

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

CASE NO. 4825

Heard in Calgary, Alberta, May 18, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissals of E. Gilbert.

JOINT STATEMENT OF ISSUE:

On December 11, 2022 Mr. Gilbert, the Grievor, was held out of service pending investigation.

On December 16 and 20, 2021 an investigation was held in connection “*with your tour of duty while working on December 11th 2021 on 143-10, more specifically alleged that you were Observed Sleeping while on Duty, resulting in a alleged violation of radio 109 inspections of passing trains and transfers*”.

On December 22, 2021 an investigation was held in connection “*to the events surrounding your tour of duty while working assignment 143-10, in Buffalo on December 11, 2021. Specifically your alleged failure to ensure that the inward facing camera was left unobstructed on CP8772*”.

On December 29, 2021, the Grievor was provided an Offer of Continued Employment which was not accepted.

On January 5, 2022, the Grievor was dismissed by the Company via two separate Form 104s as follows:

Formal investigation was issued to you in connection with the occurrence outlined below: “The events surrounding your tour of duty while working assignment 143-10 on December 11, 2021. Specifically it is alleged that you were observed sleeping while on duty, resulting in an alleged violation of CROR 109 Inspecting Passing Trains and Transfers.”

Formal investigation was conducted on December 20th, 2021 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that,

investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

- *Rule Book for Train and Engine Employees - 2.2 – While on Duty*
- *Rule Book for Train and Engine Employees - 11.7 - 11.7 INSPECTING PASSING MOVEMENTS*
- *CSX Transportation - CH 5 - Observation of Trains*
- *CSX Transportation – 104 – Employee Behaviour – 104.13*
- *CROR- 109- Inspecting Passing Trains and Transfers*

In consideration of the decision stated above, you are hereby dismissed from company service effective January 5, 2022 for failing to ensure that at all times while working, on duty, or subject to duty you were fit to work as well as meeting the requirements of CROR 109 - Inspecting Passing Trains and Transfers. As a matter of record, a copy of this document will be placed in your personnel file.

AND

Formal investigation was issued to you in connection with the occurrence outlined below,

“The events surrounding your tour of duty while working assignment 143-10, in Buffalo on December 11, 2021. Specifically your alleged failure to ensure that the inward facing camera was left unobstructed on CP 8772.”

Formal investigation was conducted on December 22th, 2021 to develop all the facts and circumstance in connection with the referenced occurrence. At the conclusion of that, investigation it was determined the investigation record as a whole contains substantial evidence proving you violated the following:

GOI Section 1 – Locomotive Video Camera Systems.

In consideration of the decision stated above, you are hereby dismissed from company service effective January 5, 2022 for failing to ensure that at all times while working, on duty, or subject to duty the in-cab camera was not obstructed as per GOI Section 1 – Locomotive Video Camera Systems. As a matter of record, a copy of this document will be placed in your personnel file.

On March 29, 2022, the Grievor was reinstated via a letter from Superintendent, Brandon Billingsley, which outlined that his record would reflect reinstatement to Company service and that he would not be paid any compensation or benefits for his time out of service.

On February 15, 2022, Step 1 grievances were filed and on June 3, 2022 Step 2 grievances were filed for each dismissal.

On April 11, 2022, the Grievor returned to the working list.

The Union's Position:

For all the reasons and submissions set forth in the Union's grievances, which are herein adopted, the Union contends as below. The Union reserves the right to object to any new positions that the Company might progress that were not done so via the grievance procedure.

The Union's position that this outright dismissal of LE Gilbert is excessive and unwarranted in this matter.

The Union contends that the access of LVVR footage by management is against the LVVR letter in the CCA as well as TC regulations and guidelines. In the US or not, the employees of CP Rail in Canada are governed by Canadian Law and Canadian Collective Agreement. The Company is abusing its management rights. The Union vehemently contends the Company to cease and desist this arbitrary use.

