CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5159

Heard in Calgary, April 8, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Locomotive Engineer Michael Sywak, PIN 163016, was assessed with thirty demerits for circumstances surrounding your violation of General Rule A (XII) and GOI 8 – safe work procedures while using a personal electronic device and personal entertainment device while working L50231-28 on April 28, 2024.

JOINT STATEMENT OF ISSUE:

On April 28, 2024, the grievor was the Locomotive Engineer on Train L50231-28 from Sarnia to Garnet Yard. Mr. Sywak and his crew were involved in a main track authority violation (MTAV). The LVVR footage identified 2 prescribed threats under section 17.91 of the Railway Safety Act. The LVVR video showed the grievor with his personal electronic device placed under his leg and then he placed it on top of the counter. In addition, the grievor was observed with an earpod in his ear.

The grievor attended a formal investigation on May 23, 2024. On June 03, 2024, the grievor was served a CN Form 780 indicating an assessment of 30 demerits for “Circumstances surrounding your violation of General Rule A (XII) and GOI 8 – safe work procedures while using a personal electronic device and personal entertainment device while working L50231-28 on April 28, 2024”.

The Union’s Position

The TCRC made several objections, which included the following examples: objected to the investigation in its entirety as the video evidence was not complete, the TCRC did not receive the video, and there were significant lag times between 3 to 5 seconds of the audio and the video, the violation of the grievor’s PIPEDA rights, the LVVR company policy, as well as the video recorder regulations, were not included in the Notice to Appear, no DTRS or CATS ticket were provided in the investigation to show what engines the grievor and his Conductor were operating and that they were on duty that day. The TCRC objected to the note at the bottom of the NTA, stating that the grievor was to bring his own EOM device to access Company rules or policies.

The Company noted all the objections, and the investigation would continue. These are violations of Article 71.1 of the Agreement.

The TCRC submits there were mitigating factors to consider in this instance. The Company has not put forth any reliable or compelling evidence to suggest that the grievor was culpable of these allegations to the point of discharge. The grievor has been disciplined twice for

the same alleged issue. Once receiving 30 demerits on June 03, 2024, and then receiving a discharge notification for the same alleged issue on the same date. The Company has no right to discipline an employee twice for the same alleged infraction. This should render the entire issue void ab initio, and he should be exonerated.

The grievor took full responsibility for his error. It was the grievor's first recorded instance of an alleged General Rule A violation of this nature, and he has learned from his mistake. The grievor is an excellent employee who rarely takes time off and takes extra work when the Company is short of employees. Furthermore, the TCRC reserves the right to allege a violation of, refer to, and/or rely upon any other provisions of the Collective Agreement and/ or any applicable statute, legislation, act, or policy.

The TCRC contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above to justify such a severe penalty. The TCRC contends the Grievor's discipline is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter, in particular the Grievor's tenure and record. It is also the Union's contention that the penalty is contrary to the arbitral principles of progressive discipline. Employees who have found themselves in similar circumstances were afforded considerable leniency, receiving far less discipline. The TCRC requests that the Grievor's thirty demerits be removed without loss of seniority, benefits, or pension and that he be made whole for all lost earnings with interest.

In the alternative, the TCRC requests that the penalty be mitigated as the Arbitrator sees fit.

The Company's Position

The Company disagrees with the Union's position. The Company maintains that the grievor, and his Union Representative, were provided with: appropriate notice to know the accusation against him, an opportunity review of all the evidence and a fair and impartial investigation. The grievor was not disciplined twice for the same instance; the grievor was issued 30 demerits for the General Rule A violation. The grievor was seen with his personal electronic device and entertainment device on his person while on duty which is a violation of CROR General Rule A.

It is the Company's position that the discipline assessed was both reasonable and warranted. The grievor's discipline record indicates he has a history of rule violations including a rule 439, passing a red signal. Furthermore, the Grievor's was not forthcoming in the investigation and showed no remorse for the serious incident which occurred and as such the proper discipline was assessed. There are no mitigating factors warranting a lesser penalty.

For the Union:
(SGD.) M. Kernaghan
General Chairperson

For the Company:
(SGD.) T. Sadhoo
Manager Labour Relations

There appeared on behalf of the Company:

S. Vincent	– Counsel, Norton Rose Fullbright, Calgary
M. Salemi	– Manager, Labour Relations, Toronto
I. Perkins	– Senior Manager Investigations, Montreal
T. Sadhoo	– Manager, Labour Relations, Toronto
J. Secreti	– Articling Student, Norton Rose Fullbright, Calgary

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
M. Kernaghan	– General Chairperson, LE-C, Trenton
C. Wright	– General Chairperson, LE-C, Barrie

D. Haynes – Vice General Chairperson, Sarnia
M. Sywak – Grievor

AWARD OF THE ARBITRATOR

[1] The background and facts relating to this Award are outlined in **CROA 5160**. This Award is to be read in conjunction with that Award, for any precedential use.

