CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4039

Heard in Montreal, Thursday, September 15, 2011

concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the Company's decision to terminate employees as a disciplinary response for any wilful breach of the Company's Personal Electronic Device Policy.

JOINT STATEMENT OF ISSUE:

In November, 2010, the Company's Chief Operations Officer wrote to the Union to advise that employees in breach of the Company's personal electronic device policy 'will be dismissed".

The Union contends that this automatic dismissal policy and practice is unreasonable, excessive and contrary to the terms of the collective agreement and the principles of progressive discipline set out in CROA&DR jurisprudence. It is the Union's position that each case turns on its own merits in view of all of the relevant circumstances at issue. Automatic dismissal is an inherently unacceptable policy. Further, the Union contends that the Company's resort to automatic dismissal is inconsistent with the terms of the personal electronic device policy itself.

The Union requests that the automatic termination for alleged breach of the Company's personal electronic device policy be declared a violation of the collective agreement and contrary to the principles of progressive discipline. The Union seeks an order that the Company cease and desist from automatically terminating employee's employment for alleged breach of the personal electronic device policy. The Union further seeks an order that directs the Company the Company to adhere to the principles of progressive discipline as defined under CROA&DR jurisprudence.

The Company disagrees and denies the Union's request.

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

FOR THE COMPANY:
(SGD.) D. FREEBORN
FOR: ASSISTANT VICE-PRESIDENT

(SGD.) D. OLSON
GENERAL CHAIRMAN

There appeared on behalf of the Company:

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

The Union grieves the Company's adoption of a Policy On the Use of Personal Electronic Devices. Specifically, it objects to the policy itself, and a related statement of the Company's president, to the effect that dismissal will be the automatic result where an employee wilfully violates the Company's Policy On the Use of Personal Electronic Devices.

The Company's policy was apparently first approved on April 13, 2009, made effective June 1st, 2009 and revised on November 1, 2010. The policy itself includes a provision in relation to compliance, and in that regard it provides as follows:

Compliance

Any person who fails to comply with this policy may be subject to investigation and discipline, up to and including suspension or dismissal.

NOTE: For purposes of investigating accidents, injuries, Cardinal Rule Violations, and observed violation of this Policy, employees may be asked to provide records showing the date and times of use of *personal communication devices* in their possession. Failure to provide the requested records will result in the Company drawing an adverse inference (will assume that the employee was using the personal communication device) in violation of this Policy and/or applicable operating rules.

Further in the policy reference is made to the role of supervisors responsible for its implementation. Among their responsibilities the following is noted: “Cautioning, mentoring and/or disciplining employees who fail to comply;”.

It would appear that the triggering event to this policy grievance is the letter of the Company’s President and Chief Executive Officer, Mr. Fred Green, sent to all employees under a date of November, 2010.

To All Employees

November 2010

I write to you today about personal safety, both on and off the job.

The growth in the use of personal electronic devices, such as cell phones, has provided us with the ability to communicate with anyone, anywhere, at any time. They have also introduced a new danger into our lives.

There is a wealth of research that has been done on “distracted driving”. The Use of cell phones, for voice or text communications, while operating a motor vehicle is dangerous. Those very same issues apply in a railway operation. As an example, on September 12, 2008, a commuter train collision occurred. The Locomotive Engineer was texting, which distracted him from his duties, and was a significant contributing factor to the collisions. That collision resulted in twenty-five fatalities, extensive passenger injuries, as well as more than $12 million in damage. All of this was avoidable.

Canadian Pacific is adopting a zero tolerance policy for inappropriate use of personal electronic devices for anyone working in our operational environment.

> We have advised our Unions of this change, and we will also communicate it at the front line level of our workplace.
>
> It is important that you understand the dangers of personal electronic devices, at work and at home, and that you understand the Company's position on this issue. **Any Canadian Pacific employee who wilfully violates our policy on the use of personal electronic devices in our operational environment will be dismissed.** This includes condoning unauthorized use by others. Please do not put your job, your safety, or that of others at risk.
>
> If you have any questions about this policy, or its application please speak with your supervisor immediately.
>
> Each of us must work safely.
>
> Yours truly
>
> (sgd) Fred Green
> President & Chief Executive Officer
>
> (emphasis added)

The Union submits, in part, that the Company's assertion, through the letter of Mr. Green, that employees who violate the policy will be dismissed is itself an unreasonable statement which is contrary to the just cause provisions of the collective agreement. It's counsel submits that as in any case of discipline, there must be a broader examination not only of whether there was a violation of a rule or policy, but of all aggravating and mitigating factors, including such elements as the prior service and disciplinary record of the employee concerned and the specific facts of the case at hand. He submits that the instant case is analogous with what was considered by the arbitrator in **SHP 530**, the CN Drug Policy case reported as **Re Canadian National Railway Co. and Canadian Autoworkers; United Transportation Union intervener**, (2000), 95 L.A.C. (4th) 341 (M.G. Picher). In that case the arbitrator found and declared that the portion of the CN policy which effectively stated that an employee testing positive for drugs pursuant to urinalysis test would be automatically discharged was

itself unreasonable, as that test could not prove the time a drug was ingested nor the quantity ingested. In other words, it could not prove impairment while on duty or subject to duty. In the conclusion of the award, therefore, at p. 400 the following appears:

> The policy's rule which stipulates automatic discharge for an employee who violates the policy is unreasonable, and contrary to the just cause provisions of the collective agreements, and is therefore null and void.

