

IN THE MATTER OF AN AD HOC ARBITRATION

BETWEEN

TEAMSTERS CANADA RAIL CONFERENCE (TCRC)

(the Union)

And

CANADIAN PACIFIC RAILWAY COMPANY (CP)

(the Company)

AH: 770

Dispute:

Appeal of the dismissal of Engineer A. Burke

Joint Statement of Issue:

Following an investigation, Engineer Burke was dismissed for the following reasons:

Please be advised that you have been dismissed from Company Service for posting to a social media platform from a personal cell phone while working on train 401-07 on May 7, 2020 in Revelstoke, BC. This is a violation of the Canadian Pacific Social Media policy HR 2020 Item 3.10; CP's Procedure # HS 5320 Item 2.2 Application "A" Use of Personal Entertainment Devices; and T&E Employees Item 2.2 While on Duty (a)(v)(vi), and (d)(v)(viii).

UNION'S POSITION:

The Union contends that given the facts of this case the Company has not justified dismissing Engineer Burke from service. During the investigation, Engineer Burke was honest and forthright with his answers, he did not attempt to hide or deceive the Company in anyway. He made it noticeably clear that he was somewhat unfamiliar with the Company Policy and did not completely realize the safety concerns of using an electronic device while on duty.

It is obvious from his postings that Engineer Burke did not post any items that were derogatory, slanderous, or directed at the Company in any way. The facts indicate that in the incident referred to, his movement was stopped and there was no damage to Company equipment or property. After a review of the Company Policy during the investigation, Engineer Burke agreed that he had made a mistake and offered his sincere apologies with assurances of not using his electronic devices in the future while on duty. Engineer Burke is now very aware of the Policy and that the Company can expect him to be in full compliance in the future.

Engineer Burke has maintained a respectable working record with Canadian Pacific up until this point. Even if he is found culpable, the Union asserts that he is not deserving of the ultimate penalty of dismissal.

For the reasons stated above and based on past CROA award 4090, the Union contends that the discipline imposed was excessive, unjustified, and unwarranted.

The Union requests that the Arbitrator expunge the dismissal from Engineer Burke's work record and that he be reinstated without loss of seniority or benefits, made whole for all wages lost, with interest, in relation to the time withheld from Company service.

COMPANY'S POSITION

The Company disagrees and denies the Union's request.

Regarding the discipline assessed, the Company respectfully maintains the facts speak for themselves. Contrary to the position advanced by the Union, during the statement, the Grievor acknowledged the applicable rules and his understanding of them and his obligations. Further the Company's Hybrid Discipline & Accountabilities Guidelines are clear: pg. 4 Conduct Unbecoming Offences Item 7. A violation of the following CP Policies: ... Use of Personal Electronic Devices.

Discipline was determined following a review of all pertinent factors, including those that Union describe as mitigating. The Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

Regarding assessments of discipline, the Company must draw specific attention to CROA 3900 which provided the use of cell phones and communication devices while on duty "simply cannot, as a general rule, be permitted among employees responsible for the movement of a train."

This is further supported by a multitude of CROA decisions including CROA 4445 which recognized "the Company made this instruction abundantly clear through its strict rules, directives and the 2010 letter indicating that the penalty of discharge would be assessed for this infraction. The conduct was serious and dangerous."

For all the reasons brought forth through the grievance process, the Company's position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances.

