alleging certain discriminatory practices by the Company, see Exhibits 13 (a) and (b) attached to the Company's brief herein. The grievant was angry about not getting his way on the EEOC charge and so simply decided to file this grievance as a way of diverting attention from his deteriorating performance.

8. The Company argued finally that the Union's stated request to purge the file of the performance evaluations cannot and should not be granted. There is no contractual support for this. Moreover, if such a remedy were to be granted it would in effect make the performance evaluations a negotiable item between the parties. This is patently contrary to the management rights clause of Article 4.01 of the collective bargaining agreement and would result in a huge number of grievances between these parties. That result is neither called for by the contract nor contemplated by the parties.

The Company seeks an award denying the grievance in its entirety.

#### **UNION'S POSITION:**

The Union took the position that the Company violated the contract when it failed to negotiate the performance appraisals policies and the management performance policies. Further, the Union claimed that the Company has conducted the grievant's performance evaluations in an arbitrary and discriminatory fashion. In support of this the Union made the following contentions:

1. The Union pointed out that the employee has been with the Company for many years and is currently the Parts Coordinator for the Company. He is the one and only Union Unit President the employees have ever had dating back to 1980 when the employees first joined the United Steelworkers.

2. The Union acknowledged that the Company has the right to evaluate its employees as a part of the management rights guaranteed in Article 4.01. The Union asserted most strenuously that while the evaluations can be used to counsel and provide guidance to employees and as a learning tool to make employees more efficient, the evaluations may not be used for disciplinary purposes unless the Company follows the dictates of the discipline procedure in the collective bargaining agreement.

3. The Union argued that the Company is attempting to circumvent the disciplinary process required in the contract by putting disciplinary warnings in employee evaluations. The Union argued that the Manufacturing Manager admitted during his testimony that comments in the evaluation could and indeed are being used as the “initial step, or words to that effect in the disciplinary process.

4. The Union pointed to Article 8.01, which provides in relevant part as follows: “Any employee discipline or discharge notice shall be in writing indicating the reason for such action, with copies to the employee and the Union, within three (3) workdays” and argued that this provision requires that any disciplinary notice shall be in writing and given to the employee and the Union.

5. If this is not done, the employee and the Union could miss critical time lines for grieving allegations contained in the evaluation and the Company could simply avoid the requirements of Article 8.01. This would place an undue burden on the employees and the Union since the evaluations are done approximately once per year and thus could not adequately respond to matters brought up in some cases months before an actual discipline was meted out against them.

6. The allegations in the 2007 and 2008 evaluations are not only inaccurate and unfounded; they could be used as discipline, at least according the Manufacturing Manager. Indeed, the Company admitted that this was a disciplinary case during its opening statement and by acknowledging that it had the responsibility to proceed first in the arbitration Hearing. The Union argued that this is thus a disciplinary case and the employer bears the burden of proof and must show that it complied with the requirements of Article 8.01. The Union argued that the Company failed to do so in this matter.

7. The grievant did not file a grievance on the 2007 review as he felt that since the supervisor was new, things would work out. He also never knew that the allegations contained within the evaluation would be used as discipline or even part of the discipline process.

8. The Union also pointed out that the two main allegations against the grievant are unfounded. First there was the allegation that he was careless when he was mowing grass and kicked up rocks that were in the grass causing them to hit the building. The grievant claimed that the rocks were simply in the grass and were left over from spring melt. Moreover, when directed to be more careful he was and there was no repeat of this. Finally, due to the type of mower used, there was little the grievant could do to avoid this as the rocks were in the grass and the mower was not a typical lawn mower but rather a deck type mower attached to a tractor.

9. Second there was the allegation that he was careless when he drove a front-end loader that lost its brakes. The allegation was that he drove it before allowing the pressure to build up in the brakes. The Union argued vehemently that this was not true. No investigation was done on this; the Company simply made the bald allegation that he drove in a rush and did not give the loader sufficient time to build up adequate brake pressure. In fact, he did not “almost” drive it into a building. He allowed the pressure to build to 60 PSI, the approved pressure, but noticed that the pressure dropped while he was driving it. He then stopped it and reported this to management.

