

**CANADIAN RAILWAY OFFICE OF ARBITRATION
& DISPUTE RESOLUTION**

CASE NO. 4817 -and- 4818

Heard via Video Conference and in Ottawa, Ontario, April 14, 2022

Concerning

CANADIAN NATIONAL RAILWAY COMPANY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

4817 The assessment of a 25-day suspension to Conductor Muhammad Noor of Edmonton, AB, for “failure to comply with the instructions of company officer(s) on December 31st, 2019.”

4818 The discharge of Conductor Muhammad Noor of Edmonton, AB, for “fraudulent and bad faith injury claim on December 30, 2019 specifically the reporting and misleading the Company on the circumstances of such claim while putting your bags in the back of a taxi at Scotford Yard, and your conduct unbecoming an employee when speaking to the taxi driver.”

JOINT STATEMENT OF ISSUE:

4817 On December 30, 2019, the Grievor worked as the Conductor on assignment L52851-30. At the end of the tour of duty, he reported having sustained an injury after being hit in the head by the tailgate of a taxi while placing his bags in the back of the vehicle.

After reporting the injury and completing paperwork as required, the Grievor was permitted to go home with his return to work forms. Before leaving, he was told to speak with Assistant Superintendent Mike Peterson or Company Officer Stephanie Wright before seeking medical treatment, if required. The following day, December 31, 2019, the Grievor saw his family physician, without first notifying a Company supervisor. Ms. Wright called the Grievor on January 2, 2020, at which time he informed her that he had sought medical treatment.

The Company conducted an investigation and assessed the Grievor a 25-day suspension for failing to comply with the instructions.

The Union’s position is that disciplining an employee for seeking medical treatment while off duty is inherently unfair. The Company provided no evidence to contradict the Grievor’s testimony that he was in a great deal of pain and had need of medical attention. Furthermore, the

Company failed to take significant mitigating factors into account. The discipline was unwarranted, and in any case excessive, and should be expunged, or in any case reduced, and the Grievor's record made whole.

The Company maintains that it is very important that it is advised immediately when a worker seeks medical attention, as there are time requirements for CN submitting to WCB.

Furthermore, as the Grievor reported a head injury, regulations might require clearance by OHS prior to returning to work. The Grievor failed to comply with directions to keep the Company apprised of his status, which removed the Company's opportunity to be involved in the injury investigation and to exercise proper reporting protocol of his alleged injury. Based on the foregoing, the suspension assessed to the Grievor was fully warranted.

The Company disagrees with the Union's contentions and has denied the request.

JOINT STATEMENT OF ISSUE:

4818 On December 30, 2019, the Grievor worked as Conductor on assignment L52851-30. Near the end of the tour of duty, as the Grievor and his crewmates were boarding a taxi to return to Walker Yard, the Grievor indicated he was hit on the head by the tailgate of the taxi closing on him. The Grievor became visibly upset and swore repeatedly at the taxi driver. The Grievor subsequently reported the incident as an on-duty injury.

On January 10, the Grievor attended an investigation regarding the injury, after which he was assessed a 25-day suspension for failing to comply with the instructions of a Company officer. Subsequently, the Grievor attended an investigation on February 18, 2020, at which time the Company presented new evidence in the form of a video recording from the taxi's inward-facing camera. The Grievor was subsequently discharged on February 20, 2020.

The Union contends that the Company in fact had access to the video evidence prior to the January 10 investigation, but failed to disclose it at that time. By withholding this keystone evidence, the Company failed to provide the fundamentals of a fair and impartial investigation. Accordingly, the investigation and discipline should be considered null and void ab initio. Notwithstanding the above, the Union also maintains that the Company has failed to meet the burden of proof to demonstrate fraud or bad faith on the part of the Grievor, or in any case justify the ultimate discipline of an outright discharge. Accordingly, the discipline should be expunged, or in any case reduced to a level short of discharge, and the Grievor's record made whole.

The Company maintains that the January 10 investigation was a very separate matter from the instant case. The Company's legal counsel only received a copy of the video footage from the inward facing camera of the transport cab on February 3 2020, after a court order was served on Yellow Cabs compelling them to produce the video to the Company. Once reviewed, the video evidence showed that the grievor was not in fact hit in the back of his head by the rear door of the taxicab and showed the grievor acting aggressively and swearing at the taxi driver, all of which warranted its own investigation. Further, at the subsequent investigation, after being shown the video evidence, the Grievor admitted that the door did not hit him on the head.

