

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

**CASE NO. 4497**

Heard in Montreal, October 11, 2016

Concerning

**CANADIAN NATIONAL RAILWAY COMPANY**

And

**UNIFOR COUNCIL 4000**

**DISPUTE:**

The assessment of forty demerits and subsequent discharge for accumulation of demerits to K. Hearn, PIN 156514, for his failure to follow General Rule 9.1 (g) Electronic Communication Devices defined in the Intermodal Safety Manual by bringing his cell phone into the terminal work area and subsequently using his cell phone on September 7, 2015, while working as an equipment operator at Brampton Intermodal Terminal.

**JOINT STATEMENT OF ISSUE:**

On September 9, 2015, a formal investigation was conducted with Mr. Hearn for his use of a cellular device while on duty on September 7, 2015. Subsequent to the investigation, Mr. Hearn was assessed 40 demerits and discharged for accumulation of demerits.

The Union contends that the assessment of 40 demerits and discharge was unwarranted, without merit and discriminatory in that the Company did not give consideration to the mitigating factors. The Union requests the grievor's reinstatement to service without loss of seniority and that he be made whole for all losses.

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.) J. Darby**  
Labour Relations Associate

There appeared on behalf of the Company:

J. Darby	– Labour Relations Associate, Toronto
S. Blackmore	– Senior Manager Labour Relations, Edmonton
G. Robb	– Intermodal Terminal Coordinator, Brampton

And on behalf of the Union:

R. Fitzgerald	– National Staff Representative, Toronto
M. Robinson	– Regional Representative, Mississauga
K. Hearn	– Grievor, Barrie

## **AWARD OF THE ARBITRATOR**

1. This case involves an analysis of two issues: i) did just cause exist for Mr. Hearn's termination? and ii) did Mr. Hearn's raising of a medical issue at the time of his termination impose a duty to accommodate?

2. For the reasons expressed herein, the arbitrator concludes that the Canadian National Railway Company (CN) had cause to terminate Mr. Hearn, given the culminating incident and the latter's already high number of demerit points. Similarly, on the facts of this case, Unifor Council 4000 (Unifor) did not raise a *prima facie* case of discrimination.

### **Facts**

3. At the time the events leading to termination took place, Mr. Hearn had already accumulated fifty demerit points. Thirty of those points had been imposed for his violation of the Brampton Intermodal Terminal (BIT) policy on Personal Communication Devices ("Policy"). For safety reasons, due to the work taking place at BIT, cell phones cannot be taken into the work area.

4. Mr. Hearn worked as an intermodal equipment operator at BIT. This role included loading heavy containers on and off trains or trucks. He would also move the containers to and from BIT storage areas.

5. On September 7, 2015, BIT managers observed Mr. Hearn with his head looking down at something while in a shunt truck. They thought he was putting a cell phone into his back pocket. When Mr. Hearn exited the truck, he denied having a cell phone. One manager found a cell phone nearby on the ground. When they called Mr. Hearn's cell phone number, the phone vibrated. Mr. Hearn initially denied it was his cell phone, but later admitted that fact.

6. During the subsequent investigation, Mr. Hearn produced a September 8, 2015 doctor's note which indicated that he carried "his cell phone on him partly for medical reasons". A September 10, 2015 doctor's note indicated Mr. Hearn was fit to return to work with no restrictions. Mr. Hearn indicated he had used his cell phone to text his brother in relation to a medical issue.

7. Mr. Hearn undertook to contact his cell carrier to provide evidence of his text messages, but did not produce this material. While CN suggested this raised an adverse inference, no evidence was led that a carrier could produce that type of information.

8. On September 18, 2015, CN assessed forty demerits points to Mr. Hearn and terminated his employment due to the overall accumulation of ninety demerit points. On October 20 and 30, 2015, Unifor provided further medical information to CN on Mr. Hearn's behalf. Unifor provided Mr. Hearn's medical records from CN's Occupational Health Department at the hearing.

