

**ARBITRATION AWARD**

BETWEEN:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS, LOCAL 1615  
(hereinafter called the "Union")

AND:

ROGERS COMMUNICATIONS INC.  
(hereinafter called the "Employer" or the "Company")

GRIEVOR: Chris Clarke

COUNSEL: For the Union

Robert Clarke

For the Employer

Harold M. Smith, Q.C.

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on July 6, 2009. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter in the event there is a question of interpretation or compensation arising from the Award, with any question to be referred to the Arbitrator within forty five (45) days following publication of the Award.

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement between Rogers Cable Communications Inc. and Local 1615 of the International Brotherhood of Electrical Workers, Operations Unit, effective September 1, 2005 to August 31, 2009
- Consent 2 - Letter dated April 30, 2009 from Tracey Birmingham, Human Resources for the Employer to Bob Clarke, Business Manager for the Union
- Consent 3 - Grievance Form No. 02-09 dated April 21, 2009
- Consent 4 - Seniority List, 2009
- Consent 5 - Letter dated April 15, 2009 from Bill Morgan to Chris Clarke
- Consent 5A- Technical Vehicle Usage Policy, revised April, 2006
- Consent 5B - *Highway Traffic Act*, Part V - Rules of the Road
- BM - 1 Technician Detail Activities for Chris Clarke dated April 3, 2009
- BM - 2 Arbitration Award between *IBEW, Local 1615 and Rogers Cable Communications Inc.* dated February 28, 2009, Grievor - Chris Clarke, unreported (W. John Clarke)
- BM - 3 Photograph - Keith's Diner
- BM - 4 Photograph - Keith's Diner
- BM - 5 Service and Installer Technician tools and test equipment list

- CC - 1 Notes taken by Chris Clarke, April 3, 2009
- CC - 2 Photograph - Keith's Diner and parked van
- CC - 3 Photograph - Keith's Diner and parked van
- CC - 4 Photograph - View of parked van from inside entrance of Keith's Diner
- CC - 5 Photograph - View of parking lot and road from driver's door of van
- CC - 6 Photograph - View of parking lot and road from passenger door of van
- CC - 7 Photograph - Location of parked van, front view
- CC - 8 Photograph - Rogers parking lot

### **Nature of the Grievance**

The Union grieves a 12 day suspension and final warning issued by the Employer to the Grievor for an incident on April 3, 2009 involving use of a vehicle assigned to the Grievor.

### **Collective Agreement**

The relevant Articles of the Collective Agreement are as follows:

#### Article 3 Management Rights

- 3.01 Except as specifically modified or restricted in this Agreement, the Company shall have the exclusive right to operate and manage the business of the Company including without restricting the generality of the foregoing, the right to manage the operations and direct the workforce in the most economic manner possible, the right to maintain flexibility in the operation of the Company's workforce, the right to maintain order and efficiency and to direct the working force, the right to hire, promote and demote employees, to discipline, suspend or discharge employees for just cause, to assign and reassign employees to jobs, to transfer and lay off employees, to increase and decrease the working force, to determine the location of plants, the services to be provided by the Company, and to determine the schedules of work and the methods, processes and means of carrying out the work and service of the Company, to study and introduce new methods of work and facilities and the

right to establish and maintain rules and regulations covering the operations of the Company and the work of its employees.

...

Article 25      Discipline Procedure

25.01 Subject to the terms of this Agreement, no employee shall be disciplined, suspended or discharged except for just cause.

### **Evidence**

The witnesses called by the Employer were Bill Morgan, Manager of Service and Installation, and Scott Bungay, Manager of Planning and Construction. The witness called by the Union was Chris Clarke, the Grievor.

The Grievor, Chris Clarke, is employed as a Service and Installation Technician by the Employer, Rogers Communications Inc. His seniority start date with the Employer is January 9, 2006. Mr. Clarke is part of a team of about 23 employees working under the supervision of Bill Morgan, Team Manager. The Grievor's duties include service and installation of all products, including cable television, internet and home telephone service.

