

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

**CASE NO. 4032**

Heard in Montreal, Tuesday, 13 September 2011

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

And

**TEAMSTERS CANADA RAIL CONFERENCE**

**MAINTENANCE OF WAY EMPLOYEES DIVISION**

**DISPUTE:**

Discipline assessed to Mr. R. Selinger.

**JOINT STATEMENT OF ISSUE:**

On July 13, 2010, the grievor, Mr. R. Selinger, was assessed with 45 demerits for using his personal cell phone while on duty on June 17, 2010. A grievance was filed.

The Union contends that:

**(1)** The investigation conducted into the matter was improper and in violation of sections 15.1 and 15.2 of the collective agreement. **(2)** The grievor was honest and forthcoming during the investigation and showed real remorse. At no time did the grievor compromise anyone's safety. This was a first offense by the grievor. **(3)** Other employees have received far less discipline in similar circumstances. Therefore, the Company's assessment of discipline in this case must be viewed as arbitrary. **(4)** The discipline assessed was excessive and unwarranted in the circumstances.

The Union requests that the 45 demerits assessed the grievor be expunged from his record immediately.

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

**FOR THE UNION:  
(SGD.) WM. BREHL  
PRESIDENT**

**FOR THE COMPANY:  
(SGD.) B. LOCKERBY  
LABOUR RELATIONS OFFICER**

There appeared on behalf of the Company:

M. Chernenkoff	– Labour Relations Officer, Calgary
M. Goldsmith	– Manager, Labour Relations, Calgary
W. Scheuerman	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. W. Brown	– Legal Counsel, Ottawa
A. R. Terry	– Vice-President, Ottawa
A. Dellaporta	– Director, Montreal

### **AWARD OF THE ARBITRATOR**

There is no dispute that the grievor was improperly in possession of his cell phone while operating a machine on the Saskatchewan Tie Crew on the morning of June 7, 2010. It appears that Mr. Selinger observed a collision between two other machines and, at a point when his machine was effectively shut down, texted a message to an employee at another location advising him of what had occurred. As it happens, that message was passed on to a Company supervisor who inquired as to how the news had been received, which resulted in the eventual identification of the grievor.

The sole issue in this grievance is the appropriate measure of discipline. The Company submits that in light of the current concern for dangerous operations as a result of employees making improper use of personal communication devices, it became necessary to insert a strong element of deterrence into any discipline for a violation of the Company's rule against the use of personal entertainment devices and personal communication devices, most recently promulgated in June of 2009.

The Union counters that this is a first offence on the part of the grievor, and that the assessment of forty-five demerits is excessive, given the normal application of principles of progressive discipline.

The Arbitrator can see merit in both sides. It is clearly important for an employer in the position of the Company to enforce deterrence by communicating to employees that certain forms of unacceptable conduct with result in a strong measure of discipline, even on a first offence. Indeed that was acknowledged by this Office in the following terms in **CROA&DR 4030**:

The Arbitrator readily appreciates the Company's right to establish strict rules with respect to the possession and use of cell phones or other recreational devices while on the job, and to place employees on notice that any infractions in that regard will be treated with most severe levels of discipline. ...

The question in the case at hand is what is the appropriate measure of demerits, on a first offence, which will serve the deterrent effect the Company wishes to assert? In my view forty-five demerits is somewhat excessive, being beyond the level of discipline sometimes assessed for serious cardinal rule violations. While each case must depend on its own facts, I am satisfied that in the instant case the assessment of thirty demerits for the possession and use of a cell phone by the grievor while on duty would be sufficient to correct his behaviour while also putting other employees on notice that such conduct will be dealt with seriously, to the point of moving an employee with a clear record halfway to the point of discharge.

The grievance is therefore allowed, in part. The Arbitrator directs that the discipline assessed against the grievor be reduce to thirty demerits.

September 22, 2011

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