CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5097

Heard in Edmonton, November 12, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

UNITED STEEL WORKERS – LOCAL 2004

DISPUTE:

Discharge of Permanent Machine Operator K. Gill (the **Grievor**), on May 23, 2023 for your involvement in a main track authority violation (MTAV), failure to verify limits, and the subsequent Track Unit Collision with CN 5663 Train 3105123 and a Backhoe at Mile 5.8 on the Clearwater Sub, on April 24, 2023 in violation of CROR General Rule A i and vi, CROR C i and ii, GEI 10.7, 10.9, 10.10b, 10.10c, 11.20-11.4.

JOINT STATEMENT OF ISSUE:

On April 24, 2023, the Grievor, Mr. K. Gill, was working as a Permanent Machine Operator (PMO) on the Clearwater Subdivision. While working, the Grievor was involved in a main track authority violation (MTAV), failing to verify his limits and ensure he had track protection as he mistakenly entered what he believed was the south track with his backhoe excavator, yet instead was actually the north track. The Grievor then observed CN 5663 Train 3105123 approaching on the north track in his direction. The Grievor was able to escape the excavator just before the moving train struck the excavator causing significant damage, yet no injuries resulted.

On May 5, 2023, the Grievor attended a formal investigation of this incident. On May 23, 2023, the Grievor was provided a Form 780 confirming that he was being discharged as a result of the April 24, 2023 MTAV and the resulting collision on the Clearwater Subdivision. On June 14, 2023, the Union filed a Step III Grievance regarding Mr. Gill's discharge. On January 25, 2024, the Union and the Company held a Joint Conference and discussed potential resolution of the Grievance, yet did not reach a final agreement on any resolution of the grievance.

Union Position:

The Union submits that the griever was denied a protecting foreman and forced to do multiple jobs. The Company failed to properly post North South Track identification as required. The Union has requested Joint Conferences from November 2022 to resolve outstanding grievances and were denied and or CN scheduled then failed to attend on numerous occasions. CN scheduled a Joint Conference in June 2023 and CN failed to attend.

The Union made repeated attempts via email and calls to resolve this grievance due to no meetings as per Article 18 of the CBA. Dave Roy, MOW Chief of Engineering West at the time, stated in June of 2023 that “he just needed a month in the penalty box and then he would return him.” During June or July of 2023, the Company agreed they could return the Grievor then refused to settle for weeks stating Rahim Karmali is reviewing the file.

On October 12, 2023, during a call with Azam Bacchus (LR) the Union learned Rahim Karmali was still reviewing the file 8 weeks later and Azam had zero response. The Union filed a JSI with CN in October 2023 and CN (Maud Boyer) called asking to discuss and resolve at a Joint Conference in January of 2024. On January 25, 2024, CN and the Union met for a Joint Conference. It is the Union’s position that the Union and CN agreed to a Last Chance Agreement as suggested by Maud Boyer (CN Rail LR), and then agreed to by Rahim Karmali and Fernando Vecchio.

Following the Joint Conference, the Union sent emails for 2 months requesting the letter of settlement. Sixty-one (61) days from the Joint Conference, CN replied stating they were no longer honouring the agreed to resolution for this grievance and maintaining the discharge of the Grievor.

As a result of this discreditable change in CN’s position, the Union requested the Grievor be made whole for all lost wages, seniority, pension in addition to a significant monetary amount to be paid in damages. Specifically, the Grievor has suffered as a consequence of CN's failure to adhere to any provisions within the Collective Bargaining Agreement (CBA), coupled with a penalty for exhibiting bad faith and obstructing the process, thereby leading to the exploitation of the Grievor's fundamental rights.

Company Position:

The Company respectfully disagrees with the Union’s position, and completely denies any and all allegations of bad faith, breaches of any provisions of the CBA, or exploitation of the Grievor’s fundamental rights as alleged by the Union.

The Company submits that the Grievor’s carelessness and failure to comply with numerous safety rules and regulations resulted in a collision on the main track that put the Grievor’s and others’ lives at risk. The Grievor’s failure to verify his track protection limits resulted in a main track authority violation and consequent collision between a train and an excavator. The Company respectfully disagrees with and denies the Union’s allegations that the collision in any way resulted from there being insufficient Foremen on duty on the date of the collision, inadequate signage on rail crossings, or inadequate training of the Grievor by the Company regarding compliance with safety rules and regulations. Due to the seriousness of the incident, as well as the Grievor having previously been involved in and disciplined for causing another track unit collision, the Company maintains that the Grievor was properly discharged for just cause.