Following an incident on April 3, 2009, Bill Morgan, Team Manager, issued a letter to the Grievor imposing a 12 day suspension and giving a final warning. The letter stated as follows:

To:                Chris Clarke, Service Technician  
 From:             Bill Morgan  
 CC:                L. Johnson, IBEW-Local 1615 & HR Representative  
 Date:              April 15, 2009  
 Subject:          Suspension and Final Notice

On Friday, April 3<sup>rd</sup> 2009, at approx 10:45 a.m., while en route to a safety inspection, your assigned Rogers vehicle was observed by Scott Bungay, Pat Dunn and I parked at Keith's Take out Main Rd Goulds. Upon further investigation the vehicle's engine was found to be idling, it's doors unlocked and no safety cones were displayed. It was also noted that the vehicle contained unsecured Roger's equipment and tools.

Your failure to secure your assigned Rogers vehicle is a direct violation of the Rogers Vehicle Usage policy. As well as, a violation under the *Highway Traffic Act*, Part IV,

Unattended Vehicle. Your actions directly exposed Rogers to unwarranted risk towards public safety and the loss of Roger's property.

Chris, in the past twenty-four (24) months, we have met and discussed issues that resulted in the following discipline:

On July 12<sup>th</sup>, 2007 - you received and served a one (1) day suspension for Failure to communicate absence.

On Feb 28<sup>th</sup>, 2008 - you received a verbal warning for failure to safeguard company tools and equipment.

On May 6<sup>th</sup>, 2008 - you received and served a three (3) day suspension for Misrepresentation of Job Site Time Records & Failure to Communicate.

On August 6<sup>th</sup>, 2008 - you received and served a six (6) day suspension for Continued Failure to communicate with your Employer.

Your continued violation of company policy and failure to adhere to your fundamental employment obligations provide clear justification to release you from your employment. However, in view of your efforts since August 2008, we are prepared to give you one final opportunity to demonstrate your ability to comply with established policies and procedures in our workplace.

As a result, the incident on Friday April 3<sup>rd</sup>, 2009 will result in a twelve (12) days suspension and a disciplinary notation to that effect will be noted in your personal file.

Please note that this is your final warning and a reoccurrence of this nature will result in your employment being terminated.

Attached to the letter was a one page document headed "Technical Vehicle Usage Policy Revised April, 2006", and a one page document headed "*Highway Traffic Act, Part V - Rules of the Road*".

The Technical Vehicle Usage Policy stated in part as follows:

The following policy must be adhered to by all Rogers Cable Technicians who use a Rogers Vehicle and HES Technicians in privately owned vehicles. In addition to the items below, each employee is expected to abide by Rogers Policy Gen. 2 "Company Vehicles" and Gen 2.1 "Company Vehicle Insurance and Accident Reporting". By signing this document, you confirm that you have read and understood these policies.

...

3. Employees must adhere to all federal, provincial and local traffic regulations and by-laws.

...

6. Vehicles must be secured when not in use by locking the doors and removing the keys. If stolen and the employee is found to be negligent, the employee will be held responsible for any damage, lost or missing equipment.

...

12. Vehicles must not be left idling.

...

15. Failure to follow any of the above guidelines may result in discipline up to and including termination.

The policy was signed by Chris Clarke on May 9, 2006.

The documented headed *Highway Traffic Act*, Part V, Rules of the Road, stated as follows:

(aa) “highway” means a place or way, including a structure forming part of the place or way, designed and intended for, or used by, the public for the passage of traffic or the parking of vehicles and includes all the space between the boundary lines of the place or way.

Unattended vehicle

150. The driver of a motor vehicle shall not permit it to stand unattended on a highway without first having

- (a) stopped the engine;
- (b) locked the ignition;
- (c) removed the key;
- (d) effectively braked the vehicle; and
- (e) when standing on a grade, having turned the front wheels to the curb or end of the roadway.

Bill Morgan testified that each Technician is assigned a motor vehicle, specifically a 3/4 ton van marked with Rogers advertising and equipped with ladders. The Technician brings the van home at the end of a shift. Each Technician is assigned a laptop computer which is used to receive service orders and to make entries in a daily log in the Field Services Management System (FSMS). The computer may be locked in place on a pedestal in the front of the van. Technicians are assigned

valuable tools and equipment, including various meters. Technicians are expected to remove equipment from the van at the end of a shift for security reasons. The Company assigned a van with tools and equipment to the Grievor.

