

**CANADIAN RAILWAY OFFICE OF ARBITRATION**  
**& DISPUTE RESOLUTION**  
**CASE NO. 4784**

Heard in Gatineau and via Zoom Video Conferencing, July 13, 2021

Concerning

**CANADIAN NATIONAL RAILWAY**

And

**UNITED STEELWORKERS – LOCAL 2004**

**DISPUTE:**

Appeal of the dismissal of Foreman A. Lucas, effective January 15, 2020 for: “Reckless disregard for the safety of CN and contract employees, who were under your leadership, which resulted in two serious incidents, one of which lead to two serious injuries. This while exhibiting unprofessional and unbecoming conduct towards your peers.”

**JOINT STATEMENT OF ISSUE:**

On November 16, 2019, two contractors and one CN employee sustained injuries when a piece of rail flew off after being cut and hit them or landed on them. Mr. Lucas, the grievor, was the Foreman at the time of the incident. On November 28, 2019, the Company received a formal complaint in relation to the incident from another bargaining unit employee, Mr. Kenlock, which implicated the grievor. On November 29, 2019, Mr. Lucas, the Grievor, provided a formal statement. On December 10 and 12, 2019, two other employees including Mr. Kenlock, were formerly investigated in relation to the incident. The grievor produced a supplemental statement on December 23, 2019. Thereafter, on January 15, 2020 he was dismissed for the above-noted reason.

**The Union’s Position:**

The Union submits that a discharge in this case is excessive. The Union submits that Mr. Kenlock knew his complaint would be damaging to Mr. Lucas as there is a history between the two individuals. The Union asks for the discipline to be reduced and for Mr. Lucas to be reinstated into his employment and made whole for all lost time and benefits and accumulated compensated service.

**The Company’s Position:**

The Company disagrees with the Union’s contentions and declines their request.

**FOR THE UNION:****(SGD.) R. Demers**

Chief Steward

**FOR THE COMPANY:****(SGD.) A. Daigle**

Business Partner, Engineering

There appeared on behalf of the Company:

- |              |                                             |
|--------------|---------------------------------------------|
| V. Paquet    | – Manager Labour Relations, Toronto         |
| S. Blackmore | – Senior Manager Labour Relations, Edmonton |
| A. Daigle    | – Manager, Labour Relations, Montreal       |
| M. Salemi    | – Labour Relations Associate, Toronto       |
| D. Loureiro  | – Senior Manager Track Standards, Toronto   |
| S. Roch      | – Manager Labour Relations, Montreal        |

And on behalf of the Union:

- |                |                                                 |
|----------------|-------------------------------------------------|
| R. Leblanc     | – Area Coordinator, Eastern Ontario, Hawkesbury |
| J.F. Migneault | – President, USW 2004, Montreal                 |
| T. Cotie       | – Chief Steward, Capreol                        |
| C. Kramer      | – Vice President, Lloydminster                  |
| A. Lucas       | – Grievor, London                               |

**AWARD OF THE ARBITRATOR**

1. The grievor, a Level III Extra Gang Foreman, was dismissed on January 15, 2020, for reckless disregard for the safety of CN employees and contractors who were under his leadership, resulting in two incidents, one of which led to injuries. The incidents occurred on July 29 and November 16, 2019. The first incident was brought to the Company's attention only after the second incident occurred. Both incidents were investigated together. The Union does not dispute that discipline was warranted. The matter to be determined is whether dismissal was excessive and, if so, what is the appropriate level of discipline.

2. As per the *Memorandum of Agreement Establishing the CROA&DR*, this decision shall be limited to the disputes or questions contained in the joint statement submitted by the parties. The Union did not raise issues of fairness and impartiality of the

investigation in the joint statement. Therefore, this issue, which was raised at the hearing, is not properly before me.

3. In its submission, the Union put significant emphasis on the strained nature of the relationship between the grievor and the extra gang labourer who filed a formal complaint against him. The Union suggests that the extra gang labourer's statement cannot be relied upon, as it was tailored to prejudice the grievor. I find that the nature of the relationship between the two men is not relevant to determining the factual issue of whether the grievor discharged his safety duties adequately. However, I remain sensitive to the credibility issues that may result from interpersonal conflicts, intentionally or not. Therefore, where the statements provided by the grievor and the extra gang labourer during the investigation were contradictory, I have primarily relied on the statement of the track maintainer who was involved in both incidents and on the summary of events prepared by a supervisor who was present during the second incident, as both appeared to be neutral in their account of the events they witnessed.

***The Paris Incident – July 29, 2019***

4. On July 29, 2019, the grievor was involved in a rail incident in Paris, Ontario, where an employee injury was avoided.

