CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 3900

Heard in Montreal Tuesday, 11 May 2010

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

and

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the Company's formal requests for employees to disclose their personal communication device records.

JOINT STATEMENT OF ISSUE:

On March 22, 2010, the Company's Assistant Vice-President, Industrial Relations, wrote to the Union to advise of the Company's intention to request that employees produce their personal communication device records as a routine part of investigations into alleged incidents and/or accidents. The Union notes that this request has been made to employees under investigation prior to the letter from the Company to the Union.

The Union contends that this request is premature, improper and violates employees' privacy rights as well as their rights under the collective agreement, including the mandatory right to a fair and impartial investigation, the *Canadian Human Rights Act*, the *Canada Labour Code* and the Company's Discrimination and Harassment Policy and the *Canadian Charter of Rights and Freedoms*.

The Union seeks an order that the Company cease and desist from requesting that employees produce their personal communication device records and any other relief necessary to preserve and protect its members' privacy rights.

The Company disagrees and denies the Union's request.

FOR THE UNION:

(SGD.) D. R. ABLE
GENERAL CHAIRMAN

(SGD.) D. W. OLSON
GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) R. WILSON
FOR: VICE-PRESIDENT, CANADIAN OPERATIONS

There appeared on behalf of the Company:

R. Hampel	– Counsel, Calgary
A. Azim Garcia	– Director, Labour Relations, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Toronto
D. Able	– General Chairman, LE, Calgary
D. Fulton	– Sr. Vice-General Chairman, CTY, Calgary
G. Edwards	– Sr. Vice-General Chairman, LE, Revelstoke
T. Beaver	– General Chairman, LE, CP Lines East, Oshawa
S. Brownlee	– General Chairwoman, RCTC (observer), Stony Plain

AWARD OF THE ARBITRATOR

Can a railway ask its employees to provide copies of their personal wireless telephone records following a serious accident or incident? That is the issue raised in this grievance. The Company maintains that it should have the latitude to request such information as part of the investigative process in what it characterizes as a highly safety sensitive industry in which employees operate trains in a largely unsupervised environment. The Union maintains that the Company's request for any such information is unprecedented, is an improper attempt to expand the employer's investigative rights and is an unreasonably intrusive form of request which violates the privacy rights, human rights and Charter rights of employees and is contrary to the provisions of the collective agreement governing disciplinary investigations.

I

BACKGROUND

The parties are agreed that this matter is properly before the Arbitrator by means of a policy grievance following the announcement of the Company's intention to request employees to provide copies of the accounts or records of their cell phones, smart phones, Blackberries or similar devices in circumstances where a serious accident or incident remains otherwise unexplained. The Company's policy is expressed in a letter dated March 22, 2010 from Assistant Vice-President of Industrial Relations, Mr. Rick Wilson, delivered to the Teamsters Canada Rail Conference. That letter reads as follows:

> Monday March 22, 2010
>
> Mr. D. Able
> General Chairperson LE West
> Teamsters Canada Rail Conference
> 101 – 10820 24 Street, S.E.
> Calgary, AB, T2Z 4C9
>
> Mr. D. Dave Olson
> General Chairperson Trainpersons West
> Teamsters Canada Rail Conference
> 101 – 10820 24 Street, S.E.
> Calgary, AB, T2Z 4C9
>
> **Re: Formal Request For Release of Personal Communication Device Records**
>
> Dear Sirs,
>
> This has reference to recent discussions between our offices concerning the Company initiating requests for the release of employees' cell phone records.
>
> The purpose of this letter is to advise you of the Company's intentions to request the production of communication device records further to any significant accident or incident, provided there is no evidence that the act or omission of the employee involved could not have been a contributing factor to the accident/incident.
>
> According to both Canadian and U.S. regulation, as well as Company policy, personal communication devices must be turned off while on duty. Personal communication devices include any personal electronic device capable of communicating remotely, through oral communications, text messaging, electronic mail, or electronic transmission of any media. These include such

things as personal cell phones, blackberries, portable computers and similar devices.

While the Union may have privacy concerns, the Company has been clear that the detailed information surrounding the phone numbers called, or the contents of the text message may be blacked out. Our legitimate interest is in knowing when and where the communication devices were used in the context of investigating a significant accident or incident. When an employee is asked to produce these records, and does not, the Company can only draw a negative inference.

I trust that you understand the issues, and the need for all of us to protect the safety of our operation, and your members. The nature of the request protects the employee's privacy, while allowing the Company to fully determine the facts surrounding a significant accident or incident.

Should you wish to discuss please contact me.

Sincerely,

(signed) Rick Wilson
Assistant Vice-President
Industrial Relations

cc: Mr. Tim Beaver – General Chairperson LE East
Mr. Daniel Genereux – General Chairperson Trainpersons East

The Company's policy does not require employees to produce their personal telephone records under pain of discipline. The policy limits itself to stating that the Company may request employees to provide their cell phone or smart phone records as part of its investigation. Employees are at liberty to decline, but as reflected in Mr. Wilson's letter, they may do so at the risk of the employer drawing adverse inferences as to what those records might reveal. The issue in this grievance, therefore, is limited to the question of whether such a request is proper and lawful, having regard to the common law and statutory privacy rights of employees and to the terms of the parties' collective agreements.

II

COMPANY ARGUMENT

The Company submits that its concern, and the reason for its request of personal cell phone records, is amply justified by recent events in the railway industry, both within its own operations and in the operations of other railway employers. The Company cites an incident involving train 300-02 on March 3, 2010. That train operated east from Revelstoke to Field, British Columbia. In conditions of clear weather and unrestricted visibility at or about 14:15 hours the train operated past an advance clear to stop signal at Mile 40.4, then through a clear to stop signal at Mile 38.6 approaching Field, British Columbia. Those signals effectively communicated to the train's crew that they should anticipate a stop signal ahead. Train 300-02 nevertheless proceeded through the stop signal at Mile 37.0. That signal would have required the crew to stop their train on the North Track at KC Junction in the town of Golden, to allow an upcoming meet with another train. Westbound train 671-037 was then crossing over from the north track to the south track for the planned purpose of passing train 300-02 on its westward journey.

Download records indicate that the crew of train 300-02 passed the approaching head end of train 671-037 and still took no action to bring their train to a stop. At the last moment an emergency brake application was made, however train 300-02 broadsided the middle of train 671-037 at a speed of 27 mph. A substantial derailment ensued. Fortunately their were no fatalities, although it appears that the engineer on one of the trains was airlifted to Calgary for medical attention. That incident, occurring as it did in an urban setting, caused understandable adverse publicity, quite apart from the injuries,

the damage to the Company's equipment and customers' goods and the closure of the Company's main line in an obviously busy corridor.

Following the accident both the Company and the Federal Transportation Safety Board (TSB) undertook investigations of the collision. It is common ground that as part of its investigation the TSB required the train's crew members to provide copies of their cell phone records. It does not appear disputed that the Company does not have the regulatory investigative powers of the TSB. (See, **Canadian Transportation Accident Investigation and Safety Board Act**, S.C. 1989 c.3 ss.19, 21.)

