IN THE CASE

BETWEEN:

THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

(COUNCIL NO. 11)

(the "Union")

-and-

CANADIAN NATIONAL RAILWAY COMPANY

(the "Company")

Grievance on behalf of Etienne Lemire

For the Union	**For the Company**
Me. Sylvain Beauchamp, Attorney	*François Daignault,* Labour Relations Manager
Luc Couture, International Representative	*Sylvie Grou,* Senior Manager, Labour Relations
Claude Ménard, Regional Representative	*Serge Lauzon,* Senior Manager (S&C), Eastern Region
Etienne Lemire, Employee	

Hearing held in Montreal, Quebec, on October 29, 2018

DECISION

1. FACTS

Mr. Lemire was hired by CN on September 8, 2014. He started his career at CN as a trainee and between April 27 and May 8, 2015 he undertook the compulsory trainee program for Signals and Communications (S&C) employees, under Article 12 of Agreement 11.1. Mr. Lemire is sent to CN's training centre in Winnipeg and takes the Level 1 course of the S&C employee training program. The program requires an employee to pass four courses with a grade of 80%. At the same time, Mr. Lemire had to do his training and pass the examinations to become a permanent technician, which he completed on October 14, 2015. Plus, at that time, Mr. Lemire was assigned to work full time at the CN control centre during night hours.

Mr. Lemire failed the first course, *Apprentice Training Program 1 (ATP 1),* given in Winnipeg in French between April 27 and May 8, 2015. His grade for the examination was 75.5%. Mr. Lemire was sent to Toronto to retake *ATP 1* and this time he passed the examination. Mr. Lemire took the *ATP 2* course and passed the examination on October 27, 2015. Between April 18 and April 29, Mr. Lemire took the *ATP 3* course and failed the examination with a grade of

76%.

Mr. Lemire was “removed from the service of the Company” on April 29, 2016, i.e., immediately after his second fail in the S&C training program, under Article 12.5 of Agreement 11.1.

On June 1, 2016, the Union submitted a grievance directly at Step 2 on behalf of Mr. Lemire alleging that he had “been unjustly dealt with.”

2. RELEVANT PROVISIONS FROM THE COLLECTIVE AGREEMENT

ARTICLE 12
Training

12.1 Employees taking training under the Training Program shall, for the purposes of this Agreement, be designated as follows:

a) Compulsory Trainee: An employee who is enrolled into the S&C Apprentice Training Program.

…

Compulsory Trainee

12.5 A Compulsory trainee hired after January 31 2013, will only have one opportunity to retake an examination during the Apprentice Training Program.

A Compulsory trainee hired after January 31, 2013, who fails on the retake of any examination or on any further examination in the Apprentice Training Program, will be removed from the service of the Company.

General

12.27 A Trainee who fails any training-related test twice and claims he did not have a proper test may appeal the decision under the provisions of the Grievance Procedure commencing at Step 2.

Grievance Procedure

13.8 A grievance concerning the interpretation or alleged violation of this Agreement or an appeal by an employee that he has been unjustly dealt with shall be processed in the following manner:

Note 1: Where discipline involves suspension or dismissal, an appeal may commence as Step 3 of the grievance procedure.

Step 1

Within 28 calendar days from the cause of the grievance the employee and/or the Local Representative may present the grievance in writing to the officer designated by the Company, who will give a decision as soon as possible, but in any case within 28 calendar days of receipt of the grievance.

Step 2

Within 30 calendar days of receiving a decision at Step 1, the Local Representative may appeal in writing to the officer designated by the Company. The appeal shall include a written statement of the grievance and where it concerns the interpretation or alleged violation of this Agreement the statement shall identify the specific provisions involved. A decision will be rendered within 30 calendar days of receipt of appeal.

Step 3

Within 45 days of receiving the decision under Step 2, the System General Chairman of the Brotherhood may request a joint conference with the officer designated by the Company. The request for joint conference must be accompanied by the Brotherhood's contention and all relevant information to the dispute involved. The joint conference shall be arranged to take place within 45

calendar days from the time such request is received and a decision shall be rendered in writing within 45 calendar days of the joint conference.

……

13.12 When a grievance not based on a claim for unpaid wages is not progressed by the Brotherhood within the prescribed time limits, the grievance will be considered to have been dropped. Where a decision is not rendered by the appropriate officer of the Company within the prescribed time limits, the grievance may be processed to the next step in the grievance procedure.

13.13 When a grievance based on a claim for unpaid wages is not progressed by the Brotherhood within the prescribed time limits, it shall be considered as dropped. When the appropriate officer of the Company fails to render a decision with respect to such a claim for unpaid wages within the prescribed time limits, the claim will be paid. The application of this Rule shall not constitute an interpretation of this Collective Agreement.