5. The grievor was assigned to repair track further to a derailment. The damaged track had cars on it. The grievor was working with a track maintainer and an extra gang labourer. He asked the track maintainer to cut the rail. As she was proceeding to do so,

the extra gang labourer intervened, indicating she should reposition and turn her saw to cut from the other side, for safety reasons. The grievor replied that it did not matter which side she cut from. The extra gang labourer insisted that she reposition, which she did. As the track maintainer was cutting the rail, it snapped, causing the saw and the brace to fly off. As a result of her positioning, they flew away from her, as opposed to towards her, thus avoiding potential injuries.

6. During the investigation, the grievor stated he was relieved that the track maintainer had repositioned before cutting the rail. He added this incident taught him that rail can move unexpectedly and with force when under stress.

***The BIT Yard Incident – November 16, 2019***

7. On November 16, 2019, the grievor was again assigned to repair track further to a derailment, at BIT Yard. The rail was broken in one place and was turned on its side over approximately 1,000 feet. There were no cars on it. The grievor's plan was to cut the rail, pull the spikes out of the tie plates, clean the tie plates and reinstall the rail. To do so, the grievor was leading a gang of eight unionized track workers and ten contractors. Before commencing the work, the grievor conducted a job briefing with them.

8. After the job briefing, the employees and contractors spread out as they progressed down the track, removing the spikes from the tie plates.

9. The grievor was working close to six employees and contractors. He instructed one of the contractors to cut the rail. As the contractor was doing so, the rail snapped forcefully, launching the saw from his hand and hurting it.

10. After snapping, the rail swung, placing the employees who were standing outside of the rolled rail in the *line of fire*.

11. The rail hit the track maintainer who had also been involved in the Paris incident. It hit her leg and landed on her foot while she was working more than 500 feet away from the point of cut. Her foot was bruised. She had not been advised that the rail was about to be cut.

12. The rail also hit a contractor who was working even further away from the point of cut. He fell and was pinned to the ground by the rail. Some employees used their claw bars to release him from under the rail.

13. According to the grievor, after the incident, the rail was corkscrewed about four times, which he had never seen before. During the investigation, he stated he did not know that rail could behave that way. He added this taught him that rail is very unpredictable further to a derailment, even if there is no pressure on it (e.g. no cars on the rail).

14. Immediately after the incident, a safety discussion was held with the employees and contractors, the senior manager, the track supervisor and the program supervisor who were on site.

### ***Appropriate Discipline***

15. At the time of dismissal, the grievor had nineteen (19) years of experience as a track worker, including approximately thirteen (13) years as a foreman.

16. The position of Level III Extra Gang Foreman is a safety-sensitive position, in which employees are responsible to oversee the safe operation by production gangs and contractors. In this role, the grievor often led 40 to 60 employees and contractors.

17. During the investigation, the grievor stated that he was experienced with derailments and was often one of the first people called when they occurred. He confirmed he had received extensive job training, including safety training. He also acknowledged being aware of the Company's safety rules and expectations. Specifically, the grievor confirmed being familiar with the following provisions:

#### **The General Engineering Instructions (GEI)**

##### 2.0 Job Briefing

2.1 Prior to commencing any work, the employee in charge of a work group will hold a job briefing session for all persons engaged in the activity.

A supplemental job briefing is required when:

- Method of protection is changed, or
- Method of protection is extended or about to be released.
- Job task is changed.

2.2 The job briefing session shall cover all relevant issues with respect to the task being performed and necessary safety precautions that must be taken, including, but not limited to the following:

[...]

- A field level risk assessment specific to the task to be performed

2.3 At the conclusion of the job briefing, all employees shall confirm understanding. Job briefing information shall be kept in writing, in prescribed job briefing books, for ready reference by each employee.

### **GEI 2014-05 Engineering Peer to Peer Communication**

General: Engineering employees \*must communicate between themselves to ensure there is a clear understanding of the critical tasks to be performed.

\*Note: All references to engineering employees are applicable to both CN employees and contractors.

Employees must conduct a job briefing prior to starting work, including a field level risk assessment and must conduct supplemental job briefings with follow-up communications when conditions change and after lunch (generally 4-6 hours after the start of shift). During the job briefing, employees must confirm:

- Understanding of protection and working limits (if applicable)
- Safe working procedures to be employed
- Operating and Engineering rules applicable to the task
- Proper tools and equipment are available to complete the task
- Role each employee is expected to perform

The Peer to Peer Policy as outlines in this document is intended as supplemental communication to job briefings and risk assessment tools. It provides examples where detailed and specific communication must take place between employees. The examples provided are only a small sample of the level of communication required between employees to ensure clear understanding. You are required to use this format to develop your own language and to address tasks not covered in this document. All employees must participate in the peer to peer communication process, seek clarification as needed and understand their specific roles and responsibilities.

