CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5072

Heard in Montreal, July 17, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE
MAINTENANCE OF WAY EMPLOYEES DIVISION

DISPUTE:

Dismissal of Mr. L. Ciampini.

JOINT STATEMENT OF ISSUE:

On August 2, 2023, Mr. Ciampini was issued a Form 104 notifying him that he was dismissed from Company service as follows:

This discipline letter is in connection with the investigation completed on July 17, 2023 regarding the September 5, 2022 incident at an at-grade crossing at the intersection of MP 12.54 Hoadley Sub and Hwy 12 between a third party passenger vehicle and the Ballast Regulator that you were operating.

The investigation determined that you had fallen asleep while operating the Ballast Regulator, failed to protect the crossing, and failed to stop to give traffic on the road the right of way.

This was in violation of the following:

- The Rule Book for Engineering Employees:
  - Section 2.2 – While on Duty, (e)(vi);
  - Section 2.1 – Reporting for Duty, (a)
  - Section 1 – Definitions, Track Unit Speed
  - Section 10.2 – Track Unit Operations, Road Crossings
- CROR, General Rules, Paragraph A, Sub Paragraph (xi)

You are hereby DISMISSED from Company Service effective immediately.

UNION POSITION:

1. At the time of the incident Mr. Ciampini was an employee of 5 years with only minor discipline on his record.
2. On the shift previous to the day of the incident, Mr. Ciampini had worked 15.5 hrs.
3. The machine that Mr. Ciampini was operating was insulated so that it did not set off on track signaling systems that could have prevented this incident.
4. Mr. Ciampini was remorseful and took full responsibility for his actions at his investigation.
5. Mr. Ciampini suffered from PTSD as a result of the incident.

6. Mr. Ciampini has offered to take part in a “Home Safe” video to explain how this incident has impacted his life and to help ensure that no other employee has a similar incident.
7. The discipline assessed on Mr. Ciampini was excessive.

The Union requests that; The discipline assessed be removed from the grievor’s record and that he be immediately reinstated into Company service without loss of seniority and with full compensation for all wage and benefits lost as a result of this matter

COMPANY POSITION:

The Company disagrees and denies the Union’s request.

The Grievor’s culpability was established through the fair and impartial investigation. Discipline was determined following a review of all pertinent factors including the Grievor’s short service, work history, and his past discipline record.

On September 5, 2022, Leonardo Ciampini was responsible for operating a ballast regulator on the Hoadley Subdivision. At approximately 8:00 am, the ballast regulator entered a crossing and struck a member of the public driving a Ford F-150. The driver of the vehicle sustained serious injuries and was transported from the scene by STARS Air Ambulance. His injuries have been described as “life altering.”

There was no fault with the equipment as may be alleged; Nor has the Union provided any factor that would mitigate the incident itself to a degree warranting a reduction in penalty.

The Grievor failed to comply with track unit speed and failed to escalate his alleged fatigue to a supervisor. He fell asleep while operating a machine on track and failed to protect the public crossing prior to proceeding over it.

The Grievor jeopardized his own safety, the safety of the public and the Company’s reputation because of his actions.

The Company’s position continues to be that the discipline assessed was just, appropriate, and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests that the Arbitrator dismiss the Union’s grievance in its entirety.

For the Union:	**For the Company:**
(SGD.) W. Phillips	**(SGD.) L. McGinley**
President, MWED	Director, Labour Relations

There appeared on behalf of the Company:

E. Carrier	– Manager, Labour Relations, Calgary
A. Cake	– Manager, Labour Relations, Calgary

And on behalf of the Union:

W. Phillips	– President, MWED, Ottawa

AWARD OF THE ARBITRATOR

Context and issue

1. On September 5, 2022 the grievor dozed off briefly while operating a Ballast Regulator. He woke up after some 20 seconds, but was unable to stop his movement in time and collided with a pick up truck at a level crossing, causing extensive injuries to the driver and damage to the vehicle, as well as to the Ballast Regulator. The investigation

was only concluded in July, 2023, as the grievor was previously unable to be interviewed due to PTSD. The grievor was terminated shortly thereafter, on August 2, 2023.

2. At issue is whether termination was appropriate in the circumstances.

Position of Parties

3. The Company takes the position that this accident was the result of a series of bad decisions by the grievor, for which he is entirely responsible. He worked a considerable amount of overtime in days prior to the accident, but overtime is voluntary and he could have refused it. He chose to start work early on the day of the accident, thereby further limiting his rest period. He knew he was tired when he began work, but only complained about fatigue to his unionized foreman, and did not escalate it to upper management. The Company insists that only the grievor can know when his fatigue level is an issue and the grievor failed to notify management or to take other action.