Bill Morgan testified that on April 3, 2009, he and two other Managers, Scott Bungay and Pat Dunn, were proceeding in a Company vehicle along the Goulds Main Road for the purpose of performing safety checks on employees who reported to Mr. Dunn. Mr. Morgan said that a safety check on each Technician is done at least once per year. The Managers often performed the safety checks together.

Mr. Morgan testified that at about 10:40 a.m., as they drove past Keith's Diner on the Main Road, he observed a Company van backed into a parking space in front of the Diner. He noticed that the van did not have orange pylons, called safety cones, displayed at opposite front and rear corners of the vehicle. The purpose of the safety cones is to ensure that the driver walks around the vehicle and does a safety check before moving the vehicle. Mr. Morgan also observed that the headlights were on, indicating that the vehicle was running, and there did not appear to be anyone inside the vehicle. Mr. Morgan's vehicle turned around a short distance up the road, returned to Keith's Diner and stopped in front of the parked van. The number marked on the van indicated that it was the van assigned to Chris Clarke, the Grievor. Mr. Morgan said that he got out of his vehicle and observed that the van's engine was idling. At that time the Grievor came out of Keith's Diner carrying a brown bag. The Grievor told Mr. Morgan that he had been waiting to receive information from the Company's office and he was taking an early lunch. Mr. Morgan testified that the Technicians are allowed one half hour for lunch, at any suitable time between 11:00 a.m. and 2:00 p.m. The Grievor's log did not record that he was on a lunch break at that time. His log recorded that he started a job at 9:35 a.m. and completed the job at 11:04 a.m. Mr. Morgan said he told the Grievor that leaving the vehicle unlocked and unattended was a safety violation. The Grievor said "I know", but explained that he only left the vehicle for a minute to pick up food that was previously ordered. Mr. Morgan said that about one minute elapsed from the time he first saw the van until he observed the Grievor coming out of the Diner. He was concerned that in the amount of time the Grievor left the van unattended, someone could get in the van and drive away. He was also concerned that the van was out of sight of the Grievor. Mr. Morgan observed that anyone standing at the counter inside the Diner would have had their back turned to the parking area.

Scott Bungay, Manager of Planning and Construction, testified that on April 3, 2009, he was proceeding in a Company vehicle along the Goulds Main Road on his way to conduct a routine

safety check of Technicians. He was accompanied by Mr. Morgan and Mr. Dunn. He observed a Company van with the headlights on, parked in front of Keith's Diner. There was no one seated in the vehicle and there were no safety cones displayed. Mr. Bungay said the display of safety cones is a national Company policy, and it is a safety item discussed at monthly team meetings. He said they turned around and returned to the Diner to investigate. He observed Mr. Morgan get out of the vehicle and speak to the Grievor. Mr. Bungay also testified that about one week prior to the arbitration hearing, he returned to Keith's Diner and made certain observations. He testified that from the counter area inside the Diner it was not possible to see the driver's door of a vehicle parked in the same spot where the Grievor's van was parked on April 3, 2009.

Chris Clarke, the Grievor, testified that, on April 3, 2009, his scheduled shift was from 8:00 a.m. to 6:30 p.m. He visited the Company office and then proceeded to a call to pick up a modem at a business on the Main Road in the Goulds. He was informed by the business customer that the internet was not working and he determined that an account had been cancelled incorrectly. He left a message at the customer relations office about the cancelled account, and he was waiting for a return call. He decided to take a break, as he was nearing the completion of the job. He phoned an order for breakfast to Keith's Diner, which was located about 300 feet away from the job site. He called the dispatch office to tell them he was leaving the job site. He drove to Keith's Diner and backed into a parking spot near the front door, adjacent to a handicapped parking spot. The Grievor testified that there were no other vehicles or pedestrians in the parking lot. He received a call on his cell phone and stepped outside the van to talk on the phone. At that time, a woman inside the Diner knocked on the window indicating that his food order was ready. He said that he was "caught off guard" and that he "ran in" to pick up his food order. He testified that he forgot to place the safety cones at the corners of the van. He was in the Diner for about 45 seconds. He did not believe that anyone could get into the van without him noticing. He could see the van through the window of the Diner when he was picking up his food. Although he was facing away from the van when standing at the counter, he frequently turned his head to check on the van. When he came out of the restaurant, he saw a Rogers vehicle parked in front of his van and he observed Bill Morgan get out of the vehicle. He had a conversation with Mr. Morgan about the safety cones and about leaving the van unattended and the engine idling. Mr. Clarke agreed that there was a risk that "things could happen" when a vehicle is left idling and unattended.

