CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4038

Heard in Montreal, Thursday, September 15, 2011

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the Company's recent practice of issuing requests for employees' personal electronic device records that in, the Union's view, overly broad.

JOINT STATEMENT OF ISSUE:

In recent months the Comp[any has requested employees' personal electronic device records for the period covering each employee's entire tour of duty in which the Company alleges the employee was involved in a significant accident or incident.

It is the Union's contention that the Company's request is overbroad and contrary to the collective agreement, the Company's representations and applicable CROA&DR jurisprudence. The Union protests that the Company's request constitutes an unreasonable exercise of management's rights, contrary to the collective agreement. The Union challenges the Company's expansion of its request for personal communication device records beyond the principles set out in the arbitrator's decision in CROA&DR 3900. The Union further contends that the Company's overbroad requests for employees' personal communication device records are made contrary to representations made by the Company's representatives in respect of such requests. As such the Union contends that the Company is estopped from requesting employees' cellular phone records for an entire tour of duty.

The Union seeks an order that the Company cease and desist from requesting that employees produce their personal communication device records save and except for requests made only in the extraordinary circumstance of a serious accident or incident and only for the period of their tour of duty in which there was a significant accident or incident. In the Union's view, this period should by no means exceed 15 minutes prior to the time of a serious accident or incident.

The Company disagrees and has denied the Union's request, maintaining that its actions are appropriate and reasonable and in accordance with the arbitrator's decision in CROA&DR 3900.

FOR THE UNION:
(SGD.) D. R. ABLE
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.) M. THOMPSON
LABOUR RELATIONS OFFICER

(SGD.) D. OLSON
GENERAL CHAIRMAN

There appeared on behalf of the Company:

M. Thompson	– Labour Relations Officer, Calgary
R. Hampel	– Counsel, Calgary
D. Freeborn	– Manager, Labour Relations, Calgary
D. Burke	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

K. Stuebing	– Counsel, Toronto
D. Able	– General Chairman, Calgary
D. Olson	– General Chairman, Calgary
D. Fulton	– Sr. Vice-General Chairman, Calgary
G. Edwards	– Sr. Vice-General Chairman, Revelstoke
H. Makoski	– Vice-General Chairman, Winnipeg
B. Hiller	– General Chairman,
T. Beaver	– General Chairman, Oshawa
I. Cole	– Local Chairman, Smiths Falls
S. Kimit	– Local Chairman, Smiths Falls

AWARD OF THE ARBITRATOR

Subsequent to the award of this Office in **CROA&DR 3900** the parties have encountered a number of areas where they are in disagreement as to the proper application that award and/or the appropriateness of certain practices apparently followed by the Company since that award. The matter was presented on the basis of certain stated examples presented by the Union, with reply from the Company. The decision In **CROA&DR 3900** issued in June of 2010 and the Company circulated a revised policy on the use of personal electronic devices in November of 2010, some aspects of which give rise to the issues here under consideration.

The first issue raised by the Union is its objection to the fact that the Company has on a number of occasions requested that employees provide their personal electronic device records for the entire period of the tour of duty which is being investigated. The Union's position is that intention of **CROA&DR 3900** was that the Company could legitimately have regard to phone records only for a partial segment of a tour of duty immediately preceding a critical accident or incident, and not for the whole tour of duty. It also submits that the Company should, in any event, not have access to telephone records for any period of a tour of duty following the incident that is being investigated.

In **CROA&DR 3900** the following passage appears:

> … The proper application of the Company's policy could not, in my view, allow the Company to request personal cellular phone records covering a twenty-four hour period, as occurred for example in the March 10, 2010 request concerning train 671-037, reviewed above. Absent unusual circumstances, in the Arbitrator's view the policy can only be properly applied if the request made of employees is confined to the period of their tour of duty in which there was a significant accident or incident. …

With the greatest respect, the Arbitrator cannot sustain the Union's interpretation of the foregoing passage. The intent of the award was not to fragment the tour of duty for the purposes of reviewing telephone records. Rather, as should be evident from the language used, the Arbitrator determined that the period of survey should be the period of their tour of duty, but nothing more. That, in other words, involves the entire period of an employee's service on the occasion of an accident or incident which is being investigated. Nor can I accept the suggestion of the Union's counsel that post-accident

or incident telephone records should not be requested or examined. I find that to be a relatively artificial distinction, particularly given that in some instances the frequency and length of telephone or text communications, whether before or after a given incident, may provide general insight into the employee's method of operating on that tour of duty and his or her general respect for the rule against the use of personal communication devices.

