

Lawyer for families of rail workers killed in 2019 Canadian Pacific derailment: “The railway companies are a law unto themselves”

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In February 2019, Canadian Pacific (CP) Rail Train 301 derailed on a steep grade near Field, British Columbia, killing the three crew members on board—Andrew Dockrell, Dylan Paradis and Daniel Waldenberger-Bulmer. In the three years that have followed the accident, the families of Paradis and Dockrell have been engaged in a legal battle to uncover the truth about what happened.

In March 2022, the Transportation Safety Board (TSB), a Canadian federal agency tasked with investigating accidents on the railways, released its grossly overdue final report into the derailment. It was a scathing indictment of the criminal policy of Precision Scheduled Railroading (PSR) that has produced hazardous working conditions akin to those that prevailed on the railroads in the 19th century. (See: Teamsters to do nothing after inquiry documents Canadian Pacific’s responsibility for fatal Field, B.C., derailment)

Rank-and-file workers at CP Rail established the CP Workers Rank-and-File Committee that same month in response to the sellout of their struggle by the Teamsters union for improved health and safety conditions and better work scheduling. In an interview with the WSWs, Pam Fraser, Paradis’ mother, stated, “We thought that the Teamsters union would be a supportive partner in our initiatives to effect change but they went by the wayside,” she stated. “Unions don’t seem to have any power anymore. Workers cannot even strike.”

The WSWs spoke recently with Regina, Saskatchewan-based lawyer Tavengwa Runyowa, whose legal team is representing the families of Paradis and Dockrell.

This is part one of a two-part interview. Part One examines Runyowa’s views on the TSB report. Part Two will discuss the regulatory system more broadly and how it is rigged in favour of the highly profitable railroad operators.

We began by asking Runyowa to describe his reaction to the TSB report. “There’s a major disparity between what the public believes that the TSB can do and what it actually does,” he noted. “By law, the TSB is not supposed to find fault or attribute blame. They can only make recommendations to the Transport Minister who decides whether or not he is going to accept them. From my understanding, the companies do not even have to accept them and have often fought recommendations in the past.

“Investigations without accountability are often nothing more than process and at most a shaming of the companies to do the right thing, and in most cases they already know what they should be doing. So, coming in from the last three years, we had low expectations for the report, knowing generally how the law is structured, but also knowing how this specific

group of TSB members were likely to handle it. It seems that this board will bend over backwards to facilitate the train companies.

“Unfortunately, the issues that led up to the accident are not new. Questions around safety and maintenance have pervaded the railway industry. So, there was nothing in the report that revealed something new that we can act on.

“A lot of the issues that were found, such as dysfunctional brakes, seem like common sense. It does not take an expert to realize the danger in sending people out in -30 degree [Celsius] blizzard conditions. Frankly, I do not believe the board should be congratulated on all the things that it identified. We all knew these issues, but it was good to have formal verification.

“There is nothing that can be told to the railway companies in terms of the industry and how trains work that they do not already know. So that is why we say the report is underwhelming. This is a case of an industry and companies that know very well what they are doing. They can ultrasound and CT scan themselves better than the ‘TSB doctor’ ever could. Ultimately, the TSB’s lack of sanctions power means that many TSB investigations amount to a disproportionate use of resources for a process that Parliament built to preclude accountability.”

Turning to specific recommendations in the report, Runyowa explained how they fell short, remarking, “One of the most important things that made it to the recommendation phase was the use of automatic brakes. All well and good. But the board did not expressly state that railway companies should not be sending their workers out into -30 degree weather in such terrain under such conditions, as a matter of human rights and basic human decency. That did not make it into the recommendations. I believe it was deliberate, because once the TSB starts to talk about labour relations, Transport Minister Omar Alghabra is unlikely to touch it, probably because it will anger the railway companies that his Government is overly keen to accommodate.

“But why was the crew out in -30 degree weather? Because the trains have to keep moving, apparently, at any cost. Why did the trains have to keep moving? Because they want profit and improvement in their efficiency ratio. Why the ‘at any cost’ approach? Because that is the only way to keep squeezing profits out of the railway companies’ operations and improving their operating ratios that larger shareholders demand. But if the labor relations component regarding worker fatigue, mandates to work in prohibitive weather, and other such issues are not addressed, the TSB’s recommendations are largely symbolic. Lots of bark, but no bite. When Canadians die, are injured, or have their property destroyed in railway incidents, they deserve regulators with true bite, not just a glorious bark.