4. The Company notes that sleeping on duty can warrant dismissal (**CROA 4535**) and that remorse is not enough (**CROA 4582**). It submits that aggravating factors include other track violations and a very serious collision. It argues that the Union jurisprudence is largely inapplicable, as the sleeping violations noted did not involve sleeping while using operating equipment.

5. The Union argues that this tragic accident was not the result of the grievor staying out late in a bar, and being fatigued the following day. The grievor was fatigued here because he did overtime every day for the last six days, including 15.5 hour days for the previous two days. It notes that doing overtime is expected and encouraged and forms part of the culture. The grievor's hours of work do not make him an outlier.

6. The Union further argues that a strong distinction must be made between intentional sleeping on the job, and unintentionally dozing off for a brief period of time.

7. The Union submits that termination is much too severe a sanction for an unintentional dozing off, which lasted for no more than 20 seconds. It insists on a recent case involving virtually identical facts between the same Parties, where the grievor was initially disciplined with a 30 day suspension, later reduced by Arbitrator Rogers to a 5 day suspension (see **Virostek** discipline, Tab 17 Union documents).

Analysis and Decision

8. The jurisprudence has dealt with many cases of sleeping on the job. Arbitrators have consistently found that sleeping while on duty is a serious offense which merits serious discipline, up to and including termination (see **CROA 1685**, where Arbitrator Picher upheld the termination of a grievor who fell asleep for 15-30 minutes while operating railway equipment, crossing multiple level crossings); **CROA 4334**, where Arbitrator Schmidt imposed 20 demerits on a grievor for sleeping at his desk; **CROA 4535**, where Arbitrator Flynn imposed a last-chance lengthy suspension to a grievor who slept in his unsecured locomotive).

9. While sleeping on the job in any environment is a major offense, it is obviously far more problematic for an employee to do so while in moving equipment. As Arbitrator Picher noted in **CROA 1685**:

> The sole issue is the appropriate measure of discipline in the circumstances. The Union submits that Mr. Millions should be given another chance, stressing that his disciplinary record was clear at the time. In this case the arbitrator has some difficulty with that submission. It is trite to say that safety must be a primary concern in the movement of any railway equipment. In this context sleeping on the job involves an obviously great dimension of peril. The risk to life and property that may result from an employee sleeping at the controls of moving railway equipment can scarcely be understated.

10. However, the jurisprudence also clearly makes a distinction between voluntary sleeping or “nesting” on the job, and someone who inadvertently dozes off. In **CROA 1573**, Arbitrator Picher held:

> “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".

11. Arbitrator Flynn in **CROA 4535** adopted this reasoning as well.

12. In **CROA 2021**, Arbitrator Picher again made the above distinction:

> As a general matter the Arbitrator accepts several of the points of principle raised by the Union in this case. There is, I think, a distinction to be made between an employee who deliberately goes to sleep when he or she is responsible for some aspect of a train movement and one who succumbs inadvertently to fatigue. Additionally, it is legitimate to consider, on a case by case basis, whether an employee could fairly be expected to obtain meaningful rest in the hours prior to a call; close attention should be paid to the pattern of sleep of the employee over a substantial period of time leading up to his or her tour of duty. If the Company can point to an employee's failure to obtain rest, as I think it properly can, the converse must also be true for the Union.

13. The facts of each case are obviously critical, and Arbitrator Picher carefully examines the facts concerning two junior employees who were dismissed after sleeping on a moving locomotive. One employee was dismissed as he had deliberately gone to the second locomotive to sleep. The second employee had only dozed off, but had an aggravating factor of lying during the investigation.

14. Here, it is not contested that the grievor dozed off for a very short period of time, as he remembered seeing the level crossing ahead of him, and then waking up prior to the crossing, but unable to stop the movement in time:

> Q 56 How long do you think you were asleep for?
> A56 It's hard to say. I remember seeing the crossing from far away and then seeing it again right before the impact.

15. The cases cited by the Parties dealing with dozing while using operating equipment are the most germane to the case at hand. **CROA 1685**, cited by the Company, deals with an employee asleep while operating equipment, but differs from the present matter, as it dealt with an employee who was asleep for 15-30 minutes. The Union cites the

decision of Arbitrator Rogers in the **Virostek** matter, between the same Parties, involving a grievor who also dozed off for some 15-20 seconds. There the grievor was disciplined with a 30 day suspension, later reduced to a 5 day suspension by the arbitrator.