The Company disagrees with the Union’s allegations that the Company purposefully or in bad faith delayed or obstructed the grievance process in breach of Article 18 the CBA, or any other provision therein. At no time was an agreement reached between the Union and the Company regarding reinstatement of the Grievor, whether through alleged statements by CN personnel in advance of the January 25, 2024 Joint Conference or during same. Furthermore, neither Ms. Boyer nor Mr. Vecchio had authority on behalf of the Company to agree to reinstatement of the Grievor at the January 25, 2024 Joint Conference. While the Union and the

Company did engage in without prejudice discussions of a potential resolution of the grievance at the January 25, 2024 Joint Conference, it did not result in an agreement to reinstate the Grievor. Consequently, the Company had no reason to provide the Union with any letter of settlement.

For the Union:	**For the Company:**
(SGD.) J. Desjardins	**(SGD.) M. Boyer**
Chief Steward	Senior Manager, LR

There appeared on behalf of the Company:

S. Vincent	– Counsel, Norton Rose Fullbright Canada, Calgary
M. Boyer	– Senior Manager, Labour Relations, Montreal

And on behalf of the Union:

D. Teolis	– Servicing Representative, Sudbury
C. Kramer	– President, Toronto
J. Desjardins	– Chief Steward – Mountain Region
K. Gill	– Grievor

AWARD OF THE ARBITRATOR

Background, Issue & Summary

[1] As made clear in the JSI, this Grievance is against the Company's decision to dismiss the Grievor for a main track authority violation which occurred on April 24, 2023. On that date, the Grievor's put his backhoe excavator on the *north* track when he had permission for the *south* track resulted in a collision between that equipment and an oncoming Train (the "Collision"). Fortunately, the Grievor was able to escape his backhoe approximately "a minute" before the collision occurred.

[2] The Company maintained its discipline of dismissal was just, warranted and reasonable and that it was not excessive, given the factual circumstances. The Union maintained that the Grievor was not culpable and that the discipline was excessive and unwarranted. It argued the Grievor should be reinstated.

[3] The Union has also raised a preliminary issue of whether the parties had reached a resolve of this dispute, by agreeing to reinstate the Grievor on a Last Chance Agreement. That issue will be resolved first.

Was Resolution Reached Pre-Hearing?

[4] As has been agreed between the parties in the JSI, a joint conference was held and potential resolution of this Grievance was discussed "*yet did not reach a final agreement on any resolution of the Grievance*" as also noted in the JSI. Despite this statement that no resolution *was* reached by the parties. It Union maintained that the Company agreed as part of a joint resolution conference to return the Grievor to work, after some time in the "penalty box", and in particular that a Last Chance Agreement ("LCA") would be put in place for the Grievor. The Union alleged this was suggested by Ms. Boyer. The Union argued the Company had acted in bad faith in not responding in a timely way to the issues raised at the joint conference, to "offer the Grievor a decision, in this case the agreed upon LCA" after that joint conference. It argued the Company acted in "bad faith" and "discriminatorily", as it was "unfair for the Company to agree to an LCA and later revoke that agreement outside of the appropriate time limits".

[5] The Union did not suggest what the *terms* were for the alleged Last Chance Agreement, but maintained the Company had agreed to implement that type of agreement, for this Grievor.

[6] For its part, the Company denied there was any agreement to resolve this Grievance, and pointed out that Ms. Boyer would not have had authority to make that arrangement. It denied it acted in bad faith.

[7] This issue is straightforward, as is its resolution.

[8] It is well-established in law that a contract requires an offer and acceptance of certainty of terms, whether that contract is oral or written. Should authority be required for that well-settled law, that is recognized in *Shorty Drywall Inc. v. Lombardo* 2003 ABQB 747 at para. 22.

[9] The essential terms required for reinstating the Grievor to his employment were not established between these parties - even on the Union's best case - as the Union was unable to provide any details regarding the terms of an alleged LCA that would have reinstated this Grievor, such as: "How long was the LCA to be in effect?" "What events would result in breach and dismissal?" or "Did the Grievor have any further recourse to

arbitration?" While a contract can be short and only have one or two terms, without essential terms, it is not possible to determine the intentions of the parties: see also *Ironside v. Smith* 1998 ABCA 366 at para. 61. In that case, it was found the parties *had* agreed to the essential terms of the contract. That is not the facts in the present case.