[2] Those facts will not be repeated here, but are adopted.

[3] The Grievor was employed as a Locomotive Engineer. He had approximately 12 years of service at the time of the event at issue in this Grievance. On April 28, 2024 he was working a tour of duty with Conductor Couture when the crew committed a main track authority violation when they lost situational awareness. As part of that violation, the Company reviewed the Locomotive Voice and Video Recorder ("LVVR") footage. As a result of that review, the Grievor was assessed 30 demerits for violation of several rules. This Grievance was filed against that discipline.

[4] In **CROA 5136**, Arbitrator Cameron upheld the assessment of 35 demerits to Conductor Couture for the MTAV. The Arbitrator determined that Conductor Couture had lost situational awareness and "*gave up an incorrect Track Clearance*". In **CROA 5137,** he upheld the assessment of 30 demerits and discharge for Conductor Couture "*sleeping/assuming the sleep position while on duty*" for approximately 35 minutes, which was evident on the LVVR.

[5] For the reasons which follow, the Grievance is dismissed.

Facts

[6] On April 28, 2024, while working on the Hagersville Subdivision, a main track authority violated ("MTAV") occurred when the Grievor lost situational awareness.

[7] The footage from the Locomotive Video and Voice Recorder (LVVR) was viewed to determine the causative factors for the MTAV.

[8] While the Union raised arguments regarding access to the LVVR, Arbitrator Cameron considered and assessed these same arguments in **CROA 5137.** Mr. Perkins was the individual who accessed the LVVR and also gave evidence before this Arbitrator and Arbitrator Cameron.

[9] While he accessed the LVVR, Mr. Perkins' evidence was that he is not involved in any discipline decisions, but that if he identifies threats in the LVVR, he takes that to management who then determines what should be done. He did so in this case.

[10] Arbitrator Cameron determined the access by the Company of the LVVR in these circumstances was appropriate: **CROA 5136**. This determination was made after hearing the same evidence from Mr. Perkins which was given in this proceeding, regarding the background and purposes for that access.

[11] I do not intend to furrow that same ground in this Award. The reasoning of Arbitrator Cameron is adopted.

[12] The LVVR was viewed by Mr. Perkins and it was also carefully viewed by this Arbitrator in the hearing.

[13] The LVVR shows the Grievor operating this Train, with a hard plastic earbud in his right ear, which the Grievor admitted in his Investigation to be wearing. This was not the

type of noise cancelling foam earbud provided by the Company, but an earbud which is capable of pairing with a cell phone for the purposes of personal entertainment.

[14] The video evidence demonstrated the Grievor had his cell phone with him at the time of his earbud use, and that this phone was initially placed under his right leg.

[15] In the video, he shifts to get a drink from a water bottle, and as he does so, he moves the cell phone from under his right leg to the desk in front of him. The Grievor is also seen vaping, and maneuvering his open window to various degrees of openness, with his right hand.

[16] When the MTAV is realized, the Grievor is seen to quickly remove the plastic earbud and stuff it into the right pocket of his hoodie.

[17] On May 19, 2024, the Grievor was given a Notice to Appear for a violation of General Rule A(xii) for “safe work procedures while using a personal electronic device and personal entertainment device while working L50231-28 on April 28, 2024. Management Investigated the Grievor on May 23, 2024.

[18] The Grievor admitted in the Investigation that he was wearing this hard plastic earbud, although he denied listening to music on it or that it was connected to his cell phone. He stated he was using it for its noise canceling properties only, as this particular locomotive was old and noisy.

Applicable Rules/Provisions

CROR General Rule A(xii)

> Every employee in any service connected with movements, handling of main rack switches and protection of track work and track units shall;
>
> …

> (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

(emphasis added).