### **1.0 Line of Fire, Walking, Detraining, and Entraining**

1.1 Identify line of fire hazards and establish safe areas.

1.2 Clearly designate walking, detraining, and entraining locations as safe areas so that employees understand that these areas must be kept clear.

1.3 Identify material, equipment, or other hazards that must be removed prior to the start of work to ensure areas are free of line of fire, walking, detraining, and entraining hazards.

1.4 Communicate with employees when and where it is safe to walk, detrain, and entrain.

1.5 Employees must verbally confirm their understanding of designated safe areas that must remain clear of line of fire, walking, detraining, and entraining hazards.

1.6 Employees must be alert to other activity and hazards in the area (such as other employees, machinery, equipment, rolling stock, ditches, uneven ground, streams, etc.) and changing working conditions.

[...]

**General Rule C** [excerpt]

(i) be vigilant to avoid the risk of injury to themselves and others;

18. Considering his position and experience, the grievor should have been aware that rail can behave unexpectedly and forcefully when being cut, although he may never have witnessed it.

19. In fact, the extra gang labourer working with the grievor at the Paris derailment site was aware of the risk of sudden rail movement and insisted that the track maintainer reposition, for safety reasons. This raises the question as to why the grievor was not alert to this risk before the extra gang labourer identified it and addressed it.

20. In any event, while the grievor stated that the Paris incident was a learning opportunity for him, he clearly did not apply the lessons learned when attending the BIT yard derailment. Although the circumstances were not identical to those of the Paris derailment (no cars or other pressure on the rail and longer piece of rail), the nature of the incidents is the same, namely: rail from a damaged track snapping with force when being cut. Also, the Company submits that the grievor should have expected that the rail was under tension, even though there were no cars on it, as the rail was rolled from having been forced out by cars going down the wrong track.



21. The evidence shows that when working on the BIT yard derailment, the grievor failed to conduct a proper job briefing prior to commencing the work, as prescribed by section 2 of the GEI. Specifically, he acknowledged, during the investigation, that his job briefing was limited to discussing the weather and walking conditions. He did not discuss cutting the rail and failed to address safe work procedures, operating rules or line of fire. Moreover, he deliberately did not have the employees confirm their understanding of the job briefing. As he put it, there was a sense of urgency to get the work done and he did not want to wait around to make sure everyone had signed the job briefing book.

22. I find that the grievor's failure to follow the job briefing procedures methodically constitutes serious negligence, considering his general training and experience, combined with the Paris incident which he experienced just four months before. In the circumstances, the grievor should have expected that unpredictable rail movement could occur and should have acted accordingly. Specifically, as the leader responsible to ensure the safety of employees and contractors, the grievor should have been proactive in identifying and communicating the risks associated with cutting rail on the damaged track. There is no suggestion that the Company instructed the grievor to disregard safety procedures to deal with the urgency.

23. After witnessing a piece of rail moving forcefully when being cut in July, the grievor did not think to caution the employees and contractors under his responsibility

before cutting rail from a damaged track again in November. This suggests that the grievor does not have the level of awareness and focus on safety required to lead others in a safety-sensitive environment.

24. I am also particularly concerned that, throughout the investigation, the grievor did not take any responsibility for the two incidents.

25. In view of the above, I accept the Company's position that severe discipline was warranted.

26. However, there are some mitigating factors to consider in assessing the appropriate level of discipline. At the time of the incident, the grievor had no active discipline record. And while he did have a number of disciplinary events relating to safety and work procedure over the course of his career, none of them were similar in nature to the ones at issue. I am also sensitive to the fact that several management employees were onsite further to the BIT yard derailment and none addressed nor reported the grievor's shortcomings at the time. It was only after a complaint was filed by a unionized employee, days after the incident that the Company reacted to the grievor's shortcomings relating to the BIT incident, which suggests that the safety supervision and the peer to peer collaboration by management did not operate as it should have.

27. In the circumstances, I am satisfied that this is an appropriate case to substitute a penalty. I deem it appropriate to return the grievor to work, however in a position other than Level III Extra Gang Foreman, or any leadership position which would have him be responsible for the safety of others.

28. The grievance is therefore allowed in part.

29. I direct that the grievor be reinstated into his employment forthwith, without loss of seniority and without compensation for wages and benefits lost. He shall be returned to a demoted position in which he has no responsibility for the safety of others. That condition shall remain until such time as the Company deems appropriate to change it. The period between the grievor's termination and reinstatement shall be recorded as a suspension.

30. I remain seized with respect to any and all disputes arising from this decision.

September 7, 2021



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**JOHANNE CAVÉ**

**ARBITRATOR**