

**IN THE MATTER OF AN ARBITRATION**

BETWEEN:

**CANADIAN PACIFIC RAILWAY COMPANY**

(the "Company")

- and -

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

(the "Union")

**Re: Darren Miller Suspension**

**Arbitrator**

Richard I. Hornung, Q.C.

**For the Company**

Diana Zurbuchen - Manager Labour Relations

Ivette Suarez - Labour Relations Officer

Nick Gaber - Assistant Director S&C Operations

Cory Wogrinc - Assistant General Manager S&C Operations

**For the Union**

Denis Ellickson – Counsel

Lee Hooper – General Chairman

Randy Roberts – Local Representative

Darren Miller - Grievor

**Hearing**

December 1, 2020

Calgary, Alberta

## I

1. On March 29, 2020, Signals and Communications (S&C) Maintainer Darren Miller (the "Grievor"), was issued a 20-day suspension, as follows:

*... A formal investigation was conducted on March 25th, 2020 to develop all the facts and circumstances surrounding your Mobility overage charges. Please be advised that you will be responsible for the full payment of the mobility overcharges that you incurred. The monetary amount owing is TBD as the Company is still negotiating with the service provider. At the conclusion of the investigation, your culpability was established regarding your unauthorized personal use of your Mifi device from the month of January 2020. A violation of:*

*Fin 5111 – Mobile Communications Procedures  
FIN 4110 – Mobile Communication Policy (Tab 1)*

2. The Company received a \$30,000.00 cell phone account in February 2020 which it ultimately traced to data usage, by the Grievor, on a Company Mifi device in January, 2020. After the Company satisfied the Grievor that it was the Mifi assigned to him, he acknowledged that he had taken it to Cuba on a family vacation in January and offered to pay for the charges.
3. There is no dispute that the Grievor breached the Company's policies, as enumerated above. He accepted responsibility. The only issue is the appropriate quantum of discipline to be assessed.

**Circumstances**

4. As part of the requirements of his job, the Grievor is provided with mobile communication devices. One of them included a Mifi - a wireless router that generates a mobile hot spot allowing other devices to connect to the internet for wireless data. S&C Maintainers use the Mifi to upload their daily reports and inspections as well as the time worked.

5. In February 2020, the Company was notified that a Company device had run up more than 30GB of international data and 150GB of domestic data in the January billing period. This resulted in an account for \$30,000 of data usage charges.
6. The evidence was that the average monthly usage for CP employees is approximately 5GB. In the month that the Company was billed the \$30,000, the Grievor's Mifi was used approximately 36 times more than the average employee. For perspective, 1GB of data will allow a person to browse the internet for approximately 12 hours, to stream songs or watch 2 hours of standard-definition video.
7. Although the Grievor offered to pay the account, his offer was not immediately accepted in that his Supervisor advised that the full amount was under negotiation and that the Company would get back to him. Prior to the investigation, when he was advised that the Company had reduced the amount to \$15,000, the Grievor asked: "who do I write the cheque to?" Ultimately the Company was able to negotiate a reduced amount to \$750.
8. According to the Grievor, the events leading up to the Mifi being connected in Cuba are somewhat convoluted. The Grievor purchased Ipads for his girlfriend's two daughters at Christmas. On December 30, 2019 there was a major power outage in the Shuswap which knocked out all of the power as well as the internet. The devices were originally hooked up at his home to allow the girls to log on with their Ipads and help calm them down. He explained:

*I suggested to calm the kids down to hook the kids' Ipads to the Mifi in order that they could watch a show and calm themselves and go to sleep. The ages of the kids are 3 and 4. Only having a few candles in the house, they were scared and freaking out, so I thought allowing them to watch a movie it would calm them down.*
9. When asked at what point he removed access to the two personal computers after December 30, 2019, he replied that (Q.28):

*I went to work and basically once the internet and power came back on, I felt that they were on the house internet. This was 3-day outage, so that last thing on my mind was the Ipads and which internet they were on. I also had the Mifi with me while at work, so I was unaware what internet they were on when I returned.*

10. His explanation of how the Mifi ended up in Cuba (and ran up the bill) was as follows: (Q.13):

*It was Thursday, payday, I had a few tests left to get finished before leaving. I ran out of time after finishing the tests to put in my time in test. I had to go pick up my girlfriend and her kids to proceed to Kelowna. So I took my laptop and my Mifi with me to enter my time and my tests. Then I proceeded to the airport. I put my Mifi in with the other electronics and proceeded off to Cuba.*

11. He explained the while in Cuba the Mifi: “... *must have latched onto my electronic devices*” because, as he was subsequently told by a Telus representative, once you put the password in for a device and you get close enough, the computer will automatically connect to the stronger signal. He believes that while in Cuba, the young girls’ devices latched onto his Mifi since the hotel had a weaker signal.
12. Mr. Miller acknowledged his actions were in violation of the Company Mobile Device Policy and concluded the statement by stating that he “[*totally*] *owned this whole thing and I am willing to pay.*” (Q & A 35).

## II

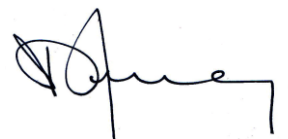
### DECISION

13. As pointed out by the Union’s Counsel (and reflected by his Disciplinary Record) the Grievor has an impressive record with the Company. He has a seniority date of September 30, 1991 with his last discipline imposed 24 years prior to the present suspension.
14. While I am impressed by the Grievor’s discipline free record - and have taken it into consideration - I am unable to conclude that the discipline imposed by the

Company is unreasonable in the circumstances here. I say this because I am not convinced, on a balance, that the Grievor's explanation of the usage being accidental, is credible.

15. No objection, or contrary evidence, was offered to refute the Company's contention that a single GB of data would allow a person to browse the internet for around 12 hours. The Grievor's usage was more than 30 GB of international and 150 GB of domestic data.
16. At the hearing, the parties allowed that the batteries in the Mifi device will, on average, power it for 6 hours before it needs to be recharged. Simple arithmetic leads to the conclusion that the Grievor had to have recharged the Mifi while he was in Cuba.
17. Although I accept that he may have inadvertently taken the Mifi with him to Cuba, the fact that it operated for the period of time that the Company was billed, satisfies me, on balance, that the Grievor was aware – or reasonably should have been – that the Mifi was being used in Cuba. His culpability in that respect cannot be deflected nor can his responsibility for – what amounted to - the misappropriation of the Company's Mifi for his personal use.
18. In the circumstances, I conclude that the discipline imposed by the Company is within the realm of reasonable and should not be interfered with.

Dated this 18<sup>th</sup> day of February, 2021.

A handwritten signature in black ink, appearing to read 'Richard I. Hornung', with a stylized flourish at the end.

Richard I. Hornung, Q.C.  
Arbitrator