CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4734

Heard in Montreal, May 12, 2020

Concerning

ONTARIO NORTHLAND TRANSPORTATION COMMISSION

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Assessment of 95 demerits resulting in termination for excess of 60 demerits of Motor Coach Operator W. Matson for failure to follow Company policy, obey the distracted driving laws and Company regulations on August 5, 2019.

JOINT STATEMENT OF ISSUE:

On August 5, 2019, while operating Coach 5501 on trip 3/2, a passenger sitting in the front seat took a picture of Motor Coach Operator William Matson holding his cell phone while operating the coach and subsequently posted it on social media. The Company became aware of the posting and took action suspending Operator Matson pending investigation.

On August 12, 2019, Mr. Matson was required to attend a formal employee statement for his alleged involvement in the utilization of a handheld device while operating a motor coach.

On August 15, 2019, Mr. Matson was required to attend a supplemental investigation. Immediately following the supplemental investigation, Mr. Matson was assessed notice in writing that his employment was being terminated effective immediately.

Union's Position:

The Union asserts that under article 23.1 of the Collective Agreement, Mr. Matson was denied a fair and impartial hearing on August 12, 2019.

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Notwithstanding the above, the Union contends that, on a balance of probabilities, the Company did not meet the burden of proof in this instance.

In the alternative, the Union submits that there are mitigating factors to consider in this instance. Mr. Matson is a long service employee.

The Union contends that the discipline assessed is unwarranted, and in any event, excessive under the circumstances. The Union requests the discipline be removed from Mr.

Matson's record in it's entirely and he be made whole. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

Company's Position:

After reviewing the Step 3 grievance and its related documents, the Company maintains that there was no violation of the Collective Agreement and has therefore denied the grievance at Step 3.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) M. Smalling	**(SGD.) D. Baker**
General Chairperson	Director, Human Resources

There appeared on behalf of the Company:

G. Ryans	– Counsel, Filion Wakely, Toronto
D. Baker	– Director Human Relations, North Bay
N. Filiatrault	– Human Resources Generalist, North Bay
K. Grube	– Senior Manager Bus Operations, North Bay
E. Segriff	– Manager Motor Coach Services, North Bay

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
M. Smalling	– General Chairperson, Division 910, North Bay
P. Boucher	– Genearl Chairperson, Central Region LE, Trenton
W. Matson	– Grievor, North Bay

AWARD OF THE ARBITRATOR

The grievor began his service with the Company in 2004 as a motor coach operator and has worked for the Company in North Bay, Timmins and Sudbury, Ontario. The grievor has one prior disciplinary offence. He was issued 45 demerits and a two-day suspension on February 6, 2019 for a similar offence of using his cell phone while operating a motor coach on January 29, 2019. The Union filed a grievance over the January 29, 2019 incident and it was ultimately resolved by reducing the demerit points to 30 demerits on the understanding that the grievor maintained a clean record for a period of six months (through to July 31, 2019). This was the first and only occasion the grievor had been disciplined during his career prior to the most recent incident on August 5, 2019.

On August 5, 2019, the grievor was operating a coach on a route between North Bay to Matheson, and then returning from North Bay to Matheson in a different coach. The Company conducted an investigation after it became aware of a photo from a passenger's Facebook posting showing the grievor on August 5, 2019 holding his cell phone in his left hand with the screen appearing to be lit up. The grievor, in response to this social media posting, completed an Occurrence Report for the Company where he wrote *"heard, saw leaving Swastika my phone slip off the small window sell (sic) left side. I grab the phone put in my pocket. Heard a click, she took a picture…".*

The grievor also wrote in the Occurrence Report that he had not used his cell phone since the previous incident (January 29, 2019) *"After the last Q/A about cell phone I have not used cell phone. If you were (sic) call history no call made".*

During the initial investigation on August 12, 2019 the grievor stated that *"he heard something raddle on the window ledge so I picked the phone up".* He added that he looked at the screen before putting it in his pocket but did not unlock his phone. The grievor also confirmed during the initial investigation that he *"did not make a phone call"* using his PDA during his August 5, 2019 assignment.