16. However, there are factual distinctions with the present matter, as there was little damage in the **Virostek** matter, while the present matter involved very serious injuries to the driver of the pick up and substantial damage to both the truck and the railway equipment. There is also a fundamental difference between the two grievors. Mr. Virostek described himself as well rested at the beginning of his shift while the present grievor described himself as "exhausted" (see Q and A 63).

17. Here it is not contested that the grievor had done a substantial amount of overtime in the days preceding the accident. The hours worked in the previous six days are as follows: Aug 30 (14 hours); Aug 31 (11.5 hours); Sept 1 (11 hours); Sept 2 (11 hours); Sept 3 (15.5 hours); Sept 4 (15.5 hours). A full work day is 10 hours. The grievor had worked overtime every day for the previous 6 days and worked 15.5 hours in each of the previous two days.

18. The grievor admits that he was not fit and rested at the beginning of his shift and that he failed to escalate concerns about his condition past his immediate foreman:

> Q61. Were you fit and rested for duty on September 5th, 2022?
> A61. No, I was very tired from the previous days.
> Q62. Do you not think that you had adequate rest the previous days although the GPS data shows that you had 8:29 hours of rest prior to your shift on September 5th and 9:14 hours of rest the day prior?
> Union Objection: The GPS data does not define the hours of rest the employee would have incurred.
> A62. No I was still tired.
> Q63. During your shift on September 5th, 2022 did you escalate to your supervisor, your foreman or anyone that you were concerning about being fit for duty?
> A63. I had a talk with the foreman about being tired, both of us were exhausted.

19. It is clear that the grievor did not meet the requirement to be “fit and rested” at the beginning of his shift, and to not sleep while at work, contrary to the Rule Book for Engineering Employees, Rule 2.1, 2.2 (e) (vi).

20. It is equally clear that the grievor violated a series of rules respecting the safe use of his equipment in dozing off as he did (see paras 18-21, Company Brief). However, as Arbitrator Sims did in **CROA 4492**, I will treat this incident as a whole, rather than as a series of individual rule violations caused by the grievor falling asleep on the job.

21. Given that the grievor clearly infringed a number of rules by falling asleep while operating equipment, discipline is entirely appropriate. To determine whether termination was reasonable in the circumstances, a review of the aggravating and mitigating factors, pursuant to the well known William Scott matter, is clearly required.

22. Aggravating factors include the very serious nature of the infraction of sleeping while operating moving equipment, with tragic consequences to a member of the public. A serious collision has been treated as an aggravating factor (see **CROA 4582**).

23. In addition, one of the most aggravating factors is that the grievor knew that he was exhausted when he began his shift. He candidly admitted that he should have escalated his condition to managers and parked his equipment (see Q and A 80-81,93). The fact that he knew he was beyond tired, but nonetheless continued working, makes the present matter significantly different from the Virostek matter.

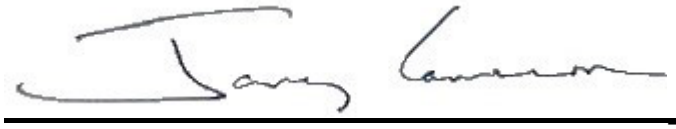
24. With five years of service, the grievor cannot be considered a long term employee.

25. Mitigating factors include the commendable actions of the grievor after the accident, where he performed well. He was candid during the investigation, admitting his errors and acknowledging that he would escalate the matter in the future. While his service is not long, he has no other discipline similar to the present matter. The error of dozing off was a momentary one.

26. In my view, termination is excessive in the circumstances. This is not a case where the employee was asleep for a considerable period of time, as in **CROA 1685**. However, a short suspension, as in the Virostek matter, is inappropriate, given the known condition of exhaustion the grievor was in at the beginning of his shift.

27. I find that his termination should be substituted for a reinstatement without compensation and without loss of seniority. This discipline recognizes the serious error of judgment made by the grievor, with tragic consequences to a member of the public and to the grievor. It also recognizes that the error was not intentional. I note that a similar result in similar circumstances was reached by Arbitrator Picher in **CROA 1717.**

28. I remain seized with respect to any questions of interpretation or application of this Award.



September 16, 2024

JAMES CAMERON
ARBITRATOR