[10] At most, what has occurred here – even if the Union's were correct – is an "agreement to agree" to a future LCA, but without any certainty of terms of what that might entail. That is not an enforceable contract: See *Ko v. Hillview Homes Ltd.* 2012 ABCA 245 (at para. 81). The Company did not fail to respond in a timely manner nor did it act in "bad faith" or "discriminatorily" when it did not offer the Grievor a LCA and reinstate his employment.

Issues & Summary of Decision

[11] The remaining issues between the parties raise the second and third questions of the *Re Wm. Scott & Co* framework. If the answer to the first question is "yes", the third question need not be addressed:

a. Was the Company's discipline just, reasonable and warranted? If not,
b. What discipline should be substituted by the exercise of this Arbitrator's discretion?

[12] On the merits, the ultimate discipline of discharge has been demonstrated to have been a just and reasonable response, in all the circumstances of this case.

Analysis and Decision

[13] The facts require a careful review to address the Union's arguments that the Company's ultimate and final disciplinary response of discharge was excessive and unwarranted.

[14] The Grievor had fourteen years of service. He was hired in 2008 as extra gang labour in track services. From 2011 forward, he worked as a Permanent Machine Operator ("PMO"), based out of Kamloops, under Agreement 10.1 between the Company

and the Union. That Agreement governs employees working under the scope of various "Maintenance of Way" agreements. At the time of the Collision, the Grievor had worked for 12.5 years as a PMO and five of those years operating a backhoe "on and off". He had put onto this section of track approximately six times since 2018.

[15] While he had no active demerits at the time of this Collision, he did have what the Company described as a "cumulative discipline history" of 65 demerits; three written reprimands and one suspension. He had worked off the demerits at the time of this Collision.

[16] A close review of the Grievor's record demonstrates the bulk of the Grievor's demerits were not assessed for operational issues, although he did unintentionally cancel an electronic track occupancy permit ("ETOP") taken out by a Foreman in 2016 which is as significant issue. Most significantly, however, his record demonstrates he received a lengthy suspension for a track collision between a Tamper and a Regulator, which incident occurred on November 15, 2018. His suspension was served between December 5, 2018 and January 3, 2019.

[17] Turning to the event at issue in this Grievance, on April 24, 2003, the Grievor began his workday at 0600. He was in possession of an electronic track occupancy ("ETOP") from the Rail Traffic Controller ("RTC"), which he obtained while parked off of the Yellow Head highway, near mile 6 marker of the Clearwater Subdivision. That ETOP allowed the Grievor to access the *south* track on the Clearwater subdivision, for his work that day. The Grievor did not request – nor did he receive – occupancy permission for the *north* track.

[18] The Grievor described that cell service was only available at mile 6 or eastward, toward Blue River, although he also pointed out in his Investigation that he backed his backhoe up 3000 feet once he put on the track, to get service, and that he was looking at his computer when he noticed the oncoming Train.

[19] The Grievor was investigated – and ultimately discharged - for failing to verify his limits, and his responsibility for the Collision with CN5663 Train 3105123, which followed. At that Investigation, he and his Union representative took two hours to review the extensive evidence before proceeding.

[20] At Q/A 25 of the Investigation transcript, the Grievor outlined his version of events. It was the Grievor's evidence that at mile marker 6, the Grievor had a discussion with Foreman Ryan McKenzie, as he and Foreman McKenzie were both traveling westward from that point. He also contacted Foreman Dennis over the radio. The Grievor understood he was to be the lead track unit that day. The job briefing document was filed into evidence. That document lists "collisions" as potential hazards; as well as "be aware of surroundings". The Grievor then drove to the crossing so that he would be ahead of Foreman McKenzie, given Foreman McKenzie was to work behind him.

[21] Unfortunately, when the Grievor arrived at the mile 6.3 crossing, he was confused which parallel track was the south track and which track was the north track. As he only had authority for one direction of the track, this raised a significant problem for this Grievor. Before the Grievor entered the track, he described looking for a mile point or signal indication for north or south "and there was nothing at the crossing".

[22] When asked how he verified his track protection limits prior to setting on the tracks, the Grievor stated he "read the TOP and confirmed my conflictions" (Q/A 50). However, when asked in the next question if there was any "confusion as to which track you were supposed to be setting on?", the Grievor answered "Yes, there was confusion when I got up to the crossing and was looking for an N or S". When asked in Q/A 52 who he sought "*confirmation with if you were confused about what track prior to putting on at the crossing?*", the Grievor answered "*no one*" (emphasis added).

