

**IN THE MATTER OF AN ARBITRATION  
(SHP 742)**

**BETWEEN**

**UNIFOR LOCAL 101-R**

(the "Union")

**AND**

**CANADIAN PACIFIC RAILWAY**

(the "Company")

**RE: Grievance of Timothy Highton**

**ARBITRATOR:** John M. Moreau QC

**Appearing for The Union:**

Joel Kennedy -Counsel  
Jashin Gill -Observer

**Appearing for The Company:**

Sharney Oliver -Manager, Labour Relations  
Michael Goulet -Advisor, Employee Relations  
James Hurst -Superintendent, Locomotive Maintenance

A virtual hearing was held on July 6, 2021

## **DISPUTE**

The dismissal of employee Timothy Highton (*“the Grievor”*) on September 12, 2019.

### **JOINT STATEMENT OF FACTS:**

Following an investigation, the Grievor was dismissed as follows:

*“For your failure to properly communicate with your groundman, follow STOC procedures and secure equipment resulting in the unintended movement of three (3) locomotives causing damage to a fuel stanchion and a locomotive on September 4, 2019 while employed as a Diesel Mechanic in Moose Jaw, SK. Violation of the following rules:*

*STOC Procedures:*

*3—Servicing Locomotives;  
6—Building Locomotives”*

### **UNION POSITION:**

The Union submits that the quantum of discipline in this instance is beyond the range of reasonable disciplinary responses to the situation.

The Union further submits that there was not just cause for discharge.

By way of remedy, the Union requests that the discipline assessed to the Grievor be replaced with a more suitable quantum of discipline and that the Grievor be reinstated to his employment and be made whole in all respects.

### **COMPANY POSITION:**

The Company disagrees and denies the Union’s request.

The Grievor’s culpability was established through the fair and impartial investigation. The discipline was determined following a review of all pertinent factors including the Grievor’s service and his past discipline record. Further, before the discipline was assessed the Company duly considered all mitigating and aggravating factors.

The Grievor’s violation with respect to securing equipment and testing handbrake effectiveness caused the unintended movement. The Company’s position continues to be that the discipline assessed was just, appropriate and warranted in all the circumstances. Accordingly, the Company cannot see a reason to disturb the discipline assessed.

The Company requests that the Arbitrator dismiss the Union’s grievance in its entirety.

#### **For the Company:**

David Pezzaniti  
CP Rail

#### **For the Union:**

Joel Kennedy  
Unifor

# AWARD

## SUMMARY OF THE EVIDENCE

The grievor, a Diesel Mechanic, entered into the service of the Company on October 22, 2007.

On September 4, 2019, the grievor was working with his fellow Diesel Mechanic, Mr. Lance Lynch, during their assigned shift from 23:00 to 07:00. The grievor and Mr. Lynch's assignment that morning included fueling and servicing three locomotives at the Company Diesel Shop fueling pad: CP 3017, CP 2248, and CEFX 2028. They were scheduled to then build train K-36 using locomotives CP 3017 and CP 2248. The grievor and Mr. Lynch held a job briefing prior to beginning their assignment in order to plan the sequence of work.

One of the locomotives, CP 3017, had already been fueled and was parked next to the west fuel stanchion. The grievor and Mr. Lynch decided to move the other two locomotives, CEFX 2028 and CP 2248, closer to the fuel stanchion to permit using both the east and west fuel guns located on the stanchion at the same time to fuel the two locomotives. During the course of performing their duties, the grievor entered the cab of the lead locomotive, CP 3017, while Mr. Lynch remained on the ground directing the movement. Using their respective radios to communicate with each other, the grievor and Mr. Lynch proceeded to move the locomotives west by one unit (80') to the fuel location.

The grievor then began setting up the air brakes on CP 3017, given his decision to designate it as the trailing unit for the K-36 consist. The grievor then exited the cab of

locomotive with the intention of setting up the next set of airbrakes on CP 2248 as the designated lead locomotive. Just after he stepped down from CP 3017, the grievor heard Mr. Lynch on his radio say “*Stop...Emergency*” as the consist began rolling westward. The grievor initiated the emergency brakes but not before the locomotives had rolled several feet, damaging both the fuel stanchion as well as the fuel coupler on the CEFX 1028 locomotive. Immediately after the incident, the grievor and Mr. Lynch notified management about the incident.

After post-incident drug testing and being interviewed by his managers over the incident, the grievor was suspended without pay pending a formal investigation. Both the grievor and Mr. Lynch were formally interviewed on September 10, 2019. The grievor was terminated on September 12, 2019. Mr. Lynch was assessed 20 demerits.

## **SUBMISSIONS OF THE COMPANY**

The Company notes in its submissions that the grievor had completed his *Shop Track Operations Curriculum* (“STOC”) on April 4, 2017, which was valid for 3 years. The STOC course modules include the following in reference to the correct fueling procedures:

Park locomotives over drip collection system and ensure air brakes are fully applied to prevent unintentional movement. The hand brake on the controlling locomotive must be fully applied.

