AH683

IN THE MATTER OF A DISPUTE

BETWEEN:

INTERATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS SYSTEM COUNCIL NO. 11
("Union")

-and-

CANADIAN PACIFIC RAILWAY COMPANY
("Company")

Discharge of
S&C Maintainer Damien Rogoza

Arbitrator
Richard I. Hornung, Q.C.

FOR THE UNION:
Denis Ellickson – Counsel
Steve Martin – Senior General Chairman
Lee Hooper – General Chairman
Brad Kauk – Western Regional Representative
Bill Duncan – Easter Regional Representative
Damien Rogoza – Grievor

FOR THE COMPANY:
Lauren McGinley – Labour Relations Manager
Andrew Hawkhurst – S&C Design Manager

Hearing Date:
January 31, 2018

Hearing Location:
Calgary, Alberta

Decision Date:
March 26, 2018

Amended Award

I

On July 10, 2017, at approximately 13:30, Road Master Kelly Maksimow arrived at the Company's facility in Yorkton. Mr. Maksimow entered the garage and headed back to the location of Damien Rogoza's (the "Grievor") office (*Company; Tab 4*). He found the lights off and the Grievor laying on the floor asleep. He initially said "*hello*" trying to rouse the Grievor who did not respond. He subsequently raised his voice asking if the Grievor was "*alright*". At that point, the Grievor moved, said "*yes*" and stood up. Mr. Maksimow left for a minute or so and returned to the Grievor to see if he might be under the influence of any substance. The Grievor appeared to be normal. At that point, he asked the Grievor if he had had a "*rough night*". The Grievor answered that he felt ill and laid down for a while and must have fallen asleep. At that point, Maksimow received a call and left the site. The Grievor went to his truck and left for home. While enroute he was called by his Supervisor Jodie Sokolosky (*Company; Tab 4*).

An investigation followed and on July 20, 2017 the Grievor was interviewed with respect to the July 10, 2017 events. At his interview, the Grievor (*Company; Tab 3*) acknowledged that he fell asleep at work. He described the circumstances as follows (Q&A 16):

> *"… after steam cleaning the batteries in the bungalow, it was very warm in there because the door had to be closed. There is no door stop so had to be closed or it could swing around. I was finishing up and started feeling dizzy and tingly and was hot, so I went to the office to try and cool down. I was looking at emails and decided to do an online course while I was there. About 10 to 15 mins into the course I started feeling tired and not feeling well. At that point, I laid down on the cool floor."*

The Grievor also allowed that at no point, prior to his being discovered by Mr. Maksimow asleep on his office floor, did he advise his Manager or Supervisor that he was feeling ill. He allows that he did not enter his time at work that day but only entered a claim for stand-by time because:

> *"…I was sleeping at work in the office and I still wasn't feeling well so I went home and went to sleep. I didn't think it was appropriate to enter time under the circumstances."*

The only time he spoke with a Supervisor was when Mr. Sokolosky called him as he (Grievor) was driving home shortly after 2:00 PM. In that call, he advised Mr. Sokolosky that:

> *"… he started feeling dizzy and sick. (And) … he lay down on his office floor and fell asleep…"*

While Mr. Sokolosky's memo states that the Grievor told him that he went to sleep around 07:00, I am satisfied that the time that he fell asleep was, as he stated in his interview - and confirmed by the timing of the online course he was doing - sometime after 13:00 that day. There was an issue as to the length of time at which he was asleep. While the Grievor estimates that it was 10 to 15 minutes, I am satisfied that it was significantly more than that. He was discovered by Mr. Maksimow at 13:30. Prior to that, the Grievor had started an online Movement of Broken Rail course *(Q&A 21*). It was not disputed that the Learning Management System course (which he was logged into) is programed to time-out after 30 minutes of user inactivity *(Company; Tab 5).* When Maksimow arrived, the Grievor was asleep and the course had timed out. It is axiomatic, given his admission that he laid down after he had begun the course, that he was on the floor and assumed a position of sleep for at least more than 30 minutes.

There was no dispute that the Grievor was forthright both in admitting the fact that he had fallen asleep at work and that he did not call anybody from management to advise them that he was feeling ill. As well, it is apparent that the Grievor advised Mr. Maksimow immediately that he was feeling ill and that he asserted the same to Mr. Sokolosky. As he explained at Q&A 36 (*Company; Tab 3*):

> *"I do regret that this situation happened. I am aware of the severity of falling asleep at work. It was not my intent to do so. At the time I felt that lying down on the floor would help me feel better. In the future I will immediately notify a manager if not feeling well at work."*

Following the conclusion of the investigation, the Company found the Grievor culpable of violating the Rule Book for Engineering Employees 2.1 while on duty and dismissed the Grievor from employment on August 9, 2017 (*Company; Tab 2*).

At the time of his dismissal the Grievor had been with the company for 5 years. His record consisted of: (1) a 5 days deferred suspension on June 3, 2015 for a violation of his equipment responsibility; and (2) a 5 days served suspension on March 8, 2016, for falsification of test records in RailDocs.

Other than a jurisdictional aspect (which I will address later), the only dispute between the parties was with respect to the appropriateness of the penalty imposed.