10. The Union put on a witness who was familiar with the loader to explain what likely happened. He explained that cold weather can sometimes cause ice to form in the lines and cause a drop in pressure and that the operator is not at fault when that occurs.

11. Most importantly, according to the Union, this allegation was made in the evaluation and was not brought up as a disciplinary warning pursuant to the procedure called for in the contract. It was not even clear exactly when this incident happened. The Union argued that it cannot be used as discipline now.

12. The Union took issue with the 2008 evaluation as well noting that many of the allegations are vague and subjective at best and again do not comply with the requirements of the contract for use as discipline. Moreover, the actual supervisor who issued the report never testified at the hearing and thus the Company could provide no factual basis for the adverse references contained within the evaluation itself. Vague references to taking too long to complete tasks were of little value and were not explained at the hearing.

13. The Union argued that some of the entries are inconsistent with each other. On the one hand the evaluation notes that the grievant does a good job communicating yet in other places it says just the opposite.

14. Most importantly, the evaluation contains the very stark warning that “further” disciplinary action may be taken unless there is improvement in the grievant’s performance. The Union queried, if the evaluation is not being used as discipline then why is the phrase “further discipline” being used? The Union asserted that if indeed the evaluation is discipline then it must comply with the requirements of Article 8.01, which it did not.

15. The essence of the Union's case is that the Company is simply trying to trump up a case against an elderly long-term employee who has served as Union President for 28 years by making up allegations against him that are not true and using a process that flies in the face of clear contractually negotiated procedures to protect him. The Union asserted that the grievant’s performance is as good as it has always been; the Company supervisor is simply trying to make up allegations to get rid of him.

The Union seeks an award ordering the Company to remove the last two reviews from the grievant’s personnel file and ordering the Company to refrain from using performance evaluations as discipline and to follow the dictates of Article VII, and 8.01 of the labor contract.

## MEMORANDUM AND DISCUSSION

The Company is engaged in the business of maintenance of railway tracks. It manufactures and services the equipment it uses for this purpose at its facility in Hamel, Minnesota. The grievant has been with the Company since 1965 and currently is the Parts Coordinator. He has held that position for 7 years but has far more time with the Company in various other positions. He is currently 70 years of age.

The evidence showed that up until the past few years his performance and his performance evaluations have been good. His evaluation dated 6-1-03 for example shows that he consistently met or exceeded expectations in all but one category. In several cases he exceeded or far exceeded those expectations. The evaluation dated 6-1-04 showed a similar pattern with again only one area, that of Planning and Organization, being the one where he “partially” met expectations. No other problems were noted in that evaluation.

The review dated 6-1-05 again showed the very same pattern with the grievant’s performance being quite good with the one exception in the area of planning and organization. There was no evidence that the Company ever raised his planning and organization skills as disciplinable nor was there any evidence that he was offered any special help in this area. It was noted as referenced above and things went on as before.

The evidence did not reveal what his 2006 evaluation was but the evidence did show that the grievant was given a new supervisor in between the 2005 and 2007 review. The 2007 review showed a very different pattern and revealed “partially” met expectations in a number of areas many of which had been shown to be meets or exceeds expectations in prior years.

The evidence further showed that in one such area, Communications, it was noted that the grievant was “defiant” and that the grievant “has become argumentative.” In another place on the same evaluation form however it was noted that the grievant’s outlook is generally positive and his manner is pleasant.” There was no further evidence of this other than those statements. For whatever reason, the supervisor who actually made those comments did not testify at the hearing.

The 2008 review was worse still and showed that he meets expectations in only two of the 9 categories of job performance rated on the form. Again, there was no direct testimony from the grievant’s supervisor about these references or why he gave him such a poor performance evaluation.