In support of its newly announced policy to request employees to provide their cell phone records, the Company cites to the Arbitrator the results of an investigation into a commuter passenger train collision that occurred near Los Angeles, at Chatsworth, California on September 12, 2008. On that occasion a MetroLink commuter train and a Union Pacific freight train were involved in a head-on collision. That event caused twenty-five fatalities, injuries to 102 passengers and damages estimated to be in excess of $12,000,000. The report of the ensuing investigation of the National Transportation Safety Board (NTSB), issued on January 21, 2010 found that the locomotive engineer on MetroLink train 111 failed to respond to a clearly visible stop signal shortly before the head-on collision. The executive summary of the report states the following:

> The National Transportation Safety Board determines that the probable cause of the September 12, 2008, collision of a MetroLink commuter train and a Union Pacific freight train was the failure of the MetroLink engineer to observe and appropriately respond to the red signal aspect at Control Point Topanga because

> he was engaged in prohibited use of a wireless device, specifically text messaging, that distracted him from his duties. Contributing to the accident was the lack of a positive train control system that would have stopped the MetroLink train short of the red signal and thus prevented the collision.

The NTSB report reveals that the locomotive engineer on MetroLink train 111 had a text messaging relationship with a young person who was a railway buff. Between the time the commuter train left the maintenance facility until the accident in broad afternoon daylight at 4:22 p.m., that person transmitted some seven text messages to the engineer of train 111. The engineer responded to his correspondent with six text messages. He also made two cell phone calls, each lasting approximately 75 seconds, to two other persons during that time. The engineer was at all material times alone in the locomotive, with the conductor stationed in the last passenger car of the train. The record discloses that train 111 was to stop, in single track territory, west of Chatsworth Station to allow a Union Pacific freight train to enter an 11,300 foot long siding at CP Topanga, west of the Chatsworth Station. At 4:20 p.m., two minutes before the collision, Verizon Wireless records disclose that the conductor of the Union Pacific freight train transmitted a text message on his personal cell phone.

As the locomotive engineer of MetroLink train 111 approached Chatsworth he failed to call out approach signals which would have advised him of the stop signal soon to be encountered. At 4:21 p.m. he received the seventh text message from his railway buff correspondent. Less than one minute later, at 4:22 p.m. the locomotive engineer sent his sixth text message to that person, while his train proceeded at 44 mph, moving through a stop signal. Twenty-two seconds after the locomotive engineer's final text message MetroLink train 111, moving at 43 mph, collided head-on with the Union

Pacific freight train which was moving properly in accordance with its signals, at 41 mph. The death and destruction that resulted was devastating. The engineer of MetroLink train 111 was one of the twenty-five people killed.

The locomotive engineer of MetroLink train 111 was forty-seven years of age and had some ten years of experience with both Amtrack and MetroLink. While operating the MetroLink bi-level train, similar to Toronto's GO trains, he was under a Company prohibition against the use of cell phones or texting devices while on duty. He nevertheless operated his train while in possession of a wireless device capable of sending and receiving emails, text messages, downloading and playing both music and video files and receiving photographic images. The deceased locomotive engineer's wireless telephone records disclose that on the day of the collision, between 6:05 a.m. and 4:22 p.m. he sent or received a total of ninety-five text messages. He sent twenty-one text messages and received twenty-one text messages while operating his train, during which time he also made four outgoing telephone calls. During the afternoon of his split-shift on that day he sent six text messages and received seven while operating his train on its collision course.

It is fair to say that for the deceased locomotive engineer text messaging was obviously a deeply engrained habitual thing. Records reveal that in the twenty-eight day period before his death there were four days on which more than one hundred text messages were sent or received. While no such messages occurred on five separate days, the remaining nineteen days involved an average of forty text messages daily. As

indicated above, the engineer was also involved in the making of voice telephone calls while on duty. The deceased locomotive engineer's use of wireless devices while on duty, which the report concludes caused the loss of many lives, was in clear violation of the General Code of Operating Rules as well as Connex MetroLink Notice No. 17.08. Issued on July 8, 2008 that directive read, in part:

> **Electronic Devices:**
>
> The inappropriate use of electronic devices by employees on duty has been shown to be a contributing factor in personal injuries and rule violations. While you are working you are obligated to be completely focused on your job and the safe transportation of passengers. As a result, under most circumstances employees are prohibited from having personal electronic devices turned on and/or in their immediate vicinity while working.

The MetroLink incident prompted the Department of Transportation, Federal Railroad Administration, to issue an emergency order (FRA Emergency Order No. 26, Federal Register / Vol. 73, No. 195) on October 7, 2008. That report alerts the industry, listing several previous train collisions between 2000 and 2006 in which cell phone use was involved immediately prior to or at the time of the collisions, some of which involved fatalities.

The Company submits that in the wake of the MetroLink incident, and other serious incidents within its own operations, including at least one in which a Company train collided with customer equipment at a coal mine following a stop signal violation in which cell phone use by crews was admitted, the decision was made to issue the letter of March 22, 2010 reproduced above. It may be further noted that the Canadian Railway Operating Rules which govern all train operations in Canada include rules prohibiting

the use of personal communication devices for any purpose that is not work related. In that regard General Rule A provides, in part:

> GENERAL RULES
>
> A. Every employee in any service connected with movements, handling of main track switches, all switches equipped with a lock and protection of track work and track units shall;
>
> …
>
> (xi) while on duty, not engage in non-railway activities which may in any way distract their attention from the full performance of their duties. Except as provided for in company policies, sleeping or assuming the position of sleeping is prohibited. The use of personal entertainment devices is prohibited. Printed material not connected with the operation of movements or required in the performance of duty, must not be openly displayed or left in the operating cab of a locomotive or track unit or at any work place location utilized in train, transfer or engine control.
>
> (xii) The use of communication devices must be restricted to matters pertaining to railway operations. Cellular telephones must not be used when normal railway radio communications are available. When cellular telephones are used in lieu of radio all applicable radio rules must be complied with.

A subsequent addendum to General Rule A restates the prohibition against personal electronic devices and clarifies and limits the use of railway provided electronic devices, in the following terms:

> **<u>SSI to General Rule A – Add new SSI to A(xii):</u>**
>
> **Personal** electronic or electrical devices
>
> Except as provided for below, employees are prohibited from using all such devices; they must be turned off and any ear pieces removed. (Not applicable to medical devices such as hearing aids, etc.)
>
> **Railway provided** electronic or electrical devices
>
> Note: The terms electronic or electrical devices do not apply to devices used for, and directly relating to, safe railway operations; e.g.: railway radios, remote switches, etc.

(a) The employee controlling the engine or track unit is prohibited from using such devices:

(i) when in motion or

(ii) when any employee is on the equipment or track unit, outside the cab, or on the ground for related work activities.

(b) Other employees may use such devices when:

(i) inside the cab while in motion, only after all crew members or operator of the track unit, agrees it is safe to do so;

(ii) outside the cab only if:

– the employee is not foul of a track;

– the employee is not engaged in physical work related activities; and

– all crew members or operator of the track unit, confirm that operation will remain suspended until advised otherwise.

In all cases stated above, cellular telephones (personal or railway provided) may be used during emergencies or in lieu of radio during radio failure.

