

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

CASE NO. 5036

Heard in Calgary, April 11, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor Connor Lumsden of Revelstoke, BC.

JOINT STATEMENT OF ISSUE:

Following a formal investigation, Mr. Lumsden was dismissed on December 14, 2022, for the following:

“For Conduct unbecoming of a CP employee while in attendance at the paid Canadian Pacific Locomotive Engineer training program as evidenced by the following:

- Failing to properly participate and pay attention to the course program and instructor;
- Sleeping while on duty, a violation of The Rule Book for T&E Employees Item 2.2 While On Duty: (d) It Is Prohibited To: (IV) Sleep or assume the position of sleep except for where otherwise provided for; and
- Your poor attitude and disruption to the instructor and training program.”

UNION POSITION

For all the reasons and submissions set forth in the Union’s grievances, which are herein adopted, the following outlines our position.

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement. For these reasons, the Union contends that the discipline is *void ab initio* and ought to be removed in its entirety and Mr. Lumsden be made whole.

The Union contends the Company has failed to meet the burden of proof or establish culpability related to the allegations outlined above.

The Union submits the discipline assessed is arbitrary, unjustified, unwarranted, and excessive assessment of discipline. The Union further contends the discipline does not conform with the principles of progressive discipline.

The Union contends the Company has failed to consider mitigating factors contained within the record.

The Union contends that the Company failed to respond to the Union’s Step One appeal.

The Union disputes the application of the Hybrid Discipline & Accountability policy in the instant matter.

The Union requests that the discipline be removed in its entirety, and that Mr. Lumsden be reinstated without loss of seniority and benefits and be made whole for all associated loss with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

The Company disagrees and denies the Union's request.

The Company maintains that discipline was assessed after a fair and impartial investigation and a review of all factors, including those the Union describe as mitigating.

The Company held a fair and impartial investigation in accordance with the collective agreement and upon conclusion of the investigation, the Grievor's culpability was established. The questions asked were fair and impartial questions which allowed the Grievor the opportunity to respond, accordingly. None of the questions posed were improper.

The Company maintains the discipline assessed was appropriate, warranted and just 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:

(SGD.) D. Fulton

General Chairperson, CTY-W

FOR THE COMPANY:

(SGD.) D. Zurbuchen (for) **F. Billings**

Asst. Director, Labour Relations

There appeared on behalf of the Company:

- | | |
|--------------|--------------------------------------|
| D. Zurbuchen | – Manager, Labour Relations, Calgary |
| R. Araya | – Officer, Labour Relations, Calgary |

And on behalf of the Union:

- | | |
|------------|--|
| R. Church | – Counsel, Caley Wray, Toronto |
| D. Fulton | – General Chairperson, CTY-W, Calgary |
| J. Hnatiuk | – Vice General Chairperson, CTY-W, Mission |
| J. Lind | – Local Chairperson, Div. 657, via Zoom |
| C. Lumsden | – Grievor, via Zoom |

AWARD OF THE ARBITRATOR

Background, Issue and Summary

- [1] The Grievor is a Conductor. He is a short-service employee, having qualified in September 2020. This Grievance was taken against his dismissal, which occurred on December 14, 2022.
- [2] This is the third Grievance heard during the April CROA session. In **CROA 5034**, the assessed discipline of 20 days was upheld, for lining a switch without authority, impacting an incoming train. In **CROA 5035**, the discipline of 30 days – for conduct which occurred

in July of 2022 – was set aside due to difficulties with the evidence offered to establish culpability.

- [3] This third event involves the Grievor’s conduct during the Grievor’s classroom training to become a Locomotive Engineer, which occurred November 7–16, 2022. He was alleged to have been in a “sleep position” and sighing (as if bored or not engaged), and also to having a poor attitude about being required to take the training. He also commented to the instructor he felt he would be able to challenge the test and write the exam, in explanation for his conduct.
- [4] His instructor – who gave evidence at this hearing – ultimately contacted the Superintendent of Operations about the Grievor’s conduct, and the Grievor was ultimately told by that individual to leave the training. He was ultimately discharged for Conduct Unbecoming.
- [5] The issues between the parties are:
- a. Did the Grievor’s conduct give cause for discipline? And
 - b. If so, was the discipline assessed just and reasonable?

Relevant Provisions

Train & Engine Safety Rule Book

Item 2.1 Reporting for Duty

(a) “You must:...

(i) be fit and rested.

...

Item 2.2 While on Duty

(d) It is prohibited to:

...(iv) sleep or assume the position of sleep except where otherwise provided for;

...

