CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2731

Heard in Calgary, Tuesday, 14 May 1996

concerning

CANADIAN PACIFIC LIMITED

and

TRANSPORTATION COMMUNICATIONS UNION

DISPUTE:

The issuance of 40 demerit marks to Winnipeg CSC employee Mr. N. Damato for "conduct unbecoming an employee – unauthorized and inappropriate use of merlin; composing and sending messages containing derogatory comments about a co-worker; and being party to an unauthorized access to a merlin ID and failing to report same to management."

JOINT STATEMENT OF ISSUE:

On February 14, 1995, Ms. H. MacDonald contacted Mr. R.A. Tisdall, Executive Director, CSC, to discuss a document which had been sent to her anonymously. The message contained derogatory comments about employee MacDonald.

On February 21 and March 3, 1995, investigations were held with Mr. N. Damato in connection with his use of merlin and his conduct as a Roll-In Team member.

On March 20, 1995, Mr. Damato's discipline record was assessed 40 demerit marks for conduct unbecoming an employee – unauthorized and inappropriate use of merlin; composing and sending messages containing derogatory comments about a co-worker; and being party to an unauthorized access to a merlin ID and failing to report same to Management.

The Union believes that the discipline issued to Mr. Damato was excessive, particularly in light of what it views as the lack of a developed policy with respect to the use of the Company's computer network merlin.

The Union progressed a grievance on behalf of Mr. Damato requesting a reduction in the discipline imposed.

The Company has declined the grievance.

FOR THE UNION:	FOR THE COMPANY:
(SGD.) L. HILDEBRAND	(SGD.) C. GRAHAM
FOR: EXECUTIVE VICE-PRESIDENT	FOR: EXECUTIVE DIRECTOR, CSC

There appeared on behalf of the Company:

C. Graham	– Labour Relations Officer, Montreal

And on behalf of the Union:

L. Hildebrand	– Assistant Division Vice-President, Winnipeg
A. Kane	– Local Protective Chairman, TCU Trucking Division, Vancouver

AWARD OF THE ARBITRATOR

The evidence discloses that the grievor did, on a number of occasions, make use of the Company's internal Merlin e-mail system to communicate personal messages to an employee in Winnipeg with whom he was romantically involved. The content of the communications falls into three categories: sexually intimate, casual chit-chat and gossip and comments about other employees, sometimes harmless, sometimes extremely negative and insulting in tone. It is proved that the grievor believed that his communications would remain confidential, as they were transmitted to his friend from his personal Merlin I.D. directly to hers. In fact, however, another employee, who was the brunt of many extremely unflattering comments within these communications, "broke into" the grievor's computer system and discovered a number of the degrading and disturbing things which he had said about her. This resulted in a report to the Company, which eventually disciplined the complaining employee for her own violation of the confidentiality of the Merlin system as well as the disciplinary investigation of the grievor, his friend and at least one other employee.

An examination of the communications sent by Mr. Damato revealed his own admission, communicated to his friend, that he and another employee had themselves broken into the personal computer files of another employee who has a confidential Merlin I.D. Following an investigation, the grievor was assessed forty demerits for sending personal messages on the Merlin system, for using Merlin for expressing derogatory comments about a fellow employee and, lastly, for violating the privacy of the Merlin system by gaining unauthorized access to the personal files of another employee.

During the course of his investigation the grievor denied ever having been told that personal messages should not be communicated via the Merlin system. The Company presented in evidence the following e-mail message which it maintains was sent to all Merlin system users on February 14, 1994:

> SUBJECT: Misuse of the Company's Computer Resources
>
> Reminder:
>
> Please note that Merlin is a business tool to be used, like other Company facilities, for business purposes only. Frivolous use, like excessive personal messages, chain letters etc., is a waste of company resources and can lead to disciplinary action.
>
> DISTRIBUTION LIST:
>
> CP Rail System

The grievor states that he cannot recall having received the above communication, and that during the course of his Merlin training he was never advised that it was contrary to Company policy to communicate personal messages on the system.

The Union submits that in the instant case the Company has not established that it developed and properly communicated a clear policy or system of rules for employees in relation to the use of Merlin e-mail for sending personal messages. The Arbitrator is inclined to give some weight to that submission, given the inability of the Company, which bears the burden of proof, to establish in a categorical way that the grievor in fact received the general communication reproduced above. While the sending of a general e-mail, addressed over the Company's entire system, may have certain efficiencies from the standpoint of broad communication, it is less than perfect for confirming the receipt of a given message by any individual employee. There is no evidence that employees were required to give any acknowledgment of the communication, or to sign a policy booklet or document, as is sometimes done in the communication of policies and rules. In the instant case the Union suggests that the grievor may well have been either in transit, or in a temporary position in Montreal at the time of the communication, so that it may not have in fact reached him. In my view that aspect of the evidence is mitigating in the case at hand. It does not, however, go as far as the grievor would have it.

Mr. Damato, by his own acknowledgment, clearly knew that some of the more offensive things which he was communicating to his friend could in fact come to the attention of others, and in particular that management might review the content of employees' Merlin files. He nevertheless proceeded to communicate what can fairly be characterized as electronic graffiti, reckless of the consequences, and of the offence which it might bring to the target

of his insults. Indeed, in one instance, he specifically asked his friend to relay a particularly offensive description of an employee to another employee of their mutual acquaintance.

Secondly, there is nothing in the record to suggest that the grievor had any reason to be unaware that it is a serious offence to breach the confidentiality of another employee's personal computer file, an act which he admittedly engaged in. In the Arbitrator's view the grievor was deserving of a substantial measure of discipline for his indifference to other employees, both in the quality of his communications to his friend, and in his invasion of the privacy of another employee's personal computer file.

The issue then becomes the appropriate measure of discipline. The grievor is a long term employee, having been hired by the Company in 1973. He has, in over twenty years of service, been disciplined on only one prior occasion. Further, as noted above, the Arbitrator is not impressed with the Company's evidence of its efforts to clearly communicate its policy with respect to the use of the e-mail system for personal messages. Firstly, the communication reproduced above would suggest that some use of the system for personal messages is permissible, to the extent that it states that "**excessive** personal messages" can lead to discipline. Secondly, and more fundamentally, there is no good evidence to ensure that individual employees, including the grievor, in fact received the communication in question, and no evidence of any requirement of acknowledgment of receipt has been put forward.

In the Arbitrator's view the most serious aspect of the grievor's conduct involves his willful breach of the confidentiality of another employee's personal computer files. For that infraction the Company has assessed twenty demerits against two other employees, neither of whom has grieved their discipline. I am not persuaded, in these circumstances, that the occasional use of the Merlin system for personal messages would, of itself, merit discipline. Further, bearing in mind that the communications were intended to remain confidential, without condoning the grievor's distasteful use of words, it would appear to the Arbitrator that a relatively light measure of discipline would be deserved for the disrespectful language found in the grievor's communications. Of greater substance, however, is the grievor's willingness to violate the privacy of another employee's computer files.

In the circumstances, having regard to the mitigating factors reviewed, the Arbitrator is satisfied that the substitution of a lesser penalty is appropriate. The Arbitrator therefore directs that the grievor be assessed twenty demerits for abuse of the Merlin e-mail system by making reckless and damaging statements about other employees and for having violated the confidentiality of the computer files of another employee.

May 17, 1996

(signed) MICHEL G. PICHER
ARBITRATOR