As can be gleaned from the foregoing, it appears to be acknowledged that personal electronic devices are a mixed blessing. Operating rules prohibit their use by employees while on duty while nevertheless recognizing their value in certain situations, such as emergencies or in the event of radio failures. It is, to that extent, understandable that the rules do not extend to absolutely prohibiting employees from being in the possession of cell phones or other personal communication devices while on duty in the operation of trains.

Counsel for the Company further draws to the Arbitrator's attention the employer's general policy on the use of electronic devices, a policy which extends to the

operation of motor vehicles. That policy, commonly referred to as policy RM 1002 made effective June 1, 2009 reads, in part, as follows:

Personal Entertainment Devices

Use of *Personal Entertainment Devices* on CP property is prohibited, subject to the exceptions listed below.

Communication Devices

Use of *Communication Devices* while operating vehicles, on-track rail equipment, or other mobile equipment; working *foul of track*; or when engaged in any physical activity while on CP property is restricted by the following:

A. In Canada, any *person* operating or working with on-track rail equipment or track units, or responsible for the control of on-track equipment (RTCs), is governed by CP's System Special Instruction to CROR General Rule A(xii).

B. In the U.S., any *person* operating or working with on-track rail equipment or track units, or responsible for the control of on-track equipment (dispatchers), is governed by GCOR Rule 1.10

C. Any *person* who is operating a *vehicle* on CP property or on any public or private roadway is prohibited from using any **hand held** *communication device* while the vehicle is in motion. Drivers must safely park their vehicle before making or retrieving calls or messages.

D. Any *person* who is operating or assisting in the operation of any type of *mobile equipment* on CP property is prohibited from using any *communication device* while that equipment is in motion. Operators must stop the equipment in a safe location before making or retrieving calls.

E. Any *person* performing *physical work* on CP is prohibited from using any *communication device*. That person must stop working, notify any other persons they are working with, and position themselves in a safe location not *foul of track* before making or retrieving calls.

Exceptions

- *Personal Entertainment Devices* may be used while on duty in an office, or similar environment, with the approval of the supervisor or other person in charge.

- *Communication devices* may be used at any time to transmit an emergency situation or to advise others of an unsafe condition.

- *Communication devices* may by used by CP Police at any time, or by other persons when responding to an emergency situation or incident, but only when safe to do so.

- Railway supplied radios are excluded if;

  (a) They are used solely for company business; and

  (b) It is safe to do so; and

- Hands free *communication devices* are excluded it;

  (a) They are used solely for company business; and

  (b) It is safe to do so; and

  (c) If a vehicle is being operated, it is NOT on a public roadway in a state, province, or other jurisdiction where such use is in violation of any law or regulation.

  Note: You are strongly discouraged from using any hands free communications device while driving, particularly in dense traffic and under poor road conditions or poor visibility.

  While hands free devices are permitted, they can still be a significant distraction while driving or working and extreme caution should be exercised. When possible, pull over and stop, have another person handle the call or let the message go to voice mail for later retrieval.

  [original emphasis]

The employer also cites some statistical studies relating to the relationship between cell phone use and motor vehicle accidents. Reference is made to an Australian study: *Role of Mobile Phone in Motor Vehicle Crashes Resulting in Hospital Attendance: A Case-Crossover Study* (McEvoy, Stevenson, McCartt, Woodward, Hayworth, Palamara and Cercarelli – BMJ, doi:10.1136/BMJ.38537.397512.55 - July 12, 2005). That study found that a driver's use of a mobile phone in the period up to ten minutes before a vehicle crash reflected a four fold increase in the likelihood of an accident. It was found that using a hands-free device made no difference. Reference is also made to a 2008 study of Britain's Transport Research Laboratory (no citation

provided) which found the reaction times of persons who were texting while driving fell by 35%, a result inferior to those whose blood alcohol content was at the legal limit (21% slower) and persons under the influence of cannabis (12% slower).

Further reference was made to a report issued by the Virginia Tech Transportation Institute dated July 27, 2009. That study found that the operation of light vehicles and cars while dialling a cell phone occasioned a risk of a crash or near crash event at a rate 2.8 times as high as found in non-distracted driving. Perhaps more significantly, in the operation of heavy vehicles and trucks, text messaging was found to raise the risk of crash or a near crash event to 23.2 times as high as for non-distracted driving.

Reference was also made to air transportation and a widely reported incident of two Northwest Airlines pilots who overflew their destination by 150 miles in October of 2009 because they were occupied operating their laptop computers. The Company additionally notes that on April 25, 2010 the US Federal Aviation Administration directed airline carriers to tighten rules on distractions from pilots using cell phones, laptops or engaged in conversation. It also references the crash of a Continental flight in Buffalo on February 12, 2009 as a result of crew inattention, resulting in the death of all on board. It was there found that on take off at the Newark airport the co-pilot was involved in texting messages as the plane taxied on the runway for take off.

As noted above, the MetroLink collision caused the US Federal Railroad Administration to release an emergency order restricting the on-duty use of cellular telephones and other electronic communication devices for all railroad operating employees. As noted above, that order cited a number of examples of serious train incidents involving cell phone use between 2000 and 2006, four of which involved fatalities and millions of dollars in damages. According to the Company, parallel laws and regulations have been adopted in respect of motor vehicle operations in a number of North American jurisdictions. Most provinces in Canada have enacted highway traffic legislation which prohibits or restricts the use of cell phones while driving. Six states in the US ban the use of hand held cell phones and twenty-one have enacted texting bans. It appears that federal regulations in the US also ban texting for all truck drivers and bus drivers.

The Company does not have the authority to compel the production of cell phone records, a power which is exercised by the Transport Safety Board. It urges the Arbitrator to appreciate, however, that it cannot, for the purposes of its own investigations, usefully rely on awaiting the results of a TSB report. In that regard it stresses that such reports can take upwards of two years before they are released, a period well beyond what the Company is obliged to respect in the commencement and completion of disciplinary investigations in accordance with collective agreement timelines. Additionally, counsel notes that not all serious incidents or near misses, such as CROR 439 stop signal violations or minor collisions, are necessarily investigated by the TSB. The employer's counsel emphasises that there is an urgency for the Company

to identify and correct unsafe practices, a goal which requires the fullest information to allow the employer to determine the root cause of any serious incident or accident. As counsel expressed it, the Company seeks to have “the best evidence available when assessing serious incidents or accidents.” The Company stresses that it should not need to await a railroading disaster before acquiring the tools to make the investigations necessary to ensure safety in its operations. In that regard reference is made to comments of the arbitrator in **SHP 530** (Canadian National Railway Company (2000) 95 L.A.C. 4th 341 (M.G. Picher)), an arbitration award concerning the drug and alcohol detection policy of CN.