“It is not to say the TSB recommendations are not important. They are. But they only trim around the edges of the problem. If the train crews do

not have the knowledge to make sure things are done safely and are too scared to be vocal about safety issues, then the TSB's recommendations literally miss more than half the assignment."

Runyowa took issue with the TSB's conclusion that the Field derailment was not preventable. He said, "During the final minutes of the press briefing on the TSB report, TSB Chair Kathy Fox was asked by a journalist if the accident was preventable, and I believe she indicated it could not be prevented."

"This is a big inconsistency. How can she say something is not preventable, when the report clearly states that multiple reports were made around that stretch of railway and that workers had filed safety reports that the company knew of but did nothing about? The board cannot look at what went wrong, say they made recommendations to address the issues, and then call it an 'accident.'"

"This is an example of the TSB bending over backwards way beyond its statutory mandate in order to protect the railway companies. It is all about trying to avoid more threats of lawsuits from the railway companies because the TSB members fear the railway companies more than they fear the actual public who they are supposed to be protecting under their Act."

"But if TSB investigations reveal that the railway companies knew about, but ignored, safety-related issues, the TSB cannot logically classify the consequences of such conduct as an unpreventable 'accident.' No, such 'accidents' don't just happen. The evidence clearly shows that the incident was preventable. The workers' many reports about the hazards of that track of railway appear to have been ignored."

In 2020, documents obtained by CBC News through a freedom of information request showed that CP Rail threatened the TSB after their lead investigator, Don Crawford, tried to refer the Field derailment to the RCMP federal police service for a criminal investigation. After CP Rail threatened the TSB with lawsuits if it did not remove Crawford from the case, the TSB Chair Kathy Fox made a grovelling apology to CP Rail. Crawford was removed from the case.

"That conversation tells you everything you need to know about the relationship between government and the railway companies," Runyowa stated. "They are more powerful than regular corporations."

"It was absolutely inappropriate. This is one of those cases of the tail wagging the dog. The referee is bowing to the players of one team at the expense of the other. There is never going to be any progress on this file with respect to railway safety as long as government is subordinate to private industry, especially in this case."

Runyowa's legal team was given access to a Memorandum of Understanding (MOU), signed in 2015 between the RCMP and the TSB, which outlines a policy of referring potentially criminal conduct to the RCMP. This procedure has been in place since the late 1990s and was reaffirmed in 2020.

Runyowa stressed that in the aftermath of the Field derailment, the TSB was well within its authority to make the referral to the RCMP. He commented, "It was clear that as recently as 2015, the Board understood that the statutory prohibition against attributing blame did not prevent the TSB from referring the Field, BC incident to an authority that could find blame, including criminal blame, which is exactly what the TSB's 2015 MOU with the RCMP provided for."

"Field happens in 2019 and for whatever reason the TSB and RCMP meet up in 2020 and decide to get rid of the reference to criminal conduct. But even the balance of the remaining text of the MOU still says that they can refer cases where the RCMP may have an interest."

"So, the criminal referral bar is low. The TSB does not have to allege that the railway companies did anything criminal. They merely direct the RCMP to look into whether the actions in question may fall under the RCMP's jurisdiction."

"The TSB has expertise that no other authority has in the highly specialized railway industry, but there is a limited exchange of

information with the RCMP. The second stage of the MOU outlines what can and cannot be shared between the TSB and the RCMP, which provides the relevant balance between making criminal referrals, which is permitted, while limiting the excessive sharing of information with the RCMP, which is not permitted."

"For example, the TSB Act may ban their investigation from being used by police in any legal proceedings. So, the police can look at these reports, but they will probably have to go and reconstruct their own case. The report itself cannot be used as evidence and the investigator cannot be compelled to testify unless there is a court order to that effect. At the same time, the Act also states that the TSB findings can provide the basis for someone else to infer guilt."

