# CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

# CASE NO. 5152

Heard in Edmonton, March 11, 2025

Concerning

**CANADIAN NATIONAL RAILWAY**

And

**UNITED STEELWORKERS, LOCAL 2004**

**DISPUTE:**

Mr. Landers Appeal against discharge: "*failure to adhere to GEI 11.1,11.3,11.8 and CROR track unit speed while operating spike CN 67392 on February 27th, 2024, on the fort Frances sub resulting in a track unit collision."*

**JOINT STATEMENT OF ISSUE:**

Union's position:

1. Mr. Landers was removed from service pending the Formal Statement which was held on February 27th, 2024.
2. The Union filed the grievance on April 10th 204, appealing the discharge.
3. Mr. Landers service date as a 2016/04/14
4. The Union contends that the Company has not taken these mitigating factors into account as the Discharge is excessive, unwarranted as the statement outcome was predetermined and "Not fair and impartial".
5. The Union request the company expunge the discharge that caused termination of points, and make Brother Landers whole for all loss of earing, including but not limited to benefits, interest, Seniority and CCS
6. The Union requests that Brother Landers be returned to his original job of Operator GRP 2 without loss of pay or seniority.

Company's position:

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

**For the Union:**
**(SGD.) R. Hanson**
General Chairperson

**For the Company:**
**(SGD.) M. Boyer**
Senior Manager Labour Relations

There appeared on behalf of the Company:

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|---|---|
| A. Hernandez Gutierrez | – Labour Relation Associate, Edmonton |
| R. Singh | – Senior Manager Labour Relations, Edmonton |
| S. Matthews | – Senior Manager Labour Relations, Toronto |
| T. Ullrich | – Occupational Health Nurse, Edmonton |
| A. Liaquat | – Specialist LR & HR, Edmonton |
| C. Fremont | – Director Labour Relations, Montreal |

A. Harker – Manager Work Equipment, Edmonton
M. Belanger – Manager Prairie Production/Engineering, Winnipeg

And on behalf of the Union:
D. Teolis – USW Staff Representative, Sudbury, ON
R. Hanson – USW Prairie Chief Stewart, Winnipeg, MB
C. Kramer – USW Local 2004 President, Lloydminster, AB
J. Landers – USW member – Vanderhoof, BC

## AWARD OF THE ARBITRATOR

*Background, Issue & Summary*

[1] The Grievor was employed as a Group 2 Machine Operator, which was a safety-sensitive position. He worked out of Winnipeg, Manitoba and was only qualified to operate certain equipment in that group.

[2] One piece of equipment was a “Spiker”, which is further described, below.

[3] This Grievance was filed against a discharge assessed to the Grievor after a collision on the Fort Frances subdivision occurred on February 27, 2024 between the Spiker he was operating and a Holland welding truck.

[4] The Union conceded that some form of discipline was appropriate, but argued that discharge was excessive.

[5] This Grievance therefore raises an assessment of the second and third questions of the *Wm. Scott* framework, being a) was discharge was “just and reasonable”?; and, b) if not, what discipline should be substituted?

[6] For the reasons which follow, upon review of all of the arguments, evidence and authorities filed, discharge was an appropriate response.

[7] The Grievance is dismissed.

*Facts*

[8] It is necessary to outline the facts of the collision and background of the equipment being operated, to assess the aggravating and mitigating factors. A “Spiker” is operated by a crew of 1 to 3 people and is used to “drive the spikes into the ties through the holes

in the plates" (Company submissions, at para. 16). It weighs 22,500 lbs and is described by the Company as being "very heavy".

[9] Between February 19, 2024 and the date of the collision on February 27, 2024, the Grievor had operated this same Spiker – CN67392.

[10] On February 27, 2024, the Grievor was operating the Spiker on the Fort Frances subdivision between Signal 811 at Rocky Inlet and Signal 562 at Farrington.

[11] The crew had completed work at the first location and were traveling to the "second location" on the track. The Grievor had two passengers with him, Mr. Dies and Mr. Desautels, who were also qualified operators, who he was transporting to the second location.

