CANADIAN RAILWAY OFFICE OF ARBITRATION

& DISPUTE RESOLUTION

CASE NO. 4445

Heard in Toronto, January 14, 2016

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of discharge of Conductor Tanner Paradis.

UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, on March 31, 2015, Conductor Paradis' employment was terminated for "your tour of duty on March 9th, 2015 and the events surrounding Trainmaster Bruno entering the cab of the locomotive on the Nipigon sub, a violation of: CROR and CP SSI User Manual for Train & Engine Employees, Item 2.2 (c), (v)(vi)(xii); CROR and CP SSI User Manual for Train & Engine Employees, Item 2.2 (d), (vii) and; T&E Safety Rule Book, T22."

The Union contends that Conductor Paradis' dismissal is unwarranted, unjustified and excessive in all of the circumstances. The Company's decision to terminate his employment is contrary to all applicable principles of industrial discipline and is completely inconsistent with the exculpatory evidence given in a clear and straightforward fashion at Mr. Paradis' disciplinary investigation.

The Union requests that Conductor Paradis be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION:
(SGD.) B. Hiller
General Chairperson

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

B. Scudds	– Assistant Director Labour Relations, Toronto
T. Bruno	– Trainmaster, Schreiber

There appeared on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
B. Hiller	– General Chair, Schreiber
W. Apsey	– Vice General Chair, Smiths Falls

R. Hackl – Vice President, Ottawa
G. Edwards – General Chairman, Calgary
T. Paradis – Grievor, Schreiber

AWARD OF THE ARBITRATOR

The Grievor is a conductor who has been employed by the Company for nine years; with five years of active service.

The Company discharged the Grievor for watching a video on his iPad while on duty and failing to wear his safety glasses. The Grievor admits the safety glass infraction but denies he was watching a video.

Trainmaster Bruno gave evidence at the hearing which was consistent with a memorandum he prepared after the incident. He reiterated that same information during the investigation. As his train was riding across the Nipigon sub, Trainmaster Bruno proceeded to the head end of the train to meet the crew. Trainmaster Bruno said that the Grievor was wearing earphones connected to an electronic device which was displaying a video. The Grievor was sitting in the conductor chair and his safety glasses were not on. After noticing the trainmaster, the Grievor quickly put the device into his grip (a bag) and put his safety glasses on. Trainmaster Bruno asked the Grievor “what the hell” he was doing, and the Grievor replied “nothing”.

The Grievor’s version of events is different. His explanation at the investigation meeting is that he removed his iPad Mini from his bag in order to access his book of

General Operating Instructions (the “GOI”) that was also in the bag. He said that he was not wearing the ear phones but they were connected to the device. He said that when asked by Trainmaster Bruno what he was doing he responded that he was reading. The Grievor said that at no point was the device on or were the ear phones in his ears. The Grievor admits that the device should not have been out of his bag and he admits the safety glasses infraction.

The Grievor was aware of the prohibition on the use of personal electronic devices at work, but maintained that he was not using one. He only admitted to having it out, which he concedes is also not permitted, but reiterates the device was only out so he could reach into the bag for his book. The Grievor said he panicked when Trainmaster Bruno came in because he realized having the iPad out of his bag was a breach of the rules

The Company rules on use of personal electronic devices while on duty is clear. CROR General Rule A (xi) provides in relevant parts, that:

> “The use of personal entertainment devices is prohibited.”
>
> CROR CP System Special Instruction (SSI) item 2.2. while on duty,
> …
> (d) it is prohibited to
> …
> (vii)
>
> Use personal electronic devices, such must be turned off, stored out of sight and not on your person.

In November of 2010 the Company president and CEO distributed a letter to employees indicating that violation of the use of the personal electronic device policy

will be met with dismissal. In **CROA&DR 4039** this Office noted the following when it dismissed a grievance in respect of the CEO's communication:

> ''…. 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.
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> …..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 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) L.A.C. 73 (Robinson)……. ''

In dismissing the grievance this in **CROA&DR 4039** Office referred to the requirements of the just cause review that must be attended to in each case but found that the promulgation of the rule on its face was not unreasonable.

In assessing just cause for discipline, I turn first to the credibility issue. Having considered the material presented, the information from the investigation and what is simply most probable and likely in the circumstances, I find the Grievor's version of events to be lacking in credibility. Trainmaster Bruno was specific and detailed in what he saw; a video being played, an image seen on that video, earplugs on and a quick

movement by the Grievor upon being discovered to hide the activity being engaged in. I do not find plausible the Grievor's version of what occurred, that he was at that moment reaching in his bag to take out his operating instructions material. If I were to accept that version of events, I would have to find that Trainmaster Bruno essentially fabricated details of what occured in order to implicate the Grievor and no evidence before me suggests any reason why that would have occurred.

The Grievor is a running trades employee working as a conductor on trains. It is obvious and clear why the use of a personal electronic device should be and is prohibited in that environment and why the Company is entitled to consider the use of those devices as a most serious offence. But, the matter of appropriate penalty is an assessment undertaken by this Office.

I consider then the issue of mitigation of penalty. The Grievor is not a long service employee. Although the Company relies on his having been terminated and reinstated for unrelated conduct (once by the Company and once by this Office in **CROA&DR 4228**), the conduct around those events not relevant to this determination.

The Union relies on decisions of this Office in support of its request that a lesser penalty be substituted for that of discharge. In **CROA&DR 3944** a Rail Traffic Controller with over thirty years of service had his discipline for unauthorized use of a cell phone reduced where the Company had allowed limited use of land lines for personal calls. In **CROA&DR 4035** the discharge of an equipment operator was reduced to a last chance

opportunity. And in **CROA&DR 4090** a conductor violated his track occupancy limits when he was distracted by viewing photos on his cell phone. The employee had over twenty-six years of service and a clear record at the time of the incident. He was reinstated with a substituted suspension for his time out of service.

In this case the severity of the discipline is commensurate with the conduct. As stated in **CROA&DR 3900** the use of cell phones and communication devices while on duty "simply cannot, as a general rule, be permitted among employees responsible for the movement of a train. "

The Grievor was watching a video on an iPad, fully distracted from his duty to operate the train. Further, he denied that he was doing so. The Grievor knew that he should not be using his iPad while on duty on the train. In addition to that being obvious when operating a train, the Company made this instruction abundantly clear through its strict rules, directives and the 2010 letter indicating that the penalty of discharge would be assessed for this infraction. The conduct was serious and dangerous. In these circumstances, and in light of the infraction engaged in, the penalty of discharge is appropriate.

Accordingly the discharge is upheld and the grievance dismissed.

February 10, 2016

MARILYN SILVERMAN
ARBITRATOR