The Company has also developed its own policy regarding the “use” of a Personal Electronic Device:

> **Personal Electronic Device**
>
> No electronic communication or personal entertainment devices may be used except in matters pertaining to railway operations 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 on duty.** (emphasis added)
>
> …

GOI 8, subsection 4.17 reads:

> 4.1.7 It is essential to safety that employees while working give their undivided attention to the performance of their job. The following actions are prohibited while working:
> • Sleeping
> • Reading books, magazines or newspapers other than company authorized manuals, instructions, etc. required to perform assigned duties.
> • **Use of unauthorized audio-visual equipment (e.g., portable music device, cell phone, etc.),**
> • **Engaging in any activity which is not directly associated with your duties.**
> • **External headphones must not be used with CN portable radios unless supplied by the company.**
> • Except in matters pertaining to railway operation, employees are prohibited from "texting" while on duty.
>
> "Texting" refers to transmitting, receiving and/or reading text or email messages on personal electronic communications devices such us, but not limited to, cellular telephones, "smart" phones, "iPhones, iPads”, netbooks, notebooks, computers, etc…

> **These devices may only be used in matters pertaining to railway operation when so authorized for usage by a company supervisor.**
>
> **Where not so authorized, they must be in a "powered off" position while at a company work location including the cabs of a locomotives or track units or at any work place locations utilized in train, transform engine control**
> (emphasis added)

[19] In the jurisprudence, employees have been disciplined for reading on their cell phones; and texting on their cell phones. This case is a unique situation, as it involves allegedly listening to media coming from a cell phone.

[20] As noted in **CROA 5098**, cell phones and the railway industry simply do not mix. That Award considered the conduct of an individual who failed to power off his cell phone while being transported across a rail yard. That conduct was discovered when it rang during that transport. Discipline of 20 demerits was upheld. As pointed out in paras. 25 and 27 of that Award, serious consequences could occur "*when attention is distracted to a personal electronic device…Arbitrators have recognized that the stakes in this industry – even for momentary inattention – are high"*.

[21] The Company's internal policy stipulates that cell phones must not only be "powered off" but must not be available to an individual by being on their person. That phone must be placed in a work bag, locker, or left in a personal vehicle. As also noted in **CROA 5098**, the word "use" as used in both CROA General Rule A and the Company's policy is broad and is not only limited to "reading" "talking" or "texting", but is broad enough to capture "any" engagement with a cell phone.

[22] Cell phones can be "used" without any physical manipulation of that phone, such as listening to media through earbuds. As was found in **CROA 5098**, I am satisfied the

purpose of CROR General Rule; the Company's own policy for "*Personal Electronic Device*"; and GOI 8, s. 4.1.7 is to prevent all uses of a cell phone in this industry, no matter whether that use requires a physical manipulation of that phone or not.

[23] The Grievor's evidence was that his phone was with him and not put away in his grip bag as he forgot he had it with him. His evidence was that he *"…was just moving my phone from the seat to the control stand because I forgot about it"* (Q/A 23). His evidence was that the hard plastic earbud he was using was "more comfortable" than the foam earplugs provided by the Company for noise canceling. He also testified it was necessary to use this for noise cancellation, because this cab was older and particularly loud.

[24] While he made that claim, the Grievor had his window open, which would have *increased* that noise level.

[25] The Union has argued the Company has not met its burden of proof to establish the Grievor was using this personal electronic/entertainment device. It argued this must be established on clear, convincing and cogent evidence.

[26] If the Union maintains that a plastic earbud was being used for *other* than its intended purpose – which purpose is to pair with a media device of some sort such as a phone when that phone is in the vicinity of that device - then it is up to the *Grievor and the Union* to bring compelling and convincing evidence to counter that inference. The Company – and an Arbitrator – are entitled to draw what is a reasonable inference that an earbud capable of pairing to a phone which is in close proximity to that device was in fact being *used for its intended purpose* unless it is established otherwise.

[27] Put another way, it is not for the Company to prove that the Grievor ***was not*** using his earbud *for the purpose for which it was intended when the evidence is his phone is close by*. The Company was entitled to infer that the Grievor *was* using the device for the purpose for which it is intended - as a personal electronic/entertainment for listening to media from a cell phone - *unless* other convincing evidence to the contrary is accepted.

[28] In this case, there is no doubt that the Grievor had his cell phone on his person *whether or not* it was even powered on or was being manipulated. Having his cell phone with him in the locomotive cab and not put away is culpable misconduct on its own, which would – in and of itself – attract discipline as a violation of the Company's Policy, whether or not the Grievor had media playing through his earbud.

[29] However, the violation does not end there, in this case. The Grievor's explanation regarding the use of his earbud was neither compelling or credible.

[30] First, I do not find it particularly compelling that the Grievor "forgot" to leave his cell phone behind, or that he forgot it was even placed under his leg. When the Grievor moved to reach for a drink, he casually moved the phone from under his leg to the desk stand in front of him. There is no surprise in his body language at finding it there.

[31] Instead of moving to put the cell phone on the floor or behind his seat away from him to be put away, he casually placed it on the desk stand in front of him.