Facts

- [6] In early November of 2022, the Grievor was enrolled in training to become a Locomotive Engineer (“LE Training”). The LET involves two partes; one of which is a thorough review of the T&E Rule Book and a further period of time in mechanical training, with simulators.

- [7] For this LE Training, there were only two rows in the class, with only seven students, in addition to the Grievor. The LE Training took place after the Grievor had served the suspension considered in **CROA 5035** (which was set aside)
- [8] Mr. Phillips, the Instructor of the LET, gave evidence at this hearing. He also wrote a full–page, single–spaced Memorandum on November 17, 2022, the same day as some of the events, and shortly after others. That Memorandum was filed into the Grievor’s Investigation. During his oral evidence, Mr. Phillips testified his role involved the development and delivery of programs, mentoring, coaching and teaching with simulators, and classroom instruction. He has no role in discipline for any issues which arise in the training. He has been an instructor for 16 years, with 4 as an associate instructor and 12 as the permanent instructor.
- [9] His memorandum states the Grievor demonstrated lack of effort in the training, had numerous episodes of sleeping (three were recalled); stated he did not want to be in the program; that he was asked twice by Mr. Phillips during the first week to “wake up” during classroom presentations when he had assumed the position of sleep; that he complied both times and was not otherwise disruptive; that he had a further incident of sleeping in the second week, and at that time, he also expressed a loud sigh, displaying a poor attitude. Mr. Phillips had to give the class a break to take the Grievor outside, which is where a conversation occurred, as described below. This resulted in the involvement of the Grievor’s his superiors and an instruction from them for the Grievor to leave the classroom before the training was finished.
- [10] In explaining what he referred to as “sleeping” in oral evidence, he testified the Grievor was slumped down, with his head down and his eyes closed while Mr. Phillips was instructed the class, while the rest of the students had their eyes open, and were paying attention.
- [11] Mr. Phillips also described a conversation with the Grievor – also noted in his Memo – where the Grievor indicated to him that he did not want to take the LET program, but was being forced to take it, after just returning from serving a disciplinary suspension¹. While

¹ Which as been set aside as unreasonable in **CROA 5035**

Mr. Phillips stated in his Memo that he tried to encourage the Grievor and pointed out he was doing well in the simulations, the Grievor's response was he did not want to take the training.

- [12] This was the first Mr. Phillips heard this information, as he does not have any history of students when they arrive in his class. This occurred during the middle of the training, although he was unsure of the date. It also occurred again when he removed the Grievor from the classroom during the second week, which is further discussed, below.
- [13] During the second week, Mr. Phillips' Memo states that the Grievor demonstrated a lack of participation and effort and once again was sleeping in class on November 16, with long periods of sitting with his hand covering his eyes while classroom teaching was occurring, and the posture already described. In the second week, Mr. Phillips demonstrated that the Grievor had his head on his arm, eyes closed, head down at his desk, while Mr. Phillips was discussing and teaching about Distributed Power.
- [14] Mr. Phillips noted that the entire time the Grievor was in this posture, it was distracting to Mr. Phillips, and he was trying to decide what to do about it, as this was the third time he noticed this behaviour, the previous two times being in the week before.
- [15] While Mr. Phillips was trying to determine what to do about the Grievor's behaviour, the Grievor then gave a loud "sigh" – which Mr. Phillips felt meant he was either totally relaxed, or that Mr. Phillips was "boring him to death", so he decided to deal with the Grievor right then. Mr. Phillips asked the class to take a five minute break and asked to speak to the Grievor alone.
- [16] When they were alone, he stated he asked the Grievor what was wrong and if something was bothering him, and why he was sleeping. In his oral evidence, he explained he wanted to give the Grievor the opportunity to explain his conduct.
- [17] It is relevant that nowhere does the Grievor offer the explanation to Mr. Phillips which he gave in the Investigation about having had little sleep due to a troubling personal issue, or that "sighing" was a habit and 'affectation' of his that he did all of the time. Rather, the Grievor again told Mr. Phillips he did not want to be there, and that he felt he was being

put in a position to be fired, having served a suspension he felt he did not deserve, and that the Company was trying to get rid of him.

[18] Mr. Phillips described the Grievor as being extremely angry about his discipline situation.

[19] Mr. Phillips did not find the Grievor to be either apologetic or remorseful about his conduct in class. Mr. Phillips asked to offer the Grievor some advice, which he did offer, which was if it was as the Grievor had suggested, the best approach would be for the Grievor to become the best LE he could be, and leave in a “power position” to give himself the best chance of success. Mr. Phillips testified he “got nothing” from the Grievor after this advice; and by that he meant he got no response and that the Grievor just looked at him.

