

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4535

Heard in Montreal, January 12, 2017

Concerning

CANADIAN PACIFIC RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Locomotive Engineer R. Arnould of Winnipeg, MB.

THE UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, Engineer Arnould was dismissed for the following reasons, for violating CROR General Notice, General Rule A, Sub items (i), (iii), (vi), (viii) and (x), Rule 112, and Rule Book for Train and Engine Employees Section 2, Sub Item 2.2 (d), for being found sleeping in the cab of your assigned power, with your unit or cars not tied down or protected in case of an unintended movement as witnessed by your taking approximately 30 seconds to wake up when Company Managers entered your cab on December 15, 2015 in Winnipeg, MB.

The Union contends the Company has not met its burden of proof to establish sole culpable behaviour that would justify the ultimate penalty of dismissal. The facts indicate Engineer Arnould was on his lunch break with the Locomotive stationary, even if he is found to be deserving of discipline for a minor incident of this nature, the Company has not justified imposing dismissal. The Union also contends, the Company acted unfairly towards Engineer Arnould when determining the appropriate discipline.

Alternatively the Union contends the discipline imposed in this case was excessive, extreme and unwarranted. Engineer Arnould is a long service employee, and if any degree of discipline is warranted, outright dismissal is certainly extreme and excessive in the instant matter.

The Union requests that the discipline imposed upon Engineer Arnould in this matter be removed from his record and that he be reinstated without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that he penalty be mitigated as the Arbitrator sees fit.

The Company has not responded to the Union's request.

FOR THE UNION:
(SGD.) G. Edwards
GENERAL CHAIRMAN

FOR THE COMPANY:
(SGD.)

There appeared on behalf of the Company:

C. Clark – Assistant Director Labour Relations, Calgary

And on behalf of the Union:

A. Stevens – Counsel, Caley Wray, Toronto
M. Biggar – Counsel, Caley Wray, Toronto
G. Edwards – General Chairman, Revelstoke
H. Makoski – Senior Vice General Chairman, Calgary
G. Brunette – Local Chairman, Winnipeg
R. Arnould – Grievor, Winnipeg

AWARD OF THE ARBITRATOR

This arbitration concerns the dismissal of Locomotive Engineer R. Arnould of Winnipeg, Manitoba, for violating CROR General Notice, General Rule A, Sub items (i), (iii), (vi), (viii) and (x), Rule 112, and Rule Book for Train and Engine Employees Section 2, Sub Item 2.2 (d). Namely, Mr. Arnould was caught sleeping in the cab of his assigned power, with his unit unprotected in case of unintended movement.

The Grievor had been hired by CP in 1995 as a Conductor and qualified as a Locomotive Engineer in 2011. Mr. Arnould works the Engineer spareboard, the Grievor works both Road and Yard, meaning he can be called to one or the other at any given time. Over the course of his career at CP, the Grievor has accumulated 170 demerits, all of which were for poor attendance or unsafe conduct. The Grievor was also dismissed on September 17th, 2012. He was later reinstated in September 19th, 2014. Since his reinstatement, Mr. Arnould was assessed with three informal assessments of discipline and a 30 day suspension for failing to properly wear his Personal Protective Equipment.

The facts in this case are not contested. On December 15, 2015, the Grievor accepted a call for a 06:30 Yard Extra. Mr. Arnould had then been available on the Engineer spareboard for over 20 hours and there was no indication on the train lineup that he would be required to work before 12:00 (noon) on the 15th. Although the Grievor did not get a full night of sleep, he nonetheless considered himself to be fit for duty and accepted the call.

Mr. Arnould worked some five hours with his crew, Yard Foreman Lang and Yard Helper Showers, and started to feel some fatigue. During his lunch break, the Grievor told his co-workers he was going to take a nap while they would eat. While Mrs. Lang and Showers went to eat lunch in the Transcona shack, the Grievor stayed in the locomotive's cab to rest, since the shack was, in the Grievor's words, "not conducive to restful sleep".