[12] Mr. Dies was also a Machine Operator Group 2. He noted that this shift started at 0700, at the Nickle Lake siding and that he was traveling in the Spiker to the work location. He confirmed that the Grievor had a conversation with "Frank" (Mr. Cellamare) about "*issues he was having with his brakes*" and that these issues were also mentioned on the "*previous cycle*". Mr. Dies confirmed that the Grievor had announced on the radio while traveling to the work location that his "*brakes were performing poorly and that the rail heater (machine directly behind him) gave him extra room to stop*" (at Q/A 11).

[13] He noted the job was performed fine at the first location and that the Spiker then travelled to the second location. He then stated:

> As we were approaching, I heard the Holland announce that they were stopping at the work location. Once I heard the Holland had stopped Jeff began to apply his brakes. Immediately he noticed his brakes were not engaging. Sensing his panic I instinctively also began to try to apply the brakes. Once I stepped down on the brake, they felt unresponsive, during the struggle. Jeff and myself immediately were trying to get the attention of the two Holland employees.
>
> Fortunately, they were able to clear the track in time. Once the two Holland employees cleared, Jeff pressed the emergency stop button. The spiker unfortunately continued momentum down track without sings of slowing down. Realizing a collision was inevitable myself and Ethan decided to exist the track unit as safely as possible (Q/A 11; emphasis added).

[14] I am satisfied that on February 27, 2024, the Grievor was aware he had been following a Holland welding truck on the track, which was proceeding ahead of him. I am

also satisfied the Holland welding truck had communicated by radio that it was coming to a stop at Mile 79, which communication was heard by Mr. Cellamare, who was at the second location and by Mr. Dies – one of the passengers traveling in the same cab as the Grievor.

[15] While the Grievor's evidence was that he did not hear this radio broadcast (Q/A 53); I prefer the evidence of Mr. Cellamare and Mr. Dies that this radio broadcast was made and Mr. Dies' evidence that it could be heard in the cab of the Spiker. The Grievor either knew – or should have known – the Holland truck had stopped at Mile 79 and should have been prepared to stop and avoid a collision with that equipment.

[16] It is not disputed that where the Holland truck had stopped was on the other side of a "blind curve" from where the Grievor was traveling with the Spiker. Evidence was provided of what the Spiker saw at that location. The "blind curve" is evident.

[17] The Grievor was required to be qualified in CROR, which are federally mandated rules which govern this industry. The Grievor had a previous track collision in 2021, for which he received a 26-day suspension. As part of that discipline, the Grievor had completed training on these rules in May of 2021.

[18] The Grievor was also subject to General Operating Instructions ("GOI"), GEI-11 "Track Unit Operation", which required him to abide by "Track Unit Speed". As noted in the CROR, "Track Unit Speed" is defined as "[*a] Speed that (a) permits a track unit to stop within one-half the range of vision of equipment or a track unit".*

[19] To determine what that speed *is,* the Grievor was required to perform a "Distance to Stop" (or "DTS") test of his equipment. I am satisfied that the DTS test was to be done both when the Grievor began work and when he moved to the second location, later that same day, given that changes in weather can impact that result.

[20] The Grievor maintained he was unaware of the obligation to perform this *second* DTS until the Investigation. I am satisfied the Grievor should have known of that requirement and that he failed to undertake a second DTS when he moved, as was required.

[21] The Grievor had performed one DTS test upon beginning his work on February 27, 2024. From that test, the Grievor determined that when traveling 8 mph he was able to stop in 180 feet. As he did not perform another DTS when the Spiker was later moved from the first to the second location, this is the only information he had regarding stopping distance of his equipment. This was despite his stated concern with his brakes.

[22] The Spiker travelled from Mile 76.24 towards the Holland welding truck.

[23] The download from the Spiker demonstrated that the Grievor was operating the equipment at 17 mph going around this blind curve near mile 79.

[24] The Grievor's evidence was that he attempted to apply the brakes multiple times to try to stop the Spiker as it approached the Holland welding truck. Mr. Dies also indicated he also tried to break the Spiker along with the Grievor. Ultimately, the Grievor applied the emergency brake.

