

AH 714

IN THE MATTER OF AN ARBITRATION

BETWEEN

**CANADIAN PACIFIC RAILWAY
("Company")**

AND

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
SYSTEM COUNCIL NO. 11
("Union")**

Re: Grievance of Alan James Mulder

ARBITRATOR: John M. Moreau QC

Appearing for The Union:

Denis Ellickson	- Counsel, Caley Wray
Lee Hooper	- General Chairman
Steve Martin	- Senior General Chairman
Alan Mulder	- Grievor

Appearing for The Company:

Diana Zurbuchen	-Manager, Labour Relations
Francine Billings	-Manager, Labour Relations
Cory Wogrine	-Assistant General Manager, S & C Operations

A hearing was held in Calgary, Alberta on August 27, 2020

EX PARTE STATEMENT OF ISSUE OF THE UNION

DISPUTE:

The dismissal of S&C Helper Alan Mulder

Following a statement taken on November 19, 2019, Mr. Mulder was dismissed on November 26, 2019 for the following reasons:

Your tour of duty on October 29, 2019, more specifically, the personal cell phone found in your CP assigned truck, in violation of:

- Policy H&S 4320 – Use of Electronic Devices
- Engineering Safety Rule Book - Use of Electronic Devices

Notwithstanding the above incident is worthy of dismissal in and of itself, based on your previous discipline history, including the Arbitration award # AH 684, this incident also constitutes a culminating incident which warrants dismissal.

UNION POSITION:

The Union contends that the investigation was not conducted in a fair and impartial manner as per the requirements of the Collective Agreement regarding the acceptable standards for an investigation. The Company failed to obtain statements or evidence from clearly relevant witnesses. For these reasons the Union contends that the discipline is null and void and ought to be removed in its entirety.

The Union further contends that there is no cause for discipline in the circumstances or, in the alternative, that the penalty of discharge is excessive and unwarranted. Mr. Mulder was separated from his personal belongings for approximately 90 minutes prior to being cited for an alleged violation of the Company's Electronic Device Policy. To the extent there was any violation of the Policy – which is denied – it was at most a technical violation and the Grievor was not responsible for any such violation.

The Union seeks removal of the discipline, that Mr. Mulder is made whole and that he is reinstated to his former position of S&C Helper. In the alternative, the Union seeks Mr. Mulder's reinstatement on terms deemed appropriate by the Arbitrator.

The Company has not responded to the Union's contentions in the manner required by Article 12 of the Collective Agreement.

EX PARTE STATEMENT OF ISSUE OF THE COMPANY

ISSUE:

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Preliminary Objection:

The Company objects to the following reference in the Union's Ex Parte Statement:

“The Company has not responded to the Union's contentions in the manner required by Article 12 of the Collective Agreement.”

The Union was provided with the ability to review the Grievance response. Despite their assertion to the contrary, the Union's lack of appreciation in the way the response is delivered to them, does not equate to a lack of response.

Further, as the Union is well aware, any attempt to bring this issue in front of an Arbitrator in the context of this grievance would be inappropriate, an expansion of the Union's issues, and only serve to delay the proceedings as this separate issue currently lies in the jurisdiction of another Arbitrator.

Notwithstanding the aforementioned, the Company disagrees and denies the Union's request.

The Company maintains the Grievor, while working his tour of duty on October 29, 2019, was found culpable of violating Policy H&S 4320 – Use of Electronic Devices, Engineering Safety Rule Book – Use of Electronic Devices and the terms of his last chance employment opportunity as ruled by Arbitration Award Ad Hoc #684, when he was found culpable of having his personal cell phone in his CP assigned vehicle while on duty.

The Company maintains after a fair and impartial investigation was conducted, culpability was established and the quantum of discipline of the Grievor's dismissal was appropriate, given the circumstances. The Company maintains the incident was worthy of dismissal in and of itself. Fair and impartial questions were asked during the statement, which allowed the Grievor to respond accordingly.

Notwithstanding the aforementioned, the Company also maintains the incident constituted a culminating incident, warranting dismissal and that based on the Grievor's previous discipline history, including the last chance opportunity terms rendered in Arbitration Award AH 684 the dismissal was an appropriate outcome.

