

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

CASE NO. 5048

Heard in Montreal, May 16, 2024

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal of the dismissal of Conductor Rajesh Sharma of Calgary, AB.

JOINT STATEMENT OF ISSUE:

Following an investigation Mr. Sharma was dismissed which was described as:

“For having your seat reclined and feet up while on duty on May 24, 2019; rule violation of T&E Rule book Sect 2, Item 2.1 (Reporting for duty); 2.2 (While on duty).”

Mr. Sharma was unilaterally reinstated in June of 2020 and returned to active service in June 2021.

UNION POSITION

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding the allegations outlined above. In the alternative the Union contends Mr. Sharma’s dismissal is unjustified, unwarranted and excessive in all of the circumstances, including significant mitigating factors evident in this matter. It is also the Union’s contention that the penalty is contrary to the arbitral principles of progressive discipline.

The Union submits that Mr. Sharma was wrongfully held from service in connection with this matter, contrary to Article 39.06 of the Collective Agreement.

The Union submits the Company in failing to respond to the Union’s 1st step grievance has violated the Collective Agreement Article 40.03.

The Union requests that Mr. Sharma be reinstated without loss of seniority and benefits, and that he be made whole for all lost earnings 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 Union suggests that the Company failed to respond to the 1st step grievance and in doing so allegedly failed to fulfill the requirements of the Collective Agreement. The Company

cannot agree with the Union's allegations pertaining to the local grievance response and the Company maintains that there is no violation of the Collective Agreement in this regard.

The Company maintains that following a fair and impartial investigation, the Grievor was found culpable for the reasons outlined in his form 104 and the discipline was properly assessed considering the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

The Grievor was held from service in accordance with the provision of Consolidated Collective Agreement Article 39.06. The nature of the infraction does place the Grievor's employment with the Company in jeopardy.

For the foregoing reasons and those provided during the grievance procedure, the Company maintains that the discipline assessed should not be disturbed and requests the Arbitrator be drawn to the same conclusion.

FOR THE UNION:

(SGD.) D. Fulton

General Chairperson, CTY-W

FOR THE COMPANY:

(SGD) F. Billings

Asst. Director, Labour Relations

There appeared on behalf of the Company:

- D. Zurbuchen – Manager, Labour Relations, Calgary
- A. Harrison – Manager, Labour Relations, Calgary

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- D. Fulton – General Chairperson, CTY-W, Calgary
- J. Hnatiuk – Vice General Chairperson, CTY-W, Mission
- M. Nilsson – Local Chairperson, Div. 355, Calgary, via Zoom
- R. Sharma – Grievor, Calgary, via Zoom

AWARD OF THE ARBITRATOR

Context

1. This matter concerns the discharge of Brakeman Sharma for an alleged violation of T and E Rule Book, Item 2.1 (Reporting for Duty) and 2.2 (While on Duty). The grievor was observed, while in a trailing locomotive, to have his chair reclined and his feet up.
2. The grievor was discharged on July 3, 2019, reinstated by the Company on June 4, 2020, and returned to active service in June 2021.
3. At the time of the incident, the grievor had been employed for approximately 7 months and had no discipline on his file.

4. Issues

- A. Was discipline warranted in the circumstances?
- B. Was the discipline imposed excessive and if so, what discipline is appropriate?
- C. What remedy should be awarded?

A. Was discipline warranted in the circumstances?

Position of Parties

5. The Company argues that the grievor has admitted to travelling in a moving train, while in a sleeping position. It argues further that the grievor failed to remain vigilant and failed to respond to communications from Trainmaster Rioux. Both are contrary to the Rule Book for T and E employees and discipline was appropriate.

6. The Union argues that “sleeping position” is not a defined term in the Rule Book and that no evidence has been led that he was taught that reclining his chair and putting his feet up constituted assuming a sleeping position.

7. It argues that as a Brakeman on a trailing locomotive, the grievor had no responsibilities to communicate with Trainmaster Rioux, as this was both the responsibility of, and performed by, the Conductor in the lead locomotive.

8. The Union argues that no discipline should be imposed as no offense occurred.

Analysis and decision

9. Excerpts from the Rule Book for T and E Employees set out the following:

2.1 Reporting For Duty

You must be fit and rested

2.2 While on Duty

d) It is prohibited to:

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

10. The term “assume the position of sleep” is not defined in the Rule Book.

11. In **CROA 4825**, one of the issues is whether the grievor was sleeping or had assumed the position of sleep. There, CSX Transportation-Employee Behaviour 104.13 had defined position of sleep as:

“Employees must not sleep while on duty. An employee laying down or in a reclined position with eyes closed, covered, or concealed is considered to be sleeping.”

12. Here the dismissal letter does not accuse the grievor of sleeping, but rather of having his seat in a reclined position and his feet up while on duty (see Tab 6, Union documents).