The Company notes that the grievor was asked about the above rule in his investigation and indicated (Q/A 65): “*I do not recall the rule because we have been doing it without and just using air brakes to fuel*”.

The Company maintains that ensuring that locomotives or railcars are properly secured to prevent uncontrolled and unattended movement is a fundamental part of the railway industry. Securing the locomotives with the hand brake alone prevents the kind of unexpected rolling of the movement that occurred here. The Company further noted in that regard that testing the effectiveness of the hand brakes system requires that all air brake systems are first released. Otherwise, an employee in such circumstances would be unable to tell which brake system, the air brake or hand brake, is preventing the locomotive from moving. The Company maintains that the grievor's negligence in not securing the handbrake as required merits a serious disciplinary response.

The Company further notes that the grievor has an unenviable record which includes his termination for sleeping on the job and an inappropriate use of electronics on April 11, 2019. This offence was subsequently altered to an 80-day suspension (not inclusive of time out of service) to July 21, 2019, as confirmed in an Award issued by Arbitrator Ready on February 16, 2021. Shortly after he was reinstated, the grievor failed on August 12, 2019 to properly line a switch for which he was assessed 20 demerits. Accordingly, within a short time after his reinstatement, the grievor had two safety violations: the current incident of September 4, 2019 and the run-through switch less than a month earlier on August 12, 2019.

The Company cites the *Steel Equipment* factors regarding the appropriateness of the disciplinary penalty, as well as several decisions of this office, **CROA 3655, 4471, 4564, 4682**, in support of its submission that the failure to properly secure equipment is a serious safety violation. The grievor cannot rely on long service or a clean disciplinary

record as mitigating factors that justify consideration of a lesser penalty. Under the circumstances, the Company requests that the grievance be dismissed.

## **SUBMISSIONS OF THE UNION**

The Union notes, as a procedural matter, that the Company only refers to the specific details of the incident of September 4, 2019 in the Form 104 as a basis for the grievor's dismissal. Accordingly, the Union argues that the details of the incident of September 4, 2019 are the only grounds upon which the Company can rely on to support its just cause for his dismissal. Any additional references to the grievor's disciplinary record, in the Union's view, would amount to a modification or expansion of the grounds for dismissal, which is prohibited under the collective agreement.

The Union submits in its review of the facts that it is clear the grievor acted quickly by initiating the emergency brakes once Mr. Lynch alerted him by radio to the rolling locomotives. Unfortunately, the locomotives had already rolled several feet causing damage to the east fuel stanchion and the fuel coupler.

The Union also maintains that the grievor was honest at his investigation, acknowledged his error; and, has resolved to apply handbrakes in order to avoid a similar occurrence in the future.

In the Union's view, this is not a case where the grievor should pay the ultimate price of termination for what essentially amounts to a single incident of an error in judgement. Counsel for the Union cites an early similar case, **CROA 1502**, where Arbitrator Kates held that 20 demerits was an appropriate disciplinary response to both the Locomotive Engineer and Conductor for failing to properly communicate with each

other over the application of handbrakes. In that case, the damage was much more severe and included both a collision and derailment of a train car. The Union also cited the *Steel Equipment* factors for assessing penalty which supports the principle that the purpose of discipline is to correct employee behaviour and discharge should only be imposed as a last resort for serious offenses. The Union also cited several other decisions of this office in that regard where similar infractions were viewed as meriting a lesser disciplinary response. See: **CROA 2356, 3974, 4419, 4471,4664, SHP 589.**

The Union submits that the Company has not met its burden of proof to justify the termination of the grievor from his employment. The Union seeks an order for the grievor's reinstatement and that he be made whole in all respects.

## **ANALYSIS**

The Union maintains that the Company is precluded from relying on the grievor's disciplinary record as a basis for his termination given the absence of any reference to it in the Form 104. I note to begin with that the Employer in its Step 2 grievance reply of December 18, 2019 stated that the "...*Company carefully considers the appropriate disciplinary consequence, if any, to be assessed including any mitigating factors or circumstances...*". The reference in my view to the consideration of the appropriate disciplinary response, including any mitigating factors, was sufficient notice to the Union that the grievor's record was considered when the Employer decided to terminate the grievor for this incident. More particularly, as the Employer pointed out in its reply submissions to the Union in these proceedings, the JSI itself squarely raises the issue of the grievor's record as a consideration in the disciplinary response where it states under

the heading of “*Company Position*” that the “...*discipline was determined following a review of all pertinent factors including the grievor’s service and his past discipline record*”. Finally, I would add that there is no evidence of any prejudice to the Union or the grievor for the failure of the Employer to directly reference the grievor’s prior record as a basis for his termination in the Form 104. For these reasons, I find that the Union’s submission with respect to the Employer being prohibited in these proceedings from relying on the grievor’s disciplinary record given the absence of a reference to it in the Form 104 is without merit.

