CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5098

Heard in Edmonton, November 12, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's assessment of 20 demerits to Foreman E. Johnson for "the circumstances surrounding your violation of CROR General Rule A xi and xii while working East Extra in MacMillian Rail Yard on November 2, 2022".

JOINT STATEMENT OF ISSUE:

On November 2nd, 2023, Foreman Johnson was assigned to the Toronto South Yard Spareboard and was called for an Extra East Coast Control Assignment at MacMillan yard on duty at 1100 hours. He reported to the East Control tower and was informed he was going to be driven to West Control to take over for the crew there, during the drive to West Control his cell phone rang while it was in his work bag.

Following the investigation he was assessed 20 demerits; the Union followed the grievance procedure and the grievance is now properly before the arbitrator.

The Union's Position:

It is the Union's position, however not limited hereto, that the Company violated Article(s) 82, 84, 85. 85.5 Addendum 124 of Collective Agreement 4.16 when they assessed 20 demerits to Conductor Johnson for "the circumstances surrounding your violation of CROR General Rule A xi and xii while working East Extra in MacMillian Rail Yard on November 2, 2022".

The Union contends that the Company failed to exercise its' rights reasonably in this matter from the failure to give proper notice for the investigation to the unreasonable assessment of discipline to Conductor Johnson for an alleged offence on his eleventh trip for pay and before his shift even commenced.

It is the Unions view that this investigation was not conducted in a fair and impartial manner, and the outcome was predetermined. The Formal Employee Statement was done solely to give the illusion of Collective Agreement compliant in order to support the Company's assessment of discipline to Conductor Johnson.

The Union views the Company's actions as contrary to their commitments under Article 85.5 of Collective Agreement 4.16, it cannot be said that the Company exercised its rights reasonably.

The Union submits that the discipline assess was unwarranted, unjustified, excessive, arbitrary, and discriminatory. The Union further submits that the discipline assessed was not done in a progressive manner as set out in the Brown System of Discipline.

The Union takes issue with the Company failing to answer the grievance at Step III in violation of Article 84, 84.2 (c) and the bolded NOTE once again leaving the Union to guess at the Company's position heading into arbitration.

The Union, as a result of the substantial violations, submit that a remedy in application of Addendum 123 of Collective Agreement 4.16 is appropriate.

The Union consequently seeks that the discipline assessed to Conductor Johnson be removed in its entirety, failing that, the Union requests that the penalty be adjusted as the Arbitrator deems appropriate.

The Company's Position:

The Company does not agree with the Union's position. The grievor was subjected to a fair and impartial investigation. It is clear from the formal employee statement that the grievor understood CROR General Rule A and a violation of critical rule occurred on the date in question. It's the Company's position that the grievor attempted to minimize the potential safety impacts of violating this rule. Furthermore, the grievor had no valid reason to have his phone with him with the ringer turned on while working his assignment in a company vehicle.

The discipline assessed was both reasonable and warranted. As supported by the jurisprudence, the short service of the grievor is not a mitigating factor in this case. Furthermore, the grievor was not forthcoming in the investigation and showed no remorse for the serious incident which occurred and as such the proper discipline was assessed.

The Company does not agree that a remedy is applicable in this case, additionally the Company does not agree that Article 85 was violated. The Company acted in a reasonable manner due to the dangers caused by employees being distracted while having a personal electronic device on them while working. The consequence of violating this rule can impact the grievor, his crew mates and/or the public.

For the Union:	**For the Company:**
(SGD.) J. Lennie	**(SGD.) T. Sadhoo**
General Chairmen CTY– C	Labour Relations

There appeared on behalf of the Company:

R. Singh	– Senior Manager, Labour Relations, Vancouver
C. Baron	– Manager, Labour Relations, Edmonton

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
G. Gower	– Vice General Chairperson, Brockville
E. Page	– Vice General Chair, Hamilton

AWARD OF THE ARBITRATOR

[1] On November 2, 2022, the Grievor was assigned to an Extra belt– pack assignment and was to be the Foreman on that job. The Grievor was a new employee, having been hired in late March 2022 and qualifying as a Conductor on October 12, 2022. This was his first shift as a Foreman.