[25] Alan Harker, Manager of Equipment, filed a Memorandum into Evidence. Mr. Harker had examined the "speed data" from the Spiker. He stated:

> An in-depth examination of the speed data further illuminates the situation, highlighting the probable "non-adherence to track unit speed. Noteworthy instances include the spiker's acceleration to 11 MPH at 13:52:42 a subsequent increase to 17 MPH at 13:57:19. However, the data also reveals at 14:00:38 the spiker while travelling at 15 MPH had deliberately and aggressively decreased speed with the collision occurring at a reduced speed of 3 MPH at 14:00:00, indicating that the braking system was operating as intended.

[26] The Union objected at the Investigation to certain of Mr. Harken's information as "*leading and judgmental*". Only the factual statements have been considered, so it is unnecessary to address this objection.

[27] I am satisfied it was after he came around the blind curve that the Grievor saw the Holland welding truck and applied the brakes.

[28] The Company also offered the evidence of Mr. Procewiat, Work Equipment Manager, at the Transcona Rebuild facility. His evidence was that when the Spiker was taken to the Transcona Work Equipment Shop on March 6, 2024, the brakes were tested and were found to be "*functioning... prior to any repairs being started*".

[29] The Union provided an Affidavit of Mr. Miller, a Mechanic at the same shop, who stated that he was present when the repairs were completed, and that there were deficiencies in the brakes, namely that the brake shoes were "*exceptionally worn on the inside of the wheel, especially on the rear*" and that the rear braking cylinder was leaking. He also gave an opinion that this would "*severely compromise*" "*stopping this machine*" in "*inclement weather*". Attached to his Affidavit are pictures of the brake shoes from the Striker, and a new brake shoe for comparison.

[30] Regardless of the condition of the brakes, a second DTS Test would have allowed the Grievor to understand *how* this Spiker was affected by the worn braking shoes noted by Mr. Miller, prior to the collision with the Holland welding truck, when travelling at 17 mph, which was the speed the Grievor chose to travel with the Spiker as he was approaching the Holland truck.

[31] Mr. Cellamare was interviewed as part of the Investigation into this collision. He has been a mechanic for 10 years, in a 15-year career at CN. He confirmed he was the mechanic assigned to the Prairie Region Rail Gang during the work cycle of February 20 to 28, 2024. He noted he was "*out with the gang on track performing repairs as they came up*" (at Q/A 19). Mr. Cellamare's evidence was that no equipment issues were brought to his attention by the Grievor at the job briefing on February 27, 2024. However, Mr. Cellamare did recall a conversation with the Grievor where the Grievor indicated to him that on the previous cycle (i.e. not during the February 20 to 28 period), "*he was having intermittent issue with the deadman cutting in and out of deadman to service. Also, he stated that while doing his DTS it was taking longer to stop than usual*" (at Q/A 32). That is a reference to the deadman brake. He also stated that he rode with the Grievor and "*checked the operation of the brakes while in travel and work mode. No issues were noted during this time*" (at Q/A 33).

[32] Mr. Cellamare also stated that he had heard the Holland truck broadcast over the radio that he was coming to a stop at the second location. Mr. Cellamare heard of the collision via a cell phone call. When he walked back and spoke to the Grievor, Mr. Cellamare stated he was told by the Grievor that when the Grievor applied the brakes,

the machine seemed to ‘speed up’ instead of ‘slow down’ (at Q/A 31). The download evidence indicated that was not, in fact, what occurred.

[33] The Grievor provided a handwritten statement, which was filed into evidence at his Investigation:

> Traveling West on the Fort Frances Sub approaching work location and applied the brakes to realize they weren’t engaging. In informed the passengers I was unable to stop we both tried to apply brakes to no avail, then pressed the [illegible] to nothing then the emergency [illegible] to no response from the brakes. Both passengers’ safety exited the machine and I still had time to warn holland that I was unable to stop and they exited their truck and I braced for impact. Earlier in the shift I announced that I needed extra space due to lack of brakes. Repairs are noted in the log book that there has been [illegible] issue (emphasis added).