Accordingly, the Company cannot see a reason to disturb the discipline assessed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:

Signed

Greg Edwards
General Chairman
TCRC LE – West

FOR THE COMPANY:

Signed

Chris Clark
Manager, Labour Relations
CP Rail

January 17, 2022

Hearing: February 17, 2022 - By Videoconference

APPEARING FOR THE UNION:

Ken Stuebing – Counsel, Caley Wray
Greg Edwards – General Chairman
Harvey Makoski – Sr. Vice General Chairman
Greg Lawrenson – Vice General Chairman
Cameron Murtagh – Local Chairman
Adam Burke – Grievor

APPEARING FOR THE COMPANY:

Chris Clark, Manager Labour Relations
Lauren McGinley, Assistant Director Labour Relations

AWARD OF THE ARBITRATOR

JURISDICTION

[1] This is an Ad Hoc Expedited Arbitration pursuant the Grievance Reduction Initiative Agreement of May 30, 2018 and Letter of Agreement dated September 7, 2021 between the parties. The protocols entered into by the parties provided for submission of detailed briefs filed and exchanged in advance of the hearing. At the hearing, the parties reviewed the documentary evidence and made final argument. The parties agree I have all the powers of an Arbitrator pursuant to Section 60 of the *Canada Labour Code*.

BACKGROUND

[2] Following an investigation, for posting to a social media platform from a personal cell phone while working on train 401-07 on May 7, 2020 in Revelstoke, BC, the Grievor was dismissed by letter on June 5, 2020 for posting to a social media platform from a personal cell phone while working.

[3] The Company Policies and Procedures are set out and attached as Appendix A of this award.

COMPANY'S POSITION

[4] There is no dispute that personal electronic devices are a major source of distraction in everyday life. Just as using a cell phone while driving a vehicle puts all road users at risk. Using a cell phone while driving a train puts railway employees, the public, the environment, and communities at risk.

[5] The Company submits that the investigation had established the Grievor used his personal cell phone to access social media to post content and commentary on at least three (3) occasions while working as Locomotive Engineer on his assignments.

[6] The Company considered the Grievor's actions as Major-Life Threatening & Conduct Unbecoming infraction under the Company's Hybrid Discipline & Accountabilities Guidelines.

[7] The Company submitted that Railways and regulatory agencies such as Transport Canada and the Transportation Safety Board recognize the associated risks when using personal communication devices and engaging in non-railway activities while operating a train. As a result of increased risk, directives are now contained in the Canadian Railway Operating Rules (CROR).

[8] The Company submitted that in 2010, it began informing its employees of changes in its approach to the handling of inappropriate personal electronic or cell phone use. The Company warned employees of the following:

- Employees may be required to produce their personal communication device records as a routine part of investigations into alleged incidents and/or accidents; and
- The Company's decision to terminate employees as a disciplinary response for any willful breach of the Company's personal Electronic Device Policy.

[9] The Company submitted that provisions against cell phone use have been upheld at the Canadian Railway office of Arbitration (CROA). It relied on CROA 3900 in which Arbitrator Picher dismissed the Union's grievance regarding the Company's intention to request that employees produce their personal communication device records as a routine part of investigations into alleged incidents and/or accidents stating :

I am satisfied that in the present world of widespread wireless communications the Company's policy is a reasonable and necessary exercise of its management prerogatives, in the pursuit of safe operations, an objective which is at the core of its legitimate business interests and public obligations. Those interests are not counterbalanced by any significant privacy interest respecting whether a personal telephone was or was not in use at or near the time of an accident or incident. For these reasons the grievance is dismissed.

[10] CP pointed me to Arbitrator Picher's decision in CROA 4038 supporting a zero tolerance for cell phone use providing:

In my view the words of President Green must be taken and understood in their context. What his letter of November of 2010 asserts that where it can be proved that a Canadian Pacific employee wilfully violates the Company's policy with respect to the use of cell phones or other personal electronic communication devices while working in Company operations, that employee will be dismissed. That assertion, in my view, must be understood as a statement on the part of the Company that the presumptive measure of discipline for a knowing and deliberate violation of the Company's cell phone policy will be discharge. In that regard it is arguably not dissimilar to the understanding that a violation of General Rule G, involving the use of intoxicants while on duty, will result in the presumptive consequence of dismissal.....

.....