II

COMPANY ARGUMENT

The Company points out that the Grievor was working unsupervised in a unique position of trust. It asserts that the Grievor fell asleep after knowingly assuming a position of sleep at a time and location when he believed he would be unobserved. The Company, relying on *CROA 4533* and *4445*, argues that the Grievor's explanation that he was not feeling well was a self-serving fabrication motivated by his attempt to avoid discipline and therefore should not be regarded as credible. In this respect it points out that the fact that the lights were turned out supports its nesting theory rather than the Grievor's explanation.

With all due respect, I do not find the Grievor's excuse that he laid down because he was not well to be credible. I say this because of the nesting circumstances in which he was found (lights off and laying on the floor); the fact that he was well aware of the workplace requirements to immediately notify his manager if he was unable to "*continue to perform (his) role safely…*" (*Company; Tab 14; application of the L.I.F.E. to S&C Program);* and the fact that he never mentioned that he was not feeling well to anyone in a supervisory capacity until after he was caught.

In the circumstances, the Company argues that dismissal was appropriate and warranted.

In the alternative, it argues that any reinstatement ought to be on a time served basis and, at a minimum, include an appropriate "*last chance*" clause so as to mitigate the risk of further transgressions by the Grievor.

III

UNION ARGUMENT

Jurisdictional Issue

In addition to its argument on the merits relative to the appropriateness of the penalty of dismissal, the Union argued that the Company violated the principal requirements of a fair and impartial investigation. It argues that, in the present case, the Company breached Article 12 of the Collective Agreement in that it failed to provide the Union with an electronic copy of the Grievor's statement and its evidence. Article 12.2 requires that:

> "*When an investigation is to be held, the employee will be provided forty-eight (48) hours written notice of the time, place and subject matter of such hearing. He will have a fellow employee and/or accredited representative of the Union present at the hearing and shall be furnished with a copy of his own statement, and copies of all evidence taken,* ***which will also be supplied electronically to an accredited representative.*** *The employee subject to the investigation will not suffer any loss in regular earnings."* (**Emphasis Added**)

The Company does not dispute that it failed to provide the required electronic copies to the accredited Union representative as required by Article 12.2. Its explanation was that, although hard copies of the required documents were provided to the Union's Regional Representative who attended with the Grievor at the investigation, as a result of an internal administrative error electronic copies (including of the Grievor's statement) were not forwarded. This issue was not raised, and no notice of this failure was given to the Company by the Union, until October 17, 2017 (*Company; Tab 8*). The Company promptly provided the same.

Given the administrative oversight; the fact that hard copies of the evidence were provided to Mr. Kauk at the time of the investigation; that he was present when the Grievor gave his statement; and, given the fact that the Union did not raise an issue with

respect to the same – to allow its rectification - until well into the process, I am of the view that the breach of Article 12.2, in the circumstances here, did not operate so as to constitute a breach of the Company's obligation to conduct a fair and impartial investigation.

Nevertheless, the Union is clearly entitled to the production of electronic copies as negotiated in, and mandated by, *Article 12.2.* It is accordingly declared that the failure, in this case, of the Company to provide the electronic copies as stipulated in *Article 12.2* constitutes a violation of the Collective Agreement. The Company is hereby directed to comply with the terms of Article 12.2 in the future.

Merits

The Union argues that on July 10, 2017, the weather was hot and humid and it was extremely hot in the garage. After the Grievor completed the steam cleaning aspect of his job that day, he felt "*dizzy and tingly*" and went to his office to try to cool down, leaving the door open. After he began some online training, he continued to not feel well and laid down on the cool cement floor, in order to find relief, and fell asleep.

The Union points to the fact that the Grievor was forthright and acknowledged - at the time that he was first discovered - that he fell asleep. He continued to be candid in this regard and took full responsibility for his actions both in his discussions with Mr. Sokolosky and at his interview. He acknowledged, as well, that he was aware of the severity of the offence of falling asleep at work and that it was not his intent to do so. He expressed remorse and regret that he did so.

The Union points to a series of cases *(CROA: 2847; 1573; 1853; 2030; 4334 and SHP: 200; 244)* in support of its argument that the discipline to be meted out for sleeping on the job should fall within the range of 15-25 demerits under the Brown System. It asserts that my recent decision in *CP v. IBEW (Scott Smith)* supports a conclusion that in more serious circumstances – where the employee had a dismal record and showed no remorse - a dismissal was replaced with a last chance agreement and a lengthy

suspension. It argues that accordingly, in the circumstances here, a lesser penalty is appropriate. However, it should be kept in mind that in *Scott Smith* there was an agreement between the parties that the grievance regarding the sleeping incident was to be assessed as standing on its own and specifically excluded a determination based on the principle of culminating incident.

As well, in *Scott Smith* there was a specific finding that nesting was not established by the evidence on a balance. Here that is not the case. The Grievor's conduct amounted to nesting and involved his sleeping for a significant period of time.

IV

DECISION

Given the Grievor's length of service; his disciplinary record; the fact that he works largely unsupervised; the fact that he was clearly nesting; and the fact that I did not find his evidence that he laid on the floor because he was feeling ill to be credible, I conclude that significant discipline is warranted.