[20] Mr. Phillips then told the Grievor his concerns – that continuing to sleep and loudly sighing in class was disruptive and disrespectful; was disruptive to the class; would not be tolerated; and he would not put up with it anymore. Mr. Phillips records the Grievor as then saying that “I will pass the exam. I just need to look things over for a few hours before and would pass.”

[21] Mr. Phillips described his efforts as falling on “deaf ears” when the Grievor made this comment.

[22] Mr. Phillips indicated he challenged that comment and asked the Grievor if he felt he would pass without attending the rest of the course and write it the same day, to which the Grievor responded he could write it the next day.

[23] Mr. Phillips told him he would be discussing this with his managers and immediately contacted his own manager, and Mr. Templeton and Mr. Miskiman, which ultimately resulted in the Grievor having a conversation with Mr. Templeton, coming back to retrieve his things, and leaving the classroom.

[24] Mr. Phillips testified that in sixteen (16) years of teaching, while he has had students with their eyes closed before, that conduct was satisfactorily addressed by his first comment to them. He testified he has never had to take anyone outside the classroom to speak to them about sleeping in class before. He noted he gave his Memo and a statement for an Investigation that was occurring as well.

- [25] In cross-examination, Mr. Phillips agreed the Grievor had done well with the simulations; and that he did not have a difficulty with him until Wednesday of the first week. He agreed he had passed the one test given in the first week.
- [26] While he did not know if the Grievor had been actually sleeping, he stated that when someone has his eyes closed and head down while Mr. Phillips is teaching, that was not appropriate behaviour in a classroom while he was instructing. There were two episodes that he had to deal with in the first week, where he spoke to him and told him to 'wake up' and that he complied. Mr. Phillips felt it was behind them, and he agreed no other students complained. He acknowledged the Grievor did answer some questions. He acknowledged the Grievor was doing well, even though the Grievor stated he did not want to be there. He confirmed he did not make the decision to remove the Grievor from the classroom and does not make discipline decisions.
- [27] The Grievor's evidence was given through his Investigation. He stated he was never asleep at any point in the LE Training and that he only had his eyes shut "for periods of 10 seconds a couple of times", although he did admit to "covering my eyes with my hand". He stated he 'shouldn't have' shared with Mr. Phillips his admission of not wanting to be in the class. He said he was having a "bad time" because of certain personal upsetting news had received which had disrupted his sleep and that he was upset/tearful over this personal issue and was covering his eyes so his classmates could not see he was upset. He stated Mr. Phillips noticed in the buffet line and asked if anything was wrong and "could I help" and the Grievor jokingly asked him if he could get him out of the program. He states he never said anything at that time about the Company being out to get him.
- [28] He did say it was his second suspension and his concerns was being on a "switching train as an Engineer trainee in winter with a very junior mountain conductor pool and running a switch I'm 8000 feet away from. That it could end up being 40 days off or maybe dismissal neither of which I could afford". The Grievor stated this conversation was the day before he was sent home, and that Mr. Phillips' demeanour changed toward him after that point.
- [29] The Grievor stated he committed to Mr. Phillips that he would not sigh or shut his eyes again in class. The Grievor also stated in his Investigation that there was a Trainmaster

in the class and that “she never warned or advised me that I should shape up and I was close to being sent home” and that he wanted to complete the training, as it would look “terrible for me to not pass or finish for any reason”.

- [30] The Grievor pointed out he was honest by saying he was not happy with the circumstances of his being there, and that he wished he could have entered the program at a more “ideal time”. He stated he regretted confiding in Mr. Phillips and realized that was a mistake. He stated he participated in class and answered his share of questions, and that he expected he would have a choice about whether to take the LE Training, as several of his coworkers had.
- [31] As the Grievor and Mr. Phillips each have a different version of how their conversation proceeded, a credibility determination must be made.
- [32] The Grievor did not provide several of his explanations used in the Investigation to Mr. Phillips when given that opportunity, which raises a suspicion they were only developed after the fact. His evidence is inconsistent with the course of events, including the need for Mr. Phillips to call his supervisors. If the Grievor had made the comments he alleged about committing to not sleep or sigh and be disruptive in class, and about complying in future, I am satisfied that Mr. Phillips would not have felt the need to contact his supervisor and he would not have been removed from the class.
- [33] Where the evidence of the Grievor and Mr. Phillips conflict, I prefer the evidence of Mr. Phillips. Mr. Phillips was a strong witness. He not only gave his evidence in a forthright and credible manner; had reasonable and consistent answers to questions; and had a strong recall for the events. His Memorandum was also detailed and written close in time to the events. He was consistent under cross-examination on all important points, with his written evidence and statements. Any alleged inconsistencies in cross-examination were minor and not unexpected. He listened carefully to questions and I am confident he answered to the best of his ability and was not swayed from his recall. He had no decision-making role in the Grievor’s discipline.
- [34] I consider him to be a credible and reliable witness regarding the events in November of 2022. I am satisfied his evidence was in harmony with the “preponderance of the

probabilities which a practical and informed person would readily recognize as reasonable”².

