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: 771

DISPUTE
Appeal of the dismissal of Locomotive Engineer Colin Maier of Medicine Hat, AB.

JOINT STATEMENT OF ISSUE

1. Following an investigation, Engineer Maier was dismissed for the following reasons:
Please be advised that you have been dismissed from company service for your conduct unbecoming of an employee of Canadian Pacific. Specifically, the use of a personal electronic device on November 15, 2020, while working as a Locomotive Engineer on train 119-12 between Maple Creek and Hatton on the Maple Creek Subdivision and the subsequent distribution of video footage taken on your cell phone from your tour of duty on train 119-12: A violation of Rule Book for T&E Employees, Section 2, item 2.2,2.3, T&E Safety Rule Book for Employees Core safety Rules, CROR Rule 106, CP Code of Business Ethics.

UNION'S POSITION:

2. The facts of the investigation are not in dispute, it is the ultimate penalty of dismissal to which the Union takes issue with. The Union does not condone the use of cell phones while on duty, however, based on the facts, clearly, there was no intentional rule violation but rather a poor judgement call on the part of Engineer Maier. As Engineer Maier stated in his investigation, he felt disturbed and upset following the incident and thought that sharing the video with a friend may assist him with working through this difficult time. This turned out to be another poor decision which led to the video being posted on social media. Once he was aware of the posting, it was immediately taken off the social media site.

3. During the investigation, it was clear that Engineer Maier was honest and forth wright with his explanations of what took place. As difficult as it was, he did not attempt to distort what took place but rather provided the investigation with all the details as required and sincerely apologized for his actions. The Union contends that these facts must be considered when determining the appropriate discipline.

4. Engineer Maier is a long service employee who is nearing the end of his career with the Company only needing a couple years to normal retirement. The Union contends that his dismissal is unwarranted and extreme, to end his career prematurely is a great injustice to an employee who has dedicated his entire life to the railway.

5. The Union requests that the Arbitrator reinstate Engineer Maier without loss of seniority and that he be made whole for all lost earnings and benefits with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY'S POSITION

6. The Company disagrees and denies the Union's request.

7. The Company maintains the Grievor's culpability as outlined in the discipline letter was established following the fair and impartial investigation. Discipline was determined following a review of all pertinent factors, including those described by the Union. 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.

8. Based on the foregoing as well as the reason provided in Superintendent Inglis' grievance response, the Company cannot agree with the Union's allegations or requested resolve.

9. Without precedent or prejudice to the Company's aforementioned position, it is incumbent on the Union to provide detailed information on alleged lost wages, benefits, and interest. The Company cannot properly respond to this request when the Union is vague and unspecific on what constitutes "made whole".

10. 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.

11. 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

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Greg Edwards
General Chairman
TCRC LE – West

FOR THE COMPANY:

Signed

____

Chris Clark
Manager, Labour Relations
CP Rail

January 15, 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
C. Maier – 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] On November 15, 2020, the Grievor was called to work as Locomotive Engineer on train 119-12, commencing duty at 10:31. The train was operating from Swift Current SK to Medicine Hat AB. Mr. Maier's crewmate on this assignment was Conductor Brian Alcorn. Between Maple Creek and Hatton on the Maple Creek Subdivision, at approximately 13:22 hours, Train 119-12 approached a herd of Antelope running alongside and on the tracks. The train struck the herd of Antelope and the Conductor reported this incident to the Rail Traffic Controller.

[3] Both the Grievor and his Conductor were later advised that a video had been brought to the Company's attention that looks to be taken from inside a locomotive that involved a train striking a herd of antelope. On November 29, 2020, the Conductor was asked if he or the Locomotive Engineer recorded the animal strike on their personal cell phone to which the Conductor stated "not that I am aware of". Similarly, the Grievor was asked if he recorded the wildlife strike on his cell phone while operating the train to which he replied, "no I did not". Later the Grievor acknowledged when speaking to General Manager John Bell about this incident that he had in fact taken the video in question. The Grievor attended an investigation on December 3, 2020 and as set out in the Joint Statement of Issue, he was dismissed on December 16, 2020.

[4] There are two distinct issues that gave rise to the Company's decision to dismiss the Grievor. First, the safety issues related to cell phone use in the alleged violations of Rule Book for T&E Employees, Section 2, item 2.2,2.3, T&E Safety Rule Book for Employees Core Safety Rules, CROR Rule 106. Second, the alleged violation of the CP Code of Business Ethics as it relates to the reputation of CP Rail.