[2] The Grievor was assigned to work in MacMillan Yard (known as “Mac” Yard). It was undisputed that Mac Yard is a very large Yard, which takes 20 minutes to traverse by truck. As described by the Union, it is one of the largest yards in North America. This was not disputed by the Company.

[3] The Grievor was assessed 20 demerits for violating CROA General Rule A for having his cell phone powered on and with him.

[4] The Union grieved that no culpability was established and that discipline was excessive.

[5] The issues between the parties are:

a. Did the Company’s Investigative Officer “prejudge” the discipline?
b. Has the Company established cause for discipline?
c. If so, was the discipline excessive? and
d. If so, what is an appropriate measure of discipline?

[6] For the reasons which follow:

a. The Company’s Investigative Officer did not prejudge the discipline;
b. The Company has established the Grievor’s conduct was culpable; and
c. The Company’s discipline of 20 demerits was not excessive in these circumstances.

Analysis and Decision

Facts

[7] The facts can be briefly stated. The Grievor reported for duty and a job briefing was held in the East control room. After the job briefing, the Grievor and a brakeman were driven in a Company vehicle by the Trainmaster to the West part of Mac Yard, to trade off

with the West crew. On the way to that part of the Yard, the Grievor's phone rang. The phone was located in the Grievor's "grip" bag. According to the evidence of the Trainmaster, the Grievor found his phone, turned his phone off and was then taken back to his car, which was near the East control tower, to leave the phone in his car.

[8] The Grievor was also informed by the Trainmaster that he was "…in violation of the CROR Rule A (xi) and (xii), and it was explained the harm that could be done with a cell phone turned on.

[9] An investigation occurred on November 14, 2022. During his investigation, the Grievor noted it was his usual practice to leave his phone in his car, and that he forgot to do so. At Q/A 15, the Grievor noted he was *not* in violation of CROR General Rule A xi, because it states "[T]he use of personal entertainment devices is prohibited" and he was not using his phone. He also stated in the previous question, however, that to be "fully compliant" with the rules, in future he would either turn his phone off, or leave his phone in his car (Q/A 19).

CROR Rules

[10] The Grievor was disciplined for violating CROR General Rule A (xi) and (xii). The CROR apply to all railroads. They are not created by the Company.

[11] However, the Company has developed its own policy for interpreting the requirements of CROR General Rule A, which are "internal" to it.

> (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. The use of personal entertainment devices is prohibited. Printed material not connected with the operation of movements or required in the performance of duty, must not be openly displayed or left in the operating cab of a locomotive or track unit or at any work place location utilized in train, transfer or engine control; and
>
> (xii) restrict the use of communication devices to matters pertaining to railway operations. Cellular telephones must not be used when normal railway radio communications are available. When cellular telephones are used in lieu of radio all applicable radio rules must be complied with.

> Personal Electronic Device
> No electronic communication or personal entertainment devices may be used except in matters pertaining to railway operations and under the specific authority from a company supervisor. When not so authorized, the devices must be powered off while at a company work location including locomotive cabs, track units or at any work place locations utilized in train, transfer or engine control. Unless otherwise authorized, operating crews are prohibited from possessing these devices on their person while on duty. Employees bringing these devices to the work place must leave them powered off in their work bag or leave them in their personal vehicles, lockers or other location where they will not have access to them while on duty.
>
> In the application of General Rules A (xi) and (xii), electronic communication or personal entertainment devices include Samsung Smart Watch, Apple Watches and any other similar device on the market. These types of devices
> are prohibited.

Analysis & Decision

[12] At the hearing, the Union gave evidence as to the reason the Grievor's bag was with him; what he intended to do with the bag when he reached the West end of the Yard (since he couldn't take his bag with him to operate a belt pack); and what would have occurred if he had been working in the East, as he expected. However, during the Investigation, the Grievor did not speak to why he was bringing his bag with him while being transported; what his intention was once he reached the West tower; or what he would have done with his bag – or his phone for that matter – when he reached the West end of the yard or even at the East end of the Yard, as was the original assignment. He had the opportunity to provide that evidence, but did not do so.

[13] An Arbitrator cannot speculate as to evidence of a Grievor's intention; neither can the Union representative give evidence at the hearing regarding that intention, to fill in the facts. I am therefore left with the evidence given by the Grievor during the Investigation, scant as it is.

