IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADIAN PACIFIC RAILWAY COMPANY

(the "Employer")

AND:

UNIFOR, LOCAL 101R

(the "Union")

(Dismissal of Shawn Kish – Grievance No. 204-2019-015;
CAN-CP-UNIFOR-2019-00008544)

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Sharney Oliver for the Employer
	Jim Wiens for the Union
HEARING:	February 1, 2021 Virtual hearing
DECISION:	April 29, 2021

The parties agreed I was properly constituted as an arbitrator under the terms and provisions of the Collective Agreement with the requisite jurisdiction to hear and determine the matters in dispute.

This matter pertains to a grievance filed by the Union on behalf of the grievor, Shawn Kish, challenging his dismissal. The grievor was terminated from his employment as a Rail Car Mechanic at the Employer's Moose Jaw, Saskatchewan facility on June 5, 2019 for a blue flag violation.

The "Form 104" dismissing him from Company service stated the basis for his dismissal as follows:

> On April 29, 2019 while working as a Rail Car Mechanic you failed to properly protect the east end of track MF02 which is a violation of the Blue Flag Policy, Rule Book Mechanical Canada Employees M-36 Track Protection and Collective Agreement No. 101R Rule 44.27 Protection of Employee's Working on or about Trains, Locomotives or Cars in Yards or Repair Track.

FACTS

The salient facts are as follows. The grievor began working for the Employer in November, 2011, although was absent from the workplace between 2014 and 2017 following his dismissal for unsafe handling of a Company vehicle and violation of its Drug and Alcohol Policies and Procedures. This dismissal was substituted with a thirty-day suspension, and the grievor was subsequently returned to the workplace pursuant to the terms of an Offer of Reinstatement signed by the Union and the grievor on April 19, 2017.

The incident giving rise to the grievor's dismissal took place on April 29, 2019. On that date, the grievor was one of four railcar mechanics assigned to perform a mechanical inspection and airbrake test to train 602-138.

At around 22:00, the grievor called out that the east end of the track was lined, locked, and verified – in other words, confirming that the requisite safety steps had been completed. The grievor had not, however, locked the switch, and the track was aligned with the track the crew was working on. It is undisputed this violated safety requirements, which dictate that a blue flag or blue light must be displayed at the entrance(s) of the track being worked on and any switches that could route movement of a train must also be lined away or locked.

The grievor was asked about the incident shortly following it and reported to his manager that he had never been shown the RT-5-RT6 switches before. The grievor was questioned a second time about the incident in the course of an investigation on May 22, 2019, at which time he explained that there are two switches labelled RT6 and that he believed that he had locked the right one. This statement was confirmed by the Union Representative in attendance at the meeting, Kevin Ryan. In respect of his earlier contradicting assertion, the grievor explained that he had been "shook up that night and…was not thinking clearly." The grievor acknowledged during the investigation meeting that it was his responsibility to lock out the RT6 switch and that he had committed a blue flag violation by failing to do so, and agreed a more serious incident could have resulted.

As previously stated, the grievor's employment was terminated by way of a Form 104 dated June 5, 2019. At the time of his dismissal, the grievor had 10 active demerits for unauthorized absences on his record. The grievor also had been issued a 20-day suspension on October 29, 2017 for a previous blue flag violation involving a failure to apply a Locomotive Disability Unit while working Yard Track F8.

POSITIONS OF THE PARTIES

Position of the Union

The Union contends that dismissal was excessive discipline, and that the Employer failed to properly consider mitigating factors identified by both the grievor and the Union which it notes were subsequently addressed by the workplace health and safety committee. The Union notes that the Moose Jaw train yard had undergone significant change in the layout of its tracks, which created significant logistical issues due to the number of tracks crossing over into the center portion that was the former lead in and out of the rest of the yard.

The Union does not dispute that the grievor did not put a lock on the correct switch, but says this was an honest error, not premeditated or intentional. The Union stresses that the grievor was honest in the investigation. The Union takes the position that the Employer has a burden to prove that the grievor "committed a deliberate act that would necessitate his termination" from employment – a burden the Union submits the Employer has not met in this case.

The Union takes issue with the fact that the grievor was not informed when the error was detected, and that corrective action was not taken at that time. Instead, it stresses, a manager was called to come out to the trainyard and examine the switch. The Union points out that neither the manager nor the employee who detected the error called the yard office to report the potential CROR violation. The Union contends that the Employer's investigation into the incident resulting in the grievor's termination was not fair or impartial, taking issue with the fact that the investigation was limited to only two of the employees on a four-person crew, and that only the grievor and one other employee on the crew were subjected to post incident testing.

According to the Union, sole culpability for the incident had already been assigned to the grievor prior to the commencement of the formal investigation, denying the grievor the opportunity to corroborate, comment on or refute his coworkers' accounts of events during the period being investigated.

Further, the Union points out that, during the Employer's investigation into the incident, the grievor's co-worker was also unable to accurately describe the process in securing a train at that location, erroneously indicating he would lock out A6 instead of A1 switch. The Union further objects to what it characterizes as an improper expansion of the investigation.