[23] The Grievor's conduct in putting onto the tracks despite his continuing confusion was made worse by the fact that he was aware there was a train expected on the *north* track: At Q/A 59, the Grievor confirmed that he was aware there was a "train around that might be approaching on the limits that you had prior to setting on tracks". He answered "Correct. Yes".

[24] Despite his confusion – and the expected Train – the Grievor put his backhoe onto the track. He chose the wrong track.

[25] When asked in Q/A 65 to describe his "thought process" for why he decided to put on the tracks before the expected train went by, the Grievor answered "Because I had track protection between the 2 controlled points and thought it was safe to enter those

limits". When asked if he verified his limits as required by GEI 10.10b (Q/A 63), the Grievor answered that "I didn't go through any controlled point". When asked in the next question if he verified his limits "prior to putting on at the crossing", the Grievor answered "The mileage points yes".

[26] What is noticeably absent in these answers – which were evasive at worst and non-responsive at best – was verification by the Grievor of the key information of which track was the *north* track and which track was the *south* track.

[27] It was unclear on the evidence why the Grievor would not have taken the important and critical steps to verify his limits for which track he was to put on, if – as he stated – he could not tell which track was north and which was south and if – when he was confused – he did not seek clarification from anyone to assist him. Nowhere in his evidence does the Grievor indicate he took *any* steps to verify which track was the *north* track and which the *south* track before putting onto the *north* track. Those steps could have included contacting his crewmates, or returning to a point where he was sure of his directions, to verify his position. To compound this situation, although his evidence was that he understood that a train was expected at his limits, the Grievor did not wait for that train to pass, which would have been another option for him to confirm for him which track was which, given he had an ETOP for the south track, so any train would be passing on the *north* track.

[28] Rather than take any of those types of efforts to verify which track was which, the Grievor made the decision to – as the Union described it – "guess" and he put his equipment on the track, following what he "*thought"* was the south track, but for which he had taken no steps to verify was the south track.

[29] He stated (at Q/A 25):

> I entered the first track [of the parallel tracks] thinking it was the south track, I announced that I was entering the south track on channel 1, there was a contracting boom truck that was beside the track and I put on and backed up so I could get service for my ETOP and the overview. I did my initial brake test as I backed up approx. 3000 ft for service. As I was in the machine I saw the train traveling my direction on the same track. I was going to attempt to put the machine in reverse to avoid the collision and then saw I didn't have enough time so I quickly removed myself from the machine before the collision.

[30] At Q/A 37, the Grievor's evidence was that he felt he had complied with CROR General Rule A as he "thought I was being safe"; and that he also felt he complied with CROR Rule C as – if he had not – he "wouldn't be here today".

[31] It is unclear how the Grievor felt he was being "safe" and was acting in compliance with the Rules, when he admitted to unresolved confusion as to which track was which and took no steps to verify that information before he put his backhoe on the track.

[32] The Grievor described that he had put on at that crossing "maybe 6 times" since 2018, and that he always verified which track he was on (Q/A 26-27), although he did not explain how he did so. He later stated he had worked at this job location "15 to 20 times" throughout his career (Q/A 48), and that he had never noticed there was no signage for north or south track at this location before (Q/A 28).

[33] Nowhere in his evidence does the Grievor explain *how* he verified which track was which when he put on the tracks at that location on the previous six time, given his confusion on April 24, 2023 as to which track was north and which was south. There was no evidence, for example, that the Grievor suggested at any point to Company officials that he had been unable to verify which track was north and which was south in the past, including when he put on the track the other six times.

[34] To prevent the hazard of "collision" which was noted on the job briefing, the Grievor stated that "To prevent a collision I would do a DTS and peer to peer if I stop with multiple track units. Run through limits it would be stop and record signals" (Q/A 40).

[35] The Grievor denied in Q/A 55 that he was told by Ms. Morgan Stephan about a Chief Bulletin Notice Directive but stated he learned about it from another employee. That Bulletin required that an employee is to "call another rules qualified employee not in your immediate work group to validate your authority, and the location you wish to put on or enter the main. This conversation must be in writing with time of validation for both employees. Documentation must be kept for a minimum of one day".

[36] Ms. Stephan was brought in for questioning. She indicated she did not discuss this Bulletin directly with the Grievor, but that she sent an email "to all my employees on the west end on the Clearwater sub" and that she sent the Chief Directive on the 14th. [of

April]. She also testified that on the 19th, she received "a text message from Mr. Gill to confirm his TOP on the west end that he was going to be putting on track on the clearwater sub and a confirmation time". She also stated she had no reason to believe the Grievor did not understand the Bulletin, nor did he seek any clarification of it and that he would not have contacted her by text on the 19th if he had not understood its requirements.