In the Arbitrator's view it does not violate the collective agreement for the Company to put employees on notice that it will exact a disciplinary penalty of discharge in the case of any employee who was found to have wilfully violated a particular rule or policy. On its face the Company's formulation would appear to address deliberate, knowing and/or reckless conduct in violation of the Company's policy.

[11] In their submissions, CP reviewed three of the significant railway accidents directly related to train operators being distracted as a result of using their personal cell phone while driving their train. It pointed me to the California Metrolink commuter train which plowed head on into a Union Pacific freight locomotive on September 12, 2008 in Chatsworth, California; the deadly accident in Spain in 2013 where a crash caused 79 deaths and 66 hospitalizations as a result of being distracted while driving a train and the 2016 German rail dispatcher's playing an online game on his cellphone shortly before two trains he was in charge of collided on a single-track line, killing 11 people.

[12] The Company submits that the Grievor chose to repeatedly access his cell phone while on duty to post content to a social media platform. The Company maintains that not only was this inappropriate and completely unnecessary, it was an appallingly egregious and selfish operating rule offense, trading the safety and wellbeing of everything around him for momentary personal amusement. It represented a serious and shameful deliberate safety risk. The Grievor was not posting anything of urgent value or at all related to his job. The postings were at best trivial and uncouth. CP argues that he has clearly demonstrated the Grievor's inability to stay focused on the task at hand. It pointed to the trivial posting on May 7, 2020 to Facebook, while on duty.

[13] The Company maintains that all of the Grievor's actions vaulted him well past the threshold for dismissal. Even if he had not been previously dismissed and reinstated on leniency terms, the Company had just cause to dismiss the Grievor. Culpability was established and dismissal was warranted and appropriate under the circumstances. The Company relies on the three part test in *William Scott & Co. v. C.F.A.W., Local P-162* (1976) [1977] 1 C.L.R.B.R. 1 (B.C.L.R.B).

[14] The Company argues that in the Grievor's case not one of the Wm. Scott factors weigh in their favour. The Grievor has already had a "Last Chance" to redeem himself as an employee of Canadian Pacific Railway. All he had to do was follow a basic rule of leaving his cell phone turned off and stored. He failed. It submits that the Grievor's record, his previous dismissal, and most recent actions while at the controls of a locomotive are simply incompatible with his continued employment with this railway.

[15] The Company says that the investigation clearly established that the Grievor was culpable for the incident and therefore some form of discipline was warranted. The facts of the investigation are undisputable. The Grievor worked through at least two tour of duties in which he accessed his cell phone on multiple occasions. Violating core Company policies, multiple times. The Grievor openly admitted to using his cell phone during other tours of duty, when the rules and policies clearly required it to be turned off, stored out of sight and not on your person.

[16] CP submits that Train & Engine employees are largely left unsupervised. There is a no doubt the Grievor has used his personal cell phone on several occasions and for extended periods of time while on duty, at the controls of a locomotive and was never caught.

[17] The Company submits that the Arbitrator must dismiss the Union's assertions that severity of the infraction has been overstated by the Company because the Grievor's movement was stopped and there was no damage to property or equipment. In support of dismissal, the Company relies on CROA 3900 in which Arbitrator Picher referenced SHP 530 in stating:

The more highly risk sensitive an enterprise is, the more an employer can, in my view, justify a proactive, rather than a reactive, approach designed to prevent a problem before it manifests itself

[18] The Company's relies on CROA 4112, 4445, 4090 and 3944 to support the appropriateness of the discipline assessed. It suggests arbitrators should not change discipline when it is within a reasonable range and points me to Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP, 2009 (Gee), CanLII 31586 (ON LRB).