13.16 A grievance concerning the interpretation or alleged violation of this Agreement, or an appeal by an employee that he has been unjustly disciplined or discharged, and which is not settled at the highest level of the grievance procedure may be referred by either party to a single arbitrator for final and binding settlement without stoppage of work.

13.23 Disputes arising out of proposed changes in rates of pay, rules or working conditions, modifications in or additions to the scope of this Agreement, are specifically excluded from the jurisdiction of the Arbitrator and he shall have no power to add to or to subtract from, or modify any of the terms of this Agreement.

COMPANY SUBMISSION

The Company submits that the grievance had missed the time limit because the Union did not file it at Step 1 within 28 days following the cause of the grievance, as provided in Article 13.8. The Company points out that Mr. Lemire had been removed from the service of the Company on April 29, 2016 and the

grievance was submitted on June 1, 2016, i.e., 33 days later. The Union therefore did not respect the required time limits of the grievance procedure. Furthermore, the Union did not ask for a time extension or present extraordinary or appropriate circumstances so that the arbitrator may exercise his powers, under Section 60 (1.1) of the *Canada Labour Code* to extend the time in favour of the Union.

Secondly, the Company submits that the Union mistakenly submitted the grievance directly at Step 2 under Article 12.27. Article 12.27 does not apply because Mr. Lemire failed two separate tests, AP1 and AP2, and not the same test twice. The Company therefore lost the benefit of the first step of the procedure to attempt to settle the grievance. In short, the Union did not follow the grievance procedure and the grievance is thus affected by a fatal procedural error.

Thirdly, the Company submits that the allegation that the Company had dismissed Mr. Lemire should have been indicated in the grievances. No allegation had been raised about that matter in the stages of the grievance, nor at the joint conference on May 31, 2017. These allegations were never raised or discussed for two and a half years, and adding such an allegation less than a month before a hearing, is inadmissible. The Company basically maintains that

it is a new grievance that did not progress through the stages of the grievance procedure contained in Agreement 11.1.

Fourthly, the Company submits that it had advised the Union throughout the grievance procedure that a grievance related to allegations by an employee who has been "unjustly dealt with" is not arbitrable. Only a grievance claiming disciplinary action or dismissal may be brought before an arbitrator.

Lastly, the Company alternatively submits that in a case where the arbitrator decides to exercise his discretionary power, the Company had been justified for removing Mr. Lemire from service following his second fail in the S&C training program, in accordance with Article 12.5 of Agreement 11.1.

UNION SUBMISSION

The Union notes what is evident from the grievance filed May 31, 2016 at Step 2 of the grievance procedure as follows (para. 27 of Union's statement of issue):

- Dispute Mr. Lemire's termination (removal from service);
- Dispute the fact that Mr. Lemire did not have the same opportunity

as his colleagues during the examination due to the heavy workload required by CN;

- Dispute this termination as the result of the instructor's biased marking due to a complaint Mr. Lemire made against him;
- Dispute the severity with which instructor Collins marked the examination;

The Union submits that the preliminary objections by the Company are inadmissible and unfounded. It took over a year after the Company's response for it to respond at Step 2 and its response did not contain any objection to the procedural aspect. This silence by the Company makes its objection inadmissible, since it is, strictly speaking, a waiver due to conduct. This situation is well known in labour law as the "waiver" doctrine, as we are reminded by authors Brown & Beatty:

> " […] by not objecting to a failure to comply with mandatory time-limits until the grievance comes on for hearing, the party who should have raised the matter earlier will be held to have waived non-compliance, and any objection to arbitrability will not he sustained. This has been held to be so even though there was a timely objection as to arbitrability but not one that related to the failure to meet time-limits."

This applies even more so in this case, where the Company did not make any preliminary objection against the arbitrability of a grievance concerning

dismissal at Step 2, on any basis or at a joint conference held one year later on May 31, 2017. Essentially and to repeat the expression used by Arbitrator Michel Picher in **Ad Hoc 551**, a party is not allowed to “to lie in the bush” during the grievance procedure and issue a procedural objection a long time after the grievance is submitted. Such a situation is covered by the notion of “waiver.”

The Union wants to point out that, by its very essence, the grievance disputes Mr. Lemire’s termination, or in other words his administrative dismissal. The fact that the Union refers to the notion of “removed from the company service” in the grievance confirms that it is indeed Mr. Lemire’s termination that is the object of the grievance. Any form of disciplinary or administrative dismissal may be subject to a grievance. (*Lethbridge College v. AUPE,* 2004 1 R.C.S. 727). Furthermore, Article 13.8 provides that an employee who he has been unjustly dealt with, in how the employer applied the collective agreement or its management right, may file a grievance.

