

**IN THE MATTER OF AN ARBITRATION CONCERNING
THE GRIEVANCE OF BRAD LAZORKO (“GRIEVOR”)**

BETWEEN:

UNITED STEELWORKERS, LOCAL 5890
 (“Union”)

- and -

EVRAZ INC.
 (“Employer”)

ARBITRATION AWARD

DATE OF AWARD: July 21, 2009

ARBITRATOR:

Gary G.W. Semenchuck, Q.C.

ARBITRATION HEARING DATE:

Thursday, June 4, 2009

COUNSEL AND REPRESENTATIVES:

Sonny Rioux and Bill Edwards for the Union and the Grievor

Larry Leblanc, Q.C. and Cindy Hinger for the Employer

ARBITRATION AWARD

INTRODUCTION AND PRELIMINARY MATTERS

This arbitration relates to the grievance by Brad Lazorko (the Grievor) against Evraz Inc. (the Employer) concerning his removal from the Mill Operator position in May, 2008 and the failure of the Employer to move him back to the Mill Operator position in September, 2008.

At the commencement of this arbitration hearing, the parties agreed that I was properly constituted as the arbitrator to hear and determine this grievance and there were no preliminary objections or jurisdictional matters to be considered.

FACTS

The grievance in this matter is dated September 10, 2008 and states:

Nature of Grievance: Brad was removed from his job in the 2 in. L.O.D. because he is unable to perform all the duties. He has medical restrictions which the Co. will not accommodate him in his job. In May 08 Brad had been moved to the AMO job and not moved to the MO job when 4 shifts were scheduled again in September.

Brad has had an accommodation in place as a MO for an extended period of time.

The Co. has shown no undue hardship as to why they had to remove Brad from his job.

Article Violation: Art. 1.01, 12.10 but not excluding any other article of the current CBA or applicable legislation.

Settlement Requested: that the accommodation be continued in his MO job and he be paid all money loss since his removal. Be made whole in all areas.

The Grievor testified that he commenced employment in 1992 and had 17 years seniority with the Employer. He has held the position of Mill Operator from 1997 to May, 2008. In 1997, the Mill Operator ran and maintained the two inch Mill by performing two tasks called the mill panel and flying cut off. He had to learn the whole operation of the Mill but generally did one of the tasks more than the other. There was

no rotation schedule for the Mill Operator in 1997. That situation changed as a result of an arbitration decision in 2007.

The Grievor testified that in 2005, the Employer acquired and installed an Accumulator and the operation of that Accumulator became part of the Mill Operator's position. The Employer added the Accumulator job to the Mill Operator position and the Grievor ended up operating the Accumulator because he was the junior Mill Operator. He testified that the Employer started a rotation schedule for the Mill Operator but the rotation was not enforced on the floor. The Grievor testified that the senior Mill Operators did not want to perform the Accumulator job which meant that he ended up with that job because he was the junior Mill Operator.

In November, 2007, the Grievor started having problems with his arm and wrists which made it difficult to swing the hammer which was required in performing the Accumulator job. He said that he had the hammer fly out of his hand because his wrists were so sore from swinging it. At that point, his supervisor put him on the Beveller. Subsequently, in January, 2008, the Grievor saw his doctor and provided a medical report indicating that the Grievor could not perform repetitive movements of his right wrist.

In May, 2008, the two inch Mill was on shut down and the Grievor was on holidays. The Grievor expected to return as the Mill Operator after holidays but received a phone call that he was being reassigned to the salvage position in the Spiral Mill. The Grievor contacted the Union for assistance and then bumped into the position of Assistant Mill Operator in the two inch Mill.

The Grievor testified that he never attended any meeting with the Union and the Employer to discuss his accommodation requirements.

In cross-examination, the Grievor acknowledged that he learned that the Mill Operator position would be a four position rotating job covering Roll Assembly Person, Welder Operator, Sizing/Cut off Operator and Accumulator Operator in the latter part of 2005. After September, 2005, the Grievor stated that he did work in all of those positions. He also admitted that his restriction would prevent him from performing the Accumulator position and the Roll Assembly position. He admitted that his restriction would be long term if not permanent. He also stated that he is the only Assistant Mill Operator with physical restrictions.