Arguments

- [35] The Company argued that culpability was established, given the Grievor’s demeanour and conduct in the classroom during this LE Training. It noted the Grievor stated he was not ‘sleeping’ but that this lacked credibility given his unconvincing responses in the Investigation. The Grievor’s comments that he had his eyes shut only for a few brief moments sitting straight up in his chair is not credible. Mr. Phillips’ evidence on the Grievor’s conduct should be preferred and is more credible.
- [36] At the very least, the Grievor had his eyes closed for prolonged periods of time in both weeks of his classroom training and clearly did not want to participate in the LE Training program. It noted that sleeping on duty or assuming the position of sleep “ was prohibited by the T&E Rule Book, item 2.2. It argued that sleeping on the job was a serious offence in this industry, relying on **CROA 4535, AH 684, CROA 4334, CROA 4520** and **SHP737**.
- [37] It noted the Grievor in this case has two years of service and a total of three major rule infractions (at that time). It also argued it was established the Grievor had a poor attitude, and a history of non-compliance with significant operating rules. As this was a third major rule infraction, the Company was justified in dismissing the Grievor, which decision was consistent with the principles of progressive discipline.
- [38] The Company argued the Investigation was fair and impartial and It argued the Grievor was made aware of the accusation against him, who made those accusations, what their statements were, and was given a fair opportunity to respond, as required by **AH712**. It argued it has been recognized that lay people conduct Investigations and are not lawyers. It pointed out that neither the Union nor Grievor made any objections at the time of the Investigation. It argued that raising this issue after the Investigation statement was closed prejudices the Company, and the Union must register its objection in a timely manner, relying on CROA jurisprudence.

² *Faryna v. Chorny* [1952] 2 D.L.R. 354 at p. 357.

- [39] The Union argued that the Company had not met its burden of proof to establish cause for discipline. It argued that Mr. Phillips' memorandum did not allege that the Grievor was in a "sleep position" at any specific point and there is no basis to confirm the Grievor was "sleeping on duty", which was the basis for his discipline. It argued Mr. Phillips conceded he did not know if the Grievor was actually asleep.
- [40] The Union argued the quality of the Grievor's performance speaks to his engagement with the materials and he was excelling in the classroom. It argued he was having a difficult time due to something personal and only discussed it with Mr. Phillips when he asked him about it. The Union argued the concerns with the suspension were fair and valid and had a demoralizing effect on the Grievor, and that it was fair he was fairly concerned about an LE position opening up additional opportunities for discipline. It argued the Grievor explained that "sighing" was a personal affectation and habit and that he did that 'constantly and without noticing'.
- [41] The Union argued the Grievor had explained he covered his eyes as he was upset and tearful and did not want anyone to see he was tearful and he did not sleep in class. It noted no one in the class complained about the Grievor's conduct and he was not disruptive to his classmate, as he did not feel his sighing was disruptive. It also argued the Grievor did not withdraw from the training at any time.
- [42] It argued that discipline of discharge was excessive. It also argued the Investigation process was fatally flawed as the Company had pre-determined the Grievor's guilt and that the Investigation proceeded like an interrogation, with presumptive and improper leading questions, speculative questions, and questions which strayed beyond the subject matter. It argued the questions were reflective of prejudgement that the Grievor was sleeping, when this had not been confirmed even by Mr. Phillips' evidence. It argued the discipline must be declared *void ab initio* as a result.
- [43] Each party distinguished the others' jurisprudence.