[34] The Grievor confirmed he had operated the Spiker every day between February 20 and 27, 2024 and that a daily inspection was performed of the machine each day. The Grievor’s evidence was he told “Frank” [Mr. Callemare] earlier when travelling to the first location that “*you need to check these brakes, and showed him how long it takes me to stop*”. He further stated that he “*did not allude to anything to be wrong, and from what I could tell he did not look at the brakes*” (at Q/11).

[35] While Mr. Cellamare stated that no issues had been raised with him by the Grievor for the work cycle February 20 to 27, 2024, he also stated that on the morning when he rode the Spiker from the backtrack to location one, the “*operators were saying that their stopping distances were a lot longer*” (at Q/A 45) and that he rode the Spiker to “*confirm the operation of the brakes and found no issues other than the stopping conditions were longer due to weather*” (at Q/A 45).

[36] I am satisfied that for Mr. Cellamare, the Spiker was able to stop appropriately on February 27, 2024 when Mr. Cellamare was in the machine, considering the weather.

[37] It was the Grievor’s evidence he did not receive any “support” when he raised issues with the brakes, although at the Investigation he was of the opinion it should not have been operated (at Q/A 41). The Grievor’s evidence at the Investigation was also that he was only “then” familiar with GEI 10.3 regarding the requirement for a second DTS test.

[38] The Grievor's evidence was he had issues previously on this Spiker "*with the Deadman system and weak brakes*" (at Q/A 21) but that he did not notice any issues with the braking system during the morning inspection on February 27", but that "*it wasn't until I did my DTS that I felt the breaks were weak*".

[39] This is an important admission when considering the Grievor's subsequent choice to travel at 17 mph, even with "weak" brakes.

[40] The only DTS was performed early in the day, well before the collision with the Holland truck. The Grievor confirmed he performed a DTS when leaving the backtrack and that the results were at a speed of 8 mph, he had a distance to stop of 180 feet. The Grievor stated that at that time the weather was blowing snow, and the rails were "a bit slick". He stated that "frost" was noted for rail conditions in the job briefing.

[41] He also confirmed that "collisions" was a noted risk at the job briefing, with "*controls"* being "*DTS and peer to peer*".

[42] He stated that neither he nor the mechanic inspected the breaks "*agai*n" when he noticed the weak brakes. He did not speak to Mr. Poloski – who is also a mechanic who was present at the job briefing – about his equipment at the job briefing.

[43] While Mr. Poloski's evidence was that he was approached by the Grievor after with the statement from the Grievor that he had talked to Mr. Poloski about the brakes that day, Mr. Poloski clarified with him that he had <u>not</u> talked to the Grievor about the brakes that day. The Grievor then left and came back 10 minutes later and stated it was Mr. Cellamare he had spoken to.

[44] Mr. Poloski confirmed the Grievor had never spoken to him about the brakes on the Spiker.

[45] It was noted in the Investigation that Mr. Dies performed the daily inspection on the Spiker on February 27, 2024.

[46] When asked how he was in compliance with GEI 11.1 "if" he had "*noticed issues with the braking system and were unable to stop safely*", his answer was:

> In my opinion I was in control based off of my last DTS. I was attempting to stop long before the work location. As per the rule, I was not in compliance (Q/A 43; emphasis added).

[47] When asked in what way he was in compliance with "Track Unit Speed", the Grievor answered *"[a]ccording to the rule I was not apparently*" (at Q/A 43).

[48] He noted the weather conditions on leaving location one were "*windy, frosty*" but that he did not perform another DTS (AT Q/A 46) and that "*now*" [at the Investigation] he was familiar with GEI 11.3 requiring another DTS.

[49] He conceded he did not comply with that rule.

[50] When asked what speed he was travelling "*from the first location mile 76.24 to the second location mile 79*", the Grievor answered "*I knew I was not going 20 MPH, but not positive on the actual speed*" (Q/A 56).

[51] He acknowledged after seeing the evidence that he was travelling at 17 MPH, and that he began to apply the brakes at 1400 feet from the 79-mile board. The distance from when he came around the blind corner and the Holland truck was estimated by the Grievor as "*probably 800 or 900 feet*".