In addition, the employer raised a number of specific performance issues. In one case the grievant was admonished to be more careful when mowing grass near the building as he was throwing rocks that were apparently hitting the building. This was referenced in the 2007 evaluation but was not made a specific warning or discipline at that time. The Company also raised an issue regarding the operation of a front-end loader also referenced in the 2007 review. The reference is that the grievant “seemed in a rush he did not give the front end loader the time needed to build sufficient air pressure in the brakes and started driving, when trying to stop he had no brakes but was able to come to a stop due in part he was not going very fast, which left him short of running into the building.” There was considerable discussion of this incident, as will be discussed below, but for now suffice it to say that this too was not given to the grievant as a warning or disciplinary notice of any kind. Again, no one from the Company testified directly about this incident.

One of the threshold issues is whether the Company has the right to conduct evaluations of its employees and place items it feels are areas of deficiency or needing improvement in those. Certainly the Management Rights provision of the CBA would allow for this. One of management’s fundamental rights is the right to evaluate and direct the workforce. Indeed, the Union did not challenge this right and agreed that the Company has the right to conduct evaluations.

Under the terms of the CBA here, it is not for the arbitrator to second guess entries made in employee performance evaluations. Certainly, to do that would result in an explosion of arbitration not intended by the parties and would place arbitrators in the unenviable position of becoming employees' supervisors. Accordingly, no such endeavor will be undertaken here. The Union's request to purge the employee's file of the performance reviews cannot be granted. There is simply no contractual basis for an arbitrator to come along later and change what is in an employee evaluation as the arbitrator cannot possibly know the details of an employee's job as rated and evaluated by that employee's supervisor.

The issue here though goes somewhat beyond that. The question is whether the references and statements in the grievant's evaluations can be used as discipline and whether any attempt to do so now must have complied with the terms of Article 8.01.

The Company argued that it has the right to note performance deficiencies in the evaluations and to use them as the basis for possible disciplinary action in the future if the employee does not meet those expectations. Certainly too the Company has that right as well. Management has the right to note any deficiencies in performance reviews and to hold employees accountable for any failure to meet those.

The issue raised by the Union however is that the Company placed specific matters in the performance review and is then attempting to use those matters as the basis for possible discipline or even as vaguely veiled discipline itself. The Union's argument is essentially that the Company must comply with the provisions of Article 8.01 providing that "any employee discipline or discharge notice shall be in writing indicating the reason for such action, with copies to the employee and the Union, within three (3) workdays." There was no evidence that either the evaluations themselves or the specific references of misconduct contained within them were ever put through that process in order for the references in the evaluations themselves to count as discipline in some progressive disciplinary process.

There is some merit to the Union's argument in this regard. The Company cannot circumvent the disciplinary process by putting references in a performance review, sometimes months after the incidents in question, and call it discipline. Doing so would circumvent the language and clear purpose of Article 8.01, which is to provide notice to the Union for purposes of interposing a grievance to challenge disciplinary notices. It could well result in the allegation that certain references of misconduct were not challenged through the grievance process and are thus now “part of the employee’s record.”

Moreover, there appears to be little evidence of actual misconduct or negligence by the grievant on two of the specific matters raised by the Company as deficiencies in his performance. The grievant gave credible testimony that he was being as careful as he could during the mowing incident but that there were rocks in the grass where he was mowing due to the snow plows. That scenario hardly appears to be something for which there would have been adequate just cause for discipline but as noted herein, that reference may not be used for disciplinary purposes for the reasons stated above.

Moreover, the Union showed why the front-end loader might have lost pressure in the incident noted in the 2007 evaluation. There was no evidence of negligence on the employee’s part in that incident and in fact the evidence showed that he acted appropriately and somehow brought the loader to a stop without it hitting anything despite having lost brake pressure. The Union showed not only why this could have happened but showed that an employee with lesser skill and experience might not have been able to do this.

The crux of the issue though is the requirement that any reference in the employee’s file, whether it be placed in an evaluation or otherwise, must follow the dictates of Article 8.01. Inherent in any disciplinary matter is the notion of notice to the employee that certain conduct is prohibited or that it will result in discipline.

Notice is one of the basic tests of discipline that arbitrators have used throughout the years to determine just cause for employee discipline. Notice must be provided to the employee somehow, whether that be in the form of an oral instruction, a posted notice, a meeting of some sort to discuss policy or in an employee evaluation outlining areas of strength and areas needing improvement. There are a wide variety of ways in which an employer can provide notice to employees as to what is expected of them and what proper and improper procedure is. Indeed, it is incumbent on the employer to provide that in order to sustain discipline later if that becomes necessary.