Analysis and Decision

- [44] The parties together provided 39 authorities in support of their positions. Not all of these authorities can be reviewed and mentioned in the context of this expedited arbitration process.
- [45] The appropriate framework for assessing discipline is that in *Re Wm. Scott & Co.*³ The first question to be addressed under that analysis is whether the Company has demonstrated there is cause for discipline. That is also the first question appropriately determined in this Award, even though the Union has raised issue with the Investigation process. If there was no cause for discipline, then the issue of whether that discipline should be *void ab initio* due to an unfair or impartial Investigatory process would be moot.
- [46] Considering first a factual issue, there is no evidence to support any assessment of how the Grievor was performing during the LE Training *vis-à-vis* the rest of the class, and in particular there was no evidence filed the Grievor was ‘excelling’ when compared to the rest of the class, as argued by the Union. That argument is without a basis. The Grievor had passed the one test given and was doing well in the simulator, according to Mr. Phillips, but the entire class could have been doing the same.
- [47] In any event, doing well in the class would not excuse the Grievor’s alleged conduct unbecoming and sleeping on duty, during the LE Training.
- [48] The Union argued there was no evidence the Grievor was “actually” sleeping or had “assumed a sleep posture”, in violation of the T&E Rule Book.
- [49] I cannot agree with this assessment.
- [50] The T&E Rule Book prohibits not just “sleeping” but also assuming a *position* of sleep. Either situation is a violation. To establish cause for discipline, therefore, the Company need only establish the Grievor assumed a *position* of sleep while on duty, not that he was ‘actually’ in a state of sleep. I am satisfied the postures described by Mr. Phillips satisfy the requirements for the Grievor to have assumed a posture of sleep. Mr. Phillips demonstrated the posture of the Grievor during the second week, at the hearing, which was a very obvious sleeping position, with a head dropped down on an arm, resting on

³ [1976] B.C.L.R.B.D. 98

the table. I am satisfied the Grievor assumed the posture of sleeping at three different times over the first two weeks; that during the first week he complied to “wake up”, but that his posture of head down on his desk and head on his arm during the second week resulted in his needing to be removed from the class.

- [51] The Grievor himself admitted he had closed his eyes, although I do not find credible the Grievor’s statements that he “only shut his eyes for 10 seconds” or that it he was covering his eyes because he was “upset” or “tearful”. Had that been the case, when Mr. Phillips took him out of the classroom, that would have been the prime opportunity to provide that explanation. That his explanation appeared in the Investigation – and not when he first had an opportunity to defend his conduct – raises a suspicion it was developed for that process.
- [52] I find credible the evidence given by Mr. Phillips on this point. Both postures in week one and two were postures of sleep. The posture in week two – which led to the Grievor being removed from class – is where he had his head on the desk and his face in his hands. I am satisfied that in doing so, the Grievor was assuming a “position” of sleep, and that this conduct was prohibited by the Rule.
- [53] While the Union argued no disruption was caused to the class, I cannot agree that is the case either. I am satisfied that the Grievor caused a disruption to the class when Mr. Phillips was required to place the class on a break and remove the Grievor from the classroom in week two, to continue to deal with his repeated sleeping and – by then – his loud sigh. There was further disruption when Mr. Phillips had to delay the class further in order to involve other supervisors when the Grievor was not responding to his correction, after he was pulled from the class.
- [54] The Grievor’s attitude to correction for this conduct was poor, which compounded his disrespect from assuming a posture of sleep, sighing and disrupting the class by requiring the instructor to remove him to deal with his behaviour. Whatever his personal circumstances, those circumstances did not excuse his assuming the posture of sleep, and did not justify his failure to respond to the correction given by Mr. Phillips in the second week, during their discussion, or his disruption to the class when he had to be removed.

- [55] That he did not change his behaviour after being corrected two times in week one was particularly concerning, as is his comment he was not “warned” he better “shape up”.
- [56] Any employee who is not aware they should not be sleeping or posturing sleep while in an LE Training course, and refuses to take responsibility for that conduct – instead suggesting he already “knows it all” – has a disturbing lack of insight into appropriate behaviour.
- [57] I do not find credible that the Grievor’s sighing was a “personal habit” or “affectation” that he did all of the time, as he claimed in the Investigation. Mr. Phillips noted the first sigh was heard in the second week, when the Grievor was in his sleep posture. Had it been a constant habit as claimed, it would have occurred more often. Further, the Grievor did not offer this explanation when first questioned by Mr. Phillips, as would have been expected if that was a “habit”. If a “habit”, it would also be expected the Grievor would be remorseful and apologetic that his ‘habit’ was so disruptive he had to be pulled from class.
- [58] I am satisfied the Grievor was sighing because he was tired and bored and felt he “knew it all” and could pass the test, all of which is supported by the discussion which ensued, even on the Grievor’s own account. The Grievor felt he did not need the training and could “challenge the training” and “pass”, even though ‘challenging’ the training was not an option available to him.
- [59] Instead of being apologetic, remorseful or even embarrassed at being pulled from class – as would be expected – the Grievor displayed a negative and poor attitude to Mr. Phillips, justifying his behaviour with his frustration over his suspension, instead of apologizing for it and being accountable for being rude to Mr. Phillips. The Grievor’s suspension had nothing to do with Mr. Phillips or the LE Training. As Mr. Phillips noted – and which I find credible – the Grievor immediately went on the offensive when Mr. Phillips pulled him out of class, by offering his own frustration at how he was treated. What was pre-occupying the Grievor was his frustration at the discipline discussed in **CROA 5035**.
- [60] I do not find credible the Grievor’s evidence that he committed to changing his behaviour. He was not contrite or apologetic. I prefer the evidence of Mr. Phillips that he felt it necessary to contact the Grievor’s supervisors, which was the first time he had to do so in his 16 years’ experience.