[32] Neither do I find compelling that he was only using the earbud for noise cancelling purposes and that the earbud was not in use by him for the purpose it was intended when a cell phone is close by, which was to listen to media from his cell phone.

[33] When the error is realized, the Grievor does not just remove the earbud to speak to the Conductor and then reinsert it, as would be expected if it was being used to block out engine noise through the open window – which would have still been there. Frankly, it would be expected he would have closed the window to better hear the Conductor if this engine was as loud as he maintained. If the Grievor was in fact using the earbud as noise cancelling, it would be expected he would take the earbud out to discuss the issue with the Conductor, but either keep it in his hand to put back in when the issue was resolved, or *casually* put it away.

[34] That is not the type of body language seen on the LVVR footage. Rather, the Grievor very quickly takes it out of his ear and shoves it into his pocket; as if he is aware he could be "caught" with it in his ear. I do not find the Grievor's body language to be consistent with an explanation of using the earbud for other than its intended use of listening to media from a phone.

[35] When he shifted for water, the Grievor at that point did not place the phone at an out of the way place, such as would be expected if he had "forgotten" he had it, or had forgotten to put it away, such as putting it behind his chair or on the floor. I do not accept the Grievor was too busy in the cab to do so, given he had one hand free periodically to manipulate the window and was seen doing so.

[36] The Union emphasized the Grievor was not seen manipulating his phone, or touching his earbud to manipulate that device. The lack of those actions is not determinative, given that it is unnecessary to interfere with either device when listening to media. That is not evidence the earbud was not being "used" for its intended purpose.

[37] It is up to the Union to bring that convincing and compelling evidence that the earbud was not being used for its intended purpose to rebut the reasonable inference that it was being so used. Given that the Grievor's evidence was not found to be credible, it has not done so in this case. I am prepared to draw the reasonable inference that the plastic earbud was being used for its intended purpose given the proximity of this cell phone to that device; the obvious use of an earbud intended to connect with a phone in close proximity; the lack of a credible explanation for that use; and the Grievor's obvious body language when he removed the earbud.

[38] Turning to the second and third questions in a *Re Wm. Scott* analysis, the Grievor is of medium service, at 12 years. While his disciplinary record is not as poor as maintained by the Company, it is also not particularly mitigating, although he did not have any active demerits. He was frank that he had used an earbud, although this would be difficult to deny given the video footage.

[39] However, his explanations were found to be lacking in credibility, which speaks to concerns with both insight and remorse.

[40] Arbitrators are united in this industry in determining that cell phone use and the railways do not mix. The jurisprudence in this industry around discipline for the use of cell phones has been reviewed in detail by this Arbitrator in other, recent cases, such as **CROA 5098** and **CROA 5126**. The most significant penalties for such use have been upheld, up to and including discharge: see for example **CROA 4684** (40 demerits for reading an eBook; 8 year employee); and **CROA 4445** (discharge of employee with five years "active service" in a nine year career, for watching a video on his iPad).

[41] In **CROA 3900**, Arbitrator Picher described the railways as "*among the most highly safety sensitive industries in Canada*" (at p. 28), and the impact of wireless communications as occasioning what he described as a:

> **…sea change in communications and an undeniable challenge to the safety sensitive workplace. The risk and possible consequences of distractions occasioned by these devices in the hand of employees performing safety sensitive functions can scarcely be understated …** the personal use of cell phones and similar communication devices while on duty simply cannot, as a general rule, be permitted among employees responsible for the movement of a train (at pp. 30 and 31; emphasis added).

As noted at para. 30 and 31 of **CROA 5126**, this Arbitrator stated:

> Arbitrators look very seriously on cell phone use in the railway industry. The stakes are high; the potential consequences are severe, whether they occur or not. Given the changes in Transport Canada regulations in 2018 – including the imposition of reporting requirements on the Company; and given the increasing concerns in society with cell phone use and vehicles – seen in the development of distracted driving legislation – the earlier case law has less persuasive value than the more recent decisions … Along with Transport Canada, the more recent decisions increasingly recognize the dangers of cell phone use in this industry and seek to deter such use in the strongest terms.

[42] While I have reviewed the cases provided by the Union, cell phone use *of any kind* simply has no place on the railroad. That the situational awareness was lost in this case without a credible explanation demonstrates the distraction and dangers of such use.

[43] The Grievance is dismissed.

I reserve jurisdiction for any questions regarding the implementation of this Award; to correct any errors; and to address any omissions to give it the intended effect.

June 16, 2025

CHERYL YINGST BARTEL
ARBITRATOR