

**CANADIAN RAILWAY OFFICE OF ARBITRATION  
& DISPUTE RESOLUTION**

**CASE NO. AH 684**

Heard in Calgary, June 25, 2019

Concerning

**CANADIAN PACIFIC RAILWAY COMPANY**

(the "Company")

and

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL  
WORKERS SYSTEM COUNCIL NO. 11**

(the "Union")

**Discharge of Alan Mulder**

Dispute:

The discharge of S&C Maintainer Alan James Mulder on October 5, 2018.

Joint Statement of Issue:

On September 26, 2018, S&C Maintainer Alan James Mulder was the subject of investigation regarding the events pertaining to his alleged sleeping while on duty on September 12 at Highway #2 Mile 41.23 Glenboro Sub. This investigation resulted in Mr. Mulder being dismissed from Company service on October 05, 2018.

The Union's Position

The Union contends that the Company violated Article 12 of the Collective Agreement and denied Mr. Mulder the right to a fair and impartial investigation. Therefore, the discipline ought to be set aside as void.

The Union also contends that there was no just cause for discharge and that Mr. Mulder's assessed discipline was unjustified, unwarranted and/or excessive.

The Union requests that Mr. Mulder be reinstated to his former position of S&C Maintainer Portage la Prairie immediately and that he is made whole for all lost wages, pension, seniority and benefits he has incurred as a result of his wrongful termination. Any subsequent displacements and/or relocations are to be reimbursed by the Company in their entirety for the affected employees. In the alternative the Union requests that the penalty, be mitigated as the arbitrator sees fit.

The Company disagrees and denies the Union's request.

The Company's Position:

The Company maintains that following the fair and impartial investigation statement which was scheduled and took place on September 26, 2018, the facts established the Grievor's culpability that he fell asleep while on duty. The Company maintains no violation of Article 12 of the Wage Agreement occurred and the Company had just cause to assess discipline.

The Company maintains the quantum of discipline assessed in the amount of dismissal is warranted, given the seriousness of the offense, arbitral jurisprudence and in accordance with the terms of the Grievor's Offer of Reinstatement, signed on May 22, 2017.

The Company denies the Union's claim that any violation of the Wage Agreement has occurred and that the discipline assessed ought to be upheld.

**FOR THE UNION:**  
**(SGD.) Lee Hooper**  
General Chairperson

**FOR THE COMPANY:**  
**(SGD.) Lauren McGinley**  
Assistant Director, Labour Relations

There appeared on behalf of the Company:

D. Zurbuchen	- Manager, Labour Relations
L. McGinley	- Assistant Director, Labour Relations
J. Switzer	- General Manager, S&C Operations

And on behalf of the Union:

D. Ellickson	- Counsel, Caley Wray, Toronto
Steve Martin	- Senior General Chairman
Lee Hooper	- General Chairman
Brad Kauk	- Regional Representative, West
Bill Duncan	- Regional Representative, East

**AWARD OF THE ARBITRATOR**

There is no dispute on the facts; only with respect to the inferences to be drawn from them. Nor is there a dispute over whether the Grievor's conduct deserved discipline.

As a result of the submissions of the parties, there are only two issues to be determined:

(1) whether or not the Company conducted a fair and impartial investigation; and, (2) If so, was the discipline of discharge levied reasonable in all of the circumstances.

**Facts**

On September 12, 2018, the Grievor was tasked with deactivating the crossing for the surface maintenance crew at a crossing on Highway #2 in the Glenboro Subdivision. After he completed that task, the Grievor fell asleep in his truck. At approximately 11:40 AM, the Grievor was observed by his Supervisor, Brad Simpson, asleep in his vehicle with his hoody sweater over his head and his seat partially reclined. Mr. Simpson walked over to the Grievor's truck (which was parked on the side of the highway) and rapped on his window approximately 7 times before he awakened. According to the Grievor, after he was awakened, he emerged from the truck and Mr. Simpson told him that he caught him sleeping but that he was not going to "*write him up*" for it. Approximately an hour later, Mr. Simpson advised him that Darren Splett had learned that he had been caught sleeping and that he would call him with respect to further questions which he had. According to the Grievor, he asked if he needed a Union Representative for this discussion and he was told: "*No, it would be informal*". After their subsequent discussion, Mr. Splett advised the Grievor that he would be taken out of service pending an investigation.