COMPANY'S ARGUMENT

[5] The Company submits the evidence established that during the tour of duty, the Conductor alerted the Rail Traffic Controller that they had come upon a herd of 200-300 antelope and struck as many as 60 of the animals while coming through Kincorth, SK. The Grievor confirmed his understanding that a video had been brought to the Company's attention that looked to be taken from inside a locomotive that involved hitting a herd of antelope.

[6] CP maintains that the Grievor confirmed during the investigation that when initially asked if he had recorded the animal strike on his cell phone and responded "he did not". The Grievor's voice can be heard on the recording describing the animals running down the track, unable to get out of the way of his train. The Grievor confirmed it was him that could be heard. He confirmed recording the animal strike using his personal cell phone. He also confirmed that there was no previous discussion about cell phone usage with his Conductor during their tour of duty.

[7] The Company submits that as a result of the Grievor's deliberate distribution of the recording, the footage went viral on various social media platforms and news media websites. The wildlife strike, already an incredibly heinous experience, was now immortalized on the internet as a consequence of the Grievor's actions. The video, with CP Rail named prominently in the title, has been viewed thousands of times.

[8] The Company maintains this incident comes up first with the search terms "CP Train Hits". It demonstrates the indelible nature of the reputational harm this incident has caused Canadian Pacific due solely to the Grievor's offenses. Canadian Pacific Railway is clearly identified in the broadcasts with the headlines almost as graphic as the video itself. The footage, still available online today, can be easily found at some of the internet's most popular social media sites and news media outlets including CBC NEWS, CTV NEWS, GLOBAL NEWS, FACEBOOK and YOU TUBE. The Company noted that the Global News report stated that the Minister of Environment would be reaching out to Canadian Pacific Railway for information. A subsequent report from Global News on December 2, 2020 after it contacted the Saskatchewan Ministry of Environment's stated that more than 100 animals were killed.

[9] The Company argues that the Grievor's recording undermines Canadian Pacific's efforts to mitigate wildlife impacts related to the operations of the railway. The video footage is now eternalized on the internet. The Company maintains the recording and subsequent distribution was a clear infraction of the Canadian Pacific Code of Business Ethics. There is ongoing harm to the Company's reputation, the recording can be found easily on the internet using the simplest of search terms.

[10] Regarding the second disciplinary issue of cell phone use, the Company maintains that distracted driving of a locomotive is no different than distracted driving of a car. The risk of an accident, the reduction of a train crew's awareness and ability to perform their job safely is greatly reduced when distracted by a personal electronic device. It says the 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.

[11] As a result of increased risk, directives are now embedded in the Canadian Railway Operating Rules (CROR). The CROR General Rule A now states:

> 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.

[12] CP submits that in 2010, the Company began informing its employees of changes in their approach to handling inappropriate personal electronic device and 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.

[13] The Union grieved the Company's aforementioned policies and those disputes were arbitrated in CROA 3900 and CROA 4039. CP maintains that in CROA 3900, 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. The Company submits that he acknowledged the Company's mission for a safer railway 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.

[14] In November 2010, the Company's Chief Operations Officer wrote to the Union to advise that employees in breach of the Company's personal electronic device policy "will be dismissed". The Union grieved the Company policy and maintaining that the automatic dismissal policy and practice was unreasonable, excessive and contrary to the terms of the Collective

Agreement. CP submits that those assertions were dismissed. In dismissing the grievance, Arbitrator Picher stated the following in CROA 4039:

> 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.

[15] CP argues that unfortunately, there are a significant number of railway accidents directly related to train operators being distracted as a result of using their personal cell phones while driving their train. It reviewed three accidents in addressing the concern. One of the most notable cases is that of a Metrolink commuter train which plowed head on into a Union Pacific freight locomotive on September 12, 2008 in Chatsworth, California. The investigation revealed the locomotive engineer, who was killed in the crash, sent 24 text messages and received another 21 in less than a two-hour span while operating his train. The accident killed 25 people and injured another 135.