Clearly not all counseling or notices to the employee of the consequences of certain conduct is considered discipline and therefore grievable under the grievance procedure in the CBA. Accordingly, to the extent that employee evaluations provide notice to the employee that certain conduct is deficient or unacceptable they can be used for that purpose. Evaluations can certainly be used to show that the employee was counseled or warned about certain conduct if there is a repeat of that conduct in the future and then that *later* incident becomes the subject of formal discipline.

However, to the extent that the Employer is seeking to use the references in the grievant's 2007 and 2008 evaluations as formal discipline in a progressive disciplinary process they must comply with the process set forth in Article 8.01. Here the evidence showed that this was not done. The references in the evaluations were placed there during the evaluation process; there was thus a considerable time lag between the incidents in question and the evaluations. There was some evidence that the references made at the end of the 2007 evaluation by Mr. Johnson were placed without the employee's knowledge. See Employer Tab 4 & 3-2-07 Memo from Keith Johnson.

Moreover, the employee must have the right to challenge allegations of improper conduct. Under the clear terms of the CBA the Employer cannot place specific references in an employee's evaluation and use those references as evidence of discipline months later without granting the employee the right to challenge them.

Simply stated, to the extent the Employer seeks to use specific references in the 2007 or 2008 evaluations to incidents of misconduct or failure to follow policy, the Employer did not follow proper contractual procedure here. If the Employer had felt that the grievant's actions in 2007 or 2008 failed to follow policy or violated Company Rules in some way it should have disciplined the grievant then and followed the discipline provisions of Article 8.01.

The remedy for the Employer is simple. If the employee engages in conduct it feels is improper or violates Company rules or standards, the Company can investigate and take whatever action it feels is appropriate at that time subject to the provisions of Article 8.01. That action would then be subject to the grievance procedure and the employee's right to challenge the accuracy and appropriateness of the Employer's action would thus be preserved.

Several things are clear. The Company has the right to evaluate its employees. The arbitrator is without jurisdiction to alter or amend the statements made through that process now and declines to purge the evaluations from the file. Certainly, management has the right to place supervisory statements in performance reviews for purposes of enhancing employee performance or to document any deficiencies or areas needing improvement. Certainly too, if the employee fails to meet those expectations the evaluations and the statements contained within them may be used as evidence that the employee was warned or at least placed on notice of the issues in a future case for discipline for the failure to adhere to the expectations of the Company.

Having said that however it is also clear that to the extent the Company desires to use any specific references to deficiencies in the grievant's performance in these particular performance reviews it must follow the dictates of the CBA. On the facts presented in this case, the references relied upon by the Company for possible use as the basis for discipline cannot be used now since they did not follow those contractual requirements.

Note too that this holding applies not only to the front-end loader incident and the mowing incident but to any such specific reference as well. (There was some discussion about a weed-whipping incident but there was little if any documentation of that.) Thus while that, like any of the rest of these references, may be used as evidence in a future case, that in and of itself cannot be used as a prior disciplinary warning of any kind since there was no showing of compliance with the contractual requirements of Article VIII.

The Union made a number of other allegations regarding the Company's desire to essentially push the grievant out due to his age. These allegations need not be addressed here as the arbitrator does not have jurisdiction to address them and because of the holding set forth above. Any such issues will need to be handled in a different forum far outside of the four corners of the labor agreement.

### **AWARD**

The Grievance is SUSTAINED IN PART and DENIED IN PART. The Union's request to purge the grievant's file of the 2007 and 2008 performance reviews is DENIED. The Union's request for an award holding that the specific references contained in the grievant's 2007 and 2008 performance reviews may not be used for purposes of discipline, as set forth above, is SUSTAINED. The Union's request that the Company be ordered to follow the provisions of Article 8.01 and notify the Union pursuant to its provisions where the Company disciplines employees is SUSTAINED.

Dated: December 18, 2008

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Jeffrey W. Jacobs, arbitrator