As for the Company’s objection that the grievance missed the time limit, the Union submits that in this case it acquired knowledge on or around May 13, 2016, and the grievance was filed May 31, 2016, which is within the time limit provided under the collective agreement, whether it be under the 28-day time limit (Step 1), the 30-day limit (Step 2) or the 45-day limit (Step 3). Alternatively,

if the arbitrator is of the opinion that this is not the case and that the grievance was submitted outside the time limit under the collective agreement, the Union asks the arbitrator to extend the time under Section 60 (1.1) of the *Canada Labour Code.*

As for the Company's submission that Article 12.27 does not apply, the Union submits that a simple reading of the article is enough to show the intent of the parties by adopting this article was to allow the Union to file a grievance at Step 2 in connection with a dispute stemming from the training test examination. Even if it were not the case, the Union submits that it is a grievance concerning a dismissal.

The Union also submits that the actual matter of this grievance is to determine whether Mr. Lemire's dismissal was well founded. The evidence shows that Mr. Lemire was not subject to the examinations in an appropriate manner, pursuant to Article 12.27, as the Company did not give him adequate training and evaluated him unfairly. In doing so, the Company did not meet its obligations under Article 12.26. Moreover, and for these same reasons, the Company did not satisfy the principles, especially the third one, stated in *Edith Cavell Private Hospital* (1982) 6 L.A.C. (3d) 229 to 233:

It is not open to an employer alleging a want of job performance to merely castigate the performance of the employee. It is necessary that specifics be provided. An employer who seeks to dismiss an employee for a non-culpable deficiency in job performance must meet certain criteria:

(a) The employer must define the level of job performance required.

(b) The employer must establish that the standard expected was communicated to the employee.

(c) The employer must show it gave reasonable supervision and instruction to the employee and afforded the employee a reasonable opportunity to meet the standard.

(d) The employer must establish an inability on the part of the employee to meet the requisite standard to an extent that renders her incapable of performing the job and that reasonable efforts were made to find alternate employment within the competence of the employee.

(e) The employer must disclose that reasonable warnings were given to the employee that a failure to meet the standard could result in dismissal.

The Union asks the arbitrator to:

1. Uphold the grievance;
2. Cancel Mr. Lemire's dismissal;
3. Order the Company to reinstate Mr. Lemire retroactively to April 29, 2016, with full compensation and no loss of seniority or benefits, including pension;
4. Render any other order deemed appropriate by the tribunal;
5. Reserve the authority to settle any dispute that could result from the arbitration award to be rendered.

DISCUSSION

It is important, first, to determine whether the measures taken by the Company constitute a dismissal that earns the rights listed in Article 13.16.

Agreement 11.1 does not state that each employee is entitled[1] to arbitration for any grievance. Article 13.16, under the title "Final Settlement of Disputes," points out that a single employee who "…has been unjustly disciplined or discharged, and which is not settled at the highest level of the grievance procedure may be referred by either party to a single arbitrator." Before this

[1] The Canada Labour Code does not require the parties to resolve every dispute before an arbitrator. They may come to an agreement on a method other than a board of arbitration.

> **57 (1)** Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application,

highest level, there is a list of “Grievance Procedure” steps for grievances solely concerning “the interpretation or alleged violation of this Agreement or an appeal by an employee that he has been unjustly dealt with.”

The Union proposes that, by its very essence, the grievance does not concern an employee who was unjustly dealt with, as per Article 13.8, but rather Mr. Lemire’s termination, which the Union characterizes as an “administrative dismissal” and which invokes the right to arbitration further to Article 13.18.

In the text *Les Mesures Disciplinaires et Non Disciplinaire dans les Rapports Collectifs du Travail*, the authors deal with the matter of dismissal [following excerpt is a translation]:

> F. Dismissal
>
> a) The principles
>
> 2.505 …Dismissal differentiates from resignation in that it is the employer who decides to break the employment contract with the employee. Dismissal is also different from layoff in that it refers to a definitive termination of employment for reasons that are specific to the employer, notably for economic or administrative reasons. In the case of a dismissal, the employer simply no longer wants the dismissed employee doing the work.
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> 2.506. Dismissal may be a disciplinary or non-disciplinary action...

The Union submits (p. 12 of their statement of issue) that in the *Lethbridge*

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administration or alleged contravention.