[16] In 2013, cell phone use also contributed to a deadly accident in Spain where a crash caused 79 deaths and 66 hospitalizations as a result of being distracted while driving a train. The locomotive engineer admitted during his court appearance that he had a "lapse of concentration". The driver lost track of his situational awareness and became confused as to what section of track he was on. Thirdly and most recently in 2016, a German rail dispatcher was 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.

[17] The Company submits that it was left with no choice but to apply a zero tolerance approach to infractions of this nature. CP has a responsibility to maintain a safe workplace under Part II of the Canada Labour Code, specifically, Part II Section 125 (1) (y). It argues that limiting the ability of the Company to deliver appropriate disciplinary consequences to employees who undermine that safety, restricts the Company's ability to meet its statutory obligations within the Canada Labour Code and leaves the safety of their employees and the public in potential peril.

[18] CP maintains that the Grievor then lied about it when asked directly by a Company Officer, which on its own is another major offense. The Grievor then distributed the recording

that led to the footage going "viral" across the internet, gaining international headlines and ultimately compromising the reputation of Canadian Pacific Railway. This alone is also a dismissible offence. 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 Last Chance Terms shortly before this incident it had just cause to dismiss the Grievor.

[19] The Company relies on CROA cases 3900, 3944, 4039, 4090, 4122, 4445, Ad hoc railway case 704, *Grand Erie District School Board and OSSTF, District 23* (Zurby), (2016), 271 L.A.C. (4th) 162 (Ont. Arb.) (QL), and *Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP*, 2009 (D. Gee) CanLII 31586 (ON LRB). The Company relies on the often cited three- part test for assessing discipline found 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).

UNION POSITION

[20] The Union submitted that at one point in this assignment Train 119-12 approached a herd of Antelope running alongside and on the tracks. The crew blew their whistle multiple times, but the animals did not get off the tracks. It submitted that the train struck several of the Antelope. The crew reported this incident to the RTC. Mr. Maier made a spontaneous decision to record a short video with his cellular phone.

[21] The Grievor was later questioned by the Company's officers about having done so. He initially denied that he had recorded the animal strike on his cell phone, but soon afterwards acknowledged recording the incident on his cell phone. He later spoke to General Manager John Bell about this incident and divulged that he had in fact taken the video in question. The Union maintained that Mr. Maier attended the investigation with his Union representative and answered all the question put to him.

[22] It says the Grievor was asked about a video that had been brought to the Company's attention, taken from a cell phone from inside a locomotive that involved a train hitting a herd of Antelope. He acknowledges that when initially confronted by Superintendent Jason Inglis, he denied having recorded the animal strike on his phone but in the investigation stated:

> Yes, however I was enroute to work at the time and answered my phone on my Bluetooth, was preoccupied and was not really sure about what he was talking about when I answered that. Since then I have talked to General Manager John Bell about this incident and I have divulged that I had in fact taken the video in question.

[23] Mr. Maier also noted in the investigation that the reason he sounded the whistle numerous times between 13:22:01 and 13:22:38 was due to his concern for the Antelope on the track, and trying to alert them to get off the tracks. When asked about a voice in the video describing the animals just running down the tracks and won't get out of the way, he acknowledged it was his voice in this video, as he was appalled that they wouldn't get off the track and that he was contacting them with being helpless to do anything about the situation.

[24] When asked if there was any other use of his cellular phone that day, he stated:

> I don't normally have my cellphone on when on duty, however this trip I did because my girlfriend has a medical condition and was recently placed on new medication with potential serious side effects and I wanted to be

> available in case something serious happened with her, but I'm unsure if I had used it prior to the video being filmed.

[25] The Union submitted that Mr. Maier acknowledged his familiarity with the exception in the SSI not allowing cellular phones to be left on in order to monitor incoming calls in the case of a family emergency. He relates that he is "more aware now" of the OC Emergency Help Line.

[26] The Union stated that Mr. Maier was asked a series of questions about whether he was aware of the Business Code of Ethics. He confirmed that he was aware of this Code. However, he was not asked about any specific alleged breach of the Code of Ethics, nor did the Company put to him any specific alleged violation.