Some time later, Superintendent Tytgat and Trainmaster Kwiatkowski entered the cab of the locomotive and found the Grievor asleep. The supervisors had a talk with the Grievor about him taking off his safety glasses and sleeping while on duty. They then left the cab and the crew kept on working. The unit in which the Grievor was observed sleeping had no handbrakes applied and thus was not properly protected from unintended movement.

Prior to the end of his shift, Mr. Arnould was removed from duty. An investigation was scheduled on December 18, 2015. The Grievor was dismissed on January 5th, 2016.

Sleeping while on duty is a serious offense, which is severely disciplined up to discharge in some circumstances. For instance, in **CROA&DR 1573**, arbitrator Picher upheld the grievor's dismissal and stated that:

"It is generally accepted by Arbitrators, nor is it disputed by the Company, that something less than termination would be appropriate in the case of an employee with an otherwise good record, who inadvertently dozed off for a brief moment. In light of the grievor's deliberate actions, that principle has no application in the instant case"

In **CROA&DR 4129**, 40 demerits were assessed and upheld by arbitrator Picher for hiding away and sleeping in a coach car while the grievor was on lunch break. In that case, the fact that the grievor slept during a break was not considered a mitigating factor:

"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."

Arbitrator Picher added that:

"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))."

In **CROA&DR 4334**, arbitrator Schmidt explained that:

“It is axiomatic that an employee must remain conscious and alert while at work. Clearly, the grievor failed to meet this basic expectation. Moreover, this was not the first time the grievor was discovered sleeping at work. The Company’s assessment of 25 demerits against the grievor for sleeping was appropriate and warranted.”

CROR General Rule A states, in part, that:

“Every employee in any service connected with movements, handling of main track switches 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.” [Emphasis added]

While it is true that sleep deprivation is a recurring problem in the railway industry, that did not grant the right to the Grievor to decide where, how and when to nap. Mr. Arnould should have asked a supervisor for permission to do so. Although the explanation given by the Grievor for his tiredness is credible, there are specific situations where napping is allowed and the present case does not fall into any such exceptions. Mr. Arnould was aware that sleeping in his locomotive was a violation but decided to do so nonetheless. As seen in **CROA&DR 4129**, sleeping during a lunch break is not a proper justification.

In any event, the Grievor should have made sure that his assignment was properly secured before falling asleep. With all due respect, I am not convinced by Mr. Arnould's explanation that since he remained in the train, and was only dozing off, he could still be responsive to any situation. Constant alertness is required to make sure no incident arises in case of unintended movement of the train. Napping or "dozing off" clearly isn't compatible with the safety sensitive position that the Grievor was in.

As for the discipline record of the Grievor, it isn't stellar and can certainly not be considered a mitigating factor. Mr. Arnould had already been discharged in 2012 for accumulation of demerits and was disciplined again in the months following his 2014 reinstatement.

It must be noted, however, that the Grievor is a long service employee, with twenty-one years of experience with the Company, which constitutes a mitigating factor. Additionally, the Grievor's co-workers were not disciplined for the failure to secure their assignment. Safety is the responsibility of all crew members and Mrs. Lang and Showers also had the responsibility to make sure that the train was properly secured as it was left unattended. Both men were aware that the Grievor was going to sleep in the locomotive's cab and should have made sure that the brakes would be applied. As such, the case at hand does not present sufficient aggravating factors to justify the outright dismissal of a long service employee.

Once again, while it is recognized that sleep deprivation is a problem that widely affects railway employees, this does not condone personal initiatives of employees outside of what has been determined to be safe practices by the Company. Sleeping while on duty is a grave offense, which can result in the dismissal of the violator in certain cases. Nonetheless, because of Mr. Arnould's long service with the Company and because his co-workers were not disciplined for their violation of CROR 112, a penalty just short of discharge is in order.

Thus, for the above-mentioned reasons, the grievance is allowed in part. The Grievor is to be reinstated forthwith, without loss of seniority. The time between the Grievor's termination and reinstatement shall be recorded as a suspension without compensation. This should be understood by the Grievor to be a last-chance opportunity to show his Employer he can work in the safe and compliant manner required by his position.

January 23, 2017



MAUREEN FLYNN
ARBITRATOR