13. The grievor denies sleeping, but admits to having his chair reclined and his feet up (see Q and As 11-12, Tab 5, Union documents).

14. I have some difficulty with the Company position that having a chair reclined with one’s feet up constitutes “assuming the position of sleep”. It undeniably constitutes a resting position, but it is not at all clear that it constitutes a “position of sleep”. The CSX definition above requires not only that the employee be laying down or reclined, but also have “eyes closed, covered or concealed”. None of that behaviour is alleged here.

15. I also have difficulty with the Company position that as a newly hired and trained employee, the grievor had to have known the rule. In fact, there is no evidence of training having been provided about the content of what constitutes assuming a sleeping position. Indeed, the only evidence presented in this matter is that the grievor had not understood the Company position:

Q25 What can the company expect from you going forward?

A25 I didn’t realize that having my feet up and chair reclined was assuming the sleeping position. I am a new employee, and after reviewing the rules with Road Foreman Stebner, I have been educated of the rule. Going forward, I will ensure to not have my feet up or have the chair reclined.

Q26 Do you understand that by not following the rules and regulations set out by the company, could result in possible injury or death?

A26 Yes

Q27 Do you understand that the company has a responsibility to ensure that employees are following the rules and regulations?

A27 Yes

Q28 Do you understand that you are in an extremely safety sensitive environment and that the Company expects employees to have their full concentration on their duties at all times and by not doing so they place their safety, the safety of their fellow employees and the safety of the general public at risk?

A28 Yes

Q29 Do you have anything you wish to add to this investigation?

A29 I was switching for 3 hours and when I sat down on the 2nd unit I was not sleeping. I took an opportunity to put my feet up until we made our next move. I have been educated from this investigation, and going forward I will do my best to follow the rules.

16. There is no doubt that sleeping on the job is a serious offence, deserving of discipline. The Parties have cited many cases which consistently uphold this principle (see, for example, **AH 676, CROA 1573, CROA 1853, CROA 4129, CROA 4535**).

17. However, the Parties have not presented any cases where the grievor was not accused of sleeping on the job, but only of having assumed a sleeping position. Where such a term is not defined, no evidence has been led that the grievor was taught the meaning of the term and the evidence shows that the grievor only learned the meaning when counselled after the incident, I have grave doubts that such behaviour warrants discipline in the circumstances.

18. The Company alleges communication difficulties while the grievor was in a sleeping position. It notes that he did not respond to communications from Trainmaster Rioux, either with respect his standing pull-by inspection, or when he contacted the lead locomotive to inquire about who was riding in the trailing locomotive. The Company notes that the answers given by the grievor changed from he “did not hear Trainmaster Rioux calling” to “Conductor Khaliq answered the radio first” (Tab 4, Company documents, Q and A 5 and 22).

19. However, as the Brakeman in the trailing locomotive, the grievor was not in charge of responding to Trainmaster Rioux concerning the pull-by inspection. Nor was

he contacted directly by the Trainmaster. All communications were with the lead locomotive (see Memo from Mr. Rioux, Tab 2, Union documents). It does not, therefore, appear that there were any communication failures on the part of the grievor.

20. Accordingly, I do not find that the Company has made out their burden of proof to establish that the grievor was deserving of discipline.

B. Was the discipline imposed excessive and if so, what discipline is appropriate?

Position of Parties

21. The Company takes the position that the discipline should be maintained, while the Union submits that the discipline should be quashed, or at most, that counselling would have been appropriate. The Union notes that Trainmaster Rioux did not communicate with the grievor, either directly or indirectly, to correct his behaviour at any time before the end of his shift.

Analysis and decision

22. Given my earlier finding that no discipline was warranted, it is clear that termination was an excessive response.

23. There was no evidence that the grievor was sleeping on the job, either in the original memo from Trainmaster Rioux, or in the subsequent investigation. At the highest, the Company was entitled to have concerns about the behaviour of the grievor. However, the investigation revealed that the grievor did not know that he was behaving inappropriately or in breach of Rule 2.2.

24. In the circumstances, counselling would have been appropriate, as was done by Trainmaster Rioux. I do not find that discipline was appropriate in the circumstances.

C. What remedy should be awarded?

Position of Parties

25. The Union seeks to have the grievor made whole for the entire period he was off work.

26. The Company submits that as there was a prima facie serious infraction, it was entitled to hold the grievor off work.

Analysis and decision

27. As discipline was not appropriate in the circumstances, it shall be removed from the grievor's record.

28. The grievor is to be made whole for any losses to wages or benefits suffered during the time he was off work, with any money earned through mitigation to be deducted from the amounts otherwise owing by the Company.

29. I remain seized as to any questions of interpretation or application of this Award.

June 17, 2024



**JAMES CAMERON
ARBITRATOR**