[37] Mr. Gill indicated at Question 57 – after Ms. Stephan's evidence was given – that he was not aware of the Bulletin and that the first time he saw it was the day of the Investigation. He was then asked why he complied with the Bulletin on April 19th, but not on April 24, 2023? It was the Grievor's evidence that on the 19th, he was in cell service and the day of the incident there was no cell service at the crossing "but I did have a verbal conversation with Foreman McKenzie prior to going down to the crossing" (Q/A 59).

[38] Once the Grievor put on at the crossing, his evidence at Q/A 67 was the had "reversed roughly 3000 ft came to a stop and pulled up my overview on the computer". When asked in the next question if he broadcasted what track he was on and the direction of his travel once he was on the tracks, he stated that "Prior to putting on I broadcasted the mileage point and south track and reverse". As the Grievor had no way to know which track was north and which was south, this broadcast was inaccurate that he put on the *south* track, as would have been any confirmation made of that event with another employee.

[39] The Grievor's evidence was that he did not realize he was on the wrong track until the "train was coming around the curve, and I thought RTC made a mistake and it wasn't till I jumped out and noticed he was on that track" (Q/A 71). Yet, the Grievor also admitted that he was confused as to which track was which, yet he put on the track anyway. The Union described the Grievor's actions as "guessing".

[40] The Grievor admitted in the next question that he was not in a "suitable position to properly observe the approach of a train from either direction or either track" and in the next question that there "was no sight line as I was east of the curve". While there was a video, the Grievor did not watch it as it was noted by the Company IO that he was "still processing through the trauma", but the Union rep viewed the video (Q/A 73). The Grievor

noted it was only “a minute” after he exited the backhoe that the train made contact with the backhoe (Q/A 76), which would have been traumatic indeed.

[41] While the Union representative also asked Mr. Gill some questions, those questions were summarizing the responses sought by the Union, and asking Mr. Gill to confirm those summaries, which is otherwise known as “leading” your witness. That type of evidence is not helpful to an Arbitrator. It is, however, a difficult issue to avoid, tripping up even seasoned counsel. The Union representative’s questions also strayed into the territory of Argument, which is best left to the hearing.

[42] At Q/A 83, the Grievor stated: “I am deeply sorry with what occurred on that day and what I put the managing and engineering team as well as the train crew through that were all involved”.

[43] The Grievor was ultimately discharged. As made clear in the JSI, this Grievance was filed disputing that decision. The Union filed a Grievance and advanced it to Step III.

The Merits: Arguments

[44] The Joint Statement of Issue filed by the parties for this dispute is extensive and summarizes the key arguments.

[45] The Company argued the ultimate discipline of discharge was just, reasonable and warranted given these egregious facts. The Company argued the Grievor was negligent and his failure to comply with numerous safety rules caused the Collision; that he admitted he was confused as to which track was the south track, but failed to verify which track was which, even though he knew trains were heading towards him on the north track; and was further negligent in where he stopped on the track, where he was not able to see an oncoming train until it was very close. Neither he nor the operator of the Train involved in the Collision had sufficient time to take action to avoid a collision. Further, the Company argued there is no requirement for the Company to install north/south signage at all crossings. All PMO’s are expected to be sufficiently aware of their surroundings to be able to determine direction, with any such confusion being easily remedied by proceeding to a familiar location and verifying their position on a map. Further, the Grievor’s decision to

put the equipment on the track when he remained confused was the cause of the Collision. The Company argued the Union's arguments did not absolve the Grievor of responsibility for the collision. The arguments the Grievor should have had a foreman or was overburdened with tasks have no basis in fact; the Grievor was trained in all of the safety rules and should have complied with those rules; and the Grievor chose to cut corners in regards to safety. The Company argued discharge was a proportional response; that the nature of this offence was particularly serious and is one of the most serious forms of misconduct; and that such misconduct supports discharge, in what is a highly safety-sensitive industry. It argued the Grievor's actions created a serious safety threat to the Company's operations and to himself.