I consider it significant that the employee is at the service of the employer in an unsupervised environment for the entire period of his or her tour of duty. To provide other than a clear, bright line test for the period for which records can be demanded would, in my view, prompt disagreements and disputes as to what is the appropriate cut-off time for pre-incident calls and, alternatively, whether post-incident calls can be considered informative for the purposes of a given incident or accident. In my view the more efficient administration of this aspect of the Company's policy as well as the evidence which will be tendered in related cases is better served by simply establishing that the entire tour of duty is a relevant period of examination for the purposes of determining an employee's involvement in the use of his or her personal communication device. The conclusions to be drawn from the records so produced will obviously be a matter for argument, should the parties be in any disagreement in that regard. With respect to the issue of the time for which the Company can properly request cell phone or communication device records, the position of the Company is therefore correct and that time is the entire duration of an employee's tour of duty.

The Union next objects to what it characterizes as the inappropriate use or attempted use of cell phone records in cases which do not involve any significant incident or accident. In this regard it cites the example of Conductor Dave Thomas of Coquitlam who was the subject of a disciplinary investigation held on August 23, 2011. That investigation was focused solely on his alleged failure of productivity, having regard to the time it required his crew to lift twenty-six cars on August 11, 2011. It appears that the grievor was not removed from service after the day of the incident, but was removed from service following his statement on August 23, 2011. After a supplementary investigation held on August 29, 2011 the Company provided the grievor with a formal written request requiring him to produce "… all activity transactions, secured from your service provider, for any personal communication devices that may have been in your possession during your tour of duty from 14:15 on August 11, 2011 to 00:01 on August 12, 2011."

The Union objects that the nature of the inquiry, which was solely about productivity, did not justify the Company requiring that the grievor produce for examination his personal cell phone communication records. The Arbitrator must agree. The decision of this Office in **CROA&DR 3900** was predicated on the Company's policy and position argued during that case. That policy was to be found in a letter dated March 22, 2010 addressed to the General Chairpersons of the Union in both running trades by the Company's Assistant Vice-President of Industrial Relations, Mr. Rick Wilson. That letter expressly states, in part: "The purpose of this letter is to advise you of the Company's intentions to request the production of communication device records

further to any significant accident or incident, …". It is on that basis that the entire dispute and decision in **CROA&DR 3900** was considered. That limitation was expressly relied upon and expressed by the Arbitrator in the following passage from the award: "It is also noteworthy that the employer's "specific need" is properly confined to serious incidents. There is no suggestion, for example, that personal telephone records will be requested in investigations unrelated to highly safety sensitive issues, such as verifying an employee's claim that he or she called a supervisor or dispatcher to advise that they would be late or absent from work. In the Arbitrator's view the Company has appropriately restricted its request for extraordinary information to the extraordinary circumstance of a serious accident or incident."

With the greatest respect to the submission of the Company, it is no answer to counter that the collective agreement contains no restriction on when cell phone records can be demanded. The same could arguably be said about the collecting of blood samples from employees. The question is not whether the collective agreement expressly deals with the issue, rather it is whether the implicit limitations on management's rights, to be reasonably inferred from the collective agreement, must be taken to involve some balancing of interests and corresponding limitation on the discretion of the Company to demand personal and private communication records. The Company's initial policy was introduced, defended and ultimately sustained by this Office on the critical basis that although it is an extraordinary invasion of personal information and privacy, it is justified in the extraordinary case of a serious accident or incident in the highly safety sensitive context of the operation of trains.

What emerges from the case of Conductor Thomas is an entirely different matter, bearing no relation to safety and obviously having no connection to any serious accident or incident. It would appear that the Company simply attempted to avail itself of private and personal communication data in the investigation of what it considered to be slow and inefficient production on the part of the conductor and his crew. Nothing in **CROA&DR 3900**, and in my view nothing in correct arbitral principle with respect to defining the scope of management's rights would justify the extraordinary intrusion into an individual's personal communication records to deal with an issue such as an employee's productivity, a matter entirely unrelated to any safety sensitive concern stemming from a serious accident or incident.