Was there "Prejudgment" by the Investigating Officer?

[14] Turning to the first issues it was the Union's position that – given the "timing and record" of the Investigation – the matter was "prejudged".

[15] I have reviewed the transcript carefully and do not see the same concern. I cannot agree that providing the discipline on the same day must mean the evidence was not appropriately considered, or that the matter was "prejudged". Efficiency in decision–making and prejudgment are not the same.

[16] Neither the record, nor the timing of the discipline lead to the conclusion the matter was "prejudged".

Was the Grievor's Conduct Culpable?

[17] The familiar framework referred to as "*Wm. Scott"* requires an arbitrator ask three questions when assessing discipline: a) was culpability for discipline established? b) If so, was the discipline assessed fair and reasonable? and c) If not, what discipline should be substituted?

[18] Turning to the first question, the Union argued the Grievor had not violated either of the two CROR Rules referred to in the Form 780 relied upon by the Company, as he did not engage in non– railway activities which distracted his attention from the performance of his duties; he did not "use" his communication device at any time, as he did not use his phone; and his phone was not powered on at a workplace location as he was being transported. The Union argued the Grievor did not use his phone "in a train, transfer or engine control", as he was in the back of a pick– up truck being transported. It pointed out he was not in control of that truck.

[19] It argued that CROR General Rule A does not address the circumstances where an employee is transferred across the Yard.

[20] The Company argued its internal notes around CROR Rule A applied and created a "strict policy against personal cell phones while on duty" noting that by that policy:

> …operating crews are prohibited from possessing these devices on their person while on duty. Employees bringing these devices to the workplace must leave them powered off in their work bag or leave them in their personal vehicles, lockers or other location where they will not have access to them while on duty.

[21] The Company argued that the Grievor need not be actively using his phone to be in breach. It argued the Grievor should have kept his phone in his vehicle or in his locker; there was no reason for the Grievor to have his phone in his bag; and that the violation represented a serious incident.

[22] This is a unique case in the jurisprudence filed, as it does not involve an individual who was using his phone to talk, text or read. It involves an individual who was in breach of the Company's policy which requires individuals to have their cell phones powered off if in their work bag, or left in their "personal vehicles, lockers or other location where they will not have access to them while on duty".

[23] As a preliminary finding of fact, I am satisfied the Grievor was on duty when this incident occurred. Being transported across the Yard did not change the fact his tour had started, or that he was at the workplace for his job. The Grievor's tour of duty had commenced before the transport occurred. While he had not yet controlled a train, a job briefing had already been performed at the East control room.

[24] Had the Company suggested the Grievor should not be paid until he actually was transported across the Yard and controlled a train, the Union would have rightly taken issue with that decision.

[25] The possession and use of cell phones in the highly safety– sensitive industry of the railroad understandably causes appropriate and significant concerns for railroad employers[1]. Individuals working for a railroad do so largely unsupervised. By their actions, they can control and direct the movement of multi– ton vehicles, often in congested Yards, or operate trough communities located along the rail lines. Given that railroads are also required to transport dangerous goods, it is not a leap to consider that serious consequences that could occur when attention is distracted to a personal electronic device.

[26] I agree with the Company that failing to turn off a cell phone in this industry is not akin to forgetting to turn it off in other circumstances, such as in a movie theater. In this

[1] See also para. 13 or CROA 4739

workplace, the attention it takes to pick up a ringing phone; silence it and then turn it off can result in a tragic accident.

[27] Arbitrators have recognized that the stakes in this industry – even for momentary inattention – are high.

[28] The Company filed **CROA 3900**, a policy grievance involving CPKC relating to the provision of cell phone records, which demonstrated the type of serious consequences that can result from mixing trains and cell phones. In that case, the arbitrator referred to a serious accident in the U.S., which caused 25 fatalities from a head– on collision, where there was failure to stop for a clearly visible stop signal, *because the Engineer was texting on his cell phone.* That is the extreme end of a dangerous spectrum.