Following that Formal Investigation, the Company dismissed the Grievor (Union Tab 6) having regard to his "*...being observed sleeping while parked along the side Highway #2 Crossing of the Glenboro Subdivision...*"

### **Fair and Impartial Investigation**

The Union takes the position that the intervention by Mr. Splett represented an "*investigation*" outside of the Formal Investigation. His doing so in the absence of Union representation violated Article 12.2 of the Collective Agreement and nullified the Grievor's right to a fair and impartial hearing.

At the commencement of the Formal Investigation on September 26, 2018, the Union stated that it:

*"...objects to the reliance on (the statement of Mr. Splett) and will be formally disputing any questions that make reference to the information supplied during these unauthorized interactions with Mr. Mulder."*

The Company takes the position that the provisions of Article 12 provide for an employee being held out of service and an officer “*who may be on the ground when the cause of the investigation occurs may hold an immediate investigation.*” However, that aside, it disputes that in the present circumstances a formal investigation, as anticipated by the provisions of Article 12, occurred. It points out that Mr. Simpson was a relatively new Supervisor and it was to be expected that he would report and consult with respect to the Grievor’s circumstances with his immediate superior prior to the Grievor being held out of service. His phone call occurred within a short time (an hour at the most) of the Grievor’s offence being discovered.

A review of the evidence of Messrs. Splett and Simpson contradicts the evidence of the Grievor in some aspects. He stated that Mr. Simpson said that he was not going to write him up but simply provide him with a warning. As well, it was alleged that Mr. Splett discovered the fact of the Grievor’s sleeping as a result of overhearing another conversation. However, it is apparent from the statement of Mr. Simpson that he advised the Grievor that he would get back to him about “*what was going to be done about him sleeping on the job beside Highway #2*”. Mr. Simpson allows that he texted Mr. Splett (a Director and Mr. Simpson’s immediate superior) and they subsequently had a phone call. Following that, Mr. Splett and the Grievor had a conference call so that the Grievor could explain his actions to Mr. Splett.

Leaving aside the disparity in the evidence between the Grievor and Messrs. Splett and Simpson, it is apparent that the discussions with Mr. Splett were relatively contemporaneous with Mr. Simpson finding the Grievor in the truck asleep. After he was informed, Mr. Splett called the Grievor back and put him out of service pending the investigation.

As stated in AH 686:

*“The broad benchmarks for essential elements of a fair and impartial investigation were earlier outlined in CROA 2073:*

*As previous awards of this Office have noted (e.g. CROA 1858), disciplinary investigations under the terms of a collective agreement containing provisions*

*such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defense. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline.*

*I have reviewed the cases submitted and conclude, based on the same, that the investigation here was conducted in a fair and impartial manner. This was not a case where any of the conclusions that needed to be reached were based solely on the evidence of Supervisor Wilson or that there was a credibility issue between Mr. Wilson and the Grievor. All evidentiary aspects are resolved by reference to the comments of the Grievor or the documents available."*

Having reviewed the statements of Messrs. Splett and Simpson, it is apparent that there is no derivation in the facts as explained by each of them. That is to say that there is nothing in the statement of Mr. Splett that would lead me to any conclusion other than that which I would have arrived at after reading only the memorandum of Mr. Simpson.

Borrowing from **AH 686** above:

*This was not a case where any of the conclusions that needed to be reached were based solely on the evidence of (Director Splett) or that there was a credibility issue between (Mr. Splett) and the Grievor. ...*

Although the Union allows that the evidence of Splett and Simpson are relatively factually the same, it objects vigorously to the process in having two superiors interview the Grievor in advance of putting him out of service. It takes the position that any questioning of the Grievor following that of Mr. Simpson, should have been left only for the final investigation meeting. It argues that what occurred is therefore a breach of the accepted and directed institutional process which, in of in itself, needs to be preserved.

I accept the Union's argument that the institutional process must be preserved between the parties. They have a long-standing history and are sophisticated in the art of representing their respective interests. It is therefore important to examine the circumstances to ensure that what occurred here did not represent an "investigation" nor interfere with a fair and impartial investigation.

