CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4760

Heard via Video Conferencing, September 9, 2020

Concerning

BOMBARDIER TRANSPORTATION

And

TEAMSTERS CANADA RAIL CONFERENCE – DIVISION 660

DISPUTE:

By letter dated September 14, 2018, employee D. Walker was informed by the employer, in part, that "*This letter is in reference to an investigation held on August 30, 2018 regarding your alleged failure to comply with the Bombardier Cell Phone Policy on August 20th, 2018. The results of this investigation revealed that you did in fact fail to comply with the Bombardier Cell Phone Policy on August 20, 2018. As a result of this non-compliance, the Company has no alternative but to terminate your employment effective September 14, 2018."*

JOINT STATEMENT OF ISSUE:

By letter dated October 24, 2018, the Union filed a Step 3 grievance as follows; "The Union appeals the dismissal of employee D. Walker.

A close review of the grievor's file reveals an absence of previous discipline at the time of the September 14, 2018 letter's issuance. The Union notes that the grievor has over eighteen (18) years of service with Bombardier. Our records indicate the grievor has maintained a good work record during his service.

We believe that the company has failed to properly apply the principles of progressive discipline and that the penalty assessed fails to take into account significant mitigating factors and is ultimately excessive.

Further, the August 20, 2018 formal employee statement revealed that, while the grievor was by his own admission in violation of the policy, he was motivated by an effort to expedite service and operations on the property when receiving delivery shipments.

A review of other cases handled by this office regarding alleged cell phone use by our members reveals a significant difference in the historical assessment of discipline by the company and the immediate case.

For the reasons stated above, as well as any other provisions of the collective agreement and/or relevant legislation which may be applicable, the union requests that the grievor be reinstated to the employment of the company, with redress for all loss of wages/and or benefits.

Thank you for your time and attention to this matter, I look forward to discussing the merits of our position at the step 3 meeting."

The parties met for a Step 3 meeting on August 20, 2018, and the Company has not provided a Step 3 response.

On August 16, 2019, the Union provided the Company with a proposed Joint Statement of Issue, which was executed by the Company on September 23, 2019.

During the course of ongoing discussions aimed at resolving this dispute, and following the decision of Arbitrator Hornung as set out in CROA 4739, the Union advocated the grievor to be reinstated to the Company's employ, and that he be made whole, less a fifteen (15) day unpaid suspension. The Company, while agreeable to reinstatement, suggested the grievor be made whole for a period of six (6) months, and the remaining duration (approximately eighteen months) remain as an unpaid suspension.

By way of Memorandum of Settlement dated August 7, 2020, the parties agree to terms that allowed for the grievor to return to work and advance the quantum of discipline as the remaining issue at dispute, as follows:

"…The Company and the Union agree, without prejudice or precedent to the following as complete and final resolution in the matter of the above.

Mr. Walker shall be reinstated without loss of seniority effective August 10, 2020.

Mr. Walker's termination will be removed from his disciplinary record and his record will reflect a suspension without pay * from September 14, 2018 until such time he returns to work.

Mr. Walker shall be returned to his former classification of Labourer B.

Mr. Walker's job assignment shall be governed by the new Displacement article, Article 22 in the Collective Agreement.

*Note: the duration of unpaid suspension shall be determined by award resulting from the Arbitration process…".

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) G. Vaughan	**(SGD.) A. Ignas**
General Chairperson	Manager, Human Resources

There appeared on behalf of the Company:

T. O'Hearn-Davies	– Counsel, Norton Rose Fullbright, Toronto
A. Ignas	– Manager, Human Resources, Toronto
J. Eledridge	– Senior Manager, Maintenance, Toronto

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
G. Vaughan	– General Chairperson, Toronto
S. English	– Vice General Chair, Toronto
S. Keene	– Consultant, Toronto
Mr. Walker	– Grievor, Toronto

AWARD OF THE ARBITRATOR

1. The facts, as stated above, are not in dispute. In a nutshell, the Grievor was observed using his cell phone while at work. In his investigation, it emerged that he was aware of the Company's strict cell phone policy nevertheless, he had been using his cell phone repeatedly at work. He explained that he did so in an effort to accommodate the expectations of driver's when delivering shipments to his floor and to expedite his service.

2. Following the investigation, the Grievor was dismissed from his employment. Subsequent thereto, through negotiations with the Union, the Grievor was returned to work leaving appropriate discipline as the only issue outstanding.