How far should employers go to ensure that employees are not involved in the operation of personal electronic devices while working in the safety sensitive context of transportation industries? With regard to that question the Company points to the following passages from the report of the NTSB concerning the MetroLink collision:

> As acknowledged during the public hearing on this accident, the nature of rail operations make enforcement of certain operating rules extremely difficult, if not impossible. MetroLink trains, as is common with other passenger trains, have only the engineer in the operating compartment. No reasonable method exists for management, by personal observation, to determine whether the engineer (or other crew member) boards the train with a personal wireless device in his or her possession, and once the train leaves a station, no mechanism is currently in place to determine whether the device is in use.
>
> …
>
> However, the NTSB does not believe that employee privacy should take precedence over public safety given the many accidents and incidents. In all transportation modes, that the NTSB has investigated that involved vehicle operator distraction. Workers in safety-critical positions in all industries should expect to be observed in the workplace, just as most employees should expect their employers to be able to monitor such activities as email and Web browsing during work hours. The argument for complete privacy in settings such as a

> locomotive cab, where lives of many are entrusted to the care of one, is not persuasive.
>
> …
> Professionalism is doing the right thing when nobody is watching. But as the Chatsworth investigation uncovered, this particular engineer was not likely to do the right thing unless he thought somebody was watching. This is a new paradigm, this area of distractions. It is changing how humans behave, how they interact with one another, and how they react in normal and emergency situations.

In conclusion, the Company submits that the ability to request that employees provide the records of their cell phone or other electronic communications in the event of serous incidents or accidents, and the employer's ability to draw adverse inferences in the event that employees refuse to do so, is a necessary management right to ensure a responsible system of investigation and safe operations in general.

III

UNION ARGUMENT

Counsel for the Union argues a substantially different position. Characterizing the Company's March 22, 2010 letter as expressing a "seismic shift" in the Company's conduct of investigations, he stresses that the Company's new policy effectively requires employees to produce evidence to be used against themselves. He makes a three fold submission: firstly the Company's request is unreasonably intrusive and violates the privacy rights of employees; secondly, he submits that the Company's policy is subject to producing erroneous, misleading or inaccurate results and that it is inconsistent with the collective agreements' precepts of a fair and impartial disciplinary investigation; finally, in the alternative, should the Arbitrator find that the Company's request is permissible, it should be subject to standards which have developed in

respect of other invasive practices such as reflected in the jurisprudence governing the drug and alcohol testing of employees.

To provide substance for the Union's objections its counsel advances a number of recent incidents in which the Company did request employees to produce personal communication device records. As a first example he cites an incident which occurred on March 14, 2010 at the Elkview Silo on the Fording River Subdivision near Sparwood, British Columbia. It appears that a train approaching a mine loading facility failed to stop in time, striking a removable wind screen. The road manager's initial memorandum concerning the incident, dated the following day, gives no indication that any inquiry was made as to the use of personal communication devices by crew members at any time before the incident. Nor does the memorandum contain any suggestion that such devices may have contributed to what occurred. A second manager's memorandum dated March 16, 2010 relates management's request for the employees to submit to post-incident drug and alcohol testing, again without any mention of having discussed with either the conductor or the locomotive engineer the possible use of cell phones or other personal communication devices before or after the incident. However, the following day, three days after the incident, both employees received formal written requests for the release of their personal cell phone records for the forty-five minute period between 20:00 PDT and 20:45 PDT on March 14, 2010, as well as analogous records for any cell phones in addition to their personal cell phone which may have been in their possession during their tour of duty.

On March 19, 2010 the Company conducted a disciplinary investigation of both employees with respect to the circumstances of the event of March 14, 2010. Both employees declined to produce the cell phone records requested. During the course of the disciplinary investigations they explained that their decision in that regard was on the instruction of their Union.

It emerged from the investigation that Conductor Chris Brock did have a cell phone in his possession but that, according to his account, he did not use it at any time during his tour of duty. He further stated that he did not see Locomotive Engineer Harris McEwen make any use of a cell phone during the tour of duty. During his own investigation the locomotive engineer stated that he did not have a cell phone in his possession at the time. According to counsel for the Union both employees were subsequently assessed fifty-five demerits, an extremely high level of discipline, being five demerits short of the dismissible position of sixty demerits. The notices of discipline issued to the employees made no mention of any alleged cell phone use.

The Union submits that a review of the Sparwood incident confirms that the Company was fully able to investigate the incident without the additional private information which it sought from the employees. As counsel phrases it, “The Company was able to satisfy its interests through the normal investigation procedure, without requiring employees to divulge personal information which by its nature is sensitive and not within the Company’s interests.”

The Union next examines an incident which did involve admitted cell phone use. That incident, which occurred on March 9, 2010, involved a Medicine Hat train crew comprised of Conductor David Mack and Locomotive Engineer Steve Sinclair. Upon going on duty and changing off with a Moose Jaw crew at Swift Current they realized that their train was in need of a pull-by inspection. After unsuccessfully attempting on the radio to reach the Moose Jaw crew then going off duty and who were then being transported on a crew bus, he attempted to reach them by utilizing his cell phone. It appears that some three minutes after those attempts his train proceeded through a stop signal.

The Company subsequently made a written request for the release of the personal cell phone records of both employees for the period between 12:20 and 13:15 on March 9, 2010, in terms similar to those utilized in the request made in respect of the Sparwood incident reviewed above. Counsel for the Union stresses that management then had no particular information to suggest that cell phone use had contributed to the train missing a stop signal. During the subsequent disciplinary investigation both employees declined to release their cell phone records, as instructed by their Union. Conductor Mack did disclose that having failed to reach the off duty crew by radio he did attempt to call the crew bus on his cell phone to verify whether they had conducted a pull-by inspection of the train. He estimated that his attempted call lasted some 29 seconds, with no one answering. When asked whether he appreciated that his involvement with a cell phone might have taken his attention off the task of the operation of his train he responded: “I was multi-tasking, no more than my other duties.”

Engineer Sinclair denied being distracted by the use of any cellular telephone during the time period in question.

It appears that at a supplemental investigation the employees provided their cell phone records within sealed envelopes, on the stated condition that the envelopes would be opened only when the Company and Union came to terms on a process for employees providing cell phone records. It does not appear that that offer was pursued, and following the investigations the conductor was assessed fifty-five demerits and the locomotive engineer twenty-five demerits, and was further restricted to yard service for six months under the terms of a special ongoing employment contract. The notice of discipline cited, in part, "… improper communication and use of a personal cell phone" as a ground of discipline.

Counsel for the Union stresses that in that circumstance the Company was able to obtain the information it needed, and indeed to assess discipline for cell phone use, without having access to the private information it unsuccessfully sought in the form of the employees' cell phone records. It appears that following a separate investigation the off duty Moose Jaw crew, who were also asked for and declined to provide their own cell phone records, were assessed twenty demerits for failing to give proper train transfer information and failing to perform the pull-by inspection. No reference to cell phone use is included in the discipline assessed against them.

Counsel next refers to what appears to have been the Company's first request for employees to provide cell phone records. On March 3, 2010 Locomotive Engineer Cliff Derosier and Conductor Peter Iaccino proceeded past a stop signal at KC Junction near Golden, B.C., colliding with another train and causing a derailment. The employees, who were home terminalled at Revelstoke, were involved in a radio conversation with a signals technician just prior to the incident. There is no suggestion that the radio communication was improper. It also appears that a hot box detector was set off in the cab of the locomotive at or about the same time.

Counsel notes that the memoranda provided by two supervisors recognized the radio conversation as being a possible source of distraction, but gave no indication of the crew members being involved in the use of cell phones during their tour of duty. Nevertheless, it appears that on March 10, 2010 the Company issued letters requesting the cell phone records of both Locomotive Engineer Derosier and Conductor Iaccino. The record before the Arbitrator does not disclose whether the employees did or did not comply with that request. It does reveal, however, that the request was in effect for a period covering the twenty-four hours period prior to the collision, including periods of time when the employees were off duty.