The Company needlessly drug and alcohol tested Mr. Gilbert and the Union finds that this testing breached Mr. Gilbert's privacy rights as the balance between investigating an occurrence did not outweigh Mr. Gilbert's intrusion of privacy. The Company did not have to go straight to the testing rather in good faith had the opportunity to discuss the situation with Mr. Gilbert and crew and ascertained that impairment was not probable. The Union contends that there were no reasonable grounds for testing and this policy does not justify the abuse of management rights.

The first series of the investigation process was flawed and in violation of the CCA as the Union had requested full disclosure and the Company continued the first investigation over two days with the appendices produced in the NTA, then at Q29, the Company introduced new evidence, in the Union's view, inadmissible evidence. Then for the investigation which resulted in the second 104, specifically and strategically on the Company's part they had called this second investigation upon wrap up of the first one. This shows the Union that the Company had malicious intent to secure the dismissal of Mr. Gilbert. Not only did they investigate a sleeping allegation, they produced new evidence mid way through and then held another investigation using the same footage. They have continued the charade of fairness to secure more questions. Mr. Billingsly, the officer at the scene provided memos, was in the locomotive and did not need the LVVR footage. Mr. Gilbert's rights were violated. The Company abused its managerial rights.

The Union submits that the Company was fully able to investigate the incident without the additional private information which it sought from the LVVR. The Company was able to satisfy its interests through the normal investigation procedure, without requiring the footage.

The Union will also argue that the Collective Agreement between the Canadian Pacific Railway and the Teamsters Canada Rail Conference is an active lawful document on both sides of the border and within that document is the LVVR letter.

The Union objects to this evidence as it is a clear violation of the Collective Agreement letter in regards to the use of in-cab footage. The LVVR or Locomotive Video / Voice Recording letter gives parameters to who (*Transportation Safety Board*) can use the footage and what circumstances (*the purpose of incident/accident investigation*) can dictate its use.

The Union and company signed the May 30, 2018 LVVR agreement outlining the parameters of usage. This specifically included the TSB. The Company does not have the regulatory investigative powers of the TSB.

The Company reopened the proceedings on December 20 under the guise of new evidence. Again, after the full disclosure request and with inadmissible evidence of LVVR footage. The Union contends a violation of Article 39 and the KVP award.

Mr. Gilbert denied being asleep and the Company has not proven otherwise. It is the Company's burden to prove such and it has failed to do so. Then, reprehensibly they dismissed Mr. Gilbert.

The Union contends that there is a theme of targeting, intimidation and harassment evident with this unprecedented focus on Mr. Gilbert. The Union contends that this is being done arbitrarily and in bad faith. The Company has singled out Mr. Gilbert by building a disciplinary case file in order to achieve this culminating result in dismissal. The Company has punitively and financially punished Mr. Gilbert and his family without cause.

During Mr. Gilbert's Investigation on December 22nd, 2021 he was asked several questions about the visor placement and the rules surrounding it. Mr. Gilbert provided forthright responses mitigating the allegation that were not taken into consideration by the company.

The Union contends that the discipline and subsequent dismissal to Locomotive Engineer Gilbert as a result of the investigations is arbitrary, unreasonable, unfair and not impartial. The discipline is excessive. The allegations would not or should not warrant such harsh and punitive discipline nor job loss. The Union further contends that past jurisprudence supports the precept of discipline being administered with a degree of consistency and fairness. The excessive level of discipline assessed to Engineer Gilbert most certainly can be considered discriminatory when compared to other cases similar in nature.

The Union contends that the December 29, 2021 offer of continued employment on last chance terms presented to Mr. Gilbert included unreasonable conditions such as a 45 day unpaid suspension, no ability to grieve or to proceed to arbitration, a 2 year time frame where all company policies, procedures, and work practices must be adhered to or dismissal may result with no grievance procedure applicable, and no grievance could be filed for the agreement. This offer was presented with terms that were next to impossible for an employee to achieve and restricted the Union's ability to represent its member.