The Grievor acknowledged the accuracy of the disciplinary record set out in the letter of suspension. He testified that he knew after his last suspension in August, 2008, that he had to change his

behaviour or his employment was at risk. He said that he had received positive feedback about his work since August, 2008, and he believed that he “had turned things around”.

Mr. Morgan testified that he signed the letter imposing the 12 day suspension. He said the Company took into consideration the Grievor’s prior disciplinary record. The disciplinary penalty of a 6 day suspension imposed on August 6, 2008 was a penalty that was settled during the grievance procedure. A 3 day suspension imposed May 6, 2008 was grieved and subsequently upheld by an arbitration award. The award was entered as Exhibit BM-2. The Company considered that the Grievor was parked on a highway, as defined under the *Highway Traffic Act* (the “Act”), and a copy of the relevant section of the *Act* was attached to the letter of discipline. Mr. Morgan said the vehicle was not safely secured, and it was important that the Grievor follow the Company’s policies. Mr. Morgan said the Company considered dismissal, but decided not to dismiss the Grievor having regard to all the circumstances. Mr. Morgan said the Grievor had shown small signs of improvement since his last disciplinary penalty in August, 2008. In the Grievor’s last performance evaluation in January, 2009, it was noted that there was need for improvement in some areas. The Company decided it had just cause to impose a 12 day suspension.

### **Employer Submission**

The Employer submitted that there were no significant disputes of fact with respect to the Grievor’s conduct. The Grievor had left his van unlocked with the engine idling, and did not place safety cones at the corners of the van. The Grievor said he was distracted because his food order was ready, however, this did not justify his conduct. He was not taking an early lunch break, contrary to what he had claimed at the time. The Grievor could have easily complied with Company policies. The Grievor said that he looked frequently at the vehicle when he was in the Diner, but if he was concerned about the vehicle he could easily have secured it. The Grievor recognized the risk to security of the vehicle. The Grievor signed the Company policies and had knowledge of the policies. The vehicle was stopped on a highway as defined in the *Highway Traffic Act*. The Grievor is deemed to know the law. Even if the *Highway Traffic Act* did not apply in this situation, Section 150 of the *Act* reinforced the reasonableness of the Company policy that vehicles not be left unattended. The Grievor had a prior disciplinary record, which was, in part, related to safety and security of equipment. His prior record for failure to communicate his location was related to safety. There were no mitigating factors. The Grievor was a junior employee with only about 3 years seniority. It was common to issue a disciplinary suspension together with a warning that future

incidents could result in dismissal. It was appropriate to impose a longer suspension than the previous suspensions of 3 days and 6 days. A 12 day suspension was an appropriate response. The Employer requested that the disciplinary penalty be upheld.

### **Union Submission**

The Union submitted that the penalty was not justified. The incident was not serious considering the brief length of time the Grievor was out of his van and all the surrounding circumstances. The Grievor had previously placed a food order and he was out of the van for only about 45 seconds to pick it up. The situation was totally different from the prior incident when the Grievor was disciplined for failure to communicate. The Company did not abide by its own policy to place safety cones outside all vehicles, having regard to the photograph of the Company parking lot showing vehicles without safety cones. The Grievor did not have to make a log entry when he went on a break. He followed the accepted procedure by notifying the dispatch office. The parking lot at Keith's Diner was not a "highway" under the *Highway Traffic Act*, and it was improper for the Employer to consider that there was a violation of the *Highway Traffic Act*. There was no culminating incident. The Employer had not consistently applied progressive discipline having regard to the arbitral authorities and the Grievor's discipline record. To impose a 12 day suspension and to issue a final warning amounted to a double penalty for the same incident. The Union requested that the grievance be allowed, that the penalties be withdrawn and that the Grievor receive full compensation.