3. As stated in Daley **CROA 4739**:

> *The Arbitrator is fully aware that, given the safety sensitive nature of the railway operations, companies have become appropriately concerned with the use of cell phones which can be very distracting. Accordingly, the Company has imposed a strict no cell phone rule at their work place.*
>
> *While the Company's strict policy is understandable, the discipline imposed for a breach of its cell phone policy must not only be consistent but reasonably exercised in all of the circumstances.*

4. As noted by Arbitrator Piche in **CROA 3900**:

> *… railways are among the most highly safety sensitive industries in Canada. Running trades employees are called upon to operate trains on a twenty-four hour, seven day a week basis. The two person crew generally in the cab of a locomotive, being a locomotive engineer and a conductor, operate trains which can extend to great lengths and tonnage. They do so in a system which involves both double track*

> *and single track territory, where the use of crossovers and sidings to allow meets with trains CROA&DR 3900 – 29 – moving in the opposite direction is an everyday occurrence. They operate in a system of complex signals and switches where alertness in the control of a train free of distractions is of paramount importance. Finally, they operate in unsupervised conditions, frequently hauling dangerous goods through various kinds of territory, including both environmentally sensitive countryside and densely populated areas.*
>
> *…*
>
> *… arbitral jurisprudence has recognized that given the particular safety sensitive nature of railway operations there must be an inevitable balancing of interests between the … rights of employees and the interests of a railway employer to ensure safe operations. That reality may justify a railway in taking certain initiatives designed to detect and deter employee conduct that may pose a threat to safe operations. That principle was expressed as follows by this Arbitrator in SHP 530, reported as Re Canadian National Railway Co. and Canadian Auto Workers; United Transportation Union, Intervenor (2000), 95 L.A.C. (4th) 341 (M. G. Picher) at p. 378: …*
>
> > *The more highly risk sensitive an enterprise is, the more an employer can, in my view, justify a proactive, rather than a reactive, approach designed to prevent a problem before it manifests itself. While more stringent thresholds may fairly be applied in non-safety sensitive work settings, as for example among clerical or bank employees, boards of arbitration should be cautious before requiring documented near disasters as a pre-condition to a vigilant and balanced policy of drug and alcohol detection in an enterprise whose normal operations pose substantial risks for the safety of employees and the public.*

5. The point that the parties, in their submissions whole heartedly agree on, is that the appropriate discipline depends on the circumstances of each case ("*every cell phone case turns on its own facts*").

6. While the circumstances here do not involve drug or alcohol detection, the principles enunciated both **CROA 4739** and **CROA 3900** equally apply.

7. In **CROA 4739**, I concluded that ordinarily the Grievor's circumstances would warrant a 15-day suspension but because of the extenuating circumstances it was increased to 30 days. By that comment (which I allow was somewhat gratuitous), I did not mean to infer that a 15-day suspension would be the acceptable "norm" for a first cell phone offense. The comment should not be interpreted as diluting the principle that each case must turn on its own facts and merits.

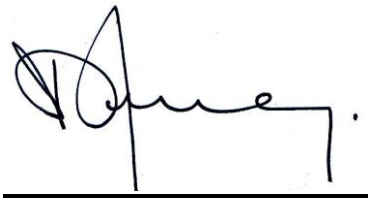
8. In the present case, the Grievor is 63 years old and had over 18 years of service when he was dismissed. For the purposes of this matter, he had no disciplinary record. In addition to those factors, the Grievor allowed that up to a year prior to the incident he was using his cell phone (with the knowledge of some supervisors) to expedite the delivery processes at the shop.

9. The facts reveal that shortly prior to the incident, on June 3, 2018, the Grievor had attended a safety talk regarding the use of cell phones. The position of the Company was made clear as was its existing policy which prohibited staff to have cell phones on the shop floor.

10. In my view, even though the Grievor was able to provide some explanation for having his cell phone with him approximately a year prior to the incident in order to facility delivery operations, the breach of the policy in the current circumstance was clear.

11. In light of the safety sensitive nature of the industry; the clarity of the Company's policy; and, the necessity for corporations to send a signal to their employees that the no cell phone policy is a critical work place policy, I am of the view that the appropriate discipline for the Grievor's offence, given all of the circumstances, is a 30-day suspension without pay and without loss of seniority.

12. The Grievor will be made whole and I shall remain seized with respect to the interpretation, application and implementation of this award.



September 21, 2020

RICHARD I. HORNUNG, Q.C.
ARBITRATOR