Conductor Iaccino admitted to having used his personal cell phone intermittently during his tour of duty. It appears that he sent approximately six text messages and possibly received as many as six. The last message which he sent is said to have been some twenty minutes prior to the train improperly passing the stop signal. The

subsequent notice of discharge given to Conductor Iaccino noted the use of his personal cell phone as one of the grounds for his termination. It also appears Locomotive Engineer Derosier also acknowledged having made some use of his cell phone while on duty, apparently making some three outgoing calls of approximately one minute's duration, all of them hours prior to the collision. Following Engineer Derosier's disciplinary investigation he was also discharged from employment, with the notice citing in part: "… use of your personal cell phone during your tour of duty" as a ground of his discharge.

It appears that the crew of the train which was struck at Golden, B.C. were also requested to provide their cell phone records for the same twenty-four hour period. The material before the Arbitrator does not confirm whether they did so, although it does not appear disputed that no discipline was assessed against them.

Finally the Union refers to a rear-end collision which occurred near Revelstoke, B.C. on April 12, 2010. Counsel submits that notwithstanding the absence of any objective indication that the use of a personal communication device might have been a contributing factor, the Company nevertheless requested personal cell phone records for the period of their entire tour of duty from both operating employees concerned. Again the record before the Arbitrator does not indicate whether the employees refused. It does appear agreed, however, that during the course of their disciplinary investigations they admitted to having cell phones in their possession. The conductor related having attempted to reach the Rail Traffic Controller when his train was stopped

in a siding, but was unable to obtain sufficient cellular signal to make the call. The locomotive engineer admitted to having made a quick personal call a considerable period of time before the collision. The subsequent discharge notices provided to both employees cited violations of General Rule A(xii) as one of the grounds of their termination.

Counsel for the Union submits that the Company's requests for the personal cell phone records of employees is a violation of the **Personal Information Protection and Electronic Documents Act**, S.C. 2000 c. 5 ("PIPEDA"). He submits that as a federally regulated undertaking the Company is subject to the terms of **PIPEDA** as it would clearly fall under the definition of a "federal work, undertaking or business" within the meaning of section 2 of that statute. Counsel notes that under that same section "personal information" is defined as "information about an identifiable individual …". Counsel relates that the Privacy Commissioner of Canada issued a finding on July 2, 2002 (**PIPEDA Case Summary 2002-55**) to the effect that telephone records are personal information within the meaning of **PIPEDA**. It appears that in that case the Commissioner ruled in favour of a complainant who objected that a telecommunications company had improperly refused him access to his own personal telephone records.

Counsel also refers the Arbitrator to the **Privacy Act,** R.S., 1985, c P-21. He submits that telephone records qualify as personal information protected under that legislation.

As a matter of general principle counsel notes that arbitral jurisprudence has affirmed that employers are generally not permitted to delve into the private or personal lives of employees. In that regard reference is made to **Bell Canada** (1984), 16 L.A.C. (3d) 397 (P.C. Picher); **Monarch Fine Foods and Teamsters Local 647** (1978), 20 L.A.C. (2d) 419 (M.G. Picher); **Re Canadian National Railway Co. and Canadian Autoworkers**; United Transportation Union, intervener (2000), 95 L.A.C. (4th) 341 (M.G. Picher). Counsel makes reference to the analogous reasoning of the Canadian Human Rights Tribunal in **McGavin v. Straight Crossing Bridge Ltd.** [2001] C.H.R.D. No. 2, an award which concerns access to an employee's health records. Counsel notes that in **McGavin** the Tribunal granted the employer's request for access to the employee's health records on the basis that the employee had herself put the question of her health at issue in the proceedings. He submits that by comparison, in none of the example cases reviewed above did the employees expressly or implicitly place their own cell phone use into issue.

Counsel also notes the decision of Arbitrator Germaine in **Camosun College and Canadian Union of Public Employees, Local 2081** (1999), B.C.C.A.A.A. No. 490. In that award Arbitrator Germaine quoted with approval the following passage from an apparently unreported award of Arbitrator J.M. Weiler in **Insurance Corporation of British Columbia**, issued on January 27, 1994:

> … there is not the same reasonable expectation for personal privacy for those employees who use the … [employer's] e-mail system as there would be by those employees who communicate through a private letter mail system or those employees who engage in private telephone conversation. As such, any sense that an individual employee's communication utilizing this … [employer] property would be treated as a private personal communication and thus would warrant

> the rights of privacy accorded to a private personal communication simply does not apply …

With respect to the application of **PIPEDA** counsel draws to the Arbitrator's attention the provisions of section 5(3) which provides as follows:

> **5 (3)** An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

Counsel submits that the Company's use of personal telephone records is not reasonable in the circumstances of the requests which the Company would make under its policy as described in Mr. Wilson's letter of March 22, 2010 or in the cases reviewed above.

With respect to the limitation of "appropriate purpose" counsel refers to the ruling of the privacy commissioner in **PIPEDA Case Summary # 2003-114**, issued January 23, 2003. That case apparently involves an employee of the instant railway who complained that the Company was collecting personal employee information by means of a digital video recording camera system installed in a Company yard. It would appear that the yard was already equipped with a non-recording camera system to assist in the monitoring of yard movements. The new and additional camera system was said by the employer to be installed purely for security purposes, to reduce the incidence of theft and vandalism which had been experienced in the yard.

The Commissioner found that the employee complaint was well founded. The report of the Commissioner's findings reads, in part, as follows:

Application: Section 5(3) states that an organization may collect, use or disclose personal information only for purpose that a reasonable person would consider are appropriate in the circumstances.

In making his findings, the Commissioner stressed that when examining this section, he must consider both the appropriateness of the organization's purposes for collecting personal information, as well as the circumstances surrounding those purposes.

The Commissioner acknowledged that the company's stated purposes, namely, to reduce vandalism and theft, improve staff security, and limit the potential liability for damages, would seem to be appropriate. However, to ensure compliance with the intent of section 5(3), the Commissioner stressed that the circumstances must also be considered. In determining whether the company's use of the digital video cameras was reasonable in this case, he found it useful to consider the following questions:

- Is the measure demonstrably necessary to meet a specific need?
- Is it likely to be effective in meeting that need?
- Is the loss of privacy proportional to the benefit gained?
- Is there a less privacy-invasive way of achieving the same end?

Given that the incidents of vandalism were relatively minor, with the most significant damage occurring to the cameras themselves, the actual threat to security was in question, and the risk from liability claims was unclear, the Commissioner determined that the company had not demonstrated the existence of a real, specific problem, only the potential for one.

Similarly, he was not convinced that the digital system was in fact effective. Although there had been no incidents since the cameras were installed, he noted that this could equally be explained by the fact that the signs warning people entering the site also serve as a deterrent to would-be vandals. While acknowledging that the system provided poor picture resolution and was not trained on areas where there was a reasonable expectation of privacy, the Commissioner determined that it might be possible to identify an individual during the day. He also noted his concern that the mere presence of these cameras may have given rise to a perception among employees that their comings and goings were being watched, even if that was not objectively the case, and that the adverse psychological effects of a perceived privacy invasion may have been occurring. Finally, he noted that the company did not appear to have evaluated the cost and effectiveness of less privacy-invasive measures, such as better lighting in parking lots, which could address the issue of employee security, with no effect on employee privacy.