Turning to the substance of the grievance, there is no dispute that the grievor and his co-worker failed by their own admission to ensure handbrakes were properly applied. The result of the grievor’s and his co-worker’s failure to secure the handbrakes could have had more serious consequences, including the potential for a fuel spill from the damaged stanchion. Luckily, the collision only caused relatively minor damage to the fuel stanchion and the locomotive.

Was termination the appropriate disciplinary response under the circumstances?

I agree with the Company’s submission that ensuring equipment is properly secured in order to prevent uncontrolled and unattended movement is fundamental to maintaining safety in the railway industry. I note in that regard the comments of Arbitrator Flynn in **CROA 4471** where she states:

While, fortunately, no one was injured during the incident and no damage was caused, the importance of properly securing equipment remains of utmost importance. The potential consequences are high, as was highlighted in the tragic Lac Megantic disaster, where the improper testing of handbrakes– with air brakes still applied – was one cause of the event.



Of note in this case is the fact that both the grievor and Mr. Lynch indicated at their respective interviews that they were unaware of the STOC module 3-12 fuel procedure rule. In the case of the grievor, he stated in that regard:

Q. 65...Were you aware that hand brake is required in addition to air brakes on the controlling locomotive in consist during fueling to prevent unintentional movement?

A 65: I do not recall the rule because we have been doing it without and just using air brakes to fuel.

The same question was put to Mr. Lynch at his interview (Q/A 44) to which he replied: "No". In addition, both the grievor and Mr. Lynch were asked what they had learned from the incident. In the case of the grievor, he stated in that regard:

Q. 83 What have you learned from this incident?

A. 83: To ensure a handbrake is on before changing ends on a consist, and better communication with my mate.

The same question was likewise put to Mr. Lynch at his interview (Q/A 51) to which he replied: "*...apply handbrakes at all times when fueling, and better communication with my mates*"

Both the grievor and Mr. Lynch were of the view that engaging the air brakes without the hand brakes was sufficient to safely prevent the locomotives from rolling unexpectedly as they did here. In addition, both admitted their failure to properly communicate with each other during the move. Under the circumstances, it is my view that the blame for the incident does not lie exclusively with the grievor as the Company asserts. This is one of those circumstances, as noted below in **CROA 4471**, where both the grievor and Mr. Lynch were equally at fault for the incident:

Mr. Harris's actions were highly irresponsible. He failed to properly check the effectiveness of the handbrakes by forgetting to release air brakes during testing. In addition to his faults, the Grievor did not verify with Mr. Mitchell if he had applied the mandatory two handbrakes for the Expressway Terminal. There were no mitigating factors that occurred during the incident, which was purely the result of the two men's failure to properly follow safety rules.

Although this is the grievor's first recorded discipline for failing to properly secure equipment, his disciplinary record indicates several instances where he has demonstrated an inattentiveness to his assigned duties. The most compelling example of this was his suspension in April 2019 for sleeping on the job, albeit the arbitrator found this to be a circumstance of inadvertence and lack of intention on his part. Most recently, that is less than a month before the current incident, the grievor incorrectly lined a switch which led to a run-through for which he was assessed 20 demerits. Clearly the grievor's demonstrated neglect of his duties on two occasions shortly after his reinstatement have placed his job in jeopardy.

The grievor had almost 12 years of service at the time of this incident. The Company maintains that his tenure is not considered to be lengthy service in this industry. In my view, 12 years of service as a Diesel Mechanic should on balance still be considered as a mitigating factor when assessing penalty in a case of this kind. I note and agree in that regard with the comments of Arbitrator Sims in **CROA 4564**, where the employee had 9/12 years of service, "*...that this is still a significant length of service, involving an investment by both the Employer and the grievor*". In addition, I also consider as a mitigating factor that the damage caused in this case to the Company's equipment was due to the shared negligence of both the grievor and Mr. Lynch.

Overall, I find the comments of Arbitrator Schmidt in **CROA 4419** properly reflect the facts in this case as well:

While it is true that the grievor is not a long service employee and his error was a critical one, it is not properly elevated to the degree of recklessness such that the employment relationship is beyond redemption.

Having regard to all of the forgoing I am of the view that the imposition of a serious sanction, short of termination, will have the desired rehabilitative impact on this grievor. I therefore direct the Company to reinstate him forthwith without loss of seniority but without compensation for any wages or benefits lost.

A similar finding was expressed by Arbitrator Ready in **SHP 689**:

I find that a lesser sanction would be sufficient to impart to the grievor the seriousness of his wrongdoing and to make clear to him that it is his duty as groundman to pay attention to the rules governing locomotive movements.

After consideration of all the circumstances, it is my view that the employment relationship is not beyond repair. The grievor should be allowed a further opportunity to prove his worth as a Diesel Mechanic. But the penalty for his negligence must be such that it sends a strong message to him that further operational incidents of this kind involving safety violations could lead to the permanent fracturing of his employment. Accordingly, I direct that the grievor be reinstated without loss of seniority but without any compensation for lost benefits or wages.



**JOHN M. MOREAU QC**

July 23, 2021