Then on March 29, 2022, with Union involvement, Mr. Gilbert is reinstated per new agreement, covering both dismissal 104's. This agreement does not include a 2 year condition, a 45 day suspension, and includes the ability for grievances to be progressed, and *your discipline record will reflect your reinstatement*.

Yet on April 7, 2022 the Company declines the Step 1 grievance stating *the dismissal will stand* which is opposite to what was agreed upon.

In the Company's response, there was no appetite for reduction of discipline, but the Union contends that the mitigating factors should be considered.

The work related stressors caused by these actions of the Company are unfortunately contributing to a workplace where the absence of promoting fair, safe, and productive environments negatively impacts the psychological health of employees.

Any discipline in this case is excessive. None should be assessed.

The Union requests Mr. Gilbert's discipline of two dismissals be expunged from his record and he be made whole for all loss of earnings with interest, without loss of EDO, GH and AV entitlement, benefits, pension and seniority for the period from December 11, 2021 until April 10, 2022. The Union requests damages for each 104 dismissal of \$10,000.00 in general damages for breach of the just cause provisions of the Collective Agreement, \$25,000.00 in aggravated damages for the Company's bad faith and malicious intent, \$25,000.00 in punitive damages owing to the Company's harsh, vindictive, reprehensible decisions in handling Mr. Gilbert, and \$10,000.00 for breach of Mr. Gilbert's rights under the employment contract. In the alternative, the Union requests that the discipline be mitigated as the Arbitrator sees fit.

Company Position:

The Company disagrees and denies the Union's request.

The Company issued two separate issuances of discipline, the assessment of each being dismissal therefore each assessment should be considered separate and reviewed upon its own merits.

The Company maintains the Grievor's culpability as outlined in both discipline letters was established following fair and impartial investigations – the Company simply cannot agree with the Union's contentions to the contrary. Discipline was determined following a review of all pertinent factors, including those that the Union describe as mitigating. The Company's position continues to be that the discipline assessed in both instances was just, appropriate, warranted and in no way discriminatory in all the circumstances.

The Company maintains that it was well within its authority as it pertains to the usage of LVVR footage and that the Grievor was post-incident tested in accordance with Company policy.

On March 22, 2019 the Grievor was reinstated via agreement which substituted his two dismissals for reinstatement with no compensation. As such, the Company maintains his dismissals were effectively substituted to time served suspensions. As such and in keeping with the aforementioned, both suspensions which were served concurrently should be reviewed upon its own merits.

In regards to the request for damages, the Company maintains that the Union has provided no support to their claim. Damages are reserved for conduct which is found to be harsh, vindictive, reprehensible, malicious, as well as extreme in nature. The Company maintains that no such conduct has occurred in this instance and therefore the Union's claims are without merit.

Based on the foregoing, the Company cannot see a reason to disturb the discipline assessed in both instances and requests the Arbitrator be drawn to the same conclusion.

Without precedent or prejudice to the Company's aforementioned position, it is incumbent on the Union to provide detailed information on alleged lost wages, benefits, and interest. The Company cannot properly respond to this request when the Union is vague and unspecific on what constitutes "made whole".

FOR THE UNION:

(SGD.) E. Mogus

General Chairperson

FOR THE COMPANY:

(SGD.) F. Billings

Assistant Director, Labour Relations

There appeared on behalf of the Company:

F. Billings	– Assistant Director, Calgary
L. McGinely	– Assistant Director, Calgary
A. Cake	– Manager, Labour Relations, Calgary
R. Araya	– Manager, Labour Relations, Calgary

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
E. Mogus	– General Chairperson, Oakville
J. Bishop	– Senior Vice General Chairperson, MacTier
D. Fulton	– General Chairperson, CTY-W, Calgary
P. Boucher	– President, TCRC, Ottawa
R. Finnon	– Vice President, TCRC, Calgary
E. Gilbert	– Grievor, Toronto

AWARD OF THE ARBITRATOR

Analysis and Decision

1. At issue are the terminations, replaced by a 96 day suspension, of Locomotive Engineer Gilbert for a) sleeping on the job; b) failure to inspect a passing movement; c) failure to ensure that an inner facing camera was unobstructed; d) whether drug and alcohol testing was appropriate; and e) appropriate discipline and possible damages.