The Mill Operator and Assistant Mill Operator positions were the subject of an Arbitration Award dated November 26, 2007 by Arbitrator Kenneth A. Stevenson, Q.C. That arbitration related to a group grievance filed by the Union on November 22, 2005 on behalf of the Mill Operators in the two inch Electric Resistance Welding Mill. That 2007 Award states in paragraph 3 that, prior to September, 2005, the positions in the two inch Mill were Mill Operator and Finishing Operator and the positions in the two inch Roll Shop were Roll Assembly Person and Roll Assembly Helper. In paragraph 5 of the Award, the Arbitrator states that, in September, 2005, the Employer installed a strip Accumulator and combined the two inch Mill positions into two jobs, being Mill Operator and Assistant Mill Operator. The changes were announced in a memorandum dated September 27, 2005 which indicated that the new Mill Operator position would be a four position rotating job covering Roll Assembly Person, Welder Operator, Sizing/Cut off Operator and Accumulator Operator. The new Assistant Mill Operator position was a four position rotating job consisting of Crop Saw Operator, Roll Assembly Helper, Beveller Operator and Bundler Operator.

In paragraph 27 of his Award, Arbitrator Stevenson said:

The Company concluded that as a result of the significant increases of production available with the introduction of the Accumulator and moving the crop saw off-line, that the efficiency of the operations required that employees working in the Mill be trained and skilled in all aspects of the various positions and duties including as Accumulator Operator and to have the training, background and experience to perform duties in connection with

the Mill rolls.

Arbitrator Stevenson goes on to say at paragraph 28:

The major component of the Company's reorganization involved combining the jobs of Roll Assembly Person and Roll Assembly Helper with the jobs of Mill Operator and Finishing Operator to create the new jobs of Mill Operator and Assistant Mill Operator with the abolition of the jobs of Roll Assembly Person and Roll Assembly Helper.

Arbitrator Stevenson allowed the grievance to the extent of removing the new jobs from the line of progression created by the Employer and made them each a bid job. However, since that time, the Union and the Employer have agreed to change the Mill Operator and Assistant Mill Operator positions back to a line of progression jobs.

Two other employees gave evidence on behalf of the Union. Derrick Ganshorn has been employed for four or five years initially as a general labourer and then as an Assistant Mill Operator and then a Mill Operator. He testified that a rotation schedule is posted and the Mill Operators are supposed to rotate. Mr. Ganshorn testified that the rotation schedule was not enforced and if anyone objected, then there was no resistance or objection by the others. He stated that the supervisors are aware that the rotation schedule is not being followed. Because the two inch Mill has been shut down, Mr. Ganshorn is now a Preliminary O.D. Inspector in the Spiral Mill.

The other employee to testify was Lowell Holliday. He has been employed for almost four years initially as a general labourer then as a Bundler in the two inch Mill and then as a Mill Operator in February, 2006. Mr. Holliday testified that he was aware of the schedule of rotation that was posted approximately every three months. He testified that some crews rotated and some did not. He also testified that the supervisors were aware that the rotation schedule was not being followed and they did not enforce the rotation schedule.

The Union also called Bill Edwards as a witness. Mr. Edwards testified that he has been President of the Union Local for just over three years and prior to that had been Vice-President for two years and Secretary and other positions for 26 years. Mr. Edwards testified that the Union was not consulted and played no role in the removal or accommodation of the Grievor. The Employer made those decisions unilaterally. He had an exchange of e-mails with Cindy Hinger, Labour Relations Specialist with the Employer in February, 2008 and the Employer's position was that the Employer did not have the ability to rotate everyone through the jobs in the Mill Operator position with five of the Mill Operators having to be accommodated. In cross-examination, Mr. Edwards agreed that the Grievor was the junior Mill Operator of the five who were being accommodated. He also agreed that the standard crew consisted of three Mill Operators and three Assistant Mill Operators. In addition, there was one Roll Assembly person who worked in that position for three months for a regular eight hour shift Monday to Friday. Based on those numbers, if four crews were being used then there would be 13 Mill Operators including the Roll Assembly person. If three crews were being operated then there would be 10 Mill Operators including one Roll Assembly person.

The Employer called one witness, Sonja Dirnberger. Ms. Dirnberger is a professional engineer who has been employed for 18 years by the Employer as an environmental engineer. Her present position is Quality Assurance Manager, Tubular Operation. In February, 2007, she was the General Foreman of the two inch Mill on the production side. She stated that the two inch Mill produces line pipe and two inch tubing primarily for oil and gas and general transmission purposes. She testified that when she became General Foreman, there were four crews in the two inch Mill with three Mill Operators on each crew plus one as the Roll Assembly person for a total of 13 Mill Operators. She testified that there was considerable physical involvement with the Accumulator and Roll Shop jobs as Mill Operator.