In *Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP*, 2009 CanLII 31586 (ON LRB) the Arbitrator enunciates a long-standing principle that:

> *"…..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."*

Having regard to the principles enunciated in *Wm. Scott (1964) 14 L.A.C. 356,* the dismissal here falls within the range of reasonable outcomes having regard to all the circumstances. While dismissal falls within the acceptable/reasonable range, that same range, as reflected in the cases cited by the parties here, extends over a broad spectrum. Other factors may also be considered. Although not necessarily an additional factor to those long enumerated in *Wm. Scott*, a consideration that may be taken into account is whether the employee might be given a last chance. Many of us make a mistake. Granting a last chance, when circumstances warrant, can sometimes

have a remarkable and lasting effect on an employee's life. By extension, it can save an entire family.

A last chance agreement represents an onerous undertaking by the Company. Generally, while management is prepared to make the necessary efforts to bring an employee along when his/her prospects are apparent, having to make special efforts with an individual that appears to be a "*lost cause*" presents a special challenge and often has the potential to sour union/management relations in general. For these reasons the terms upon which the Company is prepared to engage in a last chance solution are an important consideration.

This case has presented a difficult choice for me. Here the Grievor was forthright from the moment he was caught sleeping. He took full responsibility for his conduct and showed genuine remorse and contrition. He acknowledged that he understood the severity of his offense and provided assurances that he had learned a lesson from this transgression. Balanced against that he has only five years of service (normally the cases where last chances are given involve senior service employees) and has already been previously disciplined on two occasions; one of which involved his not telling the truth. His transgression on this occasion involved a purposive choice to sleep on the job; the severity of which he was well aware.

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's conduct was serious and deserving of significant discipline for which either dismissal or a lengthy suspension coupled with a last chance opportunity are appropriate.

The above said, I had an opportunity to observe the Grievor during the course of the hearing. I was left with the impression that he was both embarrassed by and genuinely contrite about his conduct; and, that he had a very real appreciation of the far-reaching consequences that dismissal would present for him. On the whole, I have concluded that, given a last chance, he would make the most of it and not squander it.

In the circumstances the grievance should be allowed in part.

The Grievor shall be reinstated to his former position without compensation or loss of seniority subject to the following last chance conditions, in the terms suggested by the Employer, designed to mitigate against the risk of the Grievor re-offending:

i) Before reinstatement takes effect the Grievor must:

   a. Contact Health Services within one week of the receipt of the Award to commence his return to work.

   b. Submit to a Health Services directed Safety Sensitive medical assessment, which may include a return to duty substance test, and any other medical assessment deemed necessary under the terms and conditions directed by the Health Services Department (HS). Arrangements for these assessment(s) will be made as soon as possible through HS.

   c. Comply with any medical requirements HS determines to be necessary.

   d. Be determined to be medically fit to return to service in a Safety Sensitive position by the Chief Medical Officer or his designate.

ii) The Grievor must comply with and meet the terms and conditions above before being reinstated and before any of the terms and conditions below have application.

iii) Once the terms and conditions above have been complied with, the Grievor will be reinstated and, if applicable, may be given up to two (2) weeks before being returned to active service in order to give any current employer sufficient notice.

iv) In addition to any terms and conditions arising from the above, the Grievor will be subject to the following additional terms and conditions:

a. Prior to any 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 desires, an accredited representative may accompany the Grievor to this interview.

b. Before recommencing active duty, the Grievor will be required to successfully complete any necessary training and/or rules re-qualification. The Grievor will only be entitled to compensation and/or expenses associated with his attendance at such training and/or rules re-qualification if he successfully passes all re-qualification examinations.

c. The Grievor shall be restricted to a position under direct supervision (Helper or Wireman, as available and directed by the Company) for a period of not less than one (1) year and until such time as the Company in its discretion considers to be appropriate, which would include the Grievor's successful requalification as a Maintainer. Should the Grievor fail to successfully requalify as a Maintainer, he will lose his seniority as a Maintainer and be restricted to the position of Helper. For the duration of this restriction, the Company shall be at liberty to assign the Grievor to such positions as it deems appropriate.

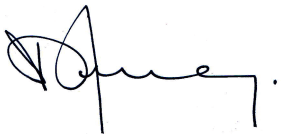
d. The Grievor will be reinstated at Step 3 of the Employee Discipline & Accountability Process and as such his employment with the Company remains in jeopardy if he commits a future offense for which discipline is warranted. The Grievor's discipline standing will only regress one Step in the Progressive Discipline Steps following two (2) years of discipline free service and thereafter will regress one Step for each additional year of discipline free service.

v) The Grievor shall strictly comply with all of CP's safety policies, procedures and work practices.

vi) Any violation of or failure to comply with any of the terms of this Agreement by the Grievor will result in removal from service and an investigation and may result in discipline up to and including dismissal.

I will retain jurisdiction with respect to the application, interpretation or implementation of this award.

Dated at the City of Calgary the 26th day of March, 2018.



Richard I. Hornung, Q.C.
Arbitrator