College decision, the Supreme Court of Canada "…had unequivocally concluded that all forms of dismissal, disciplinary and administrative, may be subject to a grievance" [translation]. First, it should be pointed out that the Supreme Court and texts on the matter distinguish between the two forms of dismissal, disciplinary and non-disciplinary. The Supreme Court does not mention "administrative" dismissal. The Court, more specifically, categorizes the employee's conduct resulting in the dismissal as being "culpable" or "non-culpable", at paragraph 42:

> Further to that point, I note that the categorization of employee conduct as either culpable or non-culpable and the subsequent requirement for cause in either case somewhat obscures the issue before the arbitrator. It has been argued that in cases of non-culpable conduct such as incompetence, cause may only be found to exist where the employer has abided by the five criteria set out in Re Edith Cavell, supra. Absent a finding that these criteria have been met, the arbitrator is required to reinstate the employee on the basis that the employer has not established that there was cause for dismissal or discipline of the employee. Put differently, the argument posits that the arbitrator lacks the capacity to make any other remedial disposition, save reinstatement.

In circumstances where a dismissal is non-culpable for reasons of incompetence, for example, the Court obviously differs (at paragraph 43) with the conclusion in *Edith Cavell* that the remedy would necessarily be the employee's reinstatement:

> In my opinion, this narrow and mechanistic approach to employee conduct and

> arbitral authority does not take full account of the arbitrator's dispute resolution mandate, nor does it consider adequately the myriad of employment circumstances that employees and employers confront. As a result, I do not believe that the criteria set out in *Re Edith Cavell* by themselves determine the framework for analysis. More particularly, they should not be seen, in and of themselves, as dictating the terms of remedial authority exercised by the arbitrator.

The principles stated in *Edith Cavell* therefore do not prevent the Company and Union from coming to an agreement, as they have done in Agreement 11.1, on a method for evaluating employees with specific consequences as described in Article 12.5. The Union and the Company have clearly come to an agreement in Article 12.5 that in circumstances where an employee such as Mr. Lemire fails the "re-examination or any other training program exam," the Company must have him "removed from the service of the Company." A removal from service further to Article 12.5 is definitely not, within the context of this agreement, a "dismissal" that could be brought before arbitration.

Putting aside the objection by the Company in regards to the procedural validity of submitting a grievance directly at Step 2 further to Article 12.27[2], the Union alleges that Mr. Lemire has been unjustly dealt with contrary to Article 13.8. Mr. Lemire claims that he did not have the same opportunity as his colleagues during the examinations due to the heavy workload assigned to him

[2] I accept the reasoning held by the Company that the facts are: Mr. Lemire did not fail one examination but has failed two separate examinations (ATP1 and APT3). Therefore Article 12.27

by the Company and that his failure was the result of biased marking by the instructor. The Company alleges that Mr. Lemire is entitled to pursue his case for being "unjustly dealt with" up to Step 3 of the Grievance Procedure, starting at Article 13.8, but is not entitled to bring a grievance before an arbitrator, further to Article 13.16. This matter of jurisdiction has often been discussed, starting with **CROA 2157** where Arbitrator Weatherhill decided as follows:

> In any event, even it were open to the employee to grieve in this respect, such a grievance may not proceed to arbitration. By Article 25.2, grievances "concerning the interpretation or alleged violation of this agreement or an appeal by an employee that he has been unjustly disciplined or discharged" may be referred to Arbitration. This is not such a case.

And in **CROA 2235**, Arbitrator Picher states:

> As is apparent from the foregoing, it is only a grievance concerning the interpretation or alleged violation of the collective agreement, or against an alleged unjust measure of discipline or discharge which may be referred to this Office for arbitration. The more general complaint of an employee that he or she has been "unjustly dealt with" in a manner unrelated to the collective agreement is, in accordance with Article 24.21 of the collective agreement, limited to being heard through the first three steps of the grievance procedure, and may not, by the agreement of the parties, proceed to arbitration.
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> This is a long recognized practice in the industry. Needless to say any contrary interpretation would open the arbitration process to each and every complaint of an employee who might feel unjustly dealt with in a myriad of ways entirely unrelated to the rights and obligations circumscribed by the collective agreement. For obvious reasons, grounded in the rational administration of the grievance procedure and arbitration system, an interest vital to unions and employers alike, no such right has ever been established either by statute or by contract in the realm of reported industrial relations in Canada. Before finding

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does not apply to Mr. Lemire's circumstances.

> that the parties intended that employees should have unlimited access to arbitration over issues unrelated to their collective agreement, such as the location of their lockers, the size of their parking space or the height of their chair, on the basis that they have been "unjustly dealt with", an arbitrator must find clear and unequivocal language to support such an extraordinary result.

I am of the same opinion. An employee is not entitled under the law or by contract, to bring any grievance or complaint before an arbitrator. More specifically, the parties did not agree in Agreement 11.1 to submit a grievance up to the arbitration step when an employee is "unjustly dealt with." Going along with the Union's interpretation of the matter would be tantamount to modifying the language, which is forbidden according to Article 13.23 of the collective agreement.

For all these reasons, I must decline jurisdiction in this case.

JOHN M. MOREAU, Q.C.

December 5, 2018