Based on this analysis, the Commissioner did not believe that a reasonable person would consider these circumstances to warrant taking such an intrusive measure as installing digital video cameras. Therefore, the company's use of this type of video surveillance for the stated purposes is not appropriate and the company is in contravention of section 5(3).

The Commissioner therefore concluded that the complaint was well-founded.

It appears that the Commissioner recommended that the Company remove the digital video cameras. While he did not express any concern about the existence of the separate operational video camera system, he did express concern that there appears to have been one incident during which information collected from the operations camera monitoring system was used for disciplinary purposes against two employees. He indicated that if that incident had formed part of the complaint he would have been inclined to find a contravention of the **Act**. Counsel notes that the test of appropriate purposes limitation discussed in **PIPEDA Case Summary 2003-114** was upheld by the Federal Court of Canada in **Eastmond v. the Canadian Pacific Railway** [2004] F.C.J. No. 1043 at para. 126.

IV

DECISION

I turn to consider the merits of the parties' competing positions. In doing so I deem it important to recall the highly safety sensitive nature of railway operations. Simply put, railways are among the most highly safety sensitive industries in Canada. Running trades employees are called upon to operate trains on a twenty-four hour, seven day a week basis. The two person crew generally in the cab of a locomotive, being a locomotive engineer and a conductor, operate trains which can extend to great lengths and tonnage. They do so in a system which involves both double track and single track territory, where the use of crossovers and sidings to allow meets with trains

moving in the opposite direction is an everyday occurrence. They operate in a system of complex signals and switches where alertness in the control of a train free of distractions is of paramount importance. Finally, they operate in unsupervised conditions, frequently hauling dangerous goods through various kinds of territory, including both environmentally sensitive countryside and densely populated areas.

Prior arbitral jurisprudence has recognized that given the particular safety sensitive nature of railway operations there must be an inevitable balancing of interests between the privacy rights of employees and the interests of a railway employer to ensure safe operations. That reality may justify a railway in taking certain initiatives designed to detect and deter employee conduct that may pose a threat to safe operations. That principle was expressed as follows by this Arbitrator in **SHP 530**, reported as **Re Canadian National Railway Co. and Canadian Auto Workers; United Transportation Union, Intervenor** (2000), 95 L.A.C. (4th) 341 (M. G. Picher) at p. 378:

> … The more highly risk sensitive an enterprise is, the more an employer can, in my view, justify a proactive, rather than a reactive, approach designed to prevent a problem before it manifests itself. While more stringent thresholds may fairly be applied in non-safety sensitive work settings, as for example among clerical or bank employees, boards of arbitration should be cautious before requiring documented near disasters as a pre-condition to a vigilant and balanced policy of drug and alcohol detection in an enterprise whose normal operations pose substantial risks for the safety of employees and the public.

Secondly, I deem it critical to recognize the emerging reality in recent years of the impact of wireless communications, both outside and inside the workplace. The advent of the internet, email communication, cell phones and smart phones with the capacity for calling, communicating by text messages and accessing games,

information, music and a vast range of other material via the internet by the use of small portable wireless devices has occasioned a sea change in communications and an undeniable challenge to the safety sensitive workplace. The risk and possible consequences of distractions occasioned by these devices in the hands of employees performing safety sensitive functions can scarcely be understated.

Nor can certain realities be denied. Among them is the fact that some individuals become attached to, if not habituated to, ongoing personal communication through handheld wireless devices both on their personal time and while in the performance of their work. Such studies as exist appear to confirm, without serious contradiction, that in the operation of vehicles the use of cell phones for calling, emailing or texting messages is an undeniably dangerous activity which substantially raises the risk of an accident or near miss. As tragically illustrated by the fatal MetroLink collision, as well as a number of other railway collisions and incidents reviewed above, the downside consequences of the distraction caused by the use of cell phones or other personal communication devices can result in high costs in human life, as well as in great costs in damage to property and equipment.

Before the advent of this technology, in the railway industry running trades employees worked alone in the cab of a locomotive, without the distraction of receiving messages, calls or other communications from persons other than persons authorized to make radio contact with them. Now, through wireless devices which are turned on contrary to the rules, an unlimited range of persons from outside the Company can, in a

virtual electronic sense, enter the cab of an operating locomotive and make demands on the attention of a train's crew, initiating an electronic conversation that can distract operating employees from safety sensitive tasks which require their undivided attention. It seems axiomatic, and indeed there is no contrary position taken by the Union, that the personal use of cell phones and similar communication devices while on duty simply cannot, as a general rule, be permitted among employees responsible for the movement of a train.

It is also important to appreciate the importance of the privacy of personal information, including such information as may be contained in the personal telephone records of employees who do own cell phones and may carry them while on duty. Barring the most exceptional circumstances, it is difficult to conceive of what legitimate business interest an employer can assert to know the content of a personal telephone conversation, email or text message sent by or received by an employee or to know by whom or to whom the communication was made. Personal communications are, by definition, generally entirely unrelated to an employee's duties and responsibilities, and to that extent are normally unrelated to his or her employer's legitimate business interests.

However, in my view it is substantially more difficult to conclude that an employer, and in particular an employer in a highly safety sensitive industry, can have no interest in knowing whether an employee in fact engaged in electronic communication of a purely personal nature while he or she was on duty. That is

particularly true, I think, in the context of employees performing highly safety sensitive work in an essentially unsupervised environment. If, for example, the operating crew of a train moving at a moderate speed in clear daylight on a straight stretch of track fail entirely to see a stop signal and to respond to it, where a subsequent investigation reveals no objective explanation for the missed signal, how can it be responsibly concluded that it is outside the legitimate purview of the employer to make reasonable inquiries as to the possibility of employee distraction? To put it differently, on what basis can an employee expect to have an iron clad expectation of privacy with respect to the question of whether he or she was distracted by the use of a personal communication device at or immediately before the time a serious rules infraction was committed? In my view an employee who brings a personal communication device into the safety sensitive environment of train operations cannot fairly expect an absolute screen of privacy or privilege in respect of the question of whether he or she did make use of that device, possibly to the point of distraction, at or near the critical moment of an undisputed cardinal operating rule violation. If there can be said to be a personal privacy interest in whether a person used a wireless telephone or similar device, there is obviously a point at which that interest must yield to the interests of pubic safety.

In my view **PIPEDA** cannot be said to extend to the absolute protection telephone records in the kind of circumstance here under examination. As important as **PIPEDA** is for the protection of personal information in Canada, it is not a code of unconditional absolutes. On the contrary, its language explicitly recognizes certain exceptions to absolute privacy. In that regard section 5(3) of **PIPEDA** provides:

> **5(3)** An organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

As reflected in the decision of the Privacy Commissioner in **PIPEDA Case Summary # 114** the following questions are set out as appropriate to the analysis of when personal information, such as telephone records, may be collected for purposes a reasonable person would find appropriate in the circumstances. Those questions are as follows:

(a) Is the measure demonstrably necessary to meet a specific need?

