CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2482

Heard in Calgary, Tuesday, 14 June 1994

concerning

CANADIAN PACIFIC LIMITED

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

EX PARTE

DISPUTE:

Dismissal of Machine Operator S. Drury.

EX PARTE STATEMENT OF ISSUE

Between September 30 and October 8, 1992 the grievor charged a number of personal long distance telephone calls to the Company. For this he was dismissed on December 16, 1992.

The Brotherhood contends that the discipline assessed to the grievor was excessive and unwarranted in the circumstances.

The Brotherhood requests that the grievor be reinstated without loss of seniority and with full compensation for all benefits and wages lost as a result of this matter.

The Company denies the Brotherhood's contentions and declines its requests.

The grievor had twelve years of service with the Company and possessed thirty demerits at the time of dismissal.

FOR THE BROTHERHOOD:

(SGD.) D. McCRACKEN
SYSTEM FEDERATION GENERAL CHAIRMAN

There appeared on behalf of the Company:

R. M. Andrews	– Labour Relations Officer, Vancouver
D. T. Cooke	– Manager, Labour Relations, Montreal

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
D. McCracken	– System Federation General Chairman, Ottawa
D. Brown	– Senior Counsel, Ottawa
K. Deptuck	– National Vice-President, Ottawa
Wm. Brehl	– General Chairman, Vancouver

AWARD OF THE ARBITRATOR

As reflected in the Brotherhood's Statement of Issue, the grievor was discharged for the unauthorized use of the Company's telephones for making personal long distance calls. It does not appear disputed that during the period in question he made some thirteen calls totaling approximately $25.00 in value. Before the Arbitrator it was not disputed that it is contrary to Company policy for employees to charge personal long distance telephone calls to the Company, save in certain exceptions as, for example, when an employee is required to make calls in relation to arrangements for working overtime, or some similar circumstance.

In its submission, the Company argues that the conduct of the grievor was tantamount to theft which, in its view, rendered the grievor's conduct a dismissible offence. While it cited no prior decisions of this Office to this effect, it draws to the Arbitrator's attention a number of awards in other industries where the misuse of an employer's telephone for personal long distance calls was found to be a form of misappropriation warranting discharge. There can be little doubt that in some cases the knowing and fraudulent misuse of a Company's telephones for making personal long distance calls, charged to the employer, may constitute a form of misappropriation deserving of serious discipline. Where a clear rule has been established and communicated to the employee, and he or she has violated that rule for personal financial gain at the expense of the employer, a case can be made that the bond of trust fundamental to the employment relationship has been breached. However, regard must also be had to any mitigating factors which may arise in the circumstances of any individual case.

The prior awards of this Office reflect that the Company has not always treated the charging of personal long distance telephone calls to the Company as grounds for discharge. In **CROA 1650**, a grievance involving the Company and the then Brotherhood of Railway, Airline and Steamship Clerks, an employee was assessed twenty-five demerit marks for charging personal long distance telephone calls, of a value of some $16.00, to Company telephone accounts. In that case the Arbitrator reduced the discipline to fifteen demerits, and made the following observations:

> It is not disputed that the grievor made some 13 long distance calls to his home, without authorization, with a resulting charge of $16.07 being made to the Company. The sole issue is whether the assessment of 25 demerits is excessive in the circumstances, as contended by the Union.
>
> The Company points to a number of other cases involving employees in separate bargaining units where similar infractions have been dealt with by the assessment of a comparable measure of demerits. There is nothing in the material before the Arbitrator, however, to indicate the circumstances of those cases in any detail, nor is there any reference to the prior disciplinary record of the individuals concerned.
>
> It is axiomatic that discipline must be assessed on an individual basis, having regard not only to the nature of the offence, but to all of the circumstances, including the attitude displayed by the employee as well as his or her previous disciplinary record. In the instant case, Mr. Muscat made immediate restitution of the full amount involved. While the Union does not plead ignorance of the rule respecting telephone calls on his behalf, it appears that there may have been some need for a reminder to employees generally, and it seems that the Company felt it important to issue a written notice to all employees in October of 1986 following the discipline of the grievor.
>
> It is moreover, significant that Mr. Muscat had no prior disciplinary record at the time of the imposition of the sanction that is the subject of this grievance. In all of the circumstances the Arbitrator deems it appropriate to substitute 15 demerits as the penalty assessed against the grievor. His record shall therefore be amended accordingly.

The material before the Arbitrator confirms that the Company policy in respect of employees not using its telephones for personal long distance calls was posted to the notice of employees at Sparwood in the form of Bulletin No. 388 which reads, in part, as follows:

> Subject: Company Telephones
>
> Employees are again reminded that Company telephones are to be used for Company business only.

Unauthorized use is strictly prohibited and will be dealt with accordingly.

Please be governed accordingly.

During the course of his investigation Mr. Drury stated that he was not aware of the rule. Firstly, he confirmed, as is not denied by the Company, that copies of Bulletin 388 were not made available in his boarding room at Elk Valley Place. When asked whether he had seen the notice, posted to the attention of the employees outside the Roadmaster's office, where he sometimes reported for work, he responded that he had never looked at it.

On the grievor's behalf the Brotherhood's representatives submit that it is possible that Mr. Drury might not have seen the bulletin at the Roadmaster's office, if in fact he commenced and finished his work day by reporting to another location. However, the material before the Arbitrator gives pause, as far as this issue is concerned. It does not appear disputed that for at least part of the time material to the grievance Mr. Drury was living and working out of Sparwood. As reflected in a letter dated January 12, 1993, Bulletin No. 388 and a letter written by Superintendent McFarlane dated January 12, 1993, Bulletin No. 388 was clearly available for the grievor to read and understand. In the Superintendent's words, "This document was posted on the Bulletin Board outside the Roadmaster's office, where Mr. Drury reported for work each morning."

On the whole of the material before me, it appears that, at the least, Mr. Drury was under an obligation to be aware of the rules posted on the bulletin board. In light of the evidence established by the Company, it would be incumbent upon the grievor, either through a statement during the course of his disciplinary investigation, or through testimony at the arbitration hearing, to establish that there were good reasons why he was unaware of the content of the bulletin posted at his work headquarters. He cannot, I think, shelter behind the explanation that he simply did not read notices posted to the attention of employees. Moreover, the supplementary investigation contains admissions by Mr. Drury that he was in fact aware that his actions were contrary to Company rules.

As reflected in the Joint Statement of Issue, Mr. Drury has twelve years' service and his disciplinary record stood at thirty demerits at the time of his termination. In this case, in considering the appropriate measure of discipline, it is instructive to note that the file in **CROA 1650** discloses that in some eight cases, involving employees from several bargaining units, the Company assessed demerits against the employees concerned rather than treating the unauthorized use of Company telephones for long distance calls as a dismissable offence going to the fundamental trust inherent in the employer-employee relationship. Having regard to these factors, in the Arbitrator's view this is an appropriate case for a substitution of penalty, as a substantial period of suspension should have the necessary rehabilitative impact.

The Arbitrator directs that the grievor be reinstated into his employment without compensation for wages and benefits lost, and without loss of seniority.

June 22, 1994

(Sgd.) MICHEL G. PICHER
ARBITRATOR