UNION POSITION

[19] The Union submitted that the Grievor's assignment giving rise to the investigation transpired without issue. Mr. Burke performed all of his duties as required in the course of operating train 401-07 on this occasion. At one point in this assignment, the crew's movement was stopped waiting for his Conductor to walk up to the head end. While stopped, Mr. Burke made an innocuous post on social media using his personal device. It argues that Locomotive Engineer Burke arrived at Revelstoke at approximately 1715. He tied up and went off duty. Subsequent to this tour of duty, the Company became aware of Mr. Burke's posting. The Union argues that the dismissal assessed to the Grievor is totally unwarranted in the circumstances.

[20] It maintains Locomotive Engineer Burke was forthright in acknowledging his error in turning his phone on while he was stopped and making a posting on isolated occasions on May 4 and 7, 2020. The Union accepts that Engineer Burke made an error in judgment by using his phone while on duty. However, outright dismissal is neither a necessary nor justified penalty in response to the circumstances.

[21] The Union argues it is undisputed that Mr. Burke was stopped and not operating the train when he turned his phone on and made each post. H&S 5320 Article 3, Item D the procedure has reference to using cellular phones while on recognised breaks:

During a recognised break or meal period in a location safe to do so. Locomotive Engineer Burke works in road freight service. He does not have scheduled "breaks" or "meal periods."

[22] The Union maintains that for the purposes of his compliance with H&S 5320 Article 3, when Mr. Burke's movement was stopped in a location safe to do this, at the time he understood this to be considered as his break. Since the incident, he has now been educated and understands the Policy. Not only did Mr. Burke only post when in a location safe to do so, the comments themselves do not have culpable content.

[23] The Union argues that given the facts of this case, the Company has not justified dismissing Engineer Burke from service. It says that during the investigation, Engineer Burke was honest and forthright with his answers, he did not attempt to hide or deceive the Company in

any way. He made it noticeably clear that he was somewhat unfamiliar with the Company Policy and did not completely realize the safety concerns of using an electronic device while on duty. Locomotive Engineer Burke's sporadic postings, while stopped, do not rise to any of these types of social media postings that have been found sufficient to justify discipline.

[24] The Union maintains that Engineer Burke did not post any items that were derogatory, slanderous, or directed at the Company in any way. The facts indicate that in the incident referred to, his movement was stopped and there was no damage to Company equipment or property. After a review of the Company Policy during the investigation, Engineer Burke agreed that he had made a mistake and offered his sincere apologies with assurances of not using his electronic devices in the future while on duty. Engineer Burke is now very aware of the Policy and that the Company can expect him to be in full compliance in the future.

[25] The Union argues that the fact of the matter is there was no significant incident giving rise to his investigation. Mr. Burke was honest and forthright and demonstrated a cooperative attitude throughout this investigation. The Union notes that Locomotive Engineer Burke has maintained a relatively positive working record with Canadian Pacific, with only two prior operating rules infractions. As evidence throughout the formal investigation, Engineer Burke has benefited from the necessary and sufficient educative function of the formal investigation. After a review of the Company Policy during the investigation, Engineer Burke agreed that he had made a mistake and offered his sincere apologies with assurances of not using his electronic devices in the future while on duty. Engineer Burke is now very aware of the Policy and that the Company can expect him to be in full compliance in the future.

[26] The Union argues that this is not the type of case that Arbitrators have found termination appropriate such as for comments that harass co-workers, racist comments, comments that could harm the Company's business or threats against co-workers. It points me to *Alberta v. Alberta Union of Provincial Employees (R. Grievance)*, [2008] A.G.A.A. No. 20 [Alberta]; *Wasaya Airways LP v Air Line Pilots Assn, International (Wyndels Grievance)*, [2010] CLAD No. 297 and *Lougheed Imports Ltd. (c.o.b. West Coast Mazda) (Re)*, [2010] BCLRBD No. 190 *Canada Post Corp. v Canadian Union of Postal Workers* [2012] CLAD No. It submits that in CROA Cases No. 903, 3044, 4035, 4090, 4419 and SHP No. 402 the arbitrators did find that some discipline was warranted, but that the Grievor's explanation warranted the substitution of a lesser penalty.