[29] Considering first the question of culpability, I am satisfied the Company has met its burden to establish the Grievor's misconduct of having a cell phone that was powered on with him at the workplace – while he was being transported during his tour of duty – was culpable misconduct. The Grievor was in breach of CROR General Rule A; which I am satisfied for this employer included its own internal policy for how it determined it would implement CROA General Rule A.

[30] First, I am satisfied the word "use" in CROR Rule A is broad and is not limited to only talking or texting with a phone. The Rule does not limit the word "use" to talking or texting. Cell phones can result in multiple distractions. In an industry where even momentary inattention can have significant consequences, I am satisfied the intention of that Rule is to reduce all distraction from personal electronic equipment. I am satisfied that Rule recognizes that personal electronic devices – including cell phones – can be distracting due to the nature of their functions, and further that this distraction would extend to turning attention to a cell phone when it rings; and responding to the ringing by turning it off.

[31] It is logical that the ringing of a cell phone, even if not answered, would be distracting, as it takes attention away from an individual's work and places that attention on to a cell phone. Even momentary distraction – in this industry – can cause significant and grave consequences. I am satisfied it is these types of consequences that CROR General Rule A was drafted to avoid.

[32] I am therefore satisfied that when the Grievor's phone rang, and the Grievor had to reach for it, find it, and turn it off, that phone was being "used" by the Grievor, in the broad manner which is contemplated by CROR Rule A. Put another way, when an individual needs to pick up a phone and turn it off, they are engaging with that electronic device in a manner prohibited by that Rule. The Company's policy is on how it will implement CROA General Rule A is also clear that "[w]hen not so authorized, the devices must be powered off while at a company work location". There is no ambiguity in that requirement. The Grievor clearly breached that requirement as evidenced by a ringing phone in his bag during his tour of duty.

[33] I am further satisfied that the reference by the Company in its Form 780 to the CROR General Rules was broad enough to capture its own internal policies for how it intended to interpret those Rules, as well as the broad nature of the Rule itself.

[34] The fact the Grievor was not controlling a train at the time his cell phone rang may influence an assessment of the *amount* of discipline, but it is not relevant to the question of culpability.

Was the Discipline Excessive?

[35] Individual circumstances must also be considered in the assessment of any discipline choice. This leads to the second question in a *Wm. Scott* analysis. It is only if that second question is determined in the Grievor's favour that the third question would even arise.

[36] One of the factors under this question is the nature of the offence. While the seriousness of the misconduct often acts to aggravate a penalty in this highly safety–sensitive industry, those circumstances can also mitigate a penalty.

[37] The Company noted the seriousness of the use of cell phones in a highly safety–sensitive industry, which it argued was recognized in CROA jurisprudence. It also noted that Rules surrounding cell phone use are strictly enforced; that cell phones can clearly distract employees from their safety sensitive tasks, with grave consequences; that there was a clear requirement that cell phones must be powered off and stored; and that the

Grievor is a short–service employee, which were all aggravating factors. It also pointed out the Grievor was acting as a Foreman, so was setting a very poor example for a junior employee, which is also aggravating; and that the Union was inappropriately trying to minimize the risk in this industry, by comparing the Grievor's actions to someone who forgets to turn their ringer off in a movie theater, which is not an appropriate comparison.

[38] It also argued if the Grievor had his phone with him, there was a probability he would use it.

[39] For its part, the Union took issue with this last statement, noting there was no evidence for that assumption.

[40] I agree with that assessment and have disregarded that argument.

[41] The Union argued that the fact the Grievor was being transported across the Yard – and not managing the movement of a train – when his cell phone rang is relevant; and that discipline was excessive for a first offence, given the circumstances. It made several arguments surrounding the Brown System, including that the system was not meant to be punitive, and that 20 demerits represents 1/3 of the discipline for the Grievor's career, since at 60 demerits, the Grievor could be dismissed. The Union also argued that it was understandable that sometimes an individual an forget to turn off a phone, as in a movie theatre. It urged the Grievor agreed he made a mistake; was committed to full compliance in the future; and was forthright and remorseful. It further argued the "few words" the Grievor had received in coaching in the truck were sufficient to educate him, in these circumstances and that further discipline was unnecessary and excessive. It argued the Company inappropriately treated this as a "worst case scenario".