[46] The Company also pointed out the Grievor has a "far from clean record" throughout his almost fifteen years of service and in fact has caused a previous collision, which warrants a significant disciplinary response. Further, it argued CROA jurisprudence supports discharge when collisions have occurred as the result of safety infractions, such as in **CROA 494** and **CROA 3655** and this Arbitrator's decisions in **CROA 4866**, which speaks of repeat offences, where prior discipline has not met its mark; and **CROA 5033**, which speaks to the breakage of the bond of trust in the Grievor to perform his safety-sensitive tasks appropriately. It further argued there are no mitigating factors sufficient to outweigh the seriousness of the Grievor's actions in this case

[47] The Union argued the Company had not met its burden of proof to establish discharge was warranted. It argued the evidence was not clear, cogent and convincing that the Grievor acted in a manner which warranted discharge and that the Company did not appropriately consider mitigating factors.

[48] The Union argued that it was an important mitigating factor "in the Grievor's culpability" that there was a lack of signage at the crossing for north and south, and that the Company "wrongfully abused its discretionary powers" in assessing discharge. It argued that *Re Wm. Scott* considered "intent" to be a mitigating factor and that the Grievor did not "intend" to enter the wrong track, but due to a lack of signage, he "had no choice but to make a guess as to which track he was on". It argued this was an "error" on the part of the Company and should serve to mitigate the Grievor's penalty. It argued the error

was analogous to jurisprudence involving a yardmaster's error of lining a movement for the wrong track on which the Grievor was traveling, in *Re CN and TCRC (Sarginson)* 2016 CarswellNat 2808.

[49] It pointed out the Company installed "north/south" signage at that crossing, after this accident, supporting that such signage was required in that area. It argued the Company's failure to install those signs before this Collision "played a critical role in creating the circumstances that led to this collision" (at para. 58).

[50] It must be noted at this juncture that the Union's reference to an impact on "culpability" under a *Re Wm. Scott* framework confuses the two concepts. The Company is correct that the factors pointed out by the Union would only act *in mitigation* and do not impact the Grievor's *culpability* in the first instance. Under a *Re Wm. Scott* framework, those factors impact the reasonableness of the disciplinary choice, not the underlying culpability.

[51] As pointed out in the factual recital, the Grievor's own evidence demonstrates the Grievor failed to take any steps to verify his limits prior to placing his backhoe on the wrong track, which he was required to do. Compounding his error, he then chose to park where he was unable to maintain sight lines for oncoming trains, even though he knew a train was expected at those limits, and had admitted his confusion.

[52] But for the Grievor's misconduct in failing to verify his limits before putting on the track, the Collision would not have occurred. The Collision resulted from that misconduct and the Grievor is culpable.

[53] The Union also argued that the lack of a Foreman for a Grievor performing tasks on a train track – to ensure the safety of employees, trains and machinery – would have led to less severe consequences. It also argued it was discriminatory for the Company to impose such harsh discipline "when their own failure to provide the Grievor with a Foreman forced the Grievor to perform his own duties as well as those that would be typically performed by a Foreman" (at para. 60).

[54] The Union also pointed out the Grievor was fully cooperative in the Investigation and offered an apology, which it argued was an "important" mitigating factor for the

viability of this employment relationship. The Union argued that given these factors, the Grievor should be reinstated, relying on **CROA 4563** involving a train handling infraction and **CROA 3744**, which was a Rule 439 violation.

Decision

[55] The Union's argument that the Company failed to consider mitigating factors is not persuasive. There were very few such factors in this case to place against the significance of the Grievor's poor judgment in putting upon a track on which he had no limits.

[56] Considering first the jurisprudence, **CROA 4563** does not provide an analogous situation, as argued by the Union. In that case, the Yardmaster had made an error. The Union's argument of analogy depends on a finding that the Company was "in error" for not providing signage at this crossing. No obligation to post that signage at every crossing has been established. While there is reference in the Union's grievance documents to "CN's commitment they must have the sign at all crossings, yet failed to do so", there is no indication where this commitment came from or any other context provided for that "commitment". There is simply no evidence that the Company was required to place north/south signage at every access point, along its thousands of miles of track.

[57] That the Company chose to place north/south track signage after this collision does not demonstrate that it had an obligation to do so *prior* to this Collision occurring. There is also no evidence the Grievor raised any difficulty with his determining north/south on the previous six times he put on this track, that he raised with the Company.

[58] The Union's arguments regarding signage are not compelling. The Company is entitled to assume that its employees will take steps that are necessary to verify their limits before entering any track, if they are confused. In this situation, that could have included waiting for the expected train to pass, given that the train would be using the *north* track. The Company is further entitled to consider that if an employee is unable to make that verification with their own directional sense, they will either take steps to make that determination (such as using the radio to contact a colleague or returning to a known point to get his bearings), and if unable to do so, *they will not enter the track.* There were steps the Grievor could have taken to verify which track was north and which was south. The Grievor chose not to take those steps.