[27] The Union maintained that there is nothing in the video that references CP and there was no intent to harm. Mr. Maier explained that when he sent this video to his cousin, he had no intent of hurting CP in any way. At the end of his statement, Mr. Maier spoke to his sincere remorse and to how he values his career with CP:

> Taking this video was a knee jerk reaction and I don't know what I was thinking when I did it. I did not take this video to use on social media against CP for any reason what so ever! If I would have known what the outcome of taking this video, I Sure as hell would not have done it.
> I am 52 years old and have never had any use for social media until missed a family member birthday and was told wouldn't have missed it if I was on Facebook, so I joined. I did not post this video on line and would never do such a thing.
> I only sent it to my cousin who is like a brother to me because hitting all those animals bothered me and I needed someone to talk to about what had happened. I had no idea that that video would have been shared with someone else who obviously shared it too. I am truly sorry for my actions in this matter and in no way did I see what could have or did happen because of me taking this video.
> I have a little more than two years left till I can retire and have nothing to fall back on at this time of my life. No education beyond high school, and do not know what I would do if I didn't have this job, so I am praying that somehow who ever makes the decision about my fate can give me another chance.
> Again, I am truly sorry from the bottom of my heart and wish this would have never taken place.

[28] The Union's position is that the dismissal assessed to the Grievor is unwarranted in the circumstances. Locomotive Engineer Maier was forthright in acknowledging his serious error in this matter. Likewise, the Union readily acknowledges that Engineer Maier made an error in judgment by using his phone while on duty. However, the Union argued that outright dismissal is neither a necessary nor justified penalty in response to the circumstances. There is no suggestion that the crew was in breach of any operating rules by virtue of the animal strike itself. Animal strikes are an unfortunate, regular occurrence on the railroad.

[29] The Union submits that it does not condone the use of cell phones while on duty. Locomotive Engineer Maier's knee-jerk decision to record the unavoidable animal strike incident was a serious error in judgment. It is, however, an act that is uncharacteristic of him and unprecedented in the course of his long career. Locomotive Engineer Maier felt disturbed and upset following the incident. He shared the video privately with his cousin as part of his process to work through this difficult time. This, in turn, was a further error in judgment. Unbeknownst to Mr. Maier the video was posted on social media.

[30] The Union maintains that the investigation demonstrates that Locomotive Engineer Maier was honest and forthcoming. He answered all of the Company's questions fully and truthfully. At his statement, he did not attempt to hide or deceive the Company in any way, nor did he minimize his role. Mr. Maier further expressed his sincere remorse for his actions. He recognized that he was in breach of the prohibition from using an electronic device while on duty on November 15, 2020. There is no dispute that there is cause for discipline in regard to his cell phone use. However, in the Union's view, it is not deserving of outright dismissal.

[31] The Union noted the Form 104 alleges that Mr. Maier breached the Company's Code of Business Ethics. On careful review of the above-summarized evidentiary record set forth in the investigation and the record of evidence in this matter, the Union submits that the Company's Code of Business Ethics is not applicable in these circumstances. The Code of Business Ethics is explicitly in regard to employees engaged in business conduct.

[32] The Union submitted that the Company has not suffered reputational harm. There is absolutely no evidence that this posting has hurt the Company in any discernible way. To the contrary, the Union submits, record profits continue to be made.

[33] The Union submitted there are far more equitable and justified measures of discipline that the Company could have utilized in response to Mr. Maier's circumstances. The Company has not properly weighed all of the mitigating factors, including that he personally did not distribute the video to more than one person. The Union finds it clear the Company has arbitrarily treated Mr. Maier as a worst-case scenario even though more equitable disciplinary options were available. Locomotive Engineer Maier candidly recognized that he made a serious mistake and offered his sincere apologies. The Company can be assured that Mr. Maier will not use any personal electronic device in the future while on duty. Engineer Maier is now very aware of the Policy and that the Company can expect him to be in full compliance in the future.

[34] The Union objected to the Company's introduction of the video and materials relating to broadcasted animal hits. It argues that the videos were available to CP but not relied upon and not introduced in the investigation whatsoever. Nor were these materials referenced whatsoever in the grievance procedure. As they did not form any part of the basis on which Mr. Maier was dismissed nor on which the grievance was denied, it is far too late to commence introduction of them. I admitted the video with weight to be provided later for establishing what the Company relied upon in making its' decision.

[35] The Union relies on CROA cases 942, 2417, 2471, 3376, 3934, 3944, 4028, 4035, 4090 4145, 4150, 4178, 4230, 4231, 4232, 4363, and 4419. The Union also appropriately relied on Ad Hoc 383 but provided CROA 383 in error within its book of documents and authorities as noted by the Company in reply. In a review of the case law I reviewed Ad Hoc 383.