**Did just cause exist for Mr. Hearn's termination?**

9. This office has previously noted that the security risk presented by cell phones and other devices can hardly be understated for employees performing safety sensitive work:

[CROA&DR 3900](#). The arbitrator takes Unifor's point that that particular case dealt with the running trades.

10. Nonetheless, Mr. Hearn's work certainly involved many safety issues given the sheer size of the containers he had to lift and the number of employees working at BIT. It is the distraction a cell phone causes to the work at hand, even if an employee is not driving when checking his cell phone, that raises significant safety concerns.

11. In [CROA&DR 4032](#), a case involving a first offence for inappropriate cell phone use, Arbitrator Picher reduced the demerit points assessed from forty-five to thirty points.

12. Given the state of the jurisprudence, Mr. Hearn's initial attempts to avoid liability and his fifty demerit points at the time of the September 7, 2015 incident, the arbitrator has not been convinced to reduce the penalty to such an extent that Mr. Hearn would not have exceeded the sixty-demerit level.

**Did Mr. Hearn's raising of a medical issue at the time of his termination impose a duty to accommodate?**

13. The arbitrator agrees with Unifor that in some situations employees may fail to come forward with sensitive medical issues to explain otherwise unacceptable behaviour such as poor attendance. A disability arising from drug or alcohol use is a common example.

14. However, it is not just the existence of a diagnosis, including treatment, which engages an employer's duty to accommodate. The employee or his/her trade union must, on a balance of probabilities, first demonstrate that a *prima facie* case of discrimination exists<sup>1</sup>. Unifor must demonstrate three things: i) that the cell phone safety policy affected Mr. Hearn differently from other employees; ii) that a connection existed between a prohibited ground and that differing affect; iii) and that the distinction impacted Mr. Hearn's full exercise of his protected rights.

15. If a *prima facie* case exists, then the employer can put in evidence that accommodation was not possible without undue hardship.

16. In this case, Mr. Hearn's doctor's short note suggested his cell phone use on September 7, 2015 was related in part to his diagnosis. On September 10, 2015, however, the same doctor indicated Mr. Hearn was fit for work without any restrictions. This limited evidence calls into question the existence of any disability during the relevant time frame.

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<sup>1</sup> [Quebec \(Commission des droits de la personne et des droits de la jeunesse\) v. Bombardier Inc. \(Bombardier Aerospace Training Center\), \[2015\] 2 SCR 789, 2015 SCC 39 \(Bombardier\)](#)

17. For the sake of argument, even if a disability existed, Unifor would still have to show “that the ground in question was a factor in the distinction, exclusion or preference”: *Bombardier* at paragraph 52. The evidence does not disclose how Mr. Hearn’s situation, even if it involved a disability, was a factor in CN’s decision to terminate his employment. CN terminated Mr. Hearn for his continued failure to abide by the Policy and for his initial attempts to hide the fact he had been using his cellphone.

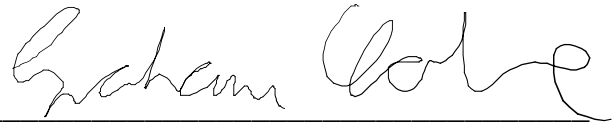
18. Unifor produced other medical information which Mr. Hearn had provided over the course of his employment to CN’s Occupational Health Department. That confidential information is evidently not shared with others at CN due to its highly personal and sensitive nature. Unifor also provided two additional October, 2015 short notes from Mr. Hearn’s doctor.

19. Mr. Hearn’s additional medical evidence, even if admissible, similarly did not demonstrate that any alleged disability was a factor in CN’s decision to terminate his employment. The evidence only shows that Mr. Hearn’s violation of the safety sensitive Policy resulted in the culminating incident which led to his dismissal.

20. In [Ad Hoc 638](#), Arbitrator Schmidt came to a similar conclusion when the evidence failed to show a connection between the grievor’s medical situation and the conduct at issue.

21. For the above reasons, this grievance is dismissed.

November 14, 2016

A handwritten signature in cursive script, appearing to read "Graham Clarke", written in black ink.

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**GRAHAM J. CLARKE**  
**ARBITRATOR**