[52] Although the download evidence was that the Spiker was decelerating, the Grievor disagreed that the machine was "*operating as intended*" (Q/A 61). He conceded he did not make a radio broadcast as he was "*trying to get the machine stopped. I waved at them through the window*" (Q/A 65).

[53] He also disputed that Mr. Cellamare inspected the brakes that he "*just observed me do a DTS. But did not say anything*" (at Q/A 66). He stated he thought the brakes were insufficient and brought that up to a mechanic; but was not compliant with the BMO training for a brake failure. He noted in future if there were any issues, he "*will make sure it is not operated*".

[54] At the end of the Investigation, the Grievor noted he was "*thankful that no one got hurt*" but believed "*there were compounding issues that I believe led to this event occurring*" and that he would not wait for mechanics to pull a machine from service in the future.

*Arguments*

[55] The Company argued the Grievor failed to comply with Track Unit Speed, which led to this collision. It argued the Grievor should have – but did not – perform a second DTS when he left the first location. It also argued the Grievor should not have operated the Spiker any faster than the DTS test, which was 8 mph, as the Grievor only had knowledge that this machine could stop in 180 feet when going 8 mph. It argued the Grievor knew what his speed was; could see the blind corner; and was aware that there was a welding truck on the track ahead of him. It also argued he should have – but did not – radio the Holland welding truck as he came around the curve. It further argued the braking was obviously working, as the Spiker went from 15 mph to 3 mph in 22 seconds, indicating the brakes were in fact working and were not "defective" as argued by the Union. It pointed out this is the Grievor's second collision, and he also has a nine-month suspension on his disciplinary record. It argued it had attempted progressive discipline with the Grievor, but that was unsuccessful in changing his behaviour.

[56] While the Union argued the Grievor's choice to travel at a speed above his initial DTS and failing to perform a second DTS could attract "some" corrective action, it argued that discharge was excessive. The Union argued the Investigation was not fair or impartial, as Mr. Cellamare's statements contradicted his testimony and the Grievor's "credible" account, which cast doubt on the narrative of the employer. It argued the questions were "constructed in a way to take sides" and that the Company failed to recognize the eye witness statements of Mr. Dies and Desautels. It argued the Company failed to maintain the equipment in safe working order; that there was no wilful negligence or reckless conduct on the part of the Grievor; and that the Company had failed to recognize systemic issues, such as severe weather conditions, which impacted braking efficiency; and the reporting of braking issues by the Grievor to Mr. Cellamare without corrective actions. The Union argued a number of mitigating factors, with a focus on the fact that the brakes on the Spiker were weak and non-responsive; that the Grievor asked for support; and that he did not receive that support; that the Grievor had made it known the brakes were not operating properly; and that he failed to obtain support form the Company or its mechanics for his concerns. It argued the brakes failed to engage when the Grievor tried to stop and that the Grievor took all of the actions he could to try to stop

the Spiker, including staying on the equipment as his two passengers jumped out of the equipment. It argued that when the Company itself has caused or contributed to a collision, that is a mitigating factor for discipline.

*Analysis & Decision*

[57] There is no question that the Grievor was culpable for this collision. The question raised is whether discharge was just and reasonable discipline.

[58] From a review of the entirety of the evidence, I am satisfied that discharge *was* just and reasonable in all of the circumstances.

[59] There are multiple actions/inactions of the Grievor which led to this collision, regardless of the state of the brakes and in fact certain of the actions should not have been taken by the Grievor *when* he was concerned about the brakes. His concern and those actions are inconsistent.

[60] I am satisfied that had the Grievor made several different choices on February 27, 2024, and this collision could have been avoided had he done so, regardless of how the weather was impacting braking distance.

[61] The footage of the Holland truck's dash camera was entered into evidence. It was viewed by this Arbitrator multiple times, to obtain a sense of this collision.

[62] That footage shows two individuals jumping from the Spiker into the snow as it approached the truck, before the Spiker collided with the welding truck. This was not a "*slow*" bump. The impact moved the Holland welding truck approximately 15 feet to the west, causing damage to the Spiker and the Holland welding truck.

[63] The Union and Company provided different types of evidence regarding the operation of the brakes. The Company's evidence was they were "functioning properly", while the Union's evidence was that the brake shoes were very worn.