[27] The Union argued that the penalty of discharge for the first offence of having an electronic device is not supported as a necessary outcome by the relevant railway arbitration jurisprudence.

It relied on CROA Case No. 4090. In that case, the Grievor made use of his cell phone, contrary to what he understood to be the rule, while his train was stopped and for a short time when his movement resumed operating until he realized that he had violated the Track Occupancy Permit (TOP). In that matter, unlike here, there was use of a device while the movement was in operation directly contributing to a TOP violation. Even in those circumstances, the Arbitrator determined that the Grievor deserved another chance.

[28] The Union submitted that Engineer Burke has maintained a respectable working record with Canadian Pacific up until this point. Even if he is found culpable, the Union asserts that he is not deserving of the ultimate penalty of dismissal.

ANALYSIS AND DECISION

[29] I have carefully considered all of the submissions provided by the parties. In keeping with the parties' process agreement, I will only review those submissions that are relevant to this award.

[30] The Grievor entered Company service on March 7, 2011 and was working as a Locomotive Engineer based out of the home terminal of Revelstoke, BC at the time of his dismissal. The Grievor became a qualified Conductor in August 2011 and subsequently qualified as a Locomotive Engineer in March 2017. At the time of dismissal, the Grievor had three active assessments of discipline on file:

- August 2019: Formal reprimand for failing to be available for duty when called for a shift on August 13, 2019.
- January 2019: 15 demerits for non-compliance with an operating bulleting which resulted in an undesired emergency brake application on the Mountain subdivision.
- October 2018: Caution for a missed call for train 3/302-10 at 0550 on October 11, 2018.

[31] Also on the Grievor's permanent record is a dismissal in May 2017 and subsequent reinstatement in October 2017. On May 13, 2017, the Grievor, working as a Locomotive Engineer, failed to control his train's movement resulting in a rear end collision. The Company submitted that the incident was investigated and the Grievor was found culpable for violating several safety rules.

[32] The Union asserts that the Grievor is not deserving of the ultimate penalty of dismissal. Similar to the CROA Case No. 4419, the Union submits that this is a reconcilable working relationship and the Grievor is capable of and willing to learn from his mistakes set forth on the record.

[33] A reading of the Company rules suggests that train crews should have a significantly diminished expectation of tolerance for the use of cell phone. Compliance with the rules is necessary for furtherance of railway safety. CP pointed me to Arbitrator Picher's decision in CROA 4038 supporting a zero tolerance for cell phone use noted earlier.

[34] Canadian Railway Operating Rules (CROR) provide:

Every employee connected with movements, every employee in any service connected with movements, handling of main track switches, all switches equipped with a lock and protection of track work and track units shall:

xi. While on duty, not engage in non-railway activities which may in anyway distract their attention from the full performance of their duties.

xii. The use of communication devices must be restricted 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.

[35] Train and Engine rules prohibit the use of personal electronic devices, such must be turned off, stored out of sight and not on your person. The Rules are reinforced by specific questions and answer information provided by the Company to clarify any doubt by stating.

Q14. I am a conductor who spends considerable time away from my family. Can I leave my personal cellular telephone on to receive incoming calls while on duty?

A14. No, in accordance with the Canadian or US operating rules restrictions, personal **cellular phones and other electronic devices must be turned off with any ear pieces removed, stored out of sight in a location not on your person** except as otherwise provided for. In the event of an emergency, your family can ensure you are notified through the RTC through use of the 24 hour Emergency Phone Number for the applicable Network Management Centre or Operations Centre as indicated in the Time Table. **Emphasis Added**

[36] The Union submitted that the Grievor made it noticeably clear that he was somewhat unfamiliar with the Company Policy. He did not completely realize the safety concerns of using an electronic device while on duty. The Union argues that Locomotive Engineer Burke's sporadic postings, while stopped, do not rise to any of these types of social media postings that have been found sufficient to justify discipline. The Union maintains that he thought he was on a break when using his phone. The Company objects to that argument. It maintains that the Grievor never thought he was on a break or that he was not familiar with the rule.