A. Sleeping On The Job

2. The Company relies on the Rule Book for Train and Engine Employees-2.2-While on Duty: "d) it is prohibited to: (iv) sleep or assume the position of sleep except where otherwise provided for".
3. It further relies on CSX Transportation-Employee Behaviour, 104.13, which states: "Employees must not sleep while on duty. An employee laying down or in a reclined position with eyes closed, covered, or concealed is considered to be sleeping".

4. Superintendent Billingsley produced a memo detailing his observations of Engineer Gilbert:

On December 11, 2021, at approximately 9:40 I arrived at CSX Sycamore and saw train 143-10 stopped at a red signal. I could see Engineer Gilbert's feet propped up on the dash from my vantage point, so I approached the locomotive. I boarded the Engineer's side of the CP8772 and then walked to the back window where I observed both employees in a reclined position and their eyes closed and feet propped up on the dash. I walked around the locomotive to the conductors side and saw the employees in the same position. I then climbed down and walked up to the front of the locomotive, mounted the engine and climbed the ladder in front of both the conductor and engineer. The employees remained in a reclined position with their eyes closed the entire time. At that time, a CSX train had been given a signal on the adjacent track and neither employee showed signs of getting of the Engine and performing a roll by inspection as required by rule Rule Book for T&E Employees - 11.7 Inspecting Passing Movements. I entered the Locomotive Cab through the front door and at that point, the Engineer woke up followed by the Conductor and I discussed with them that I had observed them sleeping for approximately 15 minutes. We discussed that employees are expected to come to work rested and ready and stay alert as required by rule Rule Book for T&E Employees – 2.2 While on duty. During the conversation inside the cab, both employees denied to me that they were sleeping (Tab 6 Appendix C). Q&A 14 is to a similar effect.

5. Locomotive Engineer Gilbert admits that he was in a reclined position, contrary to the Rules and was not as alert as he should have been, but denies that he was sleeping:

Q14: As per appendix C Memo to file from superintendent Brandon Billingsley you were observed in the Sleeping Position is that correct?

A14: My seat was reclined and my feet with up

Q15: Are you familiar with T&E Rule book section 2.2 Subsection (d) part (iv) – While on Duty – regarding taking the position of sleep/sleeping while on duty?

A15: Yes

The Union objects to this question, the General Fatigue Management Plan between the Canadian Pacific Railway and Teamsters Canada Rail Conference allows for the opportunity to nap while en route, “to minimize fatigue of operating employees in unassigned or work train service, providing that there are no other duties to perform, an employee may take an opportunity nap.”

Q16: were you taking a Nap when you were observed stopped the morning of December 11,2011?

A16: No

Q17: What were you doing when you were observed the morning of December 11, 2021?

A17: I was waiting for a signal to proceed, monitoring the radio

Q23: Could you have kept yourself busy performing other activities for alertness?

A23: Normally I would go outside, but not in an unsafe neighborhood

Q24: Why do you say this is an unsafe neighbourhood?

A24: My training in the XS pool I was told not to go outside of the cab while stopped at Sycamore due to the reputation of it being a high crime area.

Q25: How did you comply with T&E safety rule book Section 2.2, Section D, Item iv?

A25: I did not comply to the rule by assuming the position of sleep. I want it noted that it is unreasonable to expect me to walk around the cab for 1 hour and 45 minutes.

Q27: Mr. Gilbert, while you were stopped at Sycamore, did you observe a passing CSX movement?

A27: Saw the movement, yes, did not get on the ground to inspect the movement due to the dangerous neighbourhood, and being previously advised as such by a company officer.

