CaleyWray
LABOUR/EMPLOYMENT LAWYERS

1600-65 Queen Street West
Toronto ON M5H 2M5

Ken Stuebing
Direct Line: 416-775-4683
Toll Free: 1-866-691-3763
Fax: 416-366-3293
Email: stuebingk@caleywray.com

File No. 26876

June 23, 2010

E-MAILED

Mr. Dave Able
General Chairman
TEAMSTERS CANADA RAIL CONFERENCE
Engineers, CP Lines West
101-10820 24 Street SE
Calgary, AB T2Z 4C9

Mr. Dave Olson
General Chairman
TEAMSTERS CANADA RAIL CONFERENCE
Conductors, CP Lines West
101 - 10820 24 Street SE
Calgary, AB T2Z 4C9

Dear Mr. Able & Mr. Olson:

RE: CANADIAN PACIFIC RAILWAY COMPANY AND TEAMSTERS CANADA RAIL CONFERENCE – FILE NO. 3900

Please find enclosed the June 23, 2010 decision of the Arbitrator in the Union's cellular phones grievance.

Unfortunately, the grievance was dismissed insofar as the Arbitrator was unable to conclude that the Company's policy as stated in Mr. Wilson's March 22, 2010 letter was unreasonable.

The first point to note is that the Company's arguments and evidence at the hearing predominantly consisted of highly detailed reviews of several incidents that have taken place in North America in which railway employees' use of a cellular phone (eg., texting) was determined to play a contributory role to fatal railway accidents. Much of this evidence is highlighted in the Arbitrator's decision.

As you know, the Arbitrator (in this case we are referring specifically to M.G. Picher) tends to give the Company considerable leeway in ensuring the safest possible operation of its railways. The Arbitrator has a heightened sensitivity to railway safety. Based on our firm's experience, the Arbitrator is not of the opinion that a fatal accident caused by texting is needed before new and additional safety measures can be imposed. Unless the Company's intended safety measures will involve a serious infringement of employees' rights or violation of the Collective Agreement, the Arbitrator will generally permit the Company to exercise its management rights to improve the safety of railway operations.

As you know Mr. Pitcher has been your arbitrator for approximately 25 years. During that time he has heard many cases involving accidents, incidents and close misses on the railway. Some of there cases have had horrific consequences (i.e. the Hinton accident). There is no doubt that he considers all of your members to be safety critical employees working in an industry where momentary inattention or distraction can lead to horrific consequences. He normally errs on the side of safety unless there are very strong reasons, express collective agreement and/or statutory provisions to the contrary.

We forcefully argued every Fact, case and point of evidence in this case in your favour. However at the end of the day we could not persuade Mr. Picher to set aside his view that a safe railway industry justifies minor intrusions on employees privacy rights.

For the reasons set out in his decision, Mr. Picher's balancing analysis balanced the Company's interest as an employer in a highly safety sensitive industry "in knowing whether an employee in fact engaged in electronic communication of a purely personal nature while he or she was on duty" (page 28) against employees' privacy interest in whether they have used a wireless telephone or similar device" (page 29).

The Arbitrator emphasizes at page 33 that:

> 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 <u>cardinal rules violation</u> which may or may not involve a <u>collision or derailment</u>. 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. (emphasis mine)

Accordingly, the Arbitrator finds that the employee privacy interest to be balanced is "relatively slim" (page 34). He finds that the Company is seeking only to confirm whether an employee's device was used during a tour of duty. In this regard, the Arbitrator finds that, "In a world where telephones are everywhere, an expectation of absolute privacy does not attach to the <u>mere fact of using a telephone</u>" (page 34, emphasis mine).

Following his review of all of the legislation and jurisprudence relating to privacy-invasive measures taken by an employer, the Arbitrator concludes at page 43 that:

> 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.

Though the Company is permitted to proceed with its request as set out in its March 22, 2010 letter, the Arbitrator's decision imposes the following limitations on the Company's power to do so:

- The Company's request is limited to investigating serious accidents or 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**"(page 37);

- In the event an employee did not have the device in his/her possession when it was used (eg., by a family member), "The investigative process enshrined in railway collective agreements will provide employees with ample opportunity to give such explanations" (page 38);

- The records can be redacted by employees as indicated in Mr. Wilson's March 22, 2010 letter. "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" (page 39);

- No discipline will attach to any refusal to provide requested records. At page 43 the Arbitrator notes, "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" (page 43).

- Finally, the Arbitrator notes that "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" (page 44).

I note that the Arbitrator does not comment on the Company's lack of a promulgated policy in respect to cellular phone usage. However, given that the CROR already

expressly forbid the use of personal cellular phones during operation of trains, I do not believe this omission is necessarily a judicially reviewable flaw in the decision.

Though we were not successful in the overall outcome, there are numerous limitations imposed on the Company by the Arbitrator which should protect the Union's members and ensure that the Company's policy is not abused.

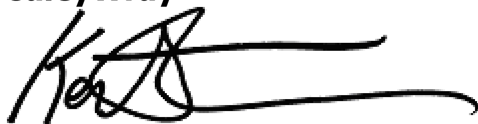
The only other point to note is that, as we argued at the hearing, there may be practical barriers to obtaining the records requested by the Company. Such practical barriers, if encountered by the employee in the course of seeking his records, should be brought to the Company's attention by the employee so that an adverse inference is not drawn against him/her during the investigation.

In addition, the Arbitrator's decision does not address the issue of cost of obtaining the records, if any. This issue can be arbitrated at a future stage if necessary.

Please review the decision and, having done so, call me to discuss your reactions, questions and concerns.

Finally, we would extend my offer to assist you in reporting and explaining the Arbitrator's decision to your members. We would suggest that this reporting letter should unequivocally advise employees, as a general matter, to refrain from any personal use of communication devices while on duty. Employees should be reminded that their use of cellular phones while on duty may be in itself a violation of the CROR, regardless of the circumstances, and that they should refrain from attracting any discipline as a result of any such uses of communication devices.

Yours truly,
CaleyWray



Ken Stuebing
KS/db
Encl.

cc:	J. Holliday	B. Willows	T. Markewich	J. Robbins	P. Vickers	D. Joannette
	D. Shewchuk	D. Finnson	S. Brownlee	D. Genereux	B. Boechler	R. Hackl
	R. Leclere	T. Beaver	G. Edwards	R. Beatty	D. Fulton	