With respect, the Arbitrator cannot agree with the Union that the instant case is analogous to what was considered in **SHP 530**. In that case CN's policy effectively mandated the automatic discharge of anyone who tested positive for drugs, without regard to whether the drugs were consumed at work or at any time proximate to the employee being at work. On that basis the rule was found to be simply unreasonable and unsupportable.

In my view the same cannot be said of the Company's policy and the letter of its President & Chief Executive Officer taken together. Firstly, on its face, the policy clearly seems to recognize that each and every case of cell phone use while on duty must be assessed on its own specific merits. That, it seems to me, is implicit from the Compliance portion of the policy which contemplates discipline "… up to and including suspension or dismissal." Similarly, the reference to supervisors being involved in: Cautioning, mentoring and/or disciplining employees who fail to comply;" is clearly something less than a mandate of automatic discharge in all cases.

In my view the words of President Green must be taken and understood in their context. What his letter of November of 2010 asserts that where it can be proved that a

Canadian Pacific employee wilfully violates the Company's policy with respect to the use of cell phones or other personal electronic communication devices while working in Company operations, that employee will be dismissed. That assertion, in my view, must be understood as a statement on the part of the Company that the presumptive measure of discipline for a knowing and deliberate violation of the Company's cell phone policy will be discharge. In that regard it is arguably not dissimilar to the understanding that a violation of General Rule G, involving the use of intoxicants while on duty, will result in the presumptive consequence of dismissal.

Can it be said that the position expressed by the Company's President & CEO is arbitrary, discriminatory, in bad faith or unrelated to any valid business purpose? I think not. The unchallenged representation of the Company's spokesperson is that in the summer of 2010 the Company was faced with a rising number of serious incidents involving the use of personal communication devices by employees on duty. Because of that situation, and in part for purposes of deterrence, it was resolved that the Company must communicate a strong rule to all employees to bring home the importance of respecting the Company's policy on the use of personal communication devices. In my view that was a legitimate business objective which the Company was entitled to pursue and which it did pursue, in my view reasonably, in the formulation of the message from its Chief Executive Officer. If the Company is to be believed, that message has in fact had a positive impact on the rate of incidents involved where violations of the policy have occurred, as the problem has been substantially reduced, according to the Company's statistics.

While I understand the argument of counsel for the Union that there can be no certainty with respect to the impact of the policy, I am not persuaded that the policy itself can be said to be in violation of the collective agreement. In my view the Company is entitled to determine the penalty it will apply for a given disciplinary infraction and to communicate the level of that penalty to its employees. It is axiomatic, of course that the Company will not have the final say where a collective agreement contains a just cause provision as is the case in the collective agreements here under consideration. At a minimum, however, it puts employees on clear notice that they risk discharge should they be found to have deliberately violated the Company's policy. I must agree with the Company's representative that in the dissemination of the Company's policy and the letter from its CEO the Company has essentially adhered to the rule setting standards reviewed and long followed in the cornerstone award of **KVP Co.** (1965) 16 L.A.C. 73 (Robinson)

In the Arbitrator's view it does not violate the collective agreement for the Company to put employees on notice that it will exact a disciplinary penalty of discharge in the case of any employee who was found to have wilfully violated a particular rule or policy. On its face the Company's formulation would appear to address deliberate, knowing and/or reckless conduct in violation of the Company's policy. I take it as implicit that the CEO's communication must be understood the context of the overall just cause language of the collective agreement and of the broader disciplinary responses which are reflected in the language of the policy itself and that its application would plainly

depend upon the factual circumstances of any individual case. In my view the case at hand is substantially distinguishable from the patently unreasonable position taken by the employer in **SHP 530** where it was declared that a positive test result, entirely unrelated to possible impairment on the job, would result in automatic dismissal. The instant case concerns a conclusive finding of a wilful violation of the Company's policy by an employee presumably in the operation of a train, as regards the Union before me. In my view whatever the merits of the Company's position, which it must be subject to just cause review in each case, it is not unreasonable on its face nor can I find that its mere promulgation constitutes a violation of the collective agreement.

For all of the foregoing reasons the grievance must be dismissed.

September 22, 2011 **(signed) MICHEL G. PICHER**
ARBITRATOR