(b) Is it likely to be effective in meeting that need?

(c) Is the loss of privacy proportional to the benefit gained?

(d) Is there a less privacy-invasive way of achieving the same end?

How do the answers to these questions bear on the instant dispute? Before addressing those question I deem it important to recall the nature of the information which the Company seeks to collect and possibly disclose as part of its investigation of a cardinal rules violation which may or may not involve a collision or derailment. Firstly it must be stressed that the Company does not seek to know the identity of the person or persons with whom the employee may have been communicating via their personal wireless communication device. Nor does it wish to know the content of any communication, whether by spoken word, by email or by text. Insofar as appears from the material before the Arbitrator, the Company seeks in no way to go behind the privacy of that information, at least insofar as appears from its position in this arbitration, as to the nature of the information which it would seek under its new policy. In that

regard it is worth recalling the words which appear in Mr. Wilson's letter of March 22, 2010:

> While the Union may have privacy concerns, the Company has been clear that the detailed information surrounding the phone numbers called, or the contents of the text message may be blacked out. Our legitimate interest is in knowing when and where the communication devices were used in the context of investigating a significant accident or incident.

As can be seen from the foregoing, the privacy interest which the Union seeks to protect is relatively slim. It does not involve the content of communications made by employees while on duty through the use of their person cell phones or other electronic devices. It does not involve identifying other persons with whom they may have been communicating. What it does involve, at most, is the production of an electronic record which is arguably the best evidence as to whether their personal wireless device was in use at a particular time when they were on duty, and most particularly in proximity to a major rules infraction, significant accident or serious incident. Simply put, the Company does not want to know or collect any information as to what employees communicated or with whom they communicated. It seeks only to know whether they were operating their wireless device in proximity to a serious accident or incident.

It is true that the finding of the employer's inquiry may have disciplinary consequences. But I can find no basis upon which that fact can be marshalled to assert that the mere use of one's personal communication device while on duty should be viewed as an element of highly confidential or protected personal information. In a world where telephones are everywhere, an expectation of absolute privacy does not attach to the mere fact of using a telephone.

It is also true, as counsel for the Union argues, that to ask employees for their personal telephone records may be to ask them to provide evidence against themselves. So too is asking an employee whether he or she violated a rule, thereby inviting the individual to effectively prove their own responsibility. Such questions are common in disciplinary investigations and do not, of themselves, violate the employer's duty to conduct a fair and impartial investigation. I do not see any impropriety in asking for possibly inculpatory documentation, material which might arguably be subpoenaed for production in a subsequent arbitration, in any event.

How would the four questions suggested by the Privacy Commissioner come to bear in this dispute? I am satisfied that those questions are indeed helpful to the analysis of determining whether the Company's policy is reasonable and appropriate.

(a) Is the measure demonstrably necessary to meet a specific need?

By definition running trades employees in railway service generally perform their work away from any possible direct supervision, save on those rare occasions when a supervisor may ride in the cab of a locomotive to conduct an inspection or to observe employees in the course of an operational efficiency test. In the vast majority of cases locomotive engineers and conductors work away from the eyes and ears of their employer. As the records of this office amply attest, when a cardinal rules infraction occurs, whether or not it involves a collision or derailment, employees may be less than forthcoming in accounting for their own actions which may have contributed to the

occurrence of an accident or incident. Very frequently the employer is compelled to piece together the events surrounding the incident, for example by using the information downloaded from a locomotive's recording computer, to ultimately draw inferences as to whether the accident or incident involved an error or negligence on the part of its employees.

Before the Arbitrator it is not substantially disputed that a great number of employees do carry personal telephones or other electronic communication devices with them when on duty in train operations. As noted above, that is not necessarily a bad thing to the extent that such devices may have considerable utility in some emergency circumstances, particularly when radio communication is impeded. Given the reality that employees are not directly supervised and that human nature is what it is, there is good reason to doubt that employees will necessarily confess their own negligence or error. To the extent that the on-board possession of cell phones and other personal communication devices is extremely common, I am satisfied, on the balance of probabilities, that the disclosure of cell phone use or non-use, particularly where no information as to the content or other party to a communication is disclosed, is demonstrably necessary to determine whether distraction by the use of such a device may have contributed to an accident or incident.

The Company's need for that information scarcely needs elaboration. As an employer with the obligations of a common carrier in a highly safety sensitive industry, it must make all reasonable efforts to investigate and understand the root causes of any

significant rules infraction, accident or serious incident. It should also be stressed that it is only in the context of investigating events such as missed stop signals, collisions, derailments or near misses that the Company seeks the ability to ask for employees' cellular telephone records, for the restricted purpose of determining whether their personal devices were in use at a moment critical to safe operations. In my view the recent history of collisions, including fatal collisions in the railway industry in North America, among them the MetroLink case, amply confirms that the railway employer has a legitimate interest in knowing, and indeed verifying, that an employee's personal electronic communication device was not a cause of possible distraction at or before the time of a serious accident or incident. In that regard the employee's right of personal privacy must cede to the greater interest of public safety.

It is also noteworthy that the employer's "specific need" is properly confined to serious incidents. There is no suggestion, for example, that personal telephone records will be requested in investigations unrelated to highly safety sensitive issues, such as verifying an employee's claim that he or she called a supervisor or dispatcher to advise that they would be late or absent from work. In the Arbitrator's view the Company has appropriately restricted its request for extraordinary information to the extraordinary circumstance of a serious accident or incident.

For all of the foregoing reasons I am satisfied that the first question suggested by the Privacy Commissioner must be answered by saying that the Company's request for records that would disclose or rule out the use of personal communication devices while

on duty is demonstrably necessary for the Company to accomplish the highly important function of getting at the facts in the wake of a serious railway accident or incident. It would also seem likely that the Company's policy will serve an important secondary need, to the extent that it may deter personal cell phone use among on-duty employees.

(b) Is it likely to be effective in meeting that need?

Precise electronic telephone records will obviously provide clear information as to whether a given cell phone or other electronic device was used at a particular time, whether for making a verbal telephone call, texting or emailing. It may also be that such records can disclose internet surfing activity, gaming or other such uses, although no evidence was called with respect to that.

Counsel for the Union raised the question as to how useful the information might be if, for example, an employee's personal cell phone or other electronic communications device was in fact not in his or her possession, but was used by a friend or family member at the critical time. That is of course possible. The question is whether that mere possibility can be effectively raised to bar a safety sensitive employer such as a railway from making any inquiry whatsoever as to an employee's personal cell phone records. The investigative process enshrined in railway collective agreements will provide employees with ample opportunity to give such explanations. However, the reality is that in most cases brought to the Arbitrator's attention in this dispute, as reviewed above, there was little or no difficulty in determining whether

employees in fact were in possession of their personal communication devices at the material time.

In the result, I am compelled to answer the second question in the positive. It will be effective in meeting the Company's need to know whether personal cell phone use was a distraction which may have contributed to an accident or incident by having reference to the employee's telephone records. The employer's ability to make such requests may also be effective in meeting the secondary but nevertheless legitimate need for deterrence of the use of such devices by all employees while on duty.