Given the inexperience of Mr. Simpson, it was understandable that he would call on Mr. Splett and rely on his directions. Further, the similarities of their statements and the contemporaneity of the discussions which followed the discovery of the Grievor sleeping, lead me to conclude that Mr. Splett's intervention was not investigative but rather "*operational*" in the sense of his overseeing the duties of Mr. Simpson. Most importantly, there is nothing in the evidence of Mr. Splett that was not already apparent from the statement of Mr. Simpson. Nor is there a credibility issue between Mr. Splett and the Grievor which could impact on the determination to dismiss. Finally, at the investigative hearing, the Union made it clear that it would challenge any questions based on the statement of Mr. Splett and then ensured that it did so.

Accordingly, I do not see that the essential elements of a fair and impartial investigation (as referred to in **CROA 2073**) was interfered with as a result of the Grievor's discussions with Mr. Splett.

### **Is Dismissal Appropriate?**

The Company points to the fact that the Grievor had a disciplinary record consisting of a caution and a dismissal after which he was reinstated on May 22, 2017, following an effective suspension of 626 days. At the time he was caught in the instant violation, he had been back to work for 15 months, the first 6 of which he was under supervision. He was reinstated at Step 3 of the Employee Discipline & Accountability Process and his job was noted as being "*in jeopardy*" if he committed another offence (Company Tab 12).

The Grievor is 31 years old and has 6 ½ years of seniority with the Company. The Company argues that: considering his relative short service; his serious disciplinary record; the fact that the Grievor was found in the vehicle with his seat tilted back, his hood up and his head inclined; and that it took 7 knocks on the window to wake him up, the offence is serious and the discipline of dismissal ought to remain.

The Union argues that the Company's inference that the Grievor was "*nesting*" is unwarranted in the circumstances. Instead, the preponderance of evidence should lead me to the opposite conclusion. The Grievor's vehicle was parked in plain sight at the side of the road. He provided a reasonable explanation for the period of time that was spent in the truck after he deactivated the Crossing. He provided an explanation that – as many of his generation do – he wore his hoody all the time and, in fact, wore his hard hat on top of it. It makes the telling point that the Grievor's head was not resting against the window but rather was inclined toward the centre consol. The Union points out that the circumstances are inconsistent with him having purposely intended to fall asleep by resting his head against the window as one would expect in such a circumstance. Furthermore, the Union points out that the Grievor was candid at the outset that he was sleeping and, while he provided an explanation for the same, he did not make excuses.

Finally, the Union points out that even though he was subject to the accountability process at the time, he was reinstated at Step 3 and, having regard to the time that had expired between his being reinstated and the violation at issue here, that dismissal was too severe a penalty. It suggests that I substitute one that is more reasonable in the circumstances.

### **Decision**

I agree that dismissal is too severe in all the circumstances. In doing so I take into consideration: the fact that the Grievor was at Step 3; his candor; the fact that he immediately accepted responsibility; and, finally, that the evidence does not support a conclusion that he was nesting.

Having regard to the circumstances surrounding his earlier dismissal, I can understand the Company's concerns regarding the Grievor. In suspending him for the time set out below, and imposing the further conditions, I have taken into consideration, *inter alia*, the fact that he committed the current infraction while his job was "*in jeopardy*" (Company Tab 12; Para. 4(d)) having been given a significant chance by the employer only 15 months earlier and only 9 months after was no longer being supervised. While

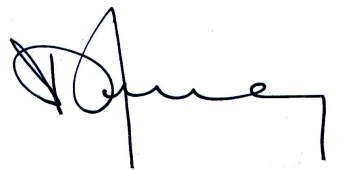
dismissal is too severe, a substantial penalty is warranted to: reflect the acknowledged seriousness of the Grievor's misconduct; take into consideration that his job was "*in jeopardy*" at the time; and, to impress upon him both the significance of the opportunity he was granted (some 15 months earlier) as well as the necessity for him to comply with his obligations arising from, and make the best of, that opportunity.

Having regard to the various precedents cited, but particularly the circumstances and the penalty discussed in Scott Smith (**AH 676**; Employer Tab 6), I direct that:

1. The grievance be allowed in part;
2. The dismissal shall be set aside and replaced with a suspension of 6 months and the Grievor be made whole as required;
3. Upon his reinstatement the provisions of Section 4 of the Company's letter of May 18, 2017 (Company Tab 12) shall apply to the Grievor; and
4. This determination should be understood by the Grievor to be a last-chance opportunity to demonstrate to his employer that he can work in a compliant and safe manner as required by his position. In the event he commits a disciplinable offense within 2 years, the Grievor shall be subject to dismissal.

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

July 3, 2019

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

Richard I. Hornung  
ARBITRATOR