- [61] Further, I do not find the Grievor's explanations of being upset and tearful and hiding his eyes to be credible. These explanations were not given at the time of the incident, when first given the opportunity to explain his behaviour, and neither are they relevant to the Grievor's requirement to be at work fit for duty. Being upset and frustrated with discipline does not justify poor behaviour in training.
- [62] That the Grievor felt they would, is also confusing and demonstrates a lack of insight into proper behaviour.
- [63] The Grievor's attitude was that he "didn't need" the training, as he already "knew it all". That is both an arrogant and short-sighted attitude to important training, especially if the Grievor was concerned about offering safe service on mountain runs in future, as he stated he was.
- [64] On a balance of probabilities – the Company has met its burden of proof, not just to establish the Grievor violated the T&E Rule by assuming a position of sleep – but that he was guilty of conduct unbecoming for the disrespect and disruption shown towards Mr. Phillips, both in class and also when Mr. Phillips was trying to correct his behaviour. This includes his sighing, his sleeping; his suggesting he could "pass" no matter if he finished the training or not when taken out of class; his lack of remorse and failure to apologize for his behaviour and for disrupting the class; and the complete lack of insight into that behaviour.
- [65] The second question is whether the discipline of discharge was appropriate. This is a contextual question, that takes into account several factors.
- [66] Considering all the relevant factors, I am satisfied that it was.
- [67] An important factor is the nature of the offence. "Sleeping" while on duty – *which includes assuming a position of sleep* – is a serious offence in this industry. It violates not just Item 2.2, but also item 2.1 of the T&E Rule Book.
- [68] Given that the training on offer was for the role of an LE – and is training that is essential for the safe operation and protection of not just the Grievor, but his co-workers and the communities through which the railway travels – "sleeping" during the training for such an important role *does* have the potential for significant consequences down the road; is

serious and significant; and exposes the Grievor to significant consequences, as supported in the jurisprudence.

[69] Even if there were not this potential, the jurisprudence recognizes the seriousness of sleeping while on duty, and of conduct unbecoming resulting from disrespect.

[70] For example, in **CROA 4334**, a twenty-four (24) year employee was working as a gate clerk and was found to have been sleeping during his shift. Like the Grievor, he was not operating any equipment at the time. While he apologized and stated it would not happen again, 20 minutes later, he was again noticed sleeping again in his chair. He was sent home and then shortly called his supervisor back, accused him of discriminating against him as he was a diabetic; called him 'sweetheart' and hung up the phone. He also called and left a disrespectful voice mail message and told his supervisor to "lose the attitude". He also referred to his manager as a "gnome". It was found the grievor was not truthful in his explanation that he was in a diabetic coma when found sleeping and his account was untenable. The 25 demerits assessed for sleeping and the 30 demerits assessed for his disrespect – leading to dismissal for accumulation – was upheld by the arbitrator, who noted the *lack of acknowledgement* of the Grievor for his disrespectful statements and a disrespectful and irreverent attitude towards his supervisor. It was also held the grievor's unwarranted defence to sleeping was 'deeply disturbing' as it was an "ill-advised attempt by the grievor to avoid the inevitable conclusion that he was indeed responsible for the two infractions committed both of which were deserving of discipline".⁴

[71] Similar comments are appropriately made in this case.

[72] In **CROA 4520**, the grievor was dismissed for being caught sleeping in a company vehicle. She was an 11 year employee (which was determined to be "relatively short service") with six occasions of discipline, including a prior termination for fraudulent submission of travel expense claims, which was converted to a six month suspension. It was acknowledged that while "sleeping on the job does not necessarily lead to termination...CP can impose discipline in such situations"⁵. In that case – like in this case – there was a lack of candour by the grievor. It was noted that "[a]n employee's failure to take responsibility necessarily

⁴ At p. 7

⁵ At p. 3.

impacts any arbitrator's assessment of whether to intervene"; and that the grievor's "relatively short service" and her disciplinary record did not provide the arbitrator with a reason to intervene. Her dismissal was upheld for sleeping on the job.