The grievor turned over his cell phone to the Company at its request after the initial investigation of August 12, 2019. A supplementary investigation was then held on August 15, 2019. The grievor confirmed at the outset of the supplementary investigation

that he had turned over his cell phone to the Company on August 13, 2019 and then indicated that there *"…should be a call around to my wife from the garage at 3:30*…". The grievor then denied making any further phone calls from the coach on August 5, 2019.

The grievor was then shown an excerpt from a security video which showed that he had called his wife while he was on assignment operating his coach on August 5, 2019.

The grievor was issued 90 demerits for the incident in keeping with the ONTC's discipline policy of issuing double the previous amount of 45 demerits for a second offence of cell phone use while driving a motor coach.

The Union maintains that the grievor was denied procedural fairness because the Company did not introduce the video evidence of his phone call to his wife until midway into the supplementary investigation on August 15, 2019. The Union cites several awards from this Office to support its submission that a breach of the procedural fairness provision of a right to a fair and impartial investigation renders the discipline void *ab initio*. **See CROA 1475, 1734 and 3061 and 4558**. The Company maintains that the grievor was fully represented during the investigation, that he knew the reason for the investigation and had a full opportunity to provide his own evidence and explanations.

I note that Article 23.2 does not state that the employee has the right to receive all evidence in advance of the investigation but rather has the right to hear all the evidence at the investigation itself:

> 23.2 He/she may select a fellow employee to appear with him/her at the investigation and he/she and such fellow employee *will have the right to hear all of the evidence submitted,* and will be given an opportunity through the presiding officer to ask questions of witnesses whose evidence may have a bearing on his/her responsibility, questions and answers to be recorded. He/she will be furnished with a copy of his/her statement taken at the investigation. (italics added).

In **CROA 2073**, a decision cited by the Company, three witness reports of an allegedly inebriated grievor were only shown to the grievor at the investigation itself: "It is not disputed that all three of the statements were shown to the grievor and his representative at the investigation." This often-quoted passage below also makes it clear that the investigation does not contemplate a full-blown trial exercise:

> As previous awards of this Office have noted (e.g. CROA 1858), disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defence. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline. In the instant case, for the reasons related above, I am satisfied that that standard has been met.

The grievor attended the supplementary investigation knowing that the Company had the opportunity to review his cell phone use while on duty. The grievor nevertheless asserted, without prompting, at the outset of his supplementary interview

that he had only used his cell phone at 3:30 p.m. from the garage. The Company then introduced the video showing the grievor speaking with his wife while operating the coach. There was no objection taken to the video's introduction at that point in the investigation. Nor do I find that the grievor suffered prejudice at that point given his earlier assertion that he had only used the cell phone at 3:30 p.m. This is not a case of a surprise ambush, as characterized by the Union. The grievor had several opportunities to admit to cell phone use on duty. Unfortunately, he was only prepared to acknowledge its use once confronted with the video evidence. As Arbitrator Mireault stated in a recent decision of this office, **CROA&DR 4732**:

> "The Union and the Grievor had the opportunity to respond to all the evidence provided by the Company".

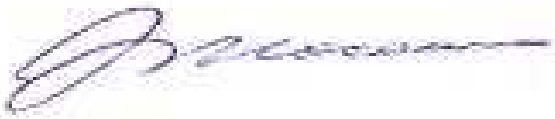
There is also evidence before the arbitrator of a Facebook photo taken by a passenger while the grievor was operating his coach on assignment. The grievor states that he was in the process of picking up his phone from the area next to the window ledge and only looked momentarily at his phone screen. Even a momentary look at his phone, when his eyes were focused on his phone screen and not on the road, is enough to establish that the grievor was in breach of both the Company policy and the law on distracted driving.

This is the grievor's second offence for distracted driving as a result of his cell phone use while on duty in less than seven months. I do not find that the discipline imposed by the Company to be a disproportionate response, particularly given the earlier disciplinary incident stemming from a similar cell phone policy breach. There is

also the aggravating factor that the grievor did not admit to calling his wife while driving his coach until confronted with the undisputed evidence from the video recording.

The grievor unfortunately did not learn a lesson from the first incident in January 2019. It would simply be unsafe and a clear risk to the public to allow the grievor a further opportunity to drive a motor coach given his repeated misuse of his cell phone while on duty.

Under the circumstances, I must deny the grievance.



June 11, 2020

JOHN M. MOREAU
ARBITRATOR