

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION
CASE NO. 4129**

Heard in Montreal, Thursday 12 July 2012

Concerning

VIA RAIL CANADA INC.

And

**THE NATIONAL AUTOMOBILE, AEROSPACE, TRANSPORTATION
AND GENERAL WORKERS' UNION OF CANADA (CAW-CANADA)**

DISPUTE:

The assessment of 40 demerits to S. Gagnon-Lewis.

JOINT STATEMENT OF ISSUE:

On October 10, 2010, Mr. Gagnon, a locomotive attendant at the Montreal Maintenance Centre, was found allegedly sleeping inside a coach car at 04:00 hrs.

He was investigated on October 15, 2010. On October 22, 2010 he was assessed 40 demerits.

The Union feels that the assessment of 40 demerit points for falling asleep on the job is punitive in nature and an inconsistent application of discipline in similar circumstances.

The Corporation submits that the issued discipline was appropriate.

**FOR THE UNION:
(SGD.) J. FOURNIER
NATIONAL REPRESENTATIVE**

**FOR THE COMPANY:
(SGD.) J. MAILHOT
FOR: SR. ADVISOR, LABOUR RELATIONS**

There appeared on behalf of the Corporation:

J. Mailhot	– Advisor, Labour Relations, Montreal
B. A. Blair	– Sr. Advisor, Labour Relations, Montreal
K. Murphy	– Manager, CE SWO, Toronto
A. Leduc	– Supervisor, Servicing, Montreal
G. Côté	– Manager, Servicing, MMC, Montreal

There appeared on behalf of the Union:

J. Fournier	– National Representative, Montreal
R. Fitzgine	– Shop Representative,
D. Andru	– Regional Representative, Toronto

S. Auger	– Regional Representative, Montreal
F. Sauvé	– Grievance Chairman, Montreal
S. Gagnon-Lewis	– Grievor

AWARD OF THE ARBITRATOR

On the basis of the material before me I am satisfied that the grievor did in fact engage in nesting/sleeping while on duty at the Montreal Maintenance Centre on October 10, 2010. The evidence confirms that the grievor placed himself inside the luggage rack of a passenger car, having turned out the lights on the car. Armed with a pillow, he was found asleep at approximately 04:00 hours by Yard Movement Supervisor, Alexandre Leduc.

The grievor's explanation, that he was in fact taking his lunch break, does little to mitigate the severity of his actions. It cannot be suggested, nor is it argued by the Union, that the grievor was free to organize himself a sleeping accommodation on the Employer's property during any regularly scheduled break. Equipped with a radio, as a locomotive attendant the grievor was responsible to reply to any call he might receive during his entire tour of duty. Nesting and sleeping as he was found to be doing was clearly an abandonment of his responsibilities that is plainly inconsistent with his most fundamental obligations to his employer.

The issue therefore becomes whether forty demerits was an appropriate measure of discipline in all of the circumstances. While it is true, as argued by the Union, that in other cases less severe discipline has been imposed, for example the assessment of fifteen demerits in **CROA 2847**, it is trite to say that discipline must be

assessed having regard to a number of considerations. Among those considerations are the length of an employee's service and the quality of his or her prior disciplinary record.

The grievor is not of long service, having been hired on June 1, 2007. Significantly, by reason of an earlier collision, he was the subject of a discharge, and was reinstated subject to an extensive suspension only by the order of this Office in **CROA&DR 3906**. I must agree with the representative of the Corporation that having been reinstated in those circumstances the grievor should have been particularly careful as to his conduct at work and the avoidance of subsequent discipline.

The instant case does not involve an employee nodding off while in the course of his active employment. The evidence is clear that the grievor extracted himself from the workplace, concealed himself in a passenger car where he effectively used an empty luggage rack as a bed equipped with a pillow. Having turned off the lights, there can be little doubt but that the grievor intended to sleep for a significant period. Nor can I accept his suggestion that he was not in fact asleep when found by his supervisor. In that regard I accept the supervisor's evidence that he observed Mr. Gagnon-Lewis to be sleeping. Additionally, for the reasons touched upon above, I am satisfied that the grievor could not use his lunch period for nesting and sleeping in a location which was in fact an unauthorized location for him to be in.

The jurisprudence confirms that sleeping on the job in circumstances such as those as the case at hand can justify termination (see, e.g., **CROA 1573** and **Re IKO Industries Ltd. and USW, Local 9033** (1987) 4 C.L.A.S. 16 (M.G. Picher)).

Having considered the evidence I am persuaded that the grievor was deserving of a serious level of discipline. In my view the forty demerits assessed against him were justified in light of his relatively short service and prior disciplinary record. The grievance is therefore dismissed.

July 17, 2012

(signed) MICHEL G. PICHER
ARBITRATOR