Ms. Dirnberger testified that five Mill Operators were being accommodated. Joe Wirll has one eye and cannot manage the crane. Mr. Fox has a problem with his upper arm ligament and is being accommodated. Mr. Fitch has a medical condition and he is unable to work on the Accumulator or in the Roll Mill Shop. Shawn Lipon is also unable to work in the Roll Mill Shop or on the Accumulator and is being accommodated. The Grievor was also unable to work in the Roll Mill Shop or on the Accumulator and he was the junior employee of those five.

Ms. Dirnberger testified that the rotation schedule was posted monthly and the employees were expected to rotate in accordance with that schedule in order to maintain their skill sets. She expected that those rotations would happen but circumstances such as holidays, training, accommodation, absenteeism could change that rotation. She testified that junior persons could not get experience in all jobs if the rotation did not occur and junior persons had expressed concern about not getting that experience. Ms. Dirnberger testified that the Employer tolerated the lack of rotation because it thought some of the accommodation would be short term. In addition, four of the five Mill Operators being accommodated were very experienced employees who were needed for continuity.

Ms. Dirnberger testified that in May, 2008, the number of crews was reduced from four to three and, as a result, the Employer could not continue with five Mill Operators being accommodated with three crews. The Employer decided to remove the Grievor, who was the junior Mill Operator. After the Grievor was told that he would be moved to another position in the Tubular Mill, the Grievor bumped into the Assistant Mill Operator position.

In cross-examination, Ms. Dirnberger admitted that the process wasn't perfect, and when someone complained, then she did whatever she could. The expectation was that the rotation schedule would be followed. She also admitted that in

May, 2008, the Grievor had enough seniority to remain as a Mill Operator except for the issue about accommodating five Mill Operators which created an untenable situation.

THE UNION'S POSITION

The Union views this grievance as a non-disciplinary demotion. The Union argues that the Employer made a unilateral decision without communicating in advance with the Union. As a result of the Employer's unilateral action, the Grievor was forced into bumping into the position of Assistant Mill Operator. The Union argues that, although the Employer claims the removal of the Grievor from the Mill Operator position was because the Grievor's accommodation made it unworkable to follow the rotation schedule, the rotation schedule was largely ignored and not enforced. The Union argues that production was never raised as an issue by the Employer. The Union requested that the Grievor be placed back in a Mill Operator position when the two inch Mill opens again and that the Grievor be compensated for the loss he suffered when he was removed from the Mill Operator position and had to bump into the Assistant Mill Operator position. As an alternative, the Union requested that I direct the Employer to fix the Accumulator in whatever manner was necessary to minimize or eliminate the heavy physical element of the job. The Union also requested that I direct the Union and Employer to explore the entire accommodation process and, if the parties were unable to reach an agreement, I would remain seized with this matter.

THE EMPLOYER'S POSITION

The Employer argues that it is important to look at the wording of the grievance. That wording takes no exception to the Employer's decision in May, 2008 to remove the Grievor from the Mill Operator position. The grievance takes issue with the fact that the Grievor was not moved to the Mill Operator position in September, 2008 when four crews were reinstated in the two inch Mill. The Employer argues that the discussion about removing the junior Mill Operator started back in February, 2008 and

that discussion included the Union. The Employer argued that Ms. Dirnberger informed the Grievor in May, 2008 that he would be removed as a Mill Operator and he should indicate his choice for another position. Mr. Edwards called Ms. Dirnberger the next day and they discussed the matter without reaching an agreement. Then the Grievor bumped into the position of Assistant Mill Operator. In September, 2008, the Employer increased the crews in the two inch Mill from three to four. The Employer argued that, with four senior Mill Operators requiring accommodation, the Employer could not operate with the Grievor as yet another Mill Operator requiring accommodation. The Employer argued that it was untenable to have five out of 13 Mill Operators with accommodation and unthinkable when three crews were being utilized which meant that five out of ten Mill Operators required accommodation. The Employer referred to the award by Arbitrator Stevenson and, in particular, his reference in paragraph 12 to the evidence that the Employer's plan was to cross train each Mill Operator and Assistant Mill Operator so that employees would have better skills and knowledge in order to assist in trouble shooting and being effective in keeping the Mill operating. The Employer argued that the rotation requirement was not perfect and the Employer did the best that it could with the accommodation requirements. The Employer argued that it could not do without the senior Mill Operators even with their required accommodation but a fifth Mill Operator with accommodation made the rotation impossible. The Employer argued that the Employer accommodated the Grievor by placing him in a position which he could perform. The Employer argued it is not part of the grievance to require the Employer to fix the Accumulator. The Employer argued that the grievance should be dismissed.