### **Considerations**

The Employer disciplined the Grievor, Chris Clarke, by imposing a 12 day suspension. The letter of suspension also stated that it was a final warning and that a reoccurrence would result in termination of employment. Article 25.01 of the Collective Agreement states that the Employer shall not discipline an employee except for just cause. The issue before the Arbitrator is whether or not the Employer had just cause to discipline the Grievor, and if so, whether there was just cause for the penalty imposed.

There is no significant dispute about the facts in relation to the incident that occurred on April 3, 2009. The Grievor is a Service and Installation Technician who is assigned a Company van, laptop computer and various tools and equipment. When he was nearing the completion of a job at a

business in the Goulds, he decided to take a break. He placed an order for takeout food to a nearby Diner and then proceeded to pick up the food order at about 10:40 a.m. He backed the van into a parking space in the parking lot in front of the Diner. From that position, the driver's door was not visible from inside the Diner. He did not place safety cones at opposite front and rear corners of the van. He left the engine idling and the van unlocked for about one minute when he went into the Diner and picked up his food order. There were no other vehicles or pedestrians in the area of the parking lot at that time. When standing at the counter inside the Diner, the Grievor would have been facing away from the van, but he could turn and see the van through the windows. The Grievor testified that after he parked the van he received a telephone call on his cell phone. When he stepped out of the van to talk on his cell phone, a woman inside the Diner knocked on the window indicating that his food order was ready. The Grievor said that he was distracted. He had no other explanation for failing to secure the van or failing to follow the required safety procedures.

The Employer's letter to the Grievor dated April 15, 2009 stated that the vehicle was left unsecured, which was a violation of the Roger's Vehicle Usage Policy and a violation of the *Highway Traffic Act*. The letter noted that the vehicle engine was idling, the doors were unlocked and no safety cones were displayed. The letter stated that the actions of the Grievor exposed Rogers to "unwarranted risk towards public safety and the loss of Roger's property".

The Grievor's actions were a violation of the Vehicle Usage Policy, revised April, 2006. The Grievor signed the Policy and there was no objection to the policy at the hearing. The policy refers to the vehicle and its equipment. Item 6 in the policy states that vehicles must be secured when not in use with the doors locked and the keys removed. Item 12 in the policy states that vehicles must not be left idling. The Grievor's actions were in violation of both items 6 and 12 of the policy. The Grievor failed to place the safety cones at the front and rear corners of the vehicle. The purpose of the safety cones is to ensure that the driver walks around the vehicle and checks for any safety hazard. The Grievor knew that he did not follow the accepted practice. The Union questioned the fact that safety cones are not placed around Company vehicles parked in the Company parking lot. The Union entered a photograph as an exhibit, showing Company vans without safety cones. There was evidence that the Company considered the parking lot to have restricted access. The Union raised the issue of whether there was consistent enforcement of the policy. There was no evidence that the Employer knew that there were violations of the policy and failed to take action to enforce the policy. The Union has not proven inconsistent enforcement of the policy.

The Company policy has a legitimate purpose. When Company vehicles are left unattended and unlocked, with the engine idling, there is both a potential risk to the Company's equipment and vehicles, and a potential risk to the safety of the public. The policy does not permit any exceptions. When the vehicle is left unattended there is always a risk that someone will cause damage, take the vehicle, or take equipment from the vehicle. The Technician does not have any discretion not to follow the policy. The policy does not allow the Technician to assess the degree of risk. The policy is clear and the risk is established by the policy. It is easy to comply with the policy. It is easy to turn off the engine, remove the keys and secure the vehicle. Having regard to the risk of not following the policy, the clarity of the policy, and the absence of any legitimate reason not to follow the policy, there was no justification for the Grievor's actions. With respect to the placing of the safety cones, there was no written policy on this procedure, however, employees were given direction to place safety cones at safety meetings. The Grievor understood that he was required to place the safety cones. There was no justification for the Grievor's failure to place the safety cones.