[59] The Union argued the Grievor “had no choice” but to put on the wrong track and “had no choice but to guess”. That is not a persuasive or convincing position, neither does it comply with the Grievor’s obligation to operate the backhoe “safely”. Considering the nature of the offence, and given the audience of this Award, it is unnecessary to emphasize the importance of track protection as a vital safety rule in this industry. The Grievor was responsible for the safe operation of this equipment. Given the importance of track protection in this industry, it is not the case that employees should be “guessing” as to which track they have limits for. That is not how this industry operates. Putting on a wrong track is a significant and serious issue, as was demonstrated in this case by the Collision which occurred. That the Grievor was able to escape his backhoe with about “a minute” to spare was indeed fortunate. However, his actions put not just his own safety into jeopardy, but also the safety of the oncoming Train crew.

[60] The traumatic nature of this event was demonstrated in the Grievor’s own inability to watch the video at the Investigation, given he was still processing the trauma.

[61] Considering the Grievor’s record, while he had no active demerits and was a long-service employee at fourteen plus years, his record is positive for a lengthy suspension for a previous on-track collision, which is an aggravating factor for discipline. In **CROA 4563**, the Grievor had a “relatively clear record”. This Grievor’s record here is positive for a previous, on-track collision.

[62] Finally, while the Grievor *was* cooperative and apologetic in the Investigation, he offered no explanation for why he put his backhoe in the track given his stated and unresolved confusion for which track was correct, and in fact suggested he *was* in *compliance* with important safety rules. That meant the Grievor in fact thought it was appropriate to ‘guess’ which track to use, rather than take any steps to verify his limits.

[63] These facts are distinguishable from **CROA 3744,** which involved an on-track collision caused by a Rule 439 violation, which is distinguishable in facts from putting equipment on the wrong track. It is a three paragraph decision where the Grievor underestimated the time it took to stop and felt he had the train under control. In that case, the Arbitrator held that the Grievor had “recognize[d] his error” and would “pay greater

attention to his duties and responsibilities in the future, leading to the Arbitrator exercising his discretion to reinstate the Grievor.

[64] The Company provided seventeen authorities to support is position. Given this is an expedited process, not every authority will be mentioned and several are not relevant. Several of the cases are short, with not enough detail to understand the background of the violation: for example, **CROA 3655**.

[65] Ultimately, it is up to the Arbitrator to consider all of the facts and circumstances specific to each event to assess the reasonableness of discipline. Prior jurisprudence has limitations for the second and third *Wm. Scott* questions.

[66] It is recognized in the jurisprudence in this industry that safety infractions are very serious offences. In **CROA 2020**, the Grievor was found to be "gravely negligent", when he did not proceed at a restricted speed – as required and was required to jump from his cab to avoid injury in the collision which occurred due to that negligence. In a short decision, his assessment of 40 demerits leading to discharge was upheld.

[67] The label of "gravely negligent" can also be applied to the Grievor's judgment in this case, which led to the same need for the Grievor to jump to protect his life.

[68] **CROA 494** involved a fatality, which did not occur in this case. That case is also dated, being decided fifty years ago, in 1975, before the *Wm. Scott* framework was developed. **CROA 4457** involved a short service employee and an assessment of 25 demerits relating to a shoving movement, where the grievor failed to release handbrakes, and a sideswipe occurred due to the improper use of the beltpack. It is distinguishable. **CROA 4886** involved a locomotive engineer of thirty-six years' service who did not acquire authority before entering track who entered. However, the grievor in that case had a poor disciplinary history and been reinstated twice, the last time on a Last Chance Agreement. Those facts are also distinguishable from this case.

[69] In **CROA 4489**, six cars jumped the track due to rough train handling, which is not as significant as an the on-track collision that occurred in the present case. In that case, it was emphasized by the Arbitrator that "if the grievor lacked information", he could have sought that information. In that case, it was found the grievor was "working on

assumptions without have checked them during a job briefing or confirming them" with his Conductor. That statement bears some similarity to the present case, however, even minimal demerits put that grievor into a dismissible situation, which is not the case here. A culminating incident was found and the mitigating factors found insufficient to justify substitution.

[70] **CROA 5033** involved a short service employee of 8 months and an improper securement test. In that case, twenty-eight cars rolled down the track due to the Grievor's negligence. While the incident and level of service are distinct from this case, in that case it was determined that the Grievor demonstrated a level of ambivalence and carelessness which was a significant issue in a highly safety-sensitive industry. The Grievor's acceptance of responsibility was insufficient to outweigh the other aggravating factors and did not attract discretion to reduce that penalty of discharge.