It should be stressed that the principles developed in **CROA&DR 3900** were developed on the basis of established rules. To a substantial degree this Office relied on the decision of the Privacy Commissioner in **PIPEDA Case Summary No. 114** which sets out the elements of analysis to be examined to determine whether personal information such as telephone records may be collected. The first of four questions posited by the Commissioner is the following: "Is the measure demonstrably necessary to meet a specific need?" As is evident from the text of the award cited above, the circumstances of a serious accident or incident satisfy the reasonable requirement of a "specific need". In my view, given the balancing of interests, it is not now open to the Company to expand the ambit of "specific need" to areas unrelated to health and safety and serious accidents or incidents related thereto, such as for example employee

productivity or other purely economic interests. In my view an incursion into the personal and private information of employees for those purposes could only be justified by clear and unequivocal language agreed into the framework of a collective agreement, something which clearly has not occurred. There is, I think, no responsible basis to infer that management rights should be taken to implicitly extend to demand the production of employees' personal communication records in cases other than those directly related to serious accidents or incidents and related health and safety concerns, in the context of a highly safety sensitive industry.

Secondly, there is an additional troubling dimension to the questions put to Conductor Thomas during the course of the supplementary investigation of August 31, 2011, when his telephone records were produced. It should be stressed that in the presentation of the Company's case in **CROA&DR 3900** great emphasis was placed on the following passage from Mr. Wilson's letter of March 22, 2010:

> While the Union may have privacy concerns, the Company has been clear that the detailed information surrounding the phone numbers called, or the contents of the text message may be blacked out. Our legitimate interest is in knowing when and where the communication devices were used in the context of investigating a significant accident or incident. …

Unfortunately, that limitation did not appear to register with the Company officer conducting the investigation of Mr. Thomas. He was specifically asked who he called at 17:26 on the day in question, and responded that the call was made to his wife. On repeated occasions the investigating officer asked him why he would have called his wife and what was the purpose of the call. The grievor provided no elaboration, simply

he stating that he wanted to speak to his wife in explanation of what appears to have been a nine minute telephone call.

While the specific issue of Mr. Thomas' discipline, if any, is obviously not before me, I am compelled to agree with the Union that for the investigating officer to use an individual's personal and private communications records to then probe the identity of persons with whom he may have communicated and the specific subject of that communication is arguably offensive to general societal values, is clearly contrary to the limitations spelled out by Mr. Wilson in his original letter of March 22, 2010 and is, arguably, of such an abusive nature as to risk departing from the limitations of what constitutes a fair and impartial investigation within the terms of the collective agreement, the failure of which would vitiate any discipline.

The Union next addresses the case of Locomotive Engineer Bill Bryant of Red Deer, Alberta. It appears that the grievor was terminated following a disciplinary investigation in relation to the alleged unsafe operation of his train. During the course of the Company's investigation the Company examined the grievor's telephone records provided pursuant to its request, records which appeared to disclose that he made no telephone calls or text messages during the time being examined. However, at a supplementary investigation conducted on September 27, 2010 the investigating officer then requested the grievor to contact his telephone service provider online to directly verify his telephone and texting account online, at the investigation hearing. It appears that the employee acquiesced, and that verification of the actual electronic file

supported the paper documentation which had been earlier produced. It appears, however, that that exercise was apparently omitted from the record of the investigation.

The Union objects to a Company demand which, as in the case of Locomotive Engineer Bryant, would in effect allow the employer full scrutiny of the unredacted communication records in an employee's personal telephone account. That information would include all of the numbers which he or she may have called and possibly numbers from which calls were received, as well as the name of any other individuals who may share the employee's telephone account.

The Arbitrator can see no legitimate basis for the Company to have that knowledge or demand the production of such unredacted material. Indeed, the actions of the investigating officer in the case of Mr. Bryant are squarely contrary to what I take to have been the serious undertaking of the Company as reflected in the letter of Mr. Wilson of March 22, 2010. That letter states, in part:

> While the Union may have privacy concerns, the Company has been clear that the detailed information surrounding the phone numbers called, or the contents of the text message, **may be blacked out**. Our legitimate interest is in knowing when and where the communication devices were used in the context of investigating a significant accident or incident. When an employee is asked to produce these records, and does not, the Company can only draw a negative inference.
>
> (emphasis added)

CROA&DR 3900, which was predicated on the undertaking expressed by Mr. Wilson, was released on June 23, 2010. On September 27, 2010 the investigating officer dealing with Locomotive Engineer Bryant knew, or reasonably should have

known, these limitations on the Company's policy and that the policy was approved by this Office subject to these limitations.