- [73] The impact of being contrite and apologetic can be seen in **AH737**, where the grievor – a locomotive mechanic – was caught sleeping in the cab of a locomotive at a repair facility. It was not disputed in that case that the grievor had fallen asleep, but argued the conduct was "unintentional" and the grievor had "nodded off for fewer than five minutes". The grievor was honest and contrite in the Investigation. Termination was found to be excessive, and it was noted the Company had already reinstated the Grievor. It was accepted by the arbitrator, that "sleeping on the job is certainly serious misconduct" but in that case, the grievor's conduct was "unintentional and inadvertent" and he was "forthright" during the Investigation process. Termination was substituted with an unpaid suspension.
- [74] In this case, the Grievor offered he was 'tired' due to his personal circumstances. He showed no response or accountability for his behaviour and was unapologetic and argumentative, even upon being removed from class. When pulled out, he instead expressed his frustration with his own problems, including discipline from a previous suspension.
- [75] That he felt his conduct would be excused from being 'tired' is also itself 'disturbing', as it demonstrates considerable lack of insight into this responsibility to present himself at work "fit" and "rested" for duty, regardless of his personal circumstances. That is a fundamental and reasonable requirement of any employee. The Grievor is also expected to not be disruptive or disrespectful to his instructor during LE Training, no matter what is going on in his personal life.
- [76] The Union has argued the Investigation was not fairly or impartially conducted. It must be emphasized that it has been recognized in this industry that Investigating Officers are lay people, who may have difficulty formulating questions that are not "leading". In fact, it is difficult even for seasoned counsel not to ask leading questions. The Union relied on **CROA 4663**, where the requirements of an Investigation process under this expedited arbitration process were reviewed, including reference to key cases in this area, such as

CROA 2073. That case set out the requirements of this informal process, including that an opportunity must be afforded to a Grievor to know the accusations, the identity of the accusers the content of the evidence, and be given an opportunity to provide rebuttal evidence.⁶

[77] The arbitrator also noted that the Investigation Officer must only meet “minimal standards of impartiality”.

[78] The Union relied on **CROA 3952**, where an LE was discharged for conduct unbecoming during telephone conversations. It was found he hung up on the crew officer. The arbitrator did not find that constituted insubordination, but would have been assessed 20 demerits, but the discipline was set aside for failure to conduct a fair and proper investigation. In that case, the Investigating Officer was not found to reflect impartiality and a withholding of judgment, but from his questions it could be seen he had drawn negative conclusions. In that case, the Grievor was also not given the advance notice he was entitled to for an allegation of a deliberate plan to delay the train, but only the conduct unbecoming in the telephone conversation, so there were multiple factors impacting the fairness of that Investigation, and not just the Investigating Officer’s conduct.

[79] That case is distinguishable from these facts.

[80] The Union also relied on **CROA 3061**. As noted in that case, the Investigation process is a keystone of this expedited hearing process and any “significant flaw” could substantially compromise the record⁷. In that case, the Investigating Officer assumed the position of chief witness against the grievor and denied the union representative the opportunity to ask questions of the only witness, who was the Investigating Officer himself. Those facts likewise are distinguishable. There was no such conduct here.

[81] Likewise in **CROA 2934**, also relied on by the Union, the Investigating Officer called the grievor a “liar” and threatened to stay until midnight to get the information he wanted. He also refused to allow the Union to call a witness.

⁶ At p. 6.

⁷ At p. 4.

