

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

CASE NO. 4035

Heard in Montreal, Wednesday, 14 September 2011

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

**THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION
AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA)**

DISPUTE:

The assessment of 30 demerits to Equipment Operator P. Korchinski for use of his personal cell phone while operating Company equipment CN 49018 on September 8, 2010 and his subsequent discharge for accumulation of demerits.

JOINT STATEMENT OF ISSUE:

On September 21, 2010 an investigation was conducted with Equipment Operator P. Korchinski for use of his cell phone while operating Company equipment CN 49018 on September 8, 2010. Following an investigation, Equipment Operator P. Korchinski was assessed 30 demerits. The assessment of 30 demerits brought the grievor's demerit total to 80, which culminated in his discharge for accumulation of demerits in excess of 60.

The Union contends that the discipline was excessive and requests that the 30 demerits be expunged from the grievor's record.

The Company disagrees with the Union's contentions and has declined the Union's grievance.

**FOR THE UNION:
(SGD.) R. FITZGERALD
NATIONAL REPRESENTATIVE**

**FOR THE COMPANY:
(SGD.) S. PRUDAMES
LABOUR RELATIONS OFFICER**

There appeared on behalf of the Company:

S. Prudames	– Labour Relations Officer, Toronto
Wm. Perry	– Sr. Terminal Coordinator, Brampton
G. Robson	– Sr. Terminal Coordinator, Brampton

There appeared on behalf of the Union:

R. Fitzgerald	– National Representative, Toronto
J. Almdal	– Regional Representative, Toronto
D. Andru	– Regional Representative, Toronto
P. Korchinski	– Grievor

AWARD OF THE ARBITRATOR

The record confirms that the grievor was observed texting on a personal cell phone while operating a shunt truck in the Brampton Intermodal Terminal. He was observed by Supervisor Ged Robson and Terminal Coordinator William Perry, both of whom saw him driving the vehicle while texting. Both supervisors saw the grievor driving the shunt vehicle extremely slowly while texting on his cell phone. Both immediately proceeded to the cab of his vehicle where they observed the phone to be in his hand. According to both of their reports he then admitted that he had been texting and that it would not happen again.

However, at the subsequent disciplinary investigation the grievor denied that he had in fact been texting and simply explained that while he was aware of the rule that his phone should have been left in his locker, because his single daughter was pregnant he wanted to have the ability to receive an emergency call if necessary. He explained that on that basis he had the phone in his possession, admittedly contrary to the rule. According to his explanation he was intended to use the phone during a washroom break when the supervisors found it to be in his possession.

The Arbitrator readily appreciates the Company's scepticism with respect to the grievor's explanation. On what basis would the grievor need to have his phone on his person if he was intending to use it during a washroom break? It is common ground that he could have then properly used his telephone, which should have been stored in the locker room which is adjacent to the washroom. The fact that the grievor had his cell

phone in his hand while operating his truck points to the more plausible conclusion that he was in fact using it or expecting to use it when he was observed by the two supervisors.

Mr. Korchinski is an employee of some ten years' service with a less than impressive disciplinary record. The Arbitrator can readily appreciate the Company's perspective that because of his lack of honesty with respect to the cell phone incident, as well as his prior record, there should be no substitution of disciplinary penalty in this case and that Mr. Korchinski's discharge should be sustained.

While as a general matter I would agree with the Company's view, the hardship of the grievor's personal circumstances, and the apparent pressure he was under on the date in question with respect to his daughter's condition is, I think, a mitigating factor which can properly be taken into account. It should, however, be taken into account only in the context of fashioning a last chance for this employee who, it appears, has yet to fully understand the importance of candour and the avoidance of game playing in his relations with his employer. Mr. Korchinski must appreciate that this award represents a last chance.

The grievance is therefore allowed, in part. The grievor shall be reinstated without loss of seniority and without compensation for wages and benefits lost. The Arbitrator directs that the thirty demerits assessed against the grievor be removed from his record, and that a suspension be recorded for the period between his termination

and reinstatement, both for the cell phone incident there under consideration and for the infraction reviewed in **CROA&DR 4034**. He shall therefore be returned to work restored to the position of having thirty demerits on his record.

September 22, 2011

(signed) MICHEL G. PICHER

ARBITRATOR