

**IN THE MATTER OF AN ARBITRATION  
(AH 738)**

**BETWEEN:**

**TEAMSTERS CANADA RAIL CONFERENCE  
(Maintenance of Way Employees Division)**

(the "Union")

AND

**CANADIAN PACIFIC RAILWAY**

(the "Company")

**RE: Grievance of Jonathan Summers**

**ARBITRATOR:** John M. Moreau QC

**Appearing for The Union:**

David Brown -Counsel, TCRC-MWED  
Wade Phillips -President, TCRC-MWED

**Appearing for The Company:**

Francine Billings - Labour Relations Manager  
Ivette Suarez - Labour Relations Officer

A hearing was held on August 26, 2021 (Virtual)

## **DISPUTE:**

Dismissal of Mr. Jonathan Summers (Union file 11-1851; Company file CAN-CP-MWED-2019-00010524)

## **JOINT STATEMENT OF ISSUE:**

Over the course of August 2019, the Grievor, Mr. John Summers, used a Company Loader to clear trees and build a bike ramp at the Kicking Horse Site #5 in Yoho National Park.

The Grievor attended an investigation statement in relation to the same on August 16, 2019 and a supplemental investigation statement on September 26, 2019.

On September 27, 2019, the Grievor was served a Form 104 advising him that he was dismissed from Company service for the following reasons:

*“For conduct unbecoming a Canadian Pacific employee, more specifically operating a Company Loader without permission and damaging Kicking horse historic site #5 in Yoho National Park (and) stealing CP material to conduct a bike ramp and damaging the Loader in the process.*

*Summary of Rules Violated:*

- *Engineering Safety Rule Book: E-2 Vehicles used for Company Business.*
- *Vehicle Fleet procedure # COR 5135 / COR 4135*
- *HR Policy 1300 - Conduct unbecoming.*
- *Hybrid Discipline Policy Conduct unbecoming offence*
  1. *Theft, fraud or the unauthorized taking of time or property.”*

A grievance objecting to the dismissal was filed on October 17, 2019.

## **The Union contends that:**

1. The grievor never stole anything;
2. The grievor’s conduct was entirely out of keeping with his history of employment with the Company. Furthermore, he took full responsibility for his actions and expressed real remorse.
3. Dismissal was an excessive, unwarranted and illegitimate response in the circumstances.

**The Union requests that:**

The Company be ordered to reinstate the grievor into active service immediately without loss of seniority and with full compensation for all wages and benefits lost as a result of this matter.

**Company Position:**

1. The Company denies the Union's contentions and declines the Union's request.
2. The Grievor used a Company Loader without permission to build a bike ramp in Yoho National Park. While doing so he damaged not only Company property but caused significant damage to a National Historical Site.
3. The Company maintains that the Grievor used Company assets and materials to construct the ramp without permission and by doing so committed theft.
4. The Company maintains that by damaging a National Historical Site not only did the Grievor irrevocably impact the Company's relationship with the National Park department but he also violated the Canada National Parks Act.
5. Moreover, the Grievor used the Company vehicle without authorization to conduct personal business which is a violation of Engineering Safety Rule Book and the Vehicle Fleet Procedure.
6. The Grievor's conduct was unacceptable and unbecoming of a Canadian Pacific employee.
7. The Company maintains that dismissal was just and warranted, given the circumstances.

**FOR THE UNION:**

Wade Phillips  
President  
TCRC MWED

**FOR THE COMPANY:**

Dave Guerin  
Managing Director Labour Relations  
Canadian Pacific

## **AWARD**

The grievor entered into the service of the Company on October 20, 2015 as a Trackman and subsequently held the positions of Group I Machine Operator and Extra Gang Foreman. The grievor was 25 years old at the time of the incident on August 15, 2009. Other than a caution he received in 2017, the grievor never received any discipline from the Company.

The grievor was working in his position as an Extra Gang Foreman on the Laggan Subdivision in Alberta. His duties on August 15, 2019 included taking protection for the Work Crews operating on the Subdivision.

The grievor, who is a biking enthusiast, decided to build a bike ramp just off a road trail in Yoho National Park. The grievor indicated at his investigation that he indulges in strenuous physical activity, such as hiking or mountain biking, to relieve stress after work. The grievor explained his actions as follows during his investigation:

Q 8: please explain what you know about the matter under investigation?

