

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. 3944**

Heard in Thursday, 14 October 2010

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

and

**TEAMSTERS CANADA RAIL CONFERENCE  
RAIL CANADA TRAFFIC CONTROLLERS**

**DISPUTE:**

Appeal of the assessment of forty-five (45) demerits to Rail Traffic Controller Daniel Perrault.

**JOINT STATEMENT OF ISSUE:**

On May 17, 2010 Rail Traffic Controller Daniel Perrault attended an investigation for his use of a Personal Electronic Device during his tour of duty on May 7, 2010. Following this investigation, the Company assessed Mr. Perrault's record with forty-five (45) demerits for violation of General Rule A(xii) and Company Policy RM1002 regarding the use of electronic devices.

The Union contends that the assessment of discipline was excessive and not progressive.

The Union requests the removal of the forty-five demerits from Mr. Perrault's file.

The Company disagrees and denies the Union's request.

**FOR THE UNION:**  
**(SGD.) S. BROWNLEE**  
GENERAL CHAIRWOMAN

**FOR THE COMPANY:**  
**(SGD.) J. DORAIS**  
MANAGER, LABOUR RELATIONS

There appeared on behalf of the Company:

B. Deacon	– Labour Relations Officer, Calgary
A. A. Garcia	– Director, Labour Relations, Calgary
R. Hampel	– Counsel, Calgary
D. Burke	– Labour Relations Officer, Calgary
P. Couture	– Manager, Montreal Operations Centre

And on behalf of the Union:

S. Brownlee	– General Chairwoman, Stony Plain
F. Zamarría	– Vice-Local Chairman, Montreal
C. Clark	– Local Chairman, Montreal
T. Beaver	– General Chairman, TCRC (LE), Oshawa

## AWARD OF THE ARBITRATOR

The record discloses that following a devastating rail collision in Los Angeles, California in September of 2008, and subsequent orders released by the US Federal Railroad Administration, the Company decided to initiate a ban on the use of personal electronic devices on Company property. It then promulgated System Special Instruction (SSI) to General Rule A (xii), communicated to all employees, and to the grievor, on November 13, 2008. That directive indicated that RTCs were obliged to have any personal electronic devices in their possession turned off while on duty. The Company's more formalized Policy On The Use Of Electronic Devices was subsequently issued in June of 2009. That document outlines restrictions on the use of personal entertainment and communication devices while on Company property. It includes the following restriction:

Any person who is operating or assisting in the operation of any type of mobile equipment on CP property is prohibited from using any communication device while that equipment is in motion.

It is not disputed that employees who assist in the operation of trains, including RTCs, are clearly under the terms of the policy.

The record discloses that on Friday, May 7, 2010 the grievor was working the Montreal Terminal Desk on a tour of duty between 06:30 and 14:30. At or about 14:10 Mr. Paul Couture, Manager, Montreal Operations Centre, approached the grievor to discuss an issue with him. As he approached Mr. Perrault's office Mr. Couture observed that Mr. Perrault was talking on his personal cell phone. He arranged subsequently to

speak to him about that. During their conversation at the end of the grievor's shift Mr. Couture counselled him with respect to not using his cell phone while on duty and indicated that there might be further action in respect of the incident in question.

Subsequently, Manager of Operations James Blotsky requested copies of the grievor's cell phone records for his tour of duty May 7, 2010. Through his local Union Chairperson he responded that he would not provide his cell phone records, as the Union viewed it as private information.

On May 17, 2010 an investigation was conducted during which the grievor was again asked if he was willing to provide his cell phone records. He again declined. Unfortunately, it would seem that during the course of the investigation the investigating officer asked the grievor if he understood that his refusal might be insubordination. It does not appear disputed that that was clearly an erroneous assertion on the part of the investigating officer, as the Company does not, in the operation of its policy, purport to demand personal telephone records under pain of discipline. Rather, as the policy has been administered, an employee's refusal to provide the records simply allows the Company to draw adverse inferences, as a result of which an employee's refusal to provide personal cell phone records may well be at his or her peril. There is no suggestion, however, that an employee is obliged to comply with the Company's request or that a refusal to do so would constitute insubordination.

The Arbitrator is satisfied that the grievor did violate the Company's policy. He knew, or reasonably should have known, that using his cell phone while on duty was prohibited for reasons of safety. I am therefore satisfied that RTC Perrault did make

himself liable to discipline. The issue of substance is the appropriate measure of discipline to be applied in the circumstances.

in addressing that question there is at least one mitigating factor which I think must be taken into account. The overall rule which applies in the Montreal Operations Centre is that Rail Traffic Controllers are entitled to use the land line phones on their desks to make personal calls, obviously only for reasonable purposes. It appears that each desk has two telephones on it, the second being a back-up phone. It is that phone which employees are instructed to use if they should need to make a personal call while on duty. It appears that all communications on the desk telephones, including the back-up phone, are recorded. The unchallenged representation of the Company's representative is that those recordings are periodically audited to ensure that there is no abuse of the privilege to make occasional personal telephone calls.

In the Arbitrator's view the fact that an employee can, with the Company's approval, make personal telephone calls while on duty tends to undermine the gravity of the offence committed by the grievor in the case at hand. While it is true that the length and content of his cell phone call could not be monitored, the fact remains that the Company appears to tolerate a certain degree of private conversation by Rail Traffic Controllers while they are on duty at their desk. That reality does, in my view, tend to colour the nature of the offence committed by the grievor and should properly be reflected in the assessment of discipline imposed.

Given the foregoing considerations I find that forty-five demerits is substantially excessive in all of the circumstances. It would appear to the Arbitrator that the assessment of a lesser measure of discipline, at the level of twenty demerits, would have been sufficient to bring home to the grievor the importance of respecting the policy not to use his cell phone while on duty. Hired in May of 1978, the grievor has over thirty years service with the Company. While he did receive discipline over his career, the instant case obviously involves a first offence in relation to a relatively new policy. In my view all of these factors justify a reduction in penalty.

The Arbitrator cannot, however, sustain the position of the Union that the investigation conducted by the Company was effectively abusive and constituted harassment of the grievor. Subject to the obvious error of suggesting that Mr. Perrault's refusal to provide his personal cell phone records might constitute insubordination, there was nothing improper or inappropriate in the conduct of the investigation. Nor did the error committed by the officer with respect to the issue of insubordination vitiate the process in my view.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor's record be adjusted by substituting twenty demerits for the forty-five demerits assessed against him for the incident of May 7, 2010.

October 18, 2010

**(signed) MICHEL G. PICHER**  
**ARBITRATOR**