Q36: Mr. Gilbert after reviewing the evidence do you still state on record you were fully alert this entire time while stop at a Stop signal Sycamore

A36: I wasn't as alert as I should have been

Q37: Do you have anything further you wish to add to this statement?

A37: I take this very seriously. I do my best all times to follow all the rules which my record reflects, in the future I will ensure I am fully alert at all times.

6. The Company attempted to rely on LVVR footage which Superintendent Billingsley accessed after the incident. The Union objected to this evidence being used, as well as with respect to the fact that it was introduced part way through the investigation. For the reasons given below with respect to the third issue, I find that the Company may not rely upon this evidence

7. While there is disagreement about whether Locomotive Engineer Gilbert was in fact sleeping, there is no dispute that he was in a reclined position for a period of time, contrary to the Rule Book and Employee Behaviour document, set out above. Moreover, LE Gilbert admits that he was not as alert as he should have been.

B. Failure To Inspect a Passing Movement

8. Superintendent Billingsley noted that Locomotive Engineer Gilbert had failed to move from his reclined position to get down on the ground to Inspect a Passing Movement, as he is required to do. Locomotive Engineer Gilbert explained that he had been informed by management that, as the area in which they were stopped was considered dangerous, they were not required to descend from the cab. This evidence, found at Q and A 27-29, was not contested by the Company.

9. However, there was nothing to prevent LE Gilbert from observing the movement upright in his chair or standing in the cab, even if he could not descend to the ground.

C. Failure to Ensure an Inner Facing Camera was Unobstructed

10. Superintendent Billingsley accessed an inner facing security camera and discovered that one of the cameras had been obscured by a sun screen. Although he had been physically present in the cab of the engine, there is no indication that he had become aware of the issue prior to accessing the security footage.

11. The Union takes the position that there was no right for Superintendent Billingsley to access the security footage. It further takes the position that this evidence was not brought to the attention of the grievor and Union prior to the questioning of the grievor, but instead “lay in the weeds” until part way through the investigation process. The Union states that this has resulted in a biased investigation and that the evidence should be excluded and the discipline removed.

12. The Company takes the position that the security footage was legitimately accessed, as LE Gilbert had been in the US at the time the footage was taken. It notes that GOI-Section 1-23.3 requires crews to ensure that items do not obstruct the camera’s view.

13. Both parties agree that Superintendent Billingsley would have accessed the inner facing security camera footage from data stored on Company servers in Canada. (see Union Exhibits, Tab 6, p. 6/9). As such, access to this data would be governed by Canadian legislation and agreements between the parties.

14. The Railway Safety Act (RSC, 1985, c.32, 4th Supp), paragraphs 17.91(1)(a)(b) and subsection 17.91(3) (Tab 34 of Union Documents) and the Locomotive Voice and Video Recorder Regulations: SOR/2020-178 set out how and when LVVR recordings may be accessed:

Authorized persons - voice and video data

14 (1) A company must designate the persons it authorizes to take one or more of the following actions and make a record of their names and positions:

(a) collecting voice and video data from crash-protected memory module or from any other storage location where such data is automatically stored;

(b) communicating voice and video data; and

(c) accessing and using voice and video data for the purposes of paragraph 17.91(1)(a) or (b) or subsection 17.91(3) of the Act, as applicable.

Prohibition

(2) For the purposes of paragraph (1)(c), the company must not designate any person who directly manages operating employees to access or use voice and video data under paragraph 17.91(1)(a) of the Act.

15. It is clear that the Company must designate a person to make this data available when called for by the Railway Safety Act. Regulation 14(2) makes clear that a person who directly manages operating employees may not be that designate. Superintendent Billingsley does directly manage operating employees, including Mr. Gilbert, and was not the Company designate.

