CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4739

Heard in Montreal, June 9, 2020

Concerning

BOMBARDIER TRANSPORTATION

And

TEAMSTERS CANADA RAIL CONFERENCE – DIVISION 660

DISPUTE:

By letter dated August 24, 2018, employee S. Daley was informed by the employer, in part, that

> "This letter is in reference to an investigation held on August 8, 2018 regarding your alleged failure to comply with the Bombardier Cell Phone Policy on July 18th, 2018.
> The result of this investigation revealed that you did in fact fail to comply with the Bombardier Cell Phone Policy on July 18th 2018.
> As a result of this non-compliance revealed, the Company has no alternative but to terminate your employment effective August 24, 2018".

JOINT STATEMENT OF ISSUE:

By letter dated October 23, 2018, the union filed a Step 3 grievance as follows;
The union appeals the dismissal of employee Sylvester Daley.

A close review of the grievor's file reveals an absence of previous discipline at the time of the August 24/18 letter's issuance. We believe that the company has failed to properly apply the principles of progressive discipline and that the penalty assessed is excessive.

In reviewing the company's cell phone policy referenced in the grievor's August 8/18 formal employee statement, the union has identified several aspects of the policy with which the company has failed to comply.

Section 6 (Training) of the company's policy, dated August 1, 2017, provides, in part;

> "The employer shall certify that employee training of individuals has been accomplished and is being kept up to date. The certification shall contain trainer's name, date, duration, and each individual's name. Training participation has to be documented and documents have to be filed for review in the individual's personnel file at HR or Training Department (if applicable)."

The union has been unable to find any record of the grievor receiving the training described within the company's policy, Indeed, such information was not made available prior to or during the

August 8/18 investigation, despite the company's investigating officer having committed to providing full disclosure.

The union notes that the grievor has over twenty (20) years of service with Bombardier. The absence of any reference to training having been provided under the current iteration of the policy, or the previous version(s), is in our view significant.

Further, the company's August 1/17 revision of the policy provides for signage to be visible at the site level. A recent review of the workplace by the union's representatives resulted in us being unable to locate any signage or direction, despite such placements being required under said policy.

A review of other cases handled by this office regarding alleged cell phone use by our members reveals a significant difference in the historical as5essment of discipline by the company and the immediate case.

It is the union's view that the company has acted in an arbitrary manner and conducted itself in bad faith by assessing the penalty of dismissal against the grievor.

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 re-instated to the employment of the company, with redress for al/loss of wages/and or benefits.

Thank you for your time and attention to this matter, hook 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, and to date the company has yet respond to the union's appeal.

FOR THE UNION:	**FOR THE COMPANY:**
(sgd.) G. Vaughan	**(sgd.) A. Ignas**
General Chairperson	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
S. Daley	– Grievor, Toronto

AWARD OF THE ARBITRATOR

1. On July 18, 2018 a client of the Company noticed the Grievor's cell phone being charged in a cab car. The Grievor was not in the cab car at the time; he was out performing his duties elsewhere.

2. Following an investigation which took place on August 8, 2018, the Company dismissed the Grievor on August 24, 2018 for his failure to comply with the Company's cell phone policy. The Union grieved and the Company denied the grievance.

3. Just prior to the hearing, the Company raised an objection regarding the Union's delay in proceeding with the grievance. There is no dispute that this issue/argument raised by the Company was not contained in the Joint Statement of Issue filed by the parties.

4. Article 6 of the ***Memorandum of Agreement Establishing the CROA & DR***, details the procedure that must be followed in processing a grievance before this Office. It makes it apparent that the jurisdiction of a CROA arbitrator:

> *"… shall be conditioned always on the submission of the dispute to the Office of Arbitration in strict accordance with the terms of this agreement*

5. Article 7 provides that:

> *A request for arbitration of a dispute shall be made by filing notice thereof with the Office of Arbitration not later than the first day of the month preceding that in which the hearing is to take place and on the same date a copy of such filed notice shall be transmitted to the other party to the grievance.*
>
> *A request for arbitration respecting a dispute of the nature set forth in section (A) of clause 6 shall contain or shall be accompanied by a "Joint Statement of Issue"…*

6. Thereafter, Article 10 directs that:

> *10. The joint statement of issue referred to in clause 7 hereof* ***shall*** *contain the facts of the dispute and reference to the specific provision*

> *or provisions of the collective agreement where it is alleged that the collective agreement had been misinterpreted or violated. In the event that the parties cannot agree upon such joint statement either or each upon forty-eight (48) hours notice in writing to the other may apply to the Office of Arbitration for permission to submit a separate statement and proceed to a hearing. The scheduled arbitrator shall have the sole authority* ***to grant or refuse*** *such application.*

7. It is apparent that the authors of the Memorandum intended that – as far as possible – the parties are to arrive at a Joint Statement of Issue (JSI) which fulfills the purposes of the same as described in the document. Failing which, the parties are required to apply for "permission" to file *Ex Parte* Statements.