[64] However, that is not the only evidence of the braking effort on the Striker. The issue of the braking force must be considered by looking at *all* of the evidence, and not just the

percentage left on the brake shoes and a mechanic's opinion that "would" have impacted stopping distance.

[65] Looking at the other evidence, I cannot agree with the Union that the brakes "*failed to engage*" as the Grievor maintained. The objective download evidence does not support the Grievor's evidence. The Company established there was braking force acting on the Spiker with the download evidence that the Spiker reduced its speed from 17 mph to 3 mph in 22 seconds. That is the result of braking effort. I am satisfied that indicates that there *was* braking force acting on the Spiker.

[66] That evidence is inconsistent with the Grievor's evidence the brakes did not "*engage*" when he tried to stop.

[67] Further, while the Grievor stated immediately after the accident that the Spiker seemed to "*speed up*" that was also inconsistent with the objective evidence from the download. It showed braking effort, just not sufficient to stop the Striker in time before it collided with the Holland truck.

[68] It must be recalled the Grievor maintained the Spiker's brakes were weak and that he had requested the mechanic who was assigned to his production gang – Frank Cellamare – ride with him to determine if there was an issue with the brakes. Mr. Cellamare rode with the Grievor and did not note anything unusual from the ability of the Striker to brake, *beyond what would be expected for the weather and he did so when he was on the scene that day.* That is also relevant evidence, from an individual trained to assess that effort.

[69] I am satisfied there *was* braking force acting on the Striker. It is not the case the brakes *"failed to engage*" as the Grievor maintained. While the brakes may well have been affected by weather, that is why employees must perform DTS tests; so that they are brought to an understanding of what the stopping distances *are* in that situation.

[70] It is difficult for the Grievor to maintain these brakes were "weak" and he was therefore unable to stop because of that, when he chose not to perform a DTS to determine what that stopping distance actually *was* and at what speed, before he left

location 1. A second DTS test would have aided the Grievor to understand how much his stopping distances had been impacted by the frosty rails, or by any ice on the brakes.

[71] That the Grievor made a choice not to perform that test to gain that understanding – even with his stated knowledge the brakes were 'weak' that day - is not the fault of the Company.

[72] It is no answer he did not know a rule which he was supposed to know regarding this test.

[73] Even if there were no rule requiring that test, it was always open to the Grievor to perform that test, if he had the concerns with the brakes of the Striker. Had the Grievor determined the appropriate "distance to stop" in the weather conditions that faced him, he could have avoided this collision.

[74] In any event, it is unnecessary to resolve this conflict in the evidence, as *even if* the Union were correct that the brakes were very worn, this is information the Grievor already suspected *and yet he chose to act in a manner that was inconsistent with that concern.* His conduct demonstrated negligence, carelessness and a significant lack of judgment and concern for the operation of the Spiker. The Grievor chose a) not perform a DTS to determine stopping distance of his equipment when he moved given his concerns; and b) then "overdrive" the one DTS test that he had *by moving down the track at 17 MPH* (2x more than the speed he had tested), when he did not know his stopping distance at that speed.

[75] That was particularly reckless behaviour given his stated concerns with the Striker's brakes.

[76] Due to the Grievor's own inactions in failing to perform another DTS when he moved locations, the Union was unable to challenge the facts of stopping distances for this Spiker and unable to demonstrate the Grievor properly applied the brakes within that distance and that the Spiker failed to stop due to faulty brakes.

[77] In addition, the Grievor significantly outdrove the only test that *had* been performed for how quickly the Spiker *could* stop: The Grievor had not performed a DTS at a speed greater than 8 mph, yet chose to operate the Spiker at 17 mph, at a time when – by his

own evidence – his brakes were weak. After operating at twice his DTS, it is no answer for the Grievor to claim failure of the brakes as a cause of this collision, when the Grievor did not even test his stopping distance at the speed he chose to operate, being twice the speed he ***had*** earlier tested. The Grievor's evidence was he did not know how fast he was going but "under 20 mph". That is a startling answer. To not have an awareness of his speed, when a DTS was performed at only 8 mph is further evidence of negligence and carelessness.

