

# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

## CASE NO. 4740

Heard in Montreal, June 9, 2020

Concerning

**BOMBARDIER TRANSPORTATION**

-And-

**TEAMSTERS CANADA RAIL CONFERENCE – DIVISION 660**

### **DISPUTE:**

By letter dated June 12, 2018, employee A. Galmani was informed by the employer, in part, that “we have concluded that your performance is not meeting the Company’s expectations during your probationary period; therefore we regret to inform you that we have no other alternative at this time but to terminate your employment with Bombardier”.

### **THE COMPANY’S EXPARTE STATEMENT OF ISSUE:**

By letter dated July 25, 2018, the union filed a Step 3 grievance as follows; The Union appeals the termination of employment of Akbar Galmani.

It is the Union's position that the company has acted in an arbitrary manner in assessing the discipline against the grievor. The grievor attended a formal employee investigation on May 29, 2018, surrounding "alleged failure to comply with the Cell Phone Policy on May 3rd, 2018". A cursory review of the company's policy reveals that the content is excessively broad and does not accurately reflect the accepted practice on the property. While the policy provides that "Requirements specific to some activities / areas are defined" as well as "signage visible at site level", the union is unable to find any such definitions within company literature or visible signage at the work locations.

It is the union's view that the investigation revealed the grievor was unclear as to the application of the company's cell phone policy. The testimony provided by the grievor during the May 29 investigation was not refuted by the company's investigating officer. We have been unable to find any evidence indicating that a supervisor/manager spoke with the grievor following the alleged incident of May 3, contrary to the company's own policy requirements.

Additionally, the company was unable to provide the grievor with a secure location (locker) for the purpose of securing his personal belongings until after the alleged incident which prompted the investigation. The Union believes this to be a significant mitigating factor which has gone overlooked by the Company.

Notwithstanding the above, the Union notes that some twenty-six {26} days passed from the time of the alleged incident and the taking of the formal employee investigation. We are also unable to find any evidence suggesting the grievor was provided any coaching or instruction following the alleged incident of May 3/18.

The June 12 letter of dismissal issued to the grievor indicates, in part; "We have concluded that your performance is not meeting the Company's expectations during your probationary period; therefore we regret to inform you that we have no other alternative at this time but to terminate your employment with Bombardier"

The Union notes there is no reference to the May 29/18 investigation contained within the letter of dismissal. Incidentally, the evidence relied upon by the company during the investigation was limited to documentation surrounding alleged cell phone use. By failing to address the issue of the alleged cell phone usage of May 3/18 with the grievor in a timely manner as well as failing to provide sufficient and specific training on the application of the policy relating to the duty location(s) and task(s). It is further our position that the company has also acted in bad faith.

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 immediately re-instated and be made whole for any/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, after which the company corresponded with the union declining the appeal and maintaining the dismissal of the grievor.

**FOR THE UNION:**  
**(SGD.) G. Vaughan**  
General Chairperson

**FOR THE COMPANY:**  
**(SGD.) A. Ignas**  
Manager Human Resources

There appeared on behalf of the Company:

D. McDonald	– Counsel, Norton Rose, Toronto
A. Ignas	– Manager, Human Resources, Toronto
J. Eldridge	– Senior Manager, Maintenance, Toronto
J. Bassett	– Counsel, Norton Rose, Toronto

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
G. Vaughan	– General Chairperson, Toronto
S. English	– Vice General Chairperson, Toronto
S. Keene	– Consultant, Toronto
A. Galmani	– Grievor, Toronto

### **AWARD OF THE ARBITRATOR**

1. Akbar Galmani, (the "Grievor") commenced employment with the Company on April 23, 2018 as an Equipment Maintainer – a safety sensitive role having regard to his job involving maintenance repairs and testing.