Accordingly, the Company maintains no violation of the Wage Agreement has occurred and the dismissal should not be disturbed.

AWARD

PRELIMINARY OBJECTION RULINGS

The Union argued at the outset of its submissions that the Company was in violation of the collective agreement given its failure to ensure that discipline was imposed after a fair and reasonable investigation. The Union submits that both Jeff Piush, the Assistant Director of the S & C Operations Centre in Winnipeg, and Foreman Melanie Panych, and arguably employee Chuck Lamoureux, should have been in attendance at the investigation given that it is the Company's obligation to notify all material and necessary witnesses to appear at the grievor's investigation. The Union notes that it was Ms. Panych in particular that allegedly first observed the cell phone on the vehicle's centre console, which is the crux of the Company's case against the grievor.

The Company notes that that the grievor and his union representative acknowledged at the outset of the investigation having received the Memorandum from Mr. Piush as well as the policy on the Use of Electronic Devices. The grievor acknowledged that he had time to review the documents. He was also asked if he wished to “refute, rebut or comment on” the documents. The grievor took the opportunity at that point to provide detailed responses to the allegations in the Piush memorandum (See items 1 to 7 below).

The importance of making timely procedural objections at disciplinary investigations, or risk waiving the right to object, has been a longstanding practice ruling of this office. See **CROA 4341, CROA Ad Hoc 521**. In my view, the grievor could have at the outset of the investigation requested that Mr. Piush appear in person, as well as Ms. Panych, if he wished to delve further into the concerns raised in his reply comments to the Piush memorandum, or if he wished to ask questions of Ms. Panych. I find there has been no violation of Article 12.

I am also not prepared to find that the grievance should be upheld as a result of the Company’s failure to respond to the grievance. The Company filed its Step II response through its electronic GMS system, a system which was implemented by the Company without the Union’s consent. The late Arbitrator Weatherhill issued a decision on September 25, 2019 which found that the Company’s implementation of the system violated the collective agreement. The Company has filed a judicial review of that decision which is currently before the courts on reserve judgement. Given the status of this matter

before the courts, I am not prepared to make any further findings of a procedural nature on this point. The Union's request to have the grievance upheld on the grounds that of the Company's failure to respond to the grievance is denied.

FACTS AND ANALYSIS

This is a credibility case. The grievor, who was employed as an S & C Helper, was directed to drive his company assigned vehicle L11252 on October 19, 2019 from Brandon, Manitoba to the Company's Weston Shops Building 11¹ in Winnipeg. It was the last day of his work cycle and he started his shift at 07:00.

After performing his vehicle inspection in Brandon, the grievor drove to Winnipeg, arriving at Building 11 that morning at approximately 09:00. The grievor indicated at his investigation that he had a personal bag with him and that he left it on the front passenger's seat for the trip from Brandon to Winnipeg. He stated that his cell phone, with his ear phones attached, were in a side pouch of his bag.

The grievor was assigned several duties after his arrival at Building 11. Later that morning, Ms. Panych took vehicle L11252 previously assigned to the grievor and drove it to a service centre where she picked up her co-worker, Chuck Lamoureux. Mr. Lamoureux, who provided a written statement and testified in these proceedings, estimates that he was picked up by Ms. Panych at around 12:00. The grievor testified that he was not in possession of the vehicle for approximately 90 minutes that morning prior to the time Ms. Panych picked up Mr. Lamoureux at the service centre.

¹ It was agreed that the reference to Building 10 in the grievor's interview should have been to Building 11.

Mr. Lamoureux testified that he got into the drivers' side of the vehicle after Ms. Panych arrived at the service centre. Mr. Lamoureux recalled that he was pretty sure that he saw a bag in the back seat of the truck as he entered the vehicle. Mr. Lamoureux further recalled that there was a cell phone in the cup holder console between the front seats. He stated that the cell phone was turned on and the ear phones were plugged into the cell phone.