"But the TSB had even stronger grounds to make a criminal referral to the RCMP on the Field, BC case. The TSB had information on multiple safety reports being made, including by Andrew Dockrell the day before he died on that same spot. So, the TSB almost had evidence that far exceeded the threshold it needed to make the referral to the RCMP."

"The TSB could have easily referred the case to the RCMP because the referral threshold in the MOU is low. There does not have to be beyond a reasonable doubt that a crime has happened to say the RCMP might have an interest. The question is, why, despite numerous deaths in the railway industry over the years, has the TSB never made a criminal referral to the RCMP?"

To date, Runyowa explained, the TSB has zero records of any referrals made to the RCMP pursuant to the MOUs. "We looked into how many cases the railway companies have ever been criminally investigated and charged in, and we found none," he explained. "If it had not been for the intense media scrutiny, it is unlikely that the RCMP would have ever mounted a criminal investigation into the Field, BC derailment almost two years later in 2020. After paying no attention to such incidents for decades, the RCMP was dragged reluctantly into finally doing its job."

Runyowa continued that in their statement of defence to the lawsuit filed by Fraser, Dylan Paradis' mother, against the Board members, the members claimed that the MOU only applies to cases where the RCMP is not knowledgeable about an incident.

"This makes no sense for two reasons," he stated. "Firstly, when someone dies, the police are always called, even if they do not investigate. Even when there is a serious injury, the police will often show up. So, it is insincere for the TSB to say it only refers cases that the RCMP does not already know about. The RCMP is going to be knowledgeable about any death."

"Secondly, the TSB is like an industrial luminol—it shines a special light on a surface to see certain things that may not be obvious to the public and even regular police officers with no railway or forensic training. It cannot argue that the RCMP can always investigate on its own because the RCMP are not experts in railway derailments. A homicide detective is not qualified to look at a tangled heap of metal and determine potential criminality. The expertise of the TSB is needed to provide that context."

"The TSB cannot argue that it will only refer cases that the RCMP does not know about because that will almost always be the case. The context that the TSB can provide in distinguishing between accidents and potential criminal incidents is invaluable."

A further factor protecting the rail operators from any criminal investigation following a deadly incident like the Field derailment is the presence of company police forces on the railroads. The CP Police and CN Police are formally tasked with enforcing federal laws on the railways in Canada and the United States.

"The RCMP's official position when something like Field happens is to defer to the CP or CN police," Runyowa explained. "We have correspondence from RCMP Commissioner Brenda Lucki, who basically declined to confirm that it is improper for the CP and CN police officers, who are company employees, to take part in the investigation of any death

or serious injury on the railways.

“When we asked the British Columbia RCMP to reconcile why it was investigating when their commissioner was indicating that the railway police had jurisdiction, the BC RCMP deferred that question back to Commissioner Lucki who has never provided a clear response.

“This is the genesis of the problem. We know there have never been any referrals or investigations because almost all police forces, including the RCMP and a few others, refused to fully disclose what their jurisdiction on the railways actually was. This murky relationship tells us that the railway companies are a law unto themselves. The public police forces, and also Alghabra, who told my clients that the Railway Safety Act places jurisdiction over their cases in the hands of the railway police see them as a law unto themselves. We even have communications from the Minister stating that if the RCMP sees themselves as second fiddle to the railway police, then they are not arriving on the incident scene with the mentality of preserving evidence or with the consideration that the company itself that employs the private police might be responsible. Because if the RCMP understands that it is starting from this premise that it is investigating the company, the necessary implication is that the railway police should have nothing to do especially regarding the content of those event recorders. We also do not know what happened to the derailed cars that were removed from the scene, and whether they were destroyed before the RCMP began its investigation.”

Runyowa pointed to specific a concern raised by the initial refusal of the RCMP to accept jurisdiction in the Field derailment. “The biggest concern we have is the integrity of some of the evidence being compromised,” he said. “Whenever you have a potentially criminal incident, if clear evidence has been tainted and excluded by the courts, it weakens the case. With Field, we do not know what evidence was handled or mishandled before the RCMP investigation began almost two years later. We do not know what evidence ended up in the hands of the CP police and what was shared with CP corporate.”

To be continued



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