2. On April 24, 2018, the Grievor attended training regarding the Company Cell Phone Policy and executed an acknowledgment confirming his attendance and his understanding of his responsibilities as it pertained to the policy (Company Tab 3).
3. On May 3, 2018, the Grievor was receiving further training. The trainer split the employees receiving training into two groups. While the second group was being trained, the Grievor was outside the consist and was observed by the trainer using his cell phone to take photographs.
4. After advising the Grievor, and the remaining trainees, that the Company's Cell Phone Policy prohibited them from having their phones on their person while working on the shop floor or in the yard, the trainer informed his Supervisor and Manager of the incident.
5. Thereafter, on May 29, 2018, the Grievor was called to attend an investigative meeting wherein he confirmed that he used his cell phone, in the manner described, to take a photo of the consist for his personal use. He allowed that he was aware of the cell phone policy and that compliance with the policy was mandatory.
6. He, nevertheless, explained that it was not made clear that he could not have his phone on his person; or, which areas the prohibition of its use applied. And that, given that his group had finished its training and was waiting outside, he believed he was using the phone "*outside of work*".

7. The Company, having regard to its firm position on the prohibition of the use of cell phones at the work place - and considering the fact that the Grievor, at the time, was a probationary employee - terminated him for just cause on June 12, 2018. (Company Tab 5).

8. The Union grieved, arguing that considering the Grievor's explanation; his genuine remorse and apology; and, the circumstances surrounding the use of his cell phone, the Company's response was disproportional. It requested the dismissal to be set aside.

9. The Company's objection to the timeliness of the grievance is dismissed for the same reasons set out in **CROA 4739**.

10. The Grievor was a probationary employee at the time of his dismissal. The Collective Agreement between the parties provides, at Article 10.2:

*It is understood and agreed that dismissal of a probationary employee is a decision of the Company. However, such dismissal of a probationary employee shall be for just cause understanding that the standard for cause relating to a probationary employee is lower than that of a non-probationary employee.*

11. The position taken by this Office relative to probationary employees was examined by Arbitrator Picher in **CROA 3731** wherein he states:

*It is well settled that boards of arbitration do not lightly interfere with the decisions of employers with respect to the termination of newly hired employees during the course of a probationary period. The governing principles were summarized as follows in CROA 1568:*

*It is common ground that the standard of proof required to establish just cause for the termination of a probationary employee is substantially lighter than for a permanent employee. The determination of "suitability" obviously leaves room for a substantial discretion on the part of the employer in deciding whether an employee should gain permanent employment status. ... It is sufficient to say that, at a minimum, the Company's decision to terminate a probationary employee must not be arbitrary, discriminatory or in bad faith. It must be exercised for a valid business purpose, having regard to the requirements of the job and the performance of the individual in question.*

12. I accept the position, as discussed in **CROA 4445**, relative to the seriousness of the use of cell phones in a safety sensitive environment such as the railway. There, the arbitrator concludes:

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

*...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. ... "*

...

*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.*

(See also **CROA 4032**)

13. Given the circumstances, I am satisfied that there was no discrimination or bad faith exhibited by the Company in exercising its discretion to dismiss the Grievor for a breach of its cell phone policy during his probationary period.

14. Further, considering that the Company is entitled to establish strict rules and impose severe levels of discipline to bring home the importance of enforcing its cell phone policy - and, that the standard to determine just cause for probationary employees is lower than that of non-probationary employees - it cannot be said that the enforcement of that rule, in the present circumstances, is arbitrary.

15. Having regard to the fact that the severity with which the Company regards a breach of its cell phone policy, and the fact that the Grievor's breach occurred during his probationary period - within a timeframe almost immediately after he was trained relative to the cell phone policy - I am unable to conclude that it is appropriate for me to interfere with his dismissal.

16. In the circumstances, the grievance is dismissed.

June 30, 2020

A handwritten signature in black ink, appearing to read 'R. Hornung', with a horizontal line underneath it.

**RICHARD I. HORNUNG, Q.C.  
ARBITRATOR**