Once both Ms. Lamoureux and Ms. Panych were seated in the vehicle, Mr. Lamoureux recalled that Ms. Panych telephoned Mr. Piush. Mr. Lamoureux indicated in his statement that Ms. Panych called Mr. Piush "*to let him know what was going on*". In his testimony, Mr. Lamoureux explained that Ms. Panych spoke with Mr. Piush with her cell phone to her ear during the conversation. He could not hear the responses from Mr. Piush to Ms. Panych during the call.

Under cross-examination, Mr. Lamoureux stated that he was sure Ms. Panych made a phone call, and that she was told during that call to go to building 11. He could not recall whether Ms. Panych mentioned to Mr. Piush during the call that she had found a cell phone in the centre console of the vehicle.

Mr. Piush was also called to testify in these proceedings. His version of events is set out in a statement that he testified was typed out in his office shortly after the incident. His statement reads:

Oct 29/ 2019

At 10:45, October 29, 2019, I was at building 17 to perform spot inspections on my crew's trucks. I asked Foreman Mel Panych who was the driver of L11252 and she said Alan Mulder. I asked Alan to come over to the vehicle for an inspection. As I opened the front driver's door on L11252, I noticed a Samsung cell phone sitting in the middle console with the screen facing the driver's seat. I then open the rear door on the driver's seat. I then opened the rear door on the driver's side. As I opened the rear door, Alan suddenly stepped up into the driver's seat and started to gather things up. I asked Alan what he was doing and he responded "just getting some of my personal items out of the way". He placed the items in the driver seat. I then noticed that one of the items he had grabbed was the cell phone. The cell phone was on and had earbuds plugged into it.

I asked Alan why he had a personal cell phone turned on with earbuds plugged into sitting in the center console, in the truck he was driving. Alan said that the cell phone was sitting on the passenger seat and someone must have put it in the console. He then said that he was using his personal cell phone to listen to music before the start of his shift and forgot to turn it off and put it away.

I asked Mr. Mulder if he was aware of the company cell phone policy. He replied "yes". Alan approach me a few minutes later and apologized for having his phone on. At [t]his time he disclosed that he was on probation and knows better.

The grievor took issue at his investigation with a number of assertions in Mr. Piush's Statement. He stated in that regard:

Q 05 is there anything in these appendixes and you wish to refute, rebut or comment on?

A 05 Appendix 1 – I don't agree with the statement I claimed responsibility for the CP truck. I hadn't driven the vehicle within the past 90 minutes.

Appendix 2 –1) These inspection occurred at building 10 not building 17 as stated in appendix 2.

2) Jeff's Quote "**I asked foreman Mel Panych who was the driver of L11252 and she said Alan Mulder**" in regards to the statement Jeff Piush watched as Chuck and Melanie drove up to building 10 prior to the inspection.

3) Jeff's Quote: **"I asked Alan to come over to the vehicle for an inspection. As I opened the front door on L11252 I noticed a Samsung cell phone sitting in the center console with the screen facing the drivers seat."** With respect to this statement I was not asked to come over for an inspection I went into the vehicle to check on my personnel keys, wallet and gym bag with my personnel belongings I had left on the passenger seat. I seen my bag in the back and keys and wallet in the center console as well as my phone now. Which I gathered up and went to put in my bag. The reason why I had went into the track for my personal keys was because they had been confiscated by Jeff Switzer due to an incident on Oct 22nd. I had to go thru several attempts to locate them and escalate to my manager before they were provided to me a week later.

4) Jeff's Quote **"I asked Alan why he had a personal cell phone turned on with earbuds plugged into sitting in the center console, and the truck he was driving"**. In respect to the statement I told Mr. Piush I had only driven the vehicle from Brandon to Winnipeg and hadn't been in the vehicle since I arrived at building 10 approximately 90 minutes earlier.

5) Jeff's Quote: **"Alan said that the cell phone was sitting on the passenger seat and someone must have put it in the console."** In respect to that statement I told Mr. Piush that my phone was in my personal bag that I had on the passenger seat which was now in the back and that it wasn't where I had left it before other employees had driven the vehicle.

6) Jeff's Quote: **"He then said he was using his personal cell phone to listen to music before the start of the shift and forgot to turn it off and put away"** In respects to this statement I said my phone was in my bag on the passenger seat and that it wasn't where I had left it. I had attempted to turn my phone off in the morning before work but apparently had only put it into reset mode.