- [82] That case is clearly not analogous to these facts and is an extreme example of an impartial investigation.
- [83] The Union relied on **CROA 3061**, which is not analogous. This is also not a case similar to **CROA 3952**, which involved an isolated incident which took place on one day, in one phone call. The arbitrator was not able to find the allegation of a threat of job action on the evidence, so the Company did not meet its burden of proof, in that case.
- [84] In this case, the Company has met its burden of proof. The Grievor had multiple issues of disrespect and conduct unbecoming over a two week period, and then showed a complete lack of insight into the difficulty when Mr. Phillips pulled him out of class. He used that opportunity to justify his behaviour and express his frustration with his discipline, instead of apologizing for his disrupting behaviour and committing to changing his behaviour. Had he made that apology, Mr. Phillips likely would not have escalated the issue to his superiors. The class was disrupted because he was not attentive to the first two corrections of “wake up” given in week one, and had to be pulled from class in week two.
- [85] I have reviewed the entirety of the Investigative transcript. I cannot agree with the concerns raised by the Union. The Union objected to the Investigating Officer stating that the Investigation was “with prejudice” and to the role of the Union representative and to the “whole” of the Investigation, which was a broad and vague objection. In Q/A 11, the Investigating Officer gave the Grievor the opportunity to “offer any rebuttals with respect to the contents of the evidence”, which is a broad initial question providing to the Grievor the opportunity – which he took – to present his side of the story. His explanation takes up approximately two pages of the transcript, uninterrupted. The Union sought and was given a copy of this part of the transcript during the Investigation. While he was asked to confirm his statement was different than that of Mr. Phillips, that is an appropriate question. Mr. Phillips was contacted by telephone and gave evidence at the Investigation, so the Union had the opportunity to question him about his evidence. He is asked questions from the lengthy recital of information given by the Grievor, which is also appropriate. The supervisors contacted by Mr. Phillips were also contacted to take part in the Investigation and the Grievor’s responses from Q/A 11 are put to him.

- [86] The Grievor's comments that he should not have been required to take the testing were also explored, which was appropriate, since this was an issue he raised to Mr. Phillips. The Grievor was given the opportunity to explain why he was sleeping class. While he denied that he was doing so, given the evidence of Mr. Phillips, that is not an unusual or inappropriate question to have the Grievor address that allegation. If the Grievor had some type of medical reason for not sleeping in class, that would have been the opportunity to address that issue. The evidence of Mr. Phillips was properly put to the Grievor. The Union did object to the Investigating Officer again suggesting that the Grievor was sleeping in class, and again the Grievor said he was not sleeping in class. The Grievor was able to explain what he was doing when Mr. Phillips felt he had been sleeping in class, and get that explanation on the record, in answer to this question.
- [87] He was also questioned regarding reasons for his potential tiredness, including when his last shift was, which were also appropriate. While the Union objected to the question which assumed the Grievor disrupted the class, it was not inappropriate to ask the Grievor to address Mr. Phillips evidence that he was disruptive to the class, and to explain that by leaving the class, it was disrupting to the class. The Grievor was given the opportunity to disagree this was disruptive to the class. He was also asked for anything he would like to add at the end of the Investigation, which gave him the opportunity to provide anything that he felt was missing.
- [88] Turning to the appropriateness of the discipline, what the precedents demonstrate is that sleeping on the job – by itself – can justify dismissal, and that the Grievor's attitude is important for an arbitrator in determining whether to exercise discretion to reduce that penalty. In this case, the Grievor is a short-service employee, and does not have a clear disciplinary record.
- [89] At the time this discipline was assessed, the Grievor had both a 20 day suspension for lining a switch without authority and impacting an incoming train and a 30 day suspension for allegedly improperly reaching across a knuckle to close an angle cock. Both were grieved. While the 20 day suspension was upheld, the 30 day suspension was set aside in **CROA 5035**. Therefore, the Grievor has a 20 day suspension on his record as his only discipline. That discipline involved a safety rule and was significant. The Grievor is a

short-service employee. His length of service is not mitigating. While the Grievor *did* have a basis to be personally frustrated with the 30 day suspension he had just served, he had no basis on which to take that frustration to the LE Training and selfishly disrupt Mr. Phillips instruction, if he wished to continue his career with the Company.

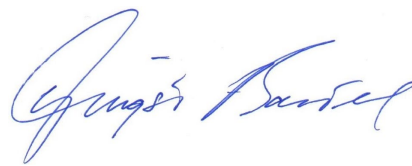
[90] The Grievor's disrespect for Mr. Phillips was blatant in this case. His actions of laying his head down on his arms; his loud sighing; and his lack of remorse, accountability or insight are also aggravating. In fact, his attitude likely resulted in this discipline being incurred. Had he learned from the correction in week one, this incident likely would not have progressed past the classroom.

[91] Having considered the entirety of the factual context, and the authorities and submissions of the parties, the response of the Company to the Grievor sleeping (including assuming the position of sleep) on duty – and to his unbecoming conduct against Mr. Phillips and his classmates was just and reasonable and I can find no basis in this case which would attract my discretion to alter that penalty.

[92] The Grievance is dismissed.

I retain jurisdiction for any questions regarding the implementation and application of this Award; to correct any errors; and to address any omissions to give it the intended effect.

June 17, 2024



CHERYL YINGST BARTEL
ARBITRATOR