8. In either event, the Memorandum is clear that the jurisdiction of the CROA arbitrator is limited by the contents of the JSI or the permitted *Ex Parte* Statements. In that respect, Article 14 provides as follows:

> ***The decision of the arbitrator shall be limited to the disputes or questions contained in the joint statement submitted by the parties or in the separate statement or statements as the case may be, or, where the applicable collective agreement itself defines and restricts the issues,*** *conditions or questions which may be arbitrated, to such issues, conditions or questions. The Arbitrator's decision shall be rendered in writing, together with written reasons therefore, to the parties concerned within 30 calendar days following the conclusion of the hearing unless this time is extended with the concurrence of the parties to the dispute, unless the applicable collective agreement specifically provides for a different period, in which case such different period shall prevail. (emphasis added)*

9. For the reasons here, and those enlarged on in **CROA 4744**, it is important that this office hold the parties to their agreement to ensure that one of the significant (perhaps the most significant) steps in the CROA process - the disclosure and negotiations that precede a hearing of a matter in order to arrive at a JSI - is followed.

10. The importance of the same is underscored by the letter of the CROA Committee sent to the Chief Arbitrator on December 1, 2004 which commented as follows:

> *As you are aware, traditionally in the CROA the principal means of proceeding before the Arbitrator has, historically, been by the filing of a joint statement of issue. The obligation to engage in the negotiation of a joint statement has, for many years, compelled the parties to cooperate in the identifying of issues to be presented to the Arbitrator, thereby avoiding allegations of surprise and the related risk of adjournments and delay. …*
>
> *…More fundamentally, a sustained departure from good faith efforts at fashioning a joint statement of issue has meant a departure from the positive influence of a long standing procedure that involved conciliatory and cooperative efforts between the parties as they proceed toward the hearing.*

11. Here, the Company's extensive argument relative to the Union's delay in filing the grievance, was not disclosed in the Joint Statement of Issue. In fact, long after the alleged delay would have become apparent, the Company agreed to a JSI which made no mention of its concern over the alleged delay. Accordingly, the Company's preliminary objection is dismissed.

12. The only remaining issue is whether or not the discipline imposed is reasonable in all of the circumstances.

13. The Arbitrator is fully aware that, given the safety sensitive nature of the railway operations, companies have become appropriately concerned with the use of cell phones which can be very distracting. Accordingly, the Company has imposed a strict no cell phone rule at their work place.

14. While the Company's strict policy is understandable, the discipline imposed for a breach of its cell phone policy must not only be consistent but reasonably exercised in all of the circumstances.

15. In the present case, the Grievor is 67 years old, married with four children (and six grandchildren). At the time of the incident, the Grievor had no active disciplinary record over 21 years of service. His job is that of a Rail Equipment Maintainer ("REM"). He works on the service, repair and maintenance of the Company's GTA operations. In that capacity, the Grievor does not move or operate any part of the equipment (trains, coaches etc.). Further, at all material times, the cab car in question was fully secured, tied down and connected to way side power.

16. At the investigation, the Grievor admitted his use of the cell phone. And, while it is apparent that at the time of the incident some of his answers to his Supervisor were sarcastic, the Grievor admitted at the investigation that he was aware of the Company's Cell Phone policy (Q. 6-10).

17. Given the facts, although his conduct was deserving of discipline, dismissal was a penalty far out of proportion with what would be reasonable in all the circumstances.

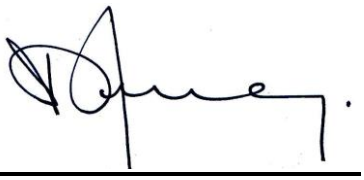
18. Ordinarily, I would have concluded that a fifteen day suspension would have been sufficient in the circumstances to send an exemplary signal to employees relative to the importance of compliance with the Company's cell phone policy. However, I

cannot ignore the "*in your face*" attitude that the Grievor displayed after being first confronted on the issue and in his investigation.

19. Accordingly, the grievance is allowed in part. The Grievor's dismissal shall be set aside and its place, he shall serve a suspension of 30 days.

20. The Grievor shall be made whole.

21. I shall remain seized with respect to the interpretation, application and implementation of this award.



June 30, 2020

RICHARD I. HORNUNG, Q.C.
ARBITRATOR