

IN THE MATTER OF A DISPUTE

B E T W E E N:

CANADIAN PACIFIC
(The "Company" or "Employer")

- and -

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS SYSTEM
COUNCIL NO. 11**
(The "Union")

Discharge of Scott Smith

Arbitrator

Richard I. Hornung, Q.C.

For the Company:

Lauren Smeltzer - Manager Labour Relations

Cavina Tsoi - Labour Relations Officer

Sherry Oliver - Observer

Jamie Ruzycski - Observer

For the Union:

Denis Ellickson - Counsel

Lee Hooper - General Chairman

Brad Kauk - Regional Rep

Hearing Date:

June 16, 2017

Hearing Location:

Calgary, Alberta

Decision Date:

July 13, 2017

I

On October 3, 2016, at approximately 12:15, Scott Smith, the Grievor, was caught sleeping in his truck. When startled awake by his S&C Supervisor, he repeatedly said: “*Oh sh*t*”. When questioned, at the time by his Supervisor, the Grievor said that he was tired from staying up all night with his son and this “*rarely happens*”.

After being caught by the Supervisor, the Grievor asked to take the remainder of the day off as unpaid leave. This was refused. On October 24, 2016, the Company took the Grievor’s statement in connection with the incident. The Grievor provided the following explanation for his conduct (CP Tab 3)

“Q23 *Referring to question 22 you answered Yes. Please explain to me in your own words why you were asleep or in the position of sleep on October 03 2016 when you know that you would be violating company policy?*

A23 *At the beginning of my shift I felt I was fit for duty, but upon arrival at the work location I opened up my laptop to check the CTC overview, realized I had train traffic in the area and would have to wait to complete the testing. I proceeded to enter my time in SAP organize my testing for the week and sync up to 10 East to clear up any outstanding tests. During the minutes it took to sync up to 10 East I became overwhelmed with fatigue and when my eyes opened Jaden was at my window and my computer had not yet gone into hibernation which would of put me out with a maximum of four minutes with my eyes closed.”*

Following the investigation, the Company concluded that the Grievor had fallen asleep after knowingly assuming a position of sleep, (reclining his vehicle chair) at a time and location where he was unsupervised and in a position of trust. The Grievor was found culpable and was dismissed on October 16, 2016.

II

The parties agreed that the incident in question was not to be regarded as a “*culminating incident*” for the purposes of my determining whether dismissal was the appropriate penalty. The Company agrees that the appropriate discipline to be meted out for the offence must rise and fall on the incident itself.

Nesting

At the hearing the Company raised the issue of “*nesting*”. The Supervisor took a photograph of the Grievor which is included in CP Tab 4. It shows the Grievor in his cab. Eyes closed. Apparently asleep. The seat, in the words of the Supervisor (CP Tab 6), is “*back*”; although, it is not fully reclined. The location at where the Grievor was found in his vehicle was where he ought to have been to complete one of his designated tasks that day. The Employer’s records show that the truck was idling in that location for an extended period of time relative to the job to be performed. The Grievor explained that there was traffic in his area and he could not conduct the tests, as required, until it passed.

Earlier sleeping

The Employer argues that the Grievor’s statement to his Supervisor that: “*he was tired from staying up all night with his son, and this rarely happens*” (CP Tab 4) represents an admission by the Grievor that he sleeps on the job but it “*rarely happens*”. The Supervisor, in his memo, clearly ascribed the “*rarely happens*” phrase to the Grievor having been asleep on the job at other times. The Employer suggests that the Grievor’s immediate reaction and explanation reflect that he knew he was caught and his blurting out the explanation he did is consistent with its interpretation of the phrase.

The Union, for its part, argues that the phrase applies equally to the interpretation that: the Grievor’s son staying up late “*rarely happens*”.

I am unable to determine, by simply reading the documents, which meaning should be ascribed to the phrase. It could represent either interpretation. It falls to the Company, who has the onus, to prove the intent of that statement before I can regard it as an admission which, on its own, establishes the fact that the Grievor previously slept on the job. Given that I cannot conclude which meaning to apply, that onus has not been met.

With all due respect I am not satisfied, on a balance of probabilities, that it has been established that the Grievor was “*nesting*” or that, by inference, he admitted that he had fallen asleep on earlier occasions. Given the same, I cannot conclude that the single incident of sleeping on the job, in and of itself, warrants dismissal.