[37] Investigations are the part of the foundation for review of accuracy and fairness in the assessing of discipline. A review of the investigation regarding his familiarity of the rules and his understanding regarding breaks is best addressed through a review of applicable questions and answers. They provide:

Q44 Is it common practice for you to use your cell phone or electronic devices on a train while on duty?

A - It isn't common practice, but I have used my cell phone on occasions in the past.

Q45 How often do you use your cell phone while on duty?

A- I'm not sure how often I use my cell phone but I have used it periodically.

Q46 What assurances can CP expect from you, with respect to fulfilling your duties and complying with the Company rules and policies to prevent the type of behavior identified in this investigation?

A- Given the opportunity, I will be 100% in compliance with the policy.

Q47 Are you aware that as a result of personal cell phone use and text messaging on trains, there have been catastrophic accidents that have taken place in railway operations?

A- After some discussions I'm aware now of some of the serious accidents that have happened.

Q48 Do you understand that the use of a cell phone is prohibited

while on duty in an effort to ensure train crews remain focused on the tasks at hand, which would bethe safe, efficient operation of their train?

A- I understand.

Q52 Do you have anything you wish to add to this statement?

A- Yes, after going through this formal investigation I am more aware of the dangers and severity of incidents if they were to occur. I am truly sorry for my actions and conduct while on duty. I will change my work performance if given the opportunityfor a second chance in the future with the Company as I take pride in my job as a Locomotive Engineer.

[38] I find the investigation established his understanding of the Rules regarding cell phone use. He violated them repeatedly. His testimony was inconsistent. I cannot find the basis for his understanding that he was on a break. He claimed that he was not previously aware of the danger and severity and incidents. I find his claim of being unaware problematic at best.

[39] The Grievor is a Locomotive Engineer who works largely unsupervised. He is in a safety critical position and can be expected to be held to a higher standard of accountability and forthrightness. He was previously dismissed. His current discipline record shows no appreciation for understanding the expectations placed on him.

[40] The Union argued that part of satisfying the just cause standard in the present case requires the Company to prove both that the Grievor has committed a workplace offence and that discharge is a proportionate disciplinary response among a range of appropriate sanctions for the misconduct. However, the principles of corrective discipline may apply even in cases of serious misconduct that no employer can be expected to tolerate.

[41] The Union emphasized the reinstatement decision of arbitrator Picher in CROA 4090 involving the reinstatement of Conductor Doner who was terminated on December 8, 2010 for the blatant misuse of his cellular phone on November 17th, 2010 for a violation of General Rule A (xii) & SSI at the time. The Union is correct in pointing to the comments of the long standing and often cited Arbitrator Picher. However, the 2010 decision was based on the rules in effect at the time as well as the related facts and circumstances.

[42] I find the rules and decisions have been changing and responding to alarming facts. That principle was expressed as follows by the Arbitrator in SHP 530, reported as Canadian National Railway Co. and Canadian Auto Workers; United Transportation Union, Intervenor (2000), 95 L.A.C. (4th) 341in which Arbitrator Picher stated:

The more highly risk sensitive an enterprise is, the more an employer can, in my view, justify a proactive, rather than a reactive, approach designed to prevent a problem before it manifests itself.

[43] In CROA 3900, June 23, 2010 Arbitrator Picher also stated:

It seems axiomatic, and indeed there is no contrary position taken by the Union, that 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.

[44] Arbitrator Picher would go on in CROA 3900 to address what, in my opinion, is worth of consideration today. He stated:

...
Professionalism is doing the right thing when nobody is watching. But as the Chatsworth investigation uncovered, this particular engineer was not likely to do the right thing unless he thought somebody was watching. This is a new paradigm, this area of distractions. It is changing how humans behave, how they interact with one another, and how they react in normal and emergency situations.