The Grievor claimed that there was minimal risk because he left the van for less than one minute and he kept the van within his sight at all times. The degree of risk does not excuse the Grievor's conduct. However, when assessing the penalty, the Arbitrator may consider whether any actual harm was caused and the likelihood that harm would have occurred having regard to all the circumstances. In this case, no actual damage was caused. There was no evidence that anyone else was in the area of the parking lot at the Diner at the time. These factors do not excuse the Grievor's conduct, but they may be taken into account in mitigation of the penalty.

The letter of suspension alleges violation of the *Highway Traffic Act*, Part IV. The page attached to the letter refers to Part V of the *Highway Traffic Act* and sets out Section 150 of the *Act*. Section 150 of the *Act* is in Part V, not Part IV. Section 150 states that the driver of a motor vehicle shall not permit it to stand unattended on a highway without first having stopped the engine, locked the ignition, removed the key and effectively braked the vehicle. The definition of "highway" in the *Highway Traffic Act* means "a place or way . . . intended for, or used by the public for the passage of traffic or the parking of vehicles". Having regard to the evidence and the language in the *Highway Traffic Act*, I find that the Employer has not proven violation of the *Highway Traffic Act* as alleged in the letter. However, it is noted that the activity prohibited by Section 150 of the *Act*, i.e. not to leave a vehicle unattended with the engine idling, is also activity prohibited by the Employer's policy. Just cause for discipline is established by the Grievor's failure to comply with the written

policy to secure the vehicle, and not to leave it unattended with the engine idling, and failure to follow directives to place the safety cones.

With respect to the appropriate penalty, the Arbitrator has considered the Grievor's disciplinary record. The Employer is entitled to impose a penalty that is more severe than might otherwise be imposed for the same offence in the case of an employee who did not have a disciplinary record. In this regard, the Arbitrator refers to the discussion in Brown and Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> edition, at paragraph 7:4310, as follows:

The doctrine of the culminating incident delineates those circumstances in which it is proper for an employer to rely on an employee's poor employment record in order to justify taking more serious action than might otherwise be warranted by the other circumstances of the case. It is the logical corollary of the proposition that an employee's long and blameless employment record may properly be relied on by an arbitrator to ameliorate a disciplinary penalty.

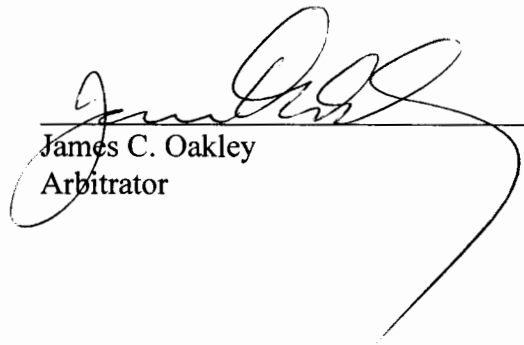
The Grievor had a disciplinary record in the preceding 24 months, consisting of a 1 day suspension, a verbal warning, a 3 day suspension and a 6 day suspension. The suspensions of 3 days and 6 days both refer to failing to communicate with the Employer. The failure to communicate gives rise to safety concerns as noted in the prior arbitration award between the parties upholding the penalty of a 3 day suspension, *IBEW, Local 1615 v. Rogers Cable Communications Inc.*, unreported, February 28, 2009 (Clarke). The Employer was entitled to take into account the prior disciplinary record.

Having regard to all the circumstances of the case, the Employer had just cause to impose a disciplinary penalty of a suspension and a warning. The warning of the Grievor that future incidents could result in dismissal is appropriate to put the Grievor on notice that his continued employment is at risk. There was no inappropriate double penalty. The Employer made one decision to issue a penalty, which included a suspension and a warning. Such a penalty is permitted according to the arbitral authorities (see Brown and Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> edition, paragraph 7:4240). The Employer had just cause to issue a suspension and warning to the Grievor that a future incident may result in termination of employment. However, the circumstances of the incident, as proven, do not justify the length of suspension imposed by the Employer. It is appropriate to reduce the suspension from 12 days to 9 days.

**Decision**

The grievance is allowed, in part. The letter of discipline is varied to the extent that the length of suspension shall be 9 days. In all other respects, the disciplinary penalty is upheld.

**DATED** this 2<sup>nd</sup> day of September, 2009.



James C. Oakley  
Arbitrator