[78] The Grievor had no explanation for why he felt it was safe to operate the Spiker at a speed of more than twice his DTS Test, down this track with weak brakes.

[79] Next, the Grievor failed to hear the radio broadcast that I am satisfied had occurred on February 27, 2024, to know that the Holland welding truck had stopped ahead, to maintain situational awareness of other equipment on the track. The Grievor knew – or should have known – that the Holland welding truck was stopped, as both Mr. Dies and Mr. Cellamare heard the radio broadcast that the Holland welding truck communicated. That broadcast should have caused him to slow his Striker or even choose not to proceed around a blind corner at twice his DTS speed.

[80] The Grievor offered no explanation why Mr. Dies and Mr. Cellamare heard that broadcast, but he did not.

[81] Next, the Grievor also chose to operate at this high speed around a "*blind corner*" even with the knowledge of the Holland welding truck ahead of him, which he should have known had stopped at Mile 79. That action compounded the issues in this case.

[82] Finally, the Grievor's own evidence actually serves to aggravate his discipline: If the Grievor had significant concerns with the brakes as he stated he did, then it is even more confounding why he chose to operate the Spiker at twice the speed at which he had tested his DTS, around a blind corner, with a known truck on the track, ahead of him. It is startling for him to do so in this situation, and with his stated concerns with stopping distances.

[83] I am satisfied that by the time the Grievor saw the Holland truck after he came around the blind corner, there was not enough time left to bring his Striker to a stop, due

to his own excessive speed and lack of understanding of stopping distances in those conditions.

[84] This collision was caused by these multiple errors of the Grievor, which lead to his inability to stop the Striker before it struck the Holland welding truck. The Grievor was simply operating very heavy equipment too fast to bring the Spiker to a stop in time to avoid the collision.

[85] The circumstances surrounding this collision present multiple aggravating factors for discipline. The only mitigating factor is the Grievor's length of service at 11 years. However, the *quality* of that service is also relevant; and in this case that presents a further aggravating factor. At the time of the incidents at issue the Grievor had two significant suspensions. He was dismissed in 2019, but reinstated in September of that year as a result of an agreement between the Company and the Union. He was assessed a nine-month suspension for that incident, which occurred in August of 2019 and involved traveling outside of his authority limits; failing to report the incident and "failure to be forthcoming during the investigation".

[86] Neither is the Grievor a stranger to on-track collisions with a Spiker. In March of 2021 he received a second suspension, this time 26 days, for a Track Unit collision between a Spike Puller he was operating and a contract excavator. He was also required to complete a five day "rules course" at that time. That this is now the second collision for the Grievor is an aggravating factor for discipline.

[87] Those two events should have put this Grievor on notice that his employment was precarious, especially given both were of a serious and significant nature.

[88] Turning to the jurisprudence, on-track collisions in this industry are considered as significant and serious events, which are capable of supporting serious and significant discipline, including discharge. As noted by this Arbitrator in **CROA 5097,** the concept of progressive discipline "does not prevent the imposition of discharge for serious, single incidents" (at para. 71). It is the "nature and degree of the misconduct" that must be considered (at para. 72).

[89] As noted, in *Re Wm. Scott* a “searching assessment” by an Arbitrator must be undertaken when discharge is assessed. The broader question is whether an individual should lose his job.

[90] That collisions are serious misconduct in this industry can be seen as early as **CROA 2020**, where the Grievor did not proceed at a restricted speed and had to jump from his cab to avoid injury. He was held to have been “gravely negligent” and the assessment of 40 dm which led to his discharge was upheld.

[91] The Company also relied on the recent decision of this Arbitrator in **CROA 5097.** In that case, a grievor with 14 years of service failed to confirm the appropriate track for which he had clearance; placed his equipment on the wrong track; and had to jump out to avoid a collision with an oncoming train. Discharge was also upheld.

[92] While I accept the collision in that case was more significant than the one at issue here, after viewing the dashcam footage filed by the parties, I am satisfied this collision was significant. The dashcam footage from the truck provides a unique perspective that is impactful.