ANALYSIS AND DECISION

I have reviewed all of the evidence and the authorities provided by both the Union and the Employer. In my view, this grievance requires the following questions to be answered:

1. Did the Employer accommodate the Grievor in the role of Mill Operator up to the point of undue hardship?

2. Is the rotation system an essential requirement of the Mill Operator position?
3. Should the Employer have reinstated the Grievor to the Mill Operator position in September, 2008 when four crews were reinstated?

In regard to the first question, the duty of an employer to accommodate an employee has been commented on by many arbitrators and other authorities including the Supreme Court of Canada. As a result, it is well understood that an employer has a duty to accommodate an employee to the point of undue hardship. Indeed, in his award dated May 4, 2007, in *Advance Engineered Products Ltd. (Neil Wirth Grievance)*, Arbitrator Hood quoted from the Saskatchewan Court of Appeal and Supreme Court of Canada to describe the duty to accommodate and to support the view that whether the duty to accommodate has been met in a particular case is largely factual. Arbitrator Hood went on to state at paragraph 40 of his award that the Employer, the Union and the employee all have a role to play in determining what accommodation is necessary and possible. I agree with those statements by Arbitrator Hood.

In this case, the Grievor's need for accommodation first came to light in November, 2007 when the Grievor was in the position of Mill Operator. The first medical confirmation of a need for accommodation by the Grievor was presented on January 14, 2008 and further medical reports were provided on May 12, 2008 and August 21, 2008. By May 12, 2008, it was apparent from the medical reports that the Grievor was restricted from heavy lifting and repetitive use of his wrists. Those restrictions prevented the Grievor from performing two of the four jobs of the Mill Operator, namely, Accumulator Operator and Roll Assembly person.

In February, 2008, there was an exchange of emails between the Employer and the Union relating to accommodation of Mill Operators. In an email dated February

6, 2008, from Cindy Hinger to Bill Edwards, Cindy Hinger, on behalf of the Employer, said:

We currently have 5 Operators who are now coming forward indicating that they are not capable of performing all the tasks associated with the Mill Operator position. Being as how there are only 3 Operators per crew we cannot have one Mill Operator on every shift that is not capable of performing all tasks.

I have put up a bid for 2" Mill Operators. Once we have completed this process and trained the successful bidder we will be removing the junior Mill Operator that cannot perform all tasks. We will continue to do this until we can fully operate efficiently.

Then in her email to Bill Edwards on February 7, 2008, Cindy Hinger said:

Bill, I am not going to remove people and not accommodate them I understand this, however we cannot operate a crew efficiently when 1 out of 3 can only do partial work.

Subsequently, in an email dated February 12, 2008 from Marshall Hamilton, on behalf of the Employer, to Bill Edwards, Marshall Hamilton said:

As you know, we have a duty to accommodate, to the point of undue hardship. You and I may disagree on this, but my position is that this accommodation does not have to be in the position that they are currently in or that they necessarily want. It has to be to a position that they can do given their physical limitations. I believe what we have here is a number of employees who don't want to do one of the jobs in the rotation, and want Ipsco to accommodate them by not requiring them to do that job. We cannot operate effectively with this scenario. So, we will do our best to accommodate them in other positions they can do, and we will fill the rotation jobs with employees who can do all of the jobs in the rotation.

Although it is the Employer's position it could not operate efficiently or effectively with five Mill Operators requiring accommodation, the evidence does not demonstrate that there was any undue hardship to the Employer. The Employer did not present any evidence that production changed because five Mill Operators required accommodation. Indeed, there was no evidence of any consequence to the Employer as a result of accommodating five Mill Operators. Undoubtedly, the Employer would prefer to have all Mill Operators working without any accommodation. However, the Employer must provide evidence that accommodating the Grievor in the Mill Operator position caused undue hardship to the Employer. No such evidence was presented by the Employer and I am not convinced that there was any undue hardship on the Employer.