A 8: ...In order to relieve my stress after work, I have to do some strenuous physical activities and usually that is hiking or mountain biking. I really had no place to ride my bike hard and without thinking of the consequences at the time, I resorted to planning and building my own ramp. I did this so that I could do tricks and jumps with my bike, which also relieves my stress at the same time as I am enjoying myself and unwinding from the pressures of work. I borrowed the Company loader and followed the road or pathway to where I built the ramp at. I used the loader to clear some brush and make a base for my ramp and landing ramp. I honestly did not even see the historical marker and if I would have, I would never have used the Loader to move it or harm it. I never even thought that anything was there because of the large amount of over-growth and brush in the area. I had no idea that this was also a historical and protected site and actually thought it was CP right-of-way territory. Any lumber used and left at the site, was

lumber that are brought from home in my own truck, or it was lumber that I asked for and got from construction sites that I worked at during my rest days. They gave me permission to take it, so I did and that is where the lumber came from. I never took any lumber that belonged to the Company. I am so sorry that this happened. I did not think at the time that I was doing anything wrong. With the exception of borrowing the loader, I never had any intentions of doing something that I thought was wrong. I see now how wrong I was about what I did and I am very sorry for it all...

The Company submits that the grievor helped himself to Company property, a loader, to clear the over-growth and brush without the Company's authorization to do so. He also did not pay, or offer to pay, for the fuel that he used in clearing the brush and building his ramp.

The Company submits that the grievor's actions amount to theft. The Company notes in that regard that theft is one of the most egregious forms of misconduct and breaks the bond of trust between an employer and an employee. Although the equipment the grievor helped himself to clear away the brush and build a ramp may be considered of little significance, the grievor's actions in using Company property without permission still amounts to an act of theft.

The Company notes that the grievor's recklessness while operating the loader resulted in damage to a visitor's sign and the remnants of a concrete foundation from a historical structure in this famous Spiral Tunnel area. Pictures taken of the area also show overturned brush and loose trees near a roadway where the grievor chose to build his ramp. The Company notes that Canadian Pacific operates within the National Parks. Damage to National Park property of this kind, particularly in a such highly tourist-visited area, could put the Company's reputation at risk. Such carelessness and property

damage also has the potential to negatively affect the Company's day-to-day operations in this regulated Parks Canada area. In considering all the circumstances, the Company was left with no choice but to dismiss the grievor.

The Union essentially argues that, in the end, the grievor, an active 25 year-old at the time, committed what can only be described as an act of stupidity. He immediately admitted to his actions and expressed regret at his investigation for his unthinking behaviour in building a ramp and operating the loader. The Union submits that the grievor, who has no discipline on his record, should not pay the ultimate price of termination for his thoughtless actions which he regrets to this day.

The Arbitrator notes, as the Union points out, and without diminishing the seriousness of the grievor's actions, that the grievor did not cause any permanent damage to the area where he built his ramp, other than a pathway marker and a concrete foundation that was initially covered in brush at the time the grievor was operating the loader. The grievor, as the Union notes, immediately admitted responsibility when approached about the incident. Parks Canada personnel were also properly informed of the incident and interviewed the grievor on August 20, 2019.

The Arbitrator does not consider the grievor's behaviour as an act of theft, as the Company argues. An act of theft pre-supposes an intent to steal and the facts here do not support such a finding. The grievor was on a mission to build a ramp and unthinkingly did so in order to pursue his athletic bike activities. The ramp was not built in a hidden area but rather next to a pathway for all passers-by to view. The grievor's complete disregard for the consequences of his behaviour does not fit the profile of someone who

was intent on carrying out a surreptitious act of theft. Rather, it strikes this arbitrator as nothing more than a foolish act with little or no thought being given to the consequence of his actions.

The grievor's relative youth at the time of his life when he was bent on having a physical outlet for his stress relief is a mitigating factor which must be considered in assessing the quantum of discipline. Further, the grievor was honest about his actions at the time he was confronted about the details of the incident and did not try to hide his culpability. The arbitrator also accepts that the grievor's expression of serious regret and remorse over the incident during his investigation was genuine and further believes the grievor when he stated at his interview "that he did not think he was doing anything wrong."

In addition, the Arbitrator finds that although the grievor is not a long-term employee, he has nevertheless risen through the ranks of his occupation from his date of hire in October 2015 to the date of his termination in September 2019. The grievor is still a good prospect for the Company and should be given another opportunity to prove himself and put this fundamentally stupid incident behind him.

The grievor is to be reinstated forthwith but without compensation or loss of seniority.



**JOHN M. MOREAU, Q.C.**

September 3, 2021