[71] As noted by the Court of King's Bench, the Supreme Court of Canada has affirmed that it is appropriate to look at labour arbitral jurisprudence regarding the concept of progressive discipline, as "[t]he theoretical basis for the progressive discipline approach as been amply developed in the arbitral jurisprudence": *Henson v. Champion Feed Services Ltd.* 2005 ABQB 215 at para. 53, commenting on statements made by the Supreme Court in *Cabiakman v. Industrial Alliance Life Insurance Co.* 2004 SCC 55 at para. 64. While progressive discipline focuses on the Grievor's potential for rehabilitation, it does not prevent the imposition of discharge for serious, single incidents.

[72] The question in a progressive discipline model is whether the nature and degree of the misconduct warrants discharge. "Chances" to improve under a progressive discipline model may – or may not – be appropriate, depending on the misconduct and even the industry, as each case must be addressed within its factual context.

[73] That the discharge decision must be contextual and not be taken in a summary fashion, but *also* must be proportional – up to and including discharge - was recognized by the Supreme Court of Canada in *McKinley v. B.C. Tel* 2001 SCC 38 (CanLII). In *McKinley,* the issue of dishonesty was addressed, although the decision has been accepted to apply broadly to other types of misconduct.

[74] It is well-recognized that a key question is whether the employment relationship remains viable or is irrevocably broken. As a result, more serious incidents can properly attract more serious discipline under a progressive discipline model, even up to and including discharge for a single, serious incident.

[75] Part of the concerns addressed in the concept of progressive discipline – especially for culminating incidents – is that an employee must not be lulled into a "false sense of security" that their misconduct was *not* serious, through a lack of previous discipline for their other misconduct; and also should also be given an opportunity address their misconduct, if that chance is warranted. However, this also brings into play the importance of whether the Grievor has demonstrated he or she has *insight* that a poor choice or judgment call *was* in fact made by them; takes responsibility for that decision; is aware of how that behaviour can be avoided in future; and commits to not making the same mistake, in the same way again. It is why Arbitrators are alert to this type of attitude, so it can contribute to their assessment of whether the employment relationship remains viable. This cannot be demonstrated where a Grievor does not acknowledge there *was* even misconduct in the first place, resulting from his poor judgment.

[76] That is, regrettably, the case for this Grievor.

[77] While the Union argued the Grievor would not make the same error again and therefore the relationship was not fractured beyond repair, the type of insight and accountability needed to be confident in that statement was not demonstrated in the evidence. The Grievor maintained he ***was*** following his safety obligations. The Grievor did not demonstrate an understanding he failed to verify limits of which track was north and south before putting on, even in the midst of his confusion, even though that decision became obvious through his other answers. While the Grievor stated he "thought" he was on the right track, he offered no evidence as to why he had that thought. Instead of understanding he should have verified which track was north and south, and of the steps he could have taken to do so, the Grievor in this case steadfastly maintained he *was* acting safely throughout. While the Grievor apologized for the effects of the Collision, he did not have *insight* into what he did wrong.

[78] The Grievor's level of service and apology are not sufficient to demonstrate the bond of trust between the Grievor and the Employer remains viable and that he should be reinstated, whether on a "last chance" basis or otherwise.

[79] As noted in **CROA 5033:**

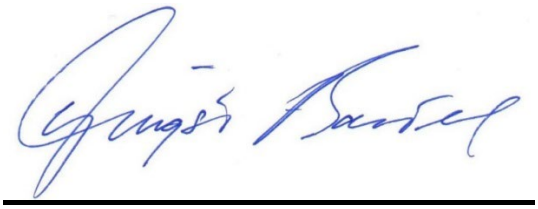
> The bond of trust that the Grievor is capable and able to perform his safety sensitive tasks appropriately and correctly has been irrevocably broken by the Grievor's conduct. I can find no basis on these facts to disturb the reasonable discipline of discharge assessed by the Company (at para. 48).

[80] The Company has met its burden to establish the discipline was just and reasonable, in all of the circumstances.

[81] The Grievance is dismissed.

I retain jurisdiction to address any questions related to the implementation of this Award,

I also retain jurisdiction to correct any errors and address any omissions, to give this Award its intended effect.



February 10, 2025

CHERYL YINGST BARTEL
ARBITRATOR