ANALYSIS AND DECISION

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

[37] The Company relies on *Wm. Scott* supra which sets out three questions generally accepted by arbitrators assessing a dismissal grievance as follows: First, has the employee given just and reasonable cause for some form of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable? In this matter, the Union acknowledges the Grievor's responsibility and accepts that some discipline was warranted but in this cased was excessive. Thus, the first question set out in the Wm. Scott award has been answered and I will address on the two remaining questions.

[38] The Grievor, entered service with Canadian Pacific on June 20, 1987. He first started as a Car Control/Checker and became a Brakeman in January 1988. Mr. Maier qualified as a Locomotive Engineer in 2000. He worked out of Medicine Hat Terminal. He will be 54 years old this July. He has two children. The Union submitted the Grievor's discipline history is not without blemish but he has recorded significant periods of discipline-free service in his long career with CP.

[39] The evidence established that at the time of dismissal, the Grievor had two active assessments of discipline on file. The first, 10 demerits for patterned absenteeism, issued in October 2020; and a formal reprimand for failure to obey a speed restriction, issued in June 2020. The Grievor's permanent record also includes a dismissal from November 2016 and subsequent "Last Chance" employment reinstatement in 2017.

[40] I have reviewed the case law submitted by both parties thoroughly. The Union provided extensive case law spanning from 1972 to 2015 for overall consideration of the various mitigating factors in my determination of this grievance.

[41] In cases specific to electronic device use, the Union submits 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 pointed me to CROA Cases 3944, 4035, 4090 and 4419 spanning 2010 to 2015. I find the facts and circumstances in those cases are of little assistance in this case. In addition, the case law regarding cell phone use has evolved significantly with the increase presence of cell phones in the workplace.

[42] The Company points to CROA 4445 (2016), in which a Conductor was discharged for watching a video on his IPAD while on duty. Arbitrator M. Silverman upheld the dismissal and noted the following:

> In this case the severity of the discipline is commensurate with the conduct. As stated in CROA&DR 3900 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.
>
> The Grievor was watching a video on an iPad, fully distracted from his duty to operate the train. Further, he denied that he was doing so. The Grievor knew that he should not be using his iPad while on duty on the train. In addition to that being obvious when operating a train, 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. In these circumstances, and in light of the infraction engaged in, the penalty of discharge is appropriate.

[43] In this case, the Grievor was working as a Locomotive Engineer operating the train at track speed. He engaged in taking a video for a significant period of time. His efforts included setting up the cell phone out of the view of the Conductor. In doing so, he endangered the employment of a co-worker. Had the Conductor been aware of the video being taken, he could have been subject to discipline.

[44] The Grievor is a long service employee. However, his discipline record is significant, he had previously been dismissed and reinstated through the efforts of the Union. He knew his obligations and the risk of using his cell phone. His reasoning for taking that risk is not consistent. The position of Locomotive Engineer requires forthrightness and accountability. He had been given a second chance and violated a significant rule and concealed it from a co-worker.

[45] The Grievor's repeatedly minimized his actions. His version of events are lacking in credibility. The Grievor maintained that he was horrified by what had occurred. Yet when initially confronted by Superintendent Jason Inglis, he denied having recorded the animal strike on his phone but in the investigation stated:

> Yes, however I was enroute to work at the time and answered my phone on my Bluetooth, was preoccupied and was not really sure about what he was talking about when I answered that. Since then I have talked to General Manager John Bell about this incident and I have divulged that I had in fact taken the video in question.

[46] The Grievor was also unsure when asked in the investigation if there was there any other use of his cell phone while on Train 119-12 November 15, 2020. He responded:

> I don't normally have my cellphone on when on duty, however this trip I did because my girlfriend has a medical condition and was recently placed on new medication with potential serious side effects and I wanted to be available in case something serious happened with her, but I'm unsure if l had used it prior to the video being filmed.

[47] The Grievor was asked is there anything else you would like to add to this investigation and answered?

> Taking this video was a knee jerk reaction and I don't know what I was thinking when I did it. I did not take this video to use on social media against CP for any reason what so ever. If l would have known what the outcome of taking this video, I sure as hell would not have done it. ….
> ……
> I only sent it to my cousin who is like a brother to me because hitting all those animals bothered me and I needed someone to talk to about what had

> happened. I had no idea that that video would have been shared with someone else who obviously shared it too.