(c) Is the loss of privacy proportional to the benefit gained?

The loss of privacy which would be occasioned by the Company's policy is highly limited. The content of any communication is not asked for nor will it be collected or disclosed. The identity of any party with whom the employee may have communicated is likewise not sought, not collected and obviously not revealed. The employee is at liberty to redact or black out that information. All that is sought is information as to whether a personal cell phone or other wireless communication device in the possession of an employee was in use at times material to a serious accident or incident. That relatively bare information reveals nothing more than is revealed to anyone who witnesses a person speaking on a telephone, whether in a public or private place. The act of sending and receiving communications is all that will be revealed.

In my view, the mere act of making a telephone call or sending an electronic message is of a substantially lower sensitivity and value from a privacy standpoint than the actual content of a telephone call or other electronic form of communication. If there can be said to be a loss of privacy, and if privacy interests can be graded as to their importance, to have it disclosed that a person did or did not use a telephone or electronic communication device must be viewed as relatively low on the scale of personal privacy interests. It would stand well below such privacy interests as personal medical records, personal financial records or the actual content of personal private communications, whether verbal, written or electronic.

What of the benefit gained? How would the family survivors of the many who have lost their lives in fatal railway collisions caused by the distraction of employees using personal cell phones and other communication devices answer that question? I believe that most of them, like most reasonable persons, would agree that the investigative ability of railway employers to detect and deal with cases of employees who violate the prohibition against the use of personal communication devices while on duty, and to correct and deter such conduct through discipline, would yield a high level of benefit to the employer, to other employees and to society at large. I would agree with them. The avoidance of potentially fatal collisions and other serious incidents is obviously of a very high order of benefit which, by any reasonable analysis, would appear to be entirely proportional to the relatively minor loss of privacy involved in the disclosure of whether an individual did or did not use his or her cell phone or other

wireless communication device at a critical time while on duty. For these reasons I would also answer the third question in the affirmative.

(d) Is there a less privacy-invasive way of achieving the same end?

Can the Company achieve the end of knowing whether an employee did or did not break the rules and utilize his or her cell phone while on duty by simply asking the employee and receiving an answer? That is obviously the least privacy-invasive way of inquiring. With the greatest respect, however, in the realities of industrial discipline and serious incidents in safety sensitive industries such as railroading, the better question would be whether there is a “meaningfully” less privacy-invasive way of achieving the same end.

In fact, under the collective agreements which operate in the industry, no employee is to be disciplined prior to according him or her a fair and impartial investigation. That means that in virtually all cases employees will in all likelihood be asked whether they did or did not use a personal cell phone or similar device at a given material time. If they should respond in the negative, what significant privacy interest is offended if they are then asked to produce telephone or other wireless device records simply to confirm whether the device was in fact used at the material time, without any disclosure of the content of any communication or of its sender or recipient? The frailty of human memory is also a problem. In an investigation employees may simply not recall with precision whether they used a cell phone while on duty, and if so exactly when.

In matters of such importance, securing documentary proof is a proper and desirable end. Parliament has obviously accepted that it is a legitimate end as it has granted to the Transportation Safety Board the power to compel the production of such records when it investigates a serious railway accident or incident. To the extent that the goal is to secure the best evidence surrounding a cardinal railway operating rules infraction, I am satisfied, on balance, that there is no equally reliable and less privacy-invasive way of achieving that purpose. Nor can the Arbitrator conceive of a less privacy-invasive means of deterring employees who would break the rule against personal cell phone use while on duty. The answer to the last question must be in the negative.

Apart from **PIPEDA**, there is little statute law which bears on the issues in dispute in the case at hand. The **Privacy Act**, cited above, deals exclusively with the disclosure of information in the possession of government institutions. With respect, the Arbitrator does not find it particularly helpful to the analysis necessary to the resolution of this grievance. Nor has the Union pointed to any specific provisions of the collective agreements, the **Canadian Human Rights Act**, or the **Canadian Charter of Rights and Freedoms** which would accord a clear right of privacy that would prevent the employer from being able to request documentary evidence to confirm or rule out that an employee's wireless cell phone or communication device was used at a particular time while he or she was on duty. In fairness, I find it difficult to imagine that Parliament or any provincial legislature would legislate such a narrow and questionable form of

privacy protection. On the whole, in the context of arbitral jurisprudence, common law and statute law, it is difficult to conceive that an employee can have a legitimate expectation of privacy that would extend to refusing to provide information that would confirm the use of a personal communication device, contrary to all rules, while on duty in a highly safety sensitive work environment.

As the cases cited above amply reflect, arbitrators are properly sensitive to the encroachment of employers into the personal and private lives of employees, particularly as relates to non-work related activity. The reasoning in those cases, however, has little or no bearing on the instant dispute. This grievance is about whether the employer can make reasonable inquiries to establish or rule out the use of a personal cell phone or other electronic communication device by an employee while he or she is on duty. To the extent that that inquiry relates only to a serious accident or incident and does not touch on the content of personal communications, it is difficult to see on what responsible basis it could be concluded that there can be no legitimate employer interest to justify the inquiry.

Additionally, it is important to note that, as formulated, the Company's policy does not extend to asking for employee's telephone records, which are to be produced in a heavily redacted form, under pain of discipline. As was clearly stated by counsel for the Company at the arbitration hearing, the Company's policy does not involve imposing discipline upon employees for failing to provide the information which is requested. At most, the employer reserves the right to draw inferences from an employee's reluctance

to give the information the employer asks for. Additionally, as noted above, the request which the employer makes is, by its policy, restricted to its investigation of serious accidents or incidents.

On the whole, in light of the foregoing, can it be said that the Company's policy, as reflected in the letter of Mr. Wilson dated March 22, 2010 unduly violates the privacy rights of employees? I am satisfied that no violation of the collective agreements or of the personal or privacy rights of the employees, be they common law or statute, is disclosed. For the purposes of clarity, however, it should be stressed, as I believe is not in fact contested, that the right to request cell phone information must obviously be restricted to a period of time which is pertinent to the employer's examination of an accident or incident. The proper application of the Company's policy could not, in my view, allow the Company to request personal cellular phone records covering a twenty-four hour period, as occurred for example in the March 10, 2010 request concerning train 671-037, reviewed above. Absent unusual circumstances, in the Arbitrator's view the policy can only be properly applied if the request made of employees is confined to the period of their tour of duty in which there was a significant accident or incident. Subject to that proviso, and on the understanding that no discipline attaches to an employee's right to refuse, I can find nothing exceptionable in the Company's policy as enunciated in the letter of Mr. Wilson of March 22, 2010.

In my view the Company's policy is properly compliant with the requirements of **PIPEDA** and does not violate the collective agreements, the **Canadian Human Rights**

Act or the **Charter of Rights and Freedoms**. I am satisfied that in the present world of widespread wireless communications the Company's policy is a reasonable and necessary exercise of its management prerogatives, in the pursuit of safe operations, an objective which is at the core of its legitimate business interests and public obligations. Those interests are not counterbalanced by any significant privacy interest respecting whether a personal telephone was or was not in use at or near the time of an accident or incident.

For these reasons the grievance is dismissed.

June 23, 2010

(original signed by) MICHEL G. PICHER
ARBITRATOR