[93] When the same type of behaviour is repeated, that is an aggravating factor for discipline. That raises concerns for arbitrators and employers alike. When the same type of incident is repeated, the concern is that the previous discipline has not “met its mark”: **CROA 4886**. In such circumstances, the employee may have used up his “chances” to demonstrate to the Company his or her rehabilitation potential.

[94] Like in **CROA 3655**, the Grievor’s choice to travel down the track at twice his DTS Test speed, was careless and reckless behaviour, especially if – as he maintained – he believed his brakes were “weak”. In such circumstances, the Grievor should have been going particularly *slow* and not twice as fast as his DTS Test speed.

[95] I must also disagree with the Union that it is only the consequences which *occur* which are relevant in a disciplinary analysis. While it is true that no fatalities occurred in this case, the railway is recognized as a highly safety sensitive industry. Safety rules – such as those which underpin DST tests – are not optional. To suggest it is only consequences which *occur* which should be disciplined is to encourage employees to

take the chance that their own misconduct will not be of that type. It could encourage negligent, careless or reckless actions which ultimately lead to those consequences.

[96] That type of thinking should not be encouraged.

[97] Further, it is often the case in this industry that multiple pieces of equipment can be working on the same track. Individuals can also be moving around standing equipment, as well as be in it, and so can be at risk when collisions occur. In this case, two individuals had to jump out of the Striker as it was moving when a collision became imminent. Had there not been snowbanks for them to fall into, this could have led to more serious and significant injuries.

[98] **CROA 5097** was a case where it was the Grievor's second on-track collision. The first collision had resulted in a one-year suspension. Like in that case, in this case the Grievor offered no credible explanation for his behaviour.

[99] Discharge was found to be a just and reasonable response in **CROA 5097** for that second collision.

[100] Like **in CROA 5097**, there are very few mitigating factors in this case to place against the numerous aggravating factors lined up against this Grievor. The Union has argued the Grievor was "candid" and "forthright" in the Investigation. When a collision occurs, the evidence of the behaviour is obvious. It would have been difficult for the Grievor to deny that a collision had occurred. The Grievor did not provide explanations for his behaviour, such as why he was operating the Spiker so quickly. Instead, he became fixated on the braking issue. That fixation ignored that if he hadn't been overdriving his DTS Test speed, then the braking effort which the evidence demonstrated did occur may well have acted to avoid this collision.

[101] Neither am I convinced that the Grievor took appropriate responsibility for his misconduct. He was fixated on the issue of weak brakes, yet at the same time failed to realize that the concern he had with those brakes should have led him to corresponding cautious behaviour, but did not: It is no explanation to state the brakes were "weak", and then to "overdrive" the only DTS Test performed. The Grievor failed to acknowledge that his speed was a key factor in this collision.

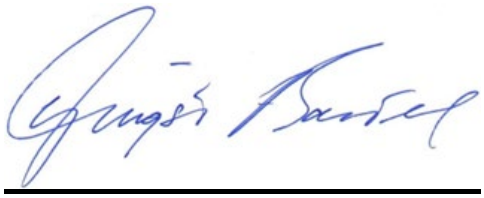
[102] If the Grievor had the concerns with the brakes that he maintained he had, it is very curious that he did not – on his own initiative – simply repeat the DTS test to understand how his braking capacity was operating, prior to following the Holland truck down this track. That could have provided valuable information to him. He failed to do so, or even to proceed cautiously, which would have been warranted if he felt he had “weak” brakes.

[103] The Grievor has failed to provide the Company with confidence in his judgment to perform his safety-sensitive tasks on the track, in a way which supports his own safety and that of his colleagues. In fact, it is the opposite.

[104] Upon review of all of the evidence and factors, including the use of progressive discipline with the Grievor relating to a previous track collision; and the significance of the Grievor’s disciplinary record, regrettably for this Grievor, the ultimate discipline of discharge was just and reasonable.

[105] The Grievance is dismissed.

I remain seized with jurisdiction regarding the implementation of this Award; to correct any errors; and to address any omissions to give it the intended effect.



**April 22, 2025**

**CHERYL YINGST BARTEL**
**ARBITRATOR**