7) Jeff's Quote: **"Alan approach me a few minutes later and apologized for having his phone on"**. In respects to this statement I approached Jeff Piush after he spoke to the crew about the cell phone policy and tried to explain the situation better. Mr. Piush said he didn't want to hear any excuses which left me with no opportunity to discuss that any further.

The Union submits that the grievor was targeted for his prohibited cell phone use as a result of the phone discussion between Ms. Panych and Mr. Piush while Ms. Panych and Mr. Lamoureux were travelling back from the automotive service centre. The Union alleges that Mr. Piush used the excuse that he was performing spot inspections on his crews' vehicles when in fact he was well aware from a discussion with Ms. Panych that she had found the grievor's cell phone in the console of vehicle L11252 which had been assigned to the grievor earlier that day. Mr. Piush was in fact specifically asked by counsel for the Union, in his thorough cross-examination of Mr. Piush, whether he received a call from Ms. Panych telling Mr. Piush that she found a cell phone in the centre console of the vehicle which belonged to the grievor. Mr. Piush stated in response that it was "completely incorrect" that he was told by Ms. Panych that she found the grievor's cell phone in the centre console of the vehicle.

Counsel for the Union notes that Ms. Panych was a key witness to the events. Her evidence is critical in the Union's view regarding whether Mr. Piush had prior knowledge about the cell phone when she and Mr. Lamoureux pulled up to Building 11. The Union asserts that an adverse inference should be drawn from the Company's failure to investigate what discussions took place between Ms. Panych and Mr. Piush prior to her arrival with Mr. Lamoureux at Building 11. Counsel for the Union also notes that Mr. Piush's testimony was unreliable given his mistaken belief, for example, that he was performing spot inspections at Building 17 and not at Building 11, as set out in his statement.

The classic statement on assessing credibility is found in the often-quoted statement of O'Halloran J.A. recently cited by Arbitrator Casey in *City of Calgary v. CUPE, Local 38* 2014 CarswellAlta 583 at p.8:

The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in these conditions.

There are a number of questions about the grievor's behaviour and his responses at the investigation which bear on the issue of credibility. Mr. Piush wrote in his statement of October 29, 2019, which he testified was written out shortly after his encounter with the grievor, that he noticed a cell phone in the middle console upon opening the door after Ms. Panych and Mr. Lamoureux returned the vehicle. He indicated in his statement that he asked the grievor why his cell phone with the earbuds plugged in were sitting in the center console to which, according to Mr. Piush's statement, the grievor replied "*that the cell phone was sitting on the passenger seat and someone must have put it in the console*".

At the investigation, the grievor maintained that he did not say to Mr. Piush that the cell phone was on the passenger seat, as Mr. Piush claims in his statement, but rather that he told Mr. Piush that the phone was in his personal bag which he had earlier placed on the passenger seat. The grievor also stated at the investigation that he told Mr. Piush during their discussion that someone who had possession of the vehicle after his arrival from Brandon had moved his bag from the passenger side of the vehicle to the back.

The grievor was asked at his investigation why his earphones were plugged into his phone when they were found in the centre console. The grievor replied that he had forgotten to unplug them earlier that morning when he packed his bag before leaving his room in Brandon. He also stated that he “...had attempted to turn my phone off in the morning before work but apparently only put it into reset mode.” The grievor was also asked directly at the investigation whether he was alleging that someone had gone into his bag and removed his cell phone. The grievor replied “No”. The grievor was then asked the following series of questions:

Q 25: So if no one removed your cell phone from your personal bag then how would they have ended up in the console of the vehicle?

Q 25: I don't know. The bag was moved to the back seat. I was not in that vehicle for approximately 90 minutes.

Q 26: In Question 13 you state that the cell phone was in your personal bag. Are you implying that someone removed it from your bag and put it in the console?

A 26: I don't have an answer for that account I was not in the vehicle for approximately 90 minutes and someone else was in possession of the vehicle during that time.

Q 27: Who would have access to the vehicle during the 90 minutes you were away from it?