III

The above being said, and irrespective of which explanation is accepted, the critical issue is that the Grievor, by his own admission, was asleep in his vehicle. According to the *Employee Discipline and Accountability Process ("EDAP")* instituted on March 8, 2017, sleeping on duty represents a major offence which:

"may warrant removal from service pending a formal hearing and may warrant dismissal."

Although the Company announced its intention to do so well in advance, the formal implementation of *EDAP* was on March 8, 2017, following the dismissal of the Grievor. To their credit, neither party argued the application of *EDAP* to this case. Rather they relied on the discipline structure set out therein to provide the benchmarks in support of their respective positions.

While there are justifiable suspicions, there is insufficient evidence, on a balance of probabilities, to conclude that the Grievor was "*nesting*". The offence is therefore less serious but nevertheless a major offence as defined in *EDAP*.

The Union argues that, given the circumstances and the Grievor's explanation, the maximum available penalty would be a 20 day suspension at the Step # 3 Offence level.

The Company argues that by virtue of the terms of *EDAP* a more severe penalty than 20 days suspension can be imposed and is warranted here. It suggests that the breach of duty in this case warrants dismissal and, in the alternative, that any reinstatement ought to, at a minimum, include an appropriate "*last chance*" clause so as to mitigate the risk of further transgressions by the Grievor.

In CROA 4535, Arbitrator Flynn notes:

"Sleeping while on duty is a grave offence which can result in the dismissal of the violator in certain cases".

I agree. Sleeping on duty, particularly for employees in the unique position of trust working unsupervised, is a serious matter.

The Grievor was in a unique position of trust working unsupervised to ensure the safe and efficient signals in communication systems for his fellow employees. I accept the Grievor's consistent explanation of his reasons for being fatigued. Nevertheless, irrespective of the circumstances which caused it, I conclude that he was not asleep for only 4 minutes as he stated. While I cannot determine the length of time, it is reasonable to conclude - based on the Company's records (*CP Tab 4 p.4: - vehicle idling for 1:37 minutes*) - that it was significantly longer. The Grievor's disingenuous explanation regarding the "4 minutes", and my, above, finding regarding the same, are taken into consideration in assessing the ultimate discipline applied here. In addition, while not nesting in and of itself, the fact that the seat is back (although not fully reclined) reflects some degree of premeditation in that the Grievor, at a minimum, intended to make himself comfortable.

The Grievor was consistent, forthright and forceful in his defence. However, I conclude that he was not contrite.

IV

The Grievor has a relatively short service with the Company and a disciplinary record consisting of 30 demerit marks and 339 days suspended. He is clearly not an individual for whom the progressive disciplinary process works well.

The Employer has requested that, in absence of dismissal, a last chance agreement be implemented. Given the circumstances, the Grievor's past record and work performance, I agree.

The Grievance is allowed in part.

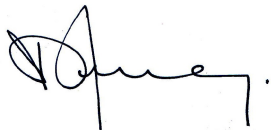
The discipline of dismissal shall be set aside and replaced with a suspension from the date of his dismissal to May 1, 2017. The Grievor shall be forthwith reinstated into his employment without loss of seniority and with compensation for the period of May 1, 2017, to the date of his reinstatement.

In addition to, and as part of, the above, the Grievor will be subject to the following terms and conditions:

1. Prior to return to active service the Grievor will be required to successfully complete a screening interview with his local manager concerning his ongoing employment. The purpose of this interview will be to review the Company's ongoing performance expectations regarding the Grievor's return to work and to provide a full understanding and clarity regarding these expectations. If he so desires, an accredited representative may accompany the Grievor to this interview.
2. The Grievor will be reinstated at Step 3 of the *EDAP* and as such his employment with the Company will be in jeopardy if he commits a future offense for which discipline is warranted.
3. The Grievor's discipline standing will only regress one Step in the Progressive Discipline Steps following two (2) years of discipline free service and thereafter will regress one Step for each additional year of discipline free service.
4. This determination should be understood by the Grievor to be a last-chance opportunity to show his employer that he can work in a compliant and safe manner as required by his position.

I shall retain jurisdiction with respect to the application, interpretation and implementation of this award.

Dated at the City of Calgary, July 13, 2017.

A handwritten signature in black ink, appearing to read "Richard I. Hornung", with a stylized flourish at the end.

Richard I. Hornung, Q.C.