Review of the Jurisprudence

[42] In addition to **CROA 3900**, the Company relied on **CROA 4032**; **CROA 4497; CROA 4684** and **CROA 4739** to support its discipline choice, which all relate to the use of cell phones in this industry**.** The Union did not provide any jurisprudence which specifically considered cell phone use. Its cases were more general and related to

discipline for other types of misconduct; the implications for discipline when an explanation is offered; and the purpose of discipline.

[43] Given the importance of the deterrence of cell phone use in this industry, it is necessary to look closely at the precedents relating to cell phones in this industry, which span the nine year period from 2011 to 2020.

[44] **CROA 4032** is a very short decision, decided in 2011 by Arbitrator Picher. The Grievor was in possession of his cell phone *while operating a machine* and texted a message that an accident had occurred, but only *after* he had shut his machine down. He was assessed 45 demerits. While the Arbitrator allowed the Grievance and reduced the discipline to 30 demerits, he recognized the deterrent effect that was necessary. He stated that "*moving an employee with a clear record halfway to the point of discharge*" would put "*other employees on notice that such conduct will be dealt with seriously*".

[45] This case is an early telegraphing of the serious manner in which this issue would be considered by arbitrators, in this industry.

[46] **CROA 4497** was offered by the Company in Reply. It was decided in 2016 by Arbitrator Moreau. I do not need to determine why this decision was not provided to the Union earlier, as I do not find it meaningfully adds to the jurisprudence in any event.

[47] The next case is **CROA 4684**, which was a decision by Arbitrator Moreau, who relied on **CROA 4032**. In that case, the Grievor was a locomotive engineer who was stopped at a siding and according to his evidence, powered on his cell phone to "read a book" while waiting, to stay alert; then put his cell phone away. The Trainmaster came onto the train and asked for his phone. The Grievor denied he even had a cell phone with him. The Trainmaster then began to call the Grievor's cell number. It was only at *that* point – when it would soon be obvious the Grievor lacked candour – that the Grievor came clean. The Grievor told the Investigating Officer he "knew having it on my person was against the rules". He was issued 40 demerits. In that case, the imposition of 40 demerits put the Grievor over the threshold of 60 demerits, under the Brown System, and resulted in his dismissal.

[48] That dismissal was upheld. The Arbitrator noted he would have reduced the demerits to a suspension – allowing the Grievor to keep his job – had he been honest about his behaviour. It is not clear from that case how long a suspension would have been imposed if the grievor demonstrated candour.

[49] As noted in that case – and as seen repeatedly in CROA jurisprudence – "honesty, of course, is a cornerstone of any employment relationship and particularly one such as in this industry where running trade employees like the grievor work with little supervision".[2] The grievor demonstrated a "*lack of candour at a critical moment*" and therefore "*undermine[d] any confidence one might have about the grievor's honesty going forward*".

[50] The last case relied upon by the Company is **CROA 4739**, decided in 2020, a decision of Arbitrator Hornung. The reasoning on the merits in that case is short. The Grievor in that case was charging his phone in a cab car. He was not found to have been engaging with that cell phone in any other manner. The grievor was dismissed. A 30-day suspension was substituted and the Grievor made whole for the difference.

[51] In determining dismissal was excessive, the arbitrator noted the Grievor in that case had *over twenty-one (21) years of service and no active disciplinary record*; did not move or operate railway equipment as he was employed as a Rail Equipment Maintainer, and the cab car was at all times noted to be "fully secured" and "tied down". However, even given those mitigating factors, he assessed a 30-day suspension for the Grievor's misconduct in having his cell phone in the cab car.

[52] I do not find the facts in this case to be similar to **CROA 903** or **SHP 402**, relied on by the Union. While I agree an explanation is generally one factor in considering the reasonableness of discipline, the Grievor's explanation of forgetting to turn his phone off is not particularly strong, given the industry in which he worked; the seriousness of the consequences from distraction and the fact he was very recently trained on the Company's rules.

[2] At p. 6

[53] While the Union argued the principles of progressive discipline (as noted in **AH264**), the imposition of 20 demerits is part of a progressive penalty structure. No progressive discipline structure requires “lock step” adherence, as the factual circumstances are always relevant.

[54] Given a review of the jurisprudence in this area, I find I cannot agree with the Union’s characterization of this event or the consequences which it argued were reasonable.

