

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

CASE NO. 4031

Heard in Montreal, Thursday, 14 July 2011

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of Mr. W. Taylor.

JOINT STATEMENT OF ISSUE:

On or about February 20, 2011, the grievor, W. Taylor, received a Form 104 advising him that he was dismissed from Company service for his alleged use of a cell phone "while operating a Company vehicle resulting in a collision between the vehicle you were operating and an office trailer on January 24, 2011." A grievance was filed.

The Union contends that: **(1)** On January 24, 2011, the grievor was operating a Company vehicle when his Company cell phone rang. It was the grievor's supervisor who was calling. The grievor stopped the vehicle to take the call, but he must have left it in reverse because it moved back a very short distance and touched the officer trailer. **(2)** Mitigating factors existed that should have served to reduce the discipline assessed. **(3)** The discipline assessed was unfair and unwarranted in the circumstances.

The Union requests that the grievor be reinstated into Company service immediately without loss of seniority and with full compensation for all losses incurred as a result of this matter.

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

FOR THE UNION:

(SGD.) WM. BREHL
PRESIDENT

FOR THE COMPANY:

(SGD.) S. SEENEY
DIRECTOR, INDUSTRIAL RELATIONS

There appeared on behalf of the Company:

M. Goldsmith	– Manager, Labour Relations, Calgary
B. Lockerby	– Labour Relations Officer, Calgary
W. Schuerman	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. W. Brown	– Counsel, Ottawa
A. R. Terry	– Vice-President, Lethbridge
A. Della Porta	– Director, Montreal

AWARD OF THE ARBITRATOR

The material before the Arbitrator confirms that the grievor was involved in a collision between his truck and an office trailer on January 24, 2011, as alleged. It appears that as the grievor was parking his truck and was backing it into the parking position when his Company cell phone rang and he answered it. It is not disputed that in doing so he violated the Company's rule on the use of communication devices which reads, in part, as follows:

B. Use of Communication Devices

1. When operating a company vehicle

a. Hand Held Communication Devices

Hand held communication devices are prohibited from use while operating a company vehicle while it is in motion on any type of road. The vehicle must be stopped and a safe location before the device can be used.

The facts before me disclose that in fact the grievor was called by his supervisor as he was backing up his truck. It appears that he then applied his foot to the brake, so that strictly speaking the vehicle was not in motion. However, it remained in gear, rather than being placed into a neutral or park position. As a result, after he concluded the brief phone call the grievor released his foot from the brake and his truck backed up slowly, striking the office trailer. While no damage occurred to either the vehicle or the

trailer, I am satisfied that the slight collision which did occur was clearly the result of the grievor's distraction by the use of his Company cell phone. I am satisfied that at a minimum the Company's rule would require that a vehicle be properly stopped and secured before a portable telephone or similar device can be used, which the grievor failed to do in the case at hand.

The real issue in the case at hand is the appropriate measure of discipline. The Company stresses that in June of 2009 it instituted a zero tolerance policy, the purpose of which was to communicate to employees that a violation of the prohibition against the use of hand held communication devices while operating a Company vehicle would result in serious discipline. To that end the policy includes the statement: "Any person who fails to comply with this policy may be subject to investigation and discipline, up to and including suspension or dismissal."

The grievor is a relatively junior employee with some two and one-half years of service at the time of the incident, which occurred on January 24, 2011. His disciplinary record reflected the assessment of ten demerits in November of 2010 for an incident unrelated to the Company's policy on communication devices.

While the Arbitrator appreciates that the Company is entitled to include deterrence as a legitimate element in the assessment of discipline, particularly in an effort to enforce a newly established policy in relation to safety, I cannot reject out of hand the submission of the Union with respect to the application of the general principle

of progressive discipline. In my view no hard and fast rule can apply, and regard must be had to all of the facts of a given case. In the instant case I am satisfied that the incident in itself was relatively minor, to the extent that the grievor placed his vehicle in a stationary position when he answered his Company cell phone. It also appears that there was no physical damage to either the truck or the trailer.

Nevertheless, I am compelled to conclude that the grievor did violate the Company's policy and made himself liable to a serious degree of discipline. However, I am not persuaded that termination for a first offence in these circumstances can be said to be justified. The grievance is therefore allowed in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for any wages and benefits lost. The time between his termination and reinstatement shall be recorded as a suspension on his record for his violation of the Company's policy on the use of communication devices.

July 18, 2011

(signed) MICHEL G. PICHER
ARBITRATOR