[45] Given Metrolink and the various tragic railway accidents which would follow, I am drawn to consider the comments of arbitrator Picher of 2011 in CROA 4039 when he stated:

In the Arbitrator's view it does not violate the collective agreement for the **Company to put employees on notice that it will exact a disciplinary penalty of discharge in the case of any employee who was found to have wilfully violated a particular rule or policy.** On its face the Company's formulation would appear to address deliberate, knowing and/or reckless conduct in violation of the Company's policy. **Emphasis added**

[46] I find the rules in place at this time for cell phones and electronic devices are reasonable to ensure safety and necessary in the work culture within the operation a railway. They are consistent with the professionalism contemplated by Arbitrator Picher in CROA 3900. There is no substantial disagreement in respect of the nature of the work done by train crews is being safety critical.

[47] The Company has identified the potential serious consequences that may result in the event of an incident relating cell phone use by railway operational employees when working. Complacency or a lack of situational awareness increases risk associated with such use. This is a matter of overall railway safety and the railway as well as the public have a right to expect the highest level of safety standards from railway companies. The Company's prohibition against cell phone use is now of long standing. It is repeated and emphasized in a number of ways. Understanding of the rules by experienced and trained employees is now reasonably expected.

[48] Safety concerns arising from cell phones on trains and the danger associated with even momentary distractions are well documented. The Company reviewed a number of train accidents which have been well covered at the time in the media. Momentary distractions are known to jeopardize situational awareness. The requirement for a device to be off and stored – not on an employee's body - is well reasoned. Few people today can claim to have not been distracted by an accidental "butt-dial" or an "I have a message for you" cell phone tone. Indeed, this Union has argued before me, in other cases that momentary distractions should mitigate against discipline assessed for serious rule violations.

[49] In turn, it is a fundamental and a basic requirement of railway operating employees that they make every effort to ensure the safe operation of trains. It is well established that to accept less is not acceptable in the safety critical operation. Safety is paramount. The Grievor's actions in this case strike at the core of his obligation and responsibility.

[50] If other employees choose to disobey the CROR and Company policies regarding proper handling of their electronic devices and cell phones while working, they are doing so at their own peril. Train crew members sitting elevated in locomotives, in plain sight using cell phones not only jeopardize safety, but they also send the wrong message to all other employees. Accordingly, deterrence of other employees who would engage in similar conduct is a legitimate factor in assessing such discipline.

[51] The Company provided a number of railway accidents known to have involved the improper use of electronic devices. The impact on the reputation of those railways is evident. In the face of such accidents, it is not unreasonable for the Company to argue the reputational impact of not fully enforcing applicable safety rules. The evidence established that this is not a case in which no one knows that rules and penalties exist to address use of cell phones. Use of cell phones in violation of established rules when committed by an employee in a highly visible safety sensitive position, working unsupervised in a position of trust makes the offence more serious than it might otherwise be. It also makes it all the more difficult to justify a remedy short of discharge. The vulnerability of co-workers, the public and overall Company safety from a distracted operating employee is significant and proven to be potentially catastrophic. Therefore discipline also serves the deterrent purpose to other employees.

[52] Given the Grievor's discipline record and his response to clear and direct questions during the investigation, there is simply no evidence on which I can rely to arrive at the conclusion that this Grievor would not reoffend if he is placed back at work in the often unsupervised position of a Locomotive Engineer. The nature of the work requires the professionalism contemplated by Arbitrator Picher in CROA 3900. The evidence does not warrant a conclusion that discharge was excessive having regard to the totality of facts and circumstances in this case. The mitigating factors in favour of the Grievor are not sufficient to compel imposition of a substituted lesser penalty.

[53] In view of all of the foregoing the grievance is dismissed.

Dated this, 26th, day of March, 2022.



Tom Hodges
Arbitrator