[48] At the hearing when questioned as to why he took the video he answered:

> Taking the video was a knee jerk reaction
> I wanted to show someone what I have to go through at work
> I was horrified

[49] Being unsure of what the Superintendent was talking about when he called about the animal strike as he was driving is problematic. The Grievor operates trains while taking instructions on the radio as part of regular duties. At the outset of the investigation, the Grievor demonstrated his recollection of specific facts regarding that day. He was specific in rebutting the mistake of the investigating officer over a one hour time of departure error on the day of the incident.

[50] His answer at the investigation regarding why he took the video is in contrast to that at the hearing. First, he did not know why he took it then he said he wanted to show someone what he goes through at work. He also said he did not normally have his cell phone on at work and was unsure if he had used his phone prior to the incident. I find his after-the-fact testimony self-serving and I considered it cautiously.

[51] The Union argues that other forms of discipline are more appropriate in these circumstances. The Company argues that the Grievor's discipline record is significant and mitigates against reinstatement. It notes that he has already had a Last Chance reinstatement after a dismissed. He was given a suspension as part of a Last Change Reinstatement Agreement. I find his use of a cell phone after being reinstated is a significant factor to consider in determining if he is likely to repeat his actions in the future.

[52] The Union objected to the Company relying on the agreement. He had been dismissed for refusing a post incident substance test on November 11, 2016. I find a review of the agreement provided that it would remain on the employment record of Mr. Maier and may be utilized in the event that he appears before an arbitrator regarding this Agreement or any other future proceeding. CP argues he has failed to appreciate the compassionate leniency already provided to him in his previous reinstatement.

[53] The Union pointed me to CROA 3934, 4231, 4332, 4364 and Ad Hoc 383 in consideration of changing the discipline to allow for retirement. The cases relied on by the Union are significantly distinguishable to the facts and circumstance of this case.

[54] In CROA 4232 arbitrator M. Picher considered the service of the Grievor before him when considering adjusting disciple to address pension issues by stating:

> Given the length and quality of their service, in my view they can be fairly viewed as having earned those benefits, although I would not disturb the Corporation's decision to terminate their services.

[55] Similarly in CROA 4364 arbitrator M. Picher noted the influence of good service on his decision with respect to benefits saying:

> The Griever is a 34-year employee. He is 54 years old. If in employment, he could retire with an unreduced pension at age 55, on June 7, 2015. In his

> long career he has had a total of 30 demerits and a caution. He had three rule violations, each in 1988, 1990 and 1994. He has not been disciplined since 2008.

[56] This Grievor had been previously dismissed. He was given an opportunity to return to work and ensure his retirement with entitlement to the fullest of benefits flowing to a non-disciplinary retirement. He chose not to protect that opportunity by using his cell phone for reasons best known to him. He set up his phone to make the video over a significant length of time and concealed the phone from the view of his co-worker. He chose to deliberately violate clear safety rules and placed a co-worker at risk of discipline. The facts and circumstances surrounding the taking of the video and the associated rule violations were established.

[57] I find the Company's evidence clearly established the potential impact on safety from the use of cell phones as demonstrated by catastrophic railway accidents. The rules are clear yet incidents continue. The deterrence to other employees contemplating personal cell phone use while working on trains in safety critical positions is therefore a factor in considering the appropriateness of the penalty. All mitigating factors have been considered. I find the dismissal for cell phone use and associated rule violations warranted on that basis alone.

[58] As a result of upholding dismissal for cell phone use rule violations in these facts and circumstances there is no need to review and establish the impact on the Company's reputation. Nor is there a need to determine appropriate discipline if it was found that discipline was appropriate.

[59] However, in obiter, I would caution against any CP employee choosing to believe they are not responsible for their conduct because they believe the CP Rail Code of Business Ethics may not apply to them. The Code of Business Ethics does not stand alone when considering inappropriate conduct that may impact the reputation of the Company. In my opinion, the long standing arbitral test for negative impact on the reputation of an employer from of an employee's conduct is also applicable. Employees can expect to have their conduct tested on the basis of what a reasonably informed person would find given the facts as having a negative impact on the reputation of the Company.

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

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

Tom Hodges
Arbitrator