Certain clarifications are obviously required. There is nothing in the collective agreement, or any law of which I am aware, which can prevent the Company from asking an employee to go online to his or her telephone account, should the employee agree to do so. However, this Office is not persuaded that an employee who declines to do so can legitimately be made the subject of discipline or of adverse inferences, where the information that would be revealed is entirely unprotected. Where a printout of an employee's telephone records is provided, with telephone numbers and identities appropriately blacked out, an inappropriate invasion of privacy obviously does not occur. On that basis the award in **CROA&DR 3900** found that it was not unreasonable for the Company to ask for redacted records and to draw adverse inferences from a refusal to provide them, in the case of a serious accident or incident. Those careful considerations, however, plainly do not come to bear in the situation involving Mr. Bryant. I am therefore compelled to find and declare that while the Company is entitled to ask an employee to go online to examine an unredacted electronic version of his or her telephone account, the employee's refusal to do so cannot be used to draw inferences against him or her.

The final ground of complaint raised by the Union concerns what it characterizes as the Company's inappropriate recourse to discipline as a means of forcing employees to provide their cell phone records. In that regard it advances the example of Conductor

David Louhuizen of Kenora, Ontario. It would appear that at the conclusion of a tour of duty Conductor Louhuizen reported to the Company that his locomotive engineer made use of the engineer's personal cell phone while operating the train. That report would arguably be in compliance with the requirement of the Company's policy that any employee aware of a violation is duty bound to report it. The Company was then in possession of no allegation that Conductor Louhuizen had himself violated the Company's policy by making use of his own cell phone while on duty. While an investigation in relation to the locomotive engineer was commenced in relation to the locomotive engineer's tour of duty of October 16, 2010, on October 21, 2010 Conductor Louhuizen was advised that he was held out of service pending the completion of the investigation concerning the tour of duty in question. The next day he received a notice advising that he must produce his cell phone records for that tour of duty. It appears that it was after the passage of some two weeks, when the conductor finally provided his telephone records, that he was reinstated to service. It appears that the locomotive engineer's own investigation was suspended for the better part of that time by reason of his absence or illness.

In responding to this incident the Company's representatives suggest that Conductor Louhuizen was being investigated because he failed to report the locomotive engineer's transgression until the end of the tour of duty, rather than having done so immediately at the time it occurred. It seems to be suggested that it was on that basis that he might have been held out of service, pending the investigation of what the employer would characterize as serious misconduct.

The Arbitrator has some difficulty with the scenario as presented by the Company. Firstly, there appears to have been no suggestion that the incident in question involved any serious accident, near miss or other health and safety concern. The sole purpose of the Company's original investigation was to deal with the grievor's own report that his locomotive engineer had himself used a cell phone while on duty. I must agree with counsel for the Union that the circumstances disclosed would not appear to give the Company the discretion to demand telephone records of Conductor Louhuizen. Even if one accepts that he was in fact being investigated himself for the belated reporting of his locomotive engineer's alleged offence, I cannot see on what rational basis that can be said to amount to the equivalent of a serious accident or incident that would justify an examination of the conductor's own telephone records. I am therefore compelled to agree that the holding out of service of Conductor Louhuizen for a period of some two weeks until such time as he relented and provided his telephone records can only be viewed as recourse to a form of discipline to compel an employee to provide what the Company asked.

This is obviously not a situation where the Company, in accordance with its stated policy, simply would have done nothing more than draw an adverse inference against the conductor based on his failure or refusal to produce telephone records. On the contrary, the Company appears to have adopted a position that he would continue to be punished by being denied gainful employment until he complied with the Company's request. That, in my view, is plainly inconsistent with the workings of the

Company's policy as it was presented in this Office in **CROA&DR 3900**, and clearly contrary to the ambit of that award. The substance of what occurred to Conductor Louhuizen is clearly that he was suspended and would remain suspended until such time as he provided his telephone records. Indeed, he was returned to service when he finally complied, and not before. As should be evident from the award in **CROA&DR 3900**, the Company cannot legitimately resort to discipline as a means of forcing an employee to provide personal and confidential records normally protected by generally accepted principles of confidentiality.

This matter is therefore remitted to the parties for their review and the implementation of the findings and declarations made herein. Should there be any dispute as to those issues, the matter may be spoken to.

October 13, 2011

(signed) MICHEL G. PICHER
ARBITRATOR