The Union submits that lesser discipline is appropriate in this case and leaves the appropriate penalty to the discretion of the arbitrator in the event the dismissal is found to be excessive.

Position of the Employer

The Employer objects to what it characterizes as an inappropriate expansion of the grievance. Specifically, the Employer objects to the Union's initial allegation that the grievor was the only employee subjected to post incident testing in a four-person crew and to its assertion that mitigating factors identified by the grievor and the Union were brought to, and corrected by, the workplace safety committee. According to the Employer, the Union had the opportunity to advance its other grievance wherein it challenged the post-incident testing, but chose only to advance the present termination grievance. The Employer articulates that it has not agreed to combine these multiple disputes into a single hearing. Further, it notes, the Union's assertion in this regard is factually inaccurate in that another employee on the crew was post-incident tested in relation to this blue flag violation.

On the merits of the grievance, the Employer stresses that blue flag protection is “a quintessential process and rule governing the mechanical staff.” The Employer opines that minimizing any failure or violation of safety rules would send the wrong message to employees – including those who were under the erroneous belief the proper protocols had been followed. With respect to the grievor’s alleged mitigation, the Employer states that the Union has failed to identify any specific factors which may have mitigated the grievor’s culpability. Further, it reiterates its position that the Union cannot now allege something that was “not brought forward at the appropriate time.”

The Employer maintains its investigation into the violation was fair and impartial, submitting that the Union “has included no evidence from the investigative record to provide that the Grievor was in anyway prejudiced by the Company’s actions”. Indeed, it notes the grievor was specifically asked during the investigation whether he had any comments or rebuttals and responded “no”. The Employer observes that the grievor was assisted by a duly authorized representative of the Union during the investigation. The Employer maintains that gathering this initial incident report is a necessary part of the investigative process, and is authorized by Rule 28.2 of the Collective Agreement. Further, it takes the position that the Union’s failure to make this procedural objection earlier bars it from pursuing this objection now.

In support of its decision to terminate the grievor’s employment, the Employer argues the grievor was less than forthcoming during its investigation into the incident – claiming to have never been shown the RRT-5-RT6 switches – which it submits is an aggravating factor weighing in favour of dismissal.

The Employer further points to the grievor’s unsatisfactory work record, noting that over his short time with the Company, the grievor received a 30-day suspension for unsafe handling of a Company vehicle and violation of its Drug and Alcohol Policies and Procedures. The Employer notes that, as part of the

reinstatement process flowing from the arbitration decision reinstating the grievor's employment, he signed an Offer of Reinstatement before being returned to the workplace wherein he committed to strict adherence with the Employer's Drug and Alcohol Policy.

The Employer also stresses the grievor was clearly well-aware of the Company's expectations around safety compliance, and its requirement for strict adherence to the rules, and relies on jurisprudence in support of is contention that repeated instances of the same misconduct is a further aggravating factor. Despite earlier attempts to correct his behaviour, the Employer argues, the grievor is still not contributing to a safe work environment. The Employer emphasizes that the grievor was in a unique position of trust working unsupervised and being relied upon by the Company, the general public, and his coworkers. Yet, he continued to demonstrate that he could not be relied upon to follow the Employer's rules and policies. It therefore submits dismissal is appropriate in the circumstances, and requests the grievance be denied.

DECISION

I start by observing that the appropriateness of the post-incident drug-testing is challenged in another grievance that is not before me. I have no jurisdiction, nor the appropriate information, to make this determination and I therefore make no finding in this respect.

With respect to the dismissal grievance before me, I find there is no basis upon which to find the Employer's investigation into this incident was improper. In so finding, I observe that Rule 28.2 specifically references the right of "on the ground" managers to hold immediate initial investigations when "the cause for such investigation occurs". I accept it is important to gather information immediately following an incident and prior to a formal

investigation commencing, and that the Collective Agreement explicitly acknowledges management's right to do so.

Indeed, the Employer has a responsibility to ensure it takes all reasonable measures to ensure and maintain a safe workplace for its employees. It is beyond dispute that blue flag protection is an important and necessary requirement to ensure the safety of mechanical staff working on or inspecting equipment on a track. It is therefore vital that employees strictly adhere to these protocols to ensure the safety of everyone in the workplace and to ensure the Employer discharges its legislated health and safety obligations.

Given the seriousness of the misconduct, and that the Employer's previous attempts at more moderate discipline for similar safety-related infractions have been ineffective, I have concluded the grievance must be denied. Indeed, I note that despite the Employer's earlier attempts to correct the grievor's unsafe behaviour, he has demonstrated that he is still not capable of, or willing to, contribute to a safe work environment. Adherence to safety protocols is a cornerstone responsibility of every employee, especially those working in potentially dangerous work settings such as railway maintenance.

For all of these reasons, the grievance is denied. It is so awarded.

This award is issued pursuant to the arbitration provisions of the Collective Agreement (Rules 29.1-29.7).

Dated at the City of Vancouver in the Province of British Columbia this 29th day of April, 2021.

Vincent L. Ready