[55] First, I cannot agree that the “few words” on the jobsite of coaching given to this Grievor was all that was required to bring home to the Grievor his mistake. In his Investigative interview – *after* those “few words” had *already* been given – the Grievor stated that he had *not* breached CROR Rule A.

[56] I therefore cannot agree those “few words” met their mark, since the Grievor did not have “insight” into his error when questioned.

[57] Second, neither do I find a high degree of candor, since the Grievor in fact initially took the position, he had *not* run afoul of the Rule. The Grievor’s statements in this regard are in fact contradictory, given he did not feel he was in breach of the Rule, but he then stated he would comply in future. For remorse, insight that a mistake has occurred is a necessary ingredient.

[58] The Company is not given a comfortable degree of assurance, given these two contradictory statements.

[59] Third, I also agree with the Company that the use of personal cell phones has no place in the highly–safety sensitive world of the railway and that arbitrators are united in taking a strong view against cell phone use in CROA jurisprudence. The damage which can be caused from the distractions of such devices, in this industry where work is largely unsupervised, can be easily understood. The stakes are high.

[60] Given that reality, I further agree that deterrence is an important element that is relevant in a discipline choice when cell phone use is disciplined. Were the Company required to limit discipline to the few words of coaching given in the truck – for a Grievor

who was in possession of a powered-on cell phone during his work day – a dangerous message would be sent to other employees.

[61] I have considered that – unlike in **CROA 4684**, the Grievor did not lie about having his cell phone. Its ringing in his bag was what made it apparent that it was powered on. Unlike in **CROA 3900**, the instant case is not a situation where "an unlimited range of persons from outside the Company" was "enter[ing] the cab of an operating locomotive and make demands the attention of the train's crew"[3]. In this case, there is no evidence the Grievor was operating a belt pack at the time of the use of his cell phone. Against that, however, is the seriousness of the stakes in this industry from the impact of cell phones; the fact the Grievor is a short–service employee; and the fact that the Grievor's level of insight and remorse was not entirely convincing and was in fact contradictory.

[62] The Grievor's actions would reasonably incur a lesser penalty than cases which have involved talking or texting or "reading a book" on a cell phone, which was in fact the case here. In cases with use of texting or "reading", discipline ranges from 40 demerits; a 30 days' suspension and dismissal, even for employees with significant levels of service.

[63] The situational factors of the Grievor being transported at the time; not yet operating a belt pack; and not talking or texting on his cell phone – but still needing to engage with his phone to turn it off because he had left it powered on in breach of the Company's policy and CROR General Rule A – were factors which I am satisfied were appropriately considered by the Company in assessing only 20 demerits rather than the more significant penalties seen in the jurisprudence for other uses.

[64] Given the review of the significant and serious penalties that are upheld by arbitrators in this industry, I am satisfied that a penalty of 20 demerits on these facts is not punitive and is just and reasonable discipline. While the discipline is in this case is 1/3 of the way to dismissal, the consequences as noted in the jurisprudence for employees

[3] At Bates p. 198 of the Company's submissions.

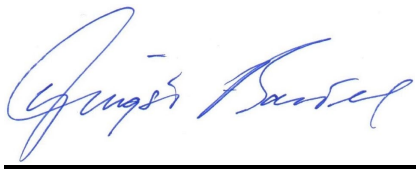
with lengthier service – *even for a first-time offence* – have been purposefully severe and have been upheld by three different arbitrators.

[65] I am also satisfied that the Company had a reasonable concern with deterrence in this case and in ensuring strict adherence to all aspects of its policy regarding cell phones. In this case, when the Grievor was being transported, he could have – but did not – given thought to what was in his bag that he chose to carry with him, and powered off his phone, so it would not ring and be distracting to either him or his fellow employees. That did not occur.

[66] I can find no basis on which to interfere with the Company's penalty and message to employees that significant discipline will follow from having powered on cell phones in the workplace.

[67] The Grievance is dismissed.

I retain jurisdiction for any questions relating to the implementation of this Award. I also retain jurisdiction to correct any errors and address any omissions, to give this Award its intended effect.



December 17, 2024

CHERYL YINGST BARTEL
ARBITRATOR