In regard to the second question, the authorities make it clear that, if a full rotational system is an essential requirement of the job, and an employee cannot meet this essential requirement, then the employer does not have a duty to accommodate an employee in that particular job. The employer would then be entitled to move that employee to another job which he can perform. See the Award by Marcotte dated October 6, 1995, in Re: Stelco Inc, Hilton Works and U.S.W.A., Loc 1005, 50 L.A.C. (4th) 301 at paragraph 61.

In my view, the evidence falls short of demonstrating that the rotating system was an essential requirement of the Mill Operator position. The evidence indicated that a rotation schedule for the Mill Operators was prepared and posted but there was no enforcement of the rotation requirement or, at best, very minimal enforcement. The evidence of the Union witnesses was that rotating occurred on a voluntary basis by the employees. If the employees wanted to rotate and agreed to rotate, rotation occurred. If one employee wanted to perform one task or two tasks, that was what happened. There was no enforcement by supervisors of the rotation. The evidence of Ms. Dirnberger was that the employees were expected to rotate but she acknowledged that the rotation could be different because of holidays, training, absenteeism and accommodation. In fact, four other Mill Operators, in addition to the Grievor, required accommodation that restricted them from performing all of the tasks. As a result, it seems obvious that rotation could not work because of that accommodation. Ms. Dirnberger also testified that the four senior Mill Operators were very experienced employees and the Employer needed them. She also admitted in cross-examination that the process was not perfect and she did what she could when someone complained. She also agreed in cross-examination that the Grievor had enough seniority to remain as a Mill Operator except that the issue of his accommodation was untenable for the Employer. The evidence does not demonstrate that rotation was an essential requirement of the Mill Operator position. The matter of accommodation was commented on in paragraph 12 of Arbitrator Stevenson's Award. He stated:

The Company's plan is to cross-train each Mill Operator and Assistant Mill Operator on each of the four aspects of the job and to rotate through each position. The Company's expectation is that the employees will have better skills and knowledge as to how the equipment operates so as to assist in troubleshooting and being effective in keeping the Mill operating. Mr. Clarke is not totally clear on how the Company would manage situations where the Mill Operator was not capable to perform the job of a particular position. He is of the opinion that this is perhaps a matter of an accommodation of special needs which will need discussion with Union representatives.

In fact, as the evidence demonstrates, accommodation was required by four senior Mill Operators, as well as by the Grievor, and the Employer knew and accepted that those Mill Operators could not participate fully in the rotation.

In regard to the third question, the wording of the grievance and the timing of the grievance are relevant to the answer. The grievance states:

In May 08 Brad had been moved to the AMO job and not moved to the MO job when 4 shifts were scheduled again in September.

The grievance requests:

That the accommodation be continued in his MO job and he be paid all money loss (sic) since his removal. Be made whole in all areas.

The grievance is dated September 10, 2008. In my view, the grievance challenges the decision by the Employer not to return the Grievor to the Mill Operator position in September, 2008 when four crews were reinstated. There was no grievance filed in regard to the Grievor being removed from the Mill Operator position in May, 2008 and bumping into the position of Assistant Mill Operator. In my view, the complaint relates to the failure of the Employer to move the Grievor back to the Mill Operator position in September, 2008.

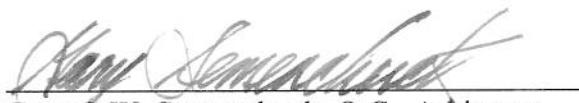
In summary, my findings and answers to the three questions are:

1. The Employer was able to accommodate the Grievor in the Mill Operator position and the Employer has not shown any undue hardship as a result of accommodating the Grievor in the Mill Operator position.

2. The evidence does not substantiate that rotation was an essential requirement of the Mill Operator position. In fact, the evidence demonstrates that rotation was an expectation but was not enforced and, with four other Mill Operators requiring accommodation, rotation was virtually impossible.
3. When the Employer increased the crews to four in September, 2008, it should have moved the Grievor back to a Mill Operator position.

For the above reasons, the grievance is allowed. The Grievor is entitled to be accommodated in the Mill Operator position as he had been and the Employer should have moved the Grievor back to the Mill Operator position in September, 2008. The Employer is directed to compensate the Grievor for any loss he suffered by not being moved back to the Mill Operator position in September, 2008. Since the two inch Mill is apparently shut down at present, the parties will need to work out the implementation of this Award. In the event that the parties are not able to do that, I will remain seized to determine any remaining issues at the request of either party.

DATED at the City of Regina, in the Province of Saskatchewan, this 21 day of July, 2009.



Gary G.W. Semenchuck, Q.C., Arbitrator