CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4030

Heard in Montreal, Thursday, 14 July 2011

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of Mr. D. Lovett.

JOINT STATEMENT OF ISSUE:

By way of form 104 dated January 19, 2011, the grievor was dismissed from Company service for various alleged rules infractions including (1) his involvement in a Cardinal Rules violation on the Laggan Subdivision on November 24, 2010; (2) his having a personal electronic device on his person while operating a tamper; and (3) a Rule G violation. A grievance was filed that objected to the discipline assessed and to the reasons used by the Company to support its actions.

The Union contends that: **(1)** The grievor is a long service employee who started with the Company in 1978 and who was discipline free at the time of the incident. **(2)** The grievor was not under the influence of drugs or alcohol while at work. **(3)** Mitigating factors existed that should have served to reduce the discipline assessed. **(4)** The grievor's dismissal was unfair and unwarranted.

The Union requests that the grievor be reinstated into Company service forthwith without loss of seniority and with full compensation for all financial losses incurred as a result of his unjust dismissal.

The Company denies the Union's contentions and declines the Union's request.

FOR THE UNION:

(SGD.) WM. BREHL
PRESIDENT

FOR THE COMPANY:

(SGD.) S. SEENEY
DIRECTOR, INDUSTRIAL RELATIONS

There appeared on behalf of the Company:

M. Goldsmith	– Manager, Labour Relations, Calgary
B. Lockerby	– Labour Relations Officer, Calgary
W. Schuerman	– Labour Relations Officer, Calgary

There appeared on behalf of the Union:

Wm. Brehl	– President, Ottawa
D. W. Brown	– Counsel, Ottawa
A. R. Terry	– Vice-President, Lethbridge
A. Della Porta	– Director, Montreal

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, beyond controversy, that Mr. Lovett did violate a number of rules. Firstly, it appears that as the grievor was proceeding to a storage track on his Chase tamper at the end of the working day the brakes on his machine locked up and he was unable to move it any further. It appears that he tried for several minutes to revive the braking system, but without success.

Mr. Lovett's machine was the first in a series of machines moving towards the storage track. He was followed by a hy-rail truck which was proceeding behind him in a reverse direction with two persons aboard. Unfortunately, Mr. Lovett made no attempt to inform the operator of the truck that he was stopped on the track, whether by radio by hand signal and as a result the truck collided into his tamper.

One of the passengers in the hy-rail vehicle was Assistant Track Maintenance Supervisor Harvey Pardy. When Mr. Pardy encountered Mr. Lovett after the collision he formed the opinion that Mr. Lovett's eyes were glossy and that his speech seemed slurred. According to his report "I smelled something like smoke on Doug and thought it

might be the smell of marijuana." Based on that report Superintendent of Track Renewal, Tim Voykin, asked the grievor to submit to a substance test, which he agreed to do. The urinalysis test which he took proved positive for drugs. Although the report provided does not specify the nature of the drug, it does not appear disputed that the grievor had a positive reading for the consumption of marijuana. Following an investigation Mr. Lovett was discharged for having failed to signal his stopped machine to the occupants of the hy-rail vehicle who were following him, having a personal telephone on his person while he was operating the tamper and for a violation of Rule G.

While the Arbitrator can appreciate the Company's concerns, the evidence presented in the case at hand falls short of establishing, on the balance of probabilities, that the grievor was impaired by marijuana or any other drug at the time of the collision. At most a urinalysis test would indicate the consumption of marijuana at some point in the previous thirty days, with no indication as to the precise time of consumption or the amount consumed. Nor, in the Arbitrator's view, do the symptoms of glassy eyes or slurred speech necessarily suggest the consumption of marijuana, being more commonly associated with the consumption of alcohol. Obviously, a cheek swab test could have confirmed or ruled out impairment with some precision. However that test was not utilized by the Company and the urinalysis test which it opted to use simply cannot be said to establish that the grievor was impaired at the time or that he had otherwise violated CROR Rule G.

I am satisfied that the Company has clearly demonstrated that the grievor was in violation of operational rules by failing to properly signal to the ensuing vehicle that his tamper machine was stopped on the track, and that he also violated rules by having a personal electronic device on his own person while he was operating the tamper. The sole issue is whether those infractions merit the assessment of discharge in all of the circumstances.

In the Arbitrator's view there are a number of mitigating factors which need to be taken into account. Hired in 1978, the grievor has some thirty-three years of service with the Company. While it is true that the Company made efforts to communicate to employees the seriousness of personal cell phone use while working, there is some question as to whether the severity of discipline which might result was in fact communicated to him. The unchallenged representation of the Union is that the Company Policy RM1002 was communicated to employees, in part, by mailing some two weeks prior to the date of the incident here under discussion. As the grievor was then working in the field, and not at home where he would be receiving mail, there is some question as to whether he was fully aware that the mere possession of a cell phone could be viewed as a dismissable offence. It is also true, as noted by the representatives of the Union, that the grievor's cell phone was not used during his tour of duty on the date in question. While that does not excuse his violation of the rule, it does have a mitigating effect. Also mitigating is the fact of a number of other cases in which cell phone use has resulted in discipline in the form of the assessment of demerits, rather than outright discharge. (See, e.g., **CROA&DR 3987**).

In the Arbitrator's view, given the length of the grievor's service, his prior disciplinary record is relatively positive, save for an earlier dismissal which was rescinded by the Company for conduct entirely unrelated to safe operating. While it is also true that he received thirty demerits for a collision incident in 1996, his record was clear at the time of the current incident of November 24. 2010 and since 1996 he had been disciplined only once, receiving ten demerits for a vehicle infraction in 2006.

The Arbitrator readily appreciates the Company's right to establish strict rules with respect to the possession and use of cell phones or other recreational devices while on the job, and to place employees on notice that any infractions in that regard will be treated with most severe levels of discipline. However, I am not persuaded that the instant case is such as to merit the dismissal of an employee of thirty-three years' service with a relatively positive employment record. In my view the substitution of a lengthy suspension will be sufficient to bring home to the grievor the importance of respecting safe operating rules, including the rule against personal communication devices.

The grievance is therefore allowed, in part. The Arbitrator directs that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation of wages and benefits lost. The period between his termination and reinstatement shall be recorded as a suspension on his record for the collision which he caused on the Laggan Subdivision on November 24, 2010 and for his having been in

possession of an personal electronic device on that date while operating a tamper. Any reference to the Rule G violation shall be struck from his record.

July 21, 2011

(signed) MICHEL G. PICHER
ARBITRATOR