A 27: Chuck Lamoureux and Melanie Panych.

Q 28: Was there anything else that was removed or moved from your personal bag?

A: 28: My keys and wallet were outside my personal bag on the passenger seat and the cell phone was in the bag in the side pouch.

In my view, to begin with, the grievor's account about not knowing that his cell phone was left on does not stand up to scrutiny. Knowing of the disciplinary consequences for driving with his cell phone on, particularly given his precarious employment situation, it is unlikely that he would not have thought to ensure his cell phone was turned off ahead of his two-hour trip. I find that his excuse that he had attempted to turn his phone off that morning before leaving on his trip is unlikely given that one typically watches their cell phone screen to ensure the device has been properly turned off when doing so. Based on the evidence before me, I find that it is more likely than not that the grievor knowingly left Brandon that morning with his cell phone on.

Mr. Lamoureux was clear that he noticed that there was a bag in the back seat when he entered the vehicle. There is no mention in his written statement that there was any discussion of the bag location with Ms. Panych when he entered the vehicle. Given that he had a two-hour trip ahead of him from Brandon to Winnipeg and bearing in mind the evidence of Mr. Lamoureux in his statement about observing the grievor's bag in the back of the truck and viewing the cell phone in the cupholder of the console, I find that it is unlikely that the grievor ever placed his bag in the front seat when he left Brandon as he claims.

The more reasonable and likely conclusion based on the evidence before me is that the grievor placed the bag in the back of his truck after removing his phone and kept his phone handy in the front seat for use along the way from Brandon to Winnipeg.

The only other explanation that in my view can be drawn from the grievor's evidence at his interview is that either Ms. Panych or Mr. Lamoureux removed the cell phone from the grievor's bag and placed it in the console. As the grievor himself noted (Q/A 27) at his investigation, Ms. Panych and Mr. Lamoureux were the two individuals that had access to the vehicle for the 90 minutes the vehicle was not in his possession.

There is no evidence, however, that either of these employees, or for that matter Mr. Piush, harbored any ill-will towards the grievor. Nor is there any reliable evidence that Ms. Panych conspired with Mr. Piush to set up the grievor by removing his cell phone from his bag and placing it in the centre console, as the Union argues. That theory is highly unlikely particularly when weighed against the more reliable evidence that it was the grievor himself who had initial custody of his cell phone, that Mr. Lamoureux noticed it in the centre console when he got into the truck and that it was found in the centre console when Mr. Piush began his inspection of the vehicle.

Rather than come clean about his responsibility for placing the cell phone in the centre console, which he knew might jeopardize his employment, I find that the grievor elected instead to create a version of events that placed responsibility for his predicament on the alleged efforts of Ms. Panych and Mr. Piush to entrap him by removing the cell phone from his bag and placing it in the console cupholder. That unfortunate allegation goes to the root of whether the grievor can be trusted in the future.

Overall, I would add that I accept Mr. Piush's account as he set out in his statement. The statement is a contemporaneous summary of his observations and discussions with the grievor, having been typed out shortly after the incident. Although Mr. Piush was mistaken on some things such as the number of the building where he met up with Foreman Panych, I find that he generally was honest and forthright in his testimony and was prepared to admit that the investigation had its shortcomings. I note in that regard that he admitted and that he could have, for example, more properly documented the approximately 90 minutes when the vehicle was not in the grievor's possession.

CONCLUSION

The grievor has an unenviable disciplinary record and was subject to a Last Chance Agreement at the time of his termination. The grievor, as evidenced by his comments to Mr. Piush that he was on probation, took the risk of driving his vehicle with his phone on next to him in the centre console and the ear phones attached-a clear breach of the Company's cell phone policy. He then went on to deny his culpability and claim that the accusations against him amount to a targeted conspiracy created by Mr. Piush and Ms. Panych.

Given the grievor's breach of the Company's cell phone policy, his lack of candour, his relatively short career of 6 years of service, his disciplinary record and the fact that he was subject to a Last Chance Agreement, I see no basis to mitigate the discipline.

The grievance is dismissed.

Dated at Calgary, this 14th day of September, 2020



JOHN M. MOREAU, Q.C.