16. The parties have also agreed that only designated persons are permitted to access LVVR footage for the Transportation Safety Board. The Letter Agreement, found at p. 414 of the Collective Agreement, reads as follows:

...
 Internal LVVR recordings can only be used at the request of the Transportation Safety Board for the purpose of incident/accident investigation.
 The review of LVVR footage or recordings by any other agency or individual is prohibited save and except for the employee of CP who is required to retrieve the footage for the Transportation Safety Board.
 The LVVR recording cannot be reviewed by CP except as provided by law.

17. Mr. Billingsley was not entitled to access the LVVR footage, by both law and agreement between the parties. The Company may therefore not rely upon this footage for the purpose of discipline.

18. Given that this was the source of the evidence for the discipline, this discipline cannot stand.

19. Given this finding, I need not address the Union's other arguments concerning the failure of the Company to provide evidence in advance.

D. Drug and Alcohol Testing

20. The Company tested LE Gilbert for drugs and alcohol, some 4 hours after Superintendent Billingsley entered the cab. The crew were permitted to return from Buffalo and complete their tour of duty before the testing was done. The results were negative (Union Tab 32).

21. According to Procedure #HR 203.1 Alcohol and Drug Procedures (Canada), a Supervisor needs "reasonable grounds to believe that the actions, appearance or conduct of an employee while on or subject to duty are indicative of possible use of alcohol and /or drugs, and there is a threat to the health and safety of employees (including the employee subject to the testing) ...". Indicators include "sleeping or drowsiness at the workplace..."

22. While Superintendent Billingsley may have had concerns about "sleeping or drowsiness at the workplace", he did have the opportunity to meet with and observe LE Gilbert in the cab of the engine, and following that meeting and observation, he permitted him to complete his tour of duty. It is difficult to believe that he would have permitted that tour of duty to be completed, had he had "reasonable grounds to believe ...that there was a threat to the health and safety of employees".

23. Accordingly, I find that there were not reasonable grounds to conduct drug and alcohol testing in these circumstances.

E. Appropriate Discipline and Damages

24. LE Gilbert returned to work after his two dismissals were changed to a 96 day unpaid suspension.

25. At issue is whether this penalty is appropriate in the circumstances. I am mindful of the comments of Arbitrator Gee of the Ontario Labour Relations Board in *Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP, 2009 CanLii 31586* (Tab 24 of the Company Documents) concerning the substitution of arbitral discretion for that of the employer:

In support, the Company turns to Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP, 2009 CanLII 31586 (ON LRB) (**Tab 24**), where Arbitrator Gee of the Ontario Labour Relations Board states:

"...the question arbitrators should ask themselves, when considering penalty substitution, is whether the penalty imposed by the employer is within the range of reason having regard to all the circumstances of the case.

Arbitrators should not interfere with a penalty merely because, had they been the employer, they would have handled the matter somewhat differently."

26. However, I am also mindful of the facts and outcome of the present matters. Here, LE Gilbert has worked for the Company for some 18 years, with only 20 demerit points and a caution on his record, both from many years ago. He was candid in his testimony, admitting to being in a reclined position, contrary to the Rules. He was successful in having the LVVR security footage being declared inadmissible. However, he did infringe a Rule and made no effort to inspect a passing movement from inside the cab.


27. In **CROA 4604**, Arbitrator Clarke substituted a 30 day suspension for a dismissal, where the grievor had some previous discipline and had not been candid about his failure to inspect a Passing Movement.

28. Here, I find a 15 day unpaid suspension to be appropriate, in light of the facts above.

29. Given the mixed results with respect to the two dismissal grievances, as reduced to a 96 day unpaid suspension, I do not find that this matter is appropriate for an award of damages. I remain concerned, however, about the inappropriate use of LVVR footage. A future decision concerning damages, depending on the facts of the case, could be different.

30. LE Gilbert is entitled to compensation, for the reduction in the suspension. I retain jurisdiction for any issues arising out of this award, including the calculation of compensation owing to LE Gilbert.

June 6, 2023



JAMES CAMERON

ARBITRATOR