The Company's position is that the Grievor knew that this injury did not occur as reported, and his actions were therefore considered fraudulent and made in bad faith. The Grievor's subsequent actions towards the cab driver were also inappropriate conduct not condoned by CN. The Company submits that the bond of trust between employer and employee has been severed, and therefore that the dismissal was fully warranted. The Company disagrees with the Union's contentions and has denied the request as its position is that the grievor was culpable for his actions and disciplined accordingly

FOR THE UNION:

(SGD.) R. S. Donegan
General Chairperson

FOR THE COMPANY:

(SGD.) K. MacDonell (for) **D. Klein**
Senior VP Human Resources

There appeared on behalf of the Company:

- K. MacDonell – Labour Relations Manager, Edmonton
- M. Boyer – Director Labour Relations, Montreal

And on behalf of the Union:

- K. Stuebing – Counsel, Caley Wray, Toronto
- R. Donegan – General Chairperson, Saskatoon
- J. Thorbjornsen – Vice General Chairperson, Saskatoon
- M. Noor – Grievor, Edmonton

AWARD OF THE ARBITRATOR

1. This award addresses two separate grievances, involving discipline imposed on the Grievor and ultimately his discharge.

2. Both grievances relate to an incident on December 30, 2019. At the end of the Grievor's tour of duty on that date, he reported sustaining an injury. According to the Grievor, he was hit in the head by the tailgate of a taxi, while he was placing his bags in the back of the vehicle.

First Grievance: 25-day suspension

3. The Grievor reported the injury to the Company, completed the required paperwork, and was permitted to go home. At the time, the Grievor did not believe he required medical care. However, Assistant Superintendent Mike Peterson told the Grievor that he must contact him or Stephanie Wright before seeking medical treatment, should any be required.

4. The Grievor sought medical attention from his family doctor on December 31, 2019. He did not contact Mr. Peterson or Ms. Wright before doing so.

5. The Company conducted an investigation on January 10, 2020 and assessed the Grievor a 25-day suspension for failing to comply with Mr. Peterson's instructions. This 25-day suspension is the subject of the first grievance.

6. The Company submits that it was not attempting to restrict or deny the Grievor's access to medical care. It was merely instructing him to notify the Company beforehand. At the hearing, when asked what would likely have happened if the Grievor had notified officials, the Company explained: "We would likely have sent him through the OIS process to see a doctor in a faster manner."

7. I find that the Company had no authority to require an employee to notify company officials before seeking medical treatment, particularly when the employee is off-duty. There is no basis for this authority in the Collective Agreement, nor did the Company identify any policy, rule or procedure that reasonably requires that the Company be notified before an employee seeks medical attention.

8. There is a long line of jurisprudence holding that an employer cannot require an employee to submit to an examination by a doctor of the employer's choice: *Federated Cooperatives Limited v General Teamsters, Local 987*, 2010 CanLII 98266 (AB GAA) ("*Federated Cooperative*"). Only where strong reasons exist and less invasive alternatives

have been unsuccessful can an employer intrude on an employee's privacy and require him to attend a physician of its choice. On the facts of this case, as a first step immediately following an alleged injury, it was entirely inappropriate for the Company to require notification before the Grievor obtained medical attention.

9. I do not accept that there is a material distinction between requiring the employee to notify the Company before seeking medical attention and interfering with his personal health care choices. Why would the Company require notification if it did not intend to take some steps or provide some direction based on that notification? Indeed, as noted, the Company indicated that had it been notified, the Company would likely have referred the Grievor to a doctor in its OIS process.

10. The Company had no authority to require that the Grievor notify officials before seeking medical attention and it could not properly discipline the Grievor for failing to comply with these unreasonable and improper instructions.

11. The grievance is allowed. The 25-day suspension is removed from the Grievor's record.

Second Grievance: Discharge

12. The Company obtained a copy of a video recording of the December 30, 2019 incident. The recording is from the taxi's inward-facing camera.

13. The video revealed two things:
 - a. the Grievor was not actually struck on the head by the taxi's tailgate; and
 - b. the Grievor became very upset and confronted the taxi driver, swearing at him repeatedly.

14. The Company conducted a second investigation on February 18th, for an alleged fraudulent injury claim. At this time, the Company provided the video recording to the Union and the Grievor.

15. At the February 18th meeting and after reviewing the video, the Grievor acknowledged that the tailgate of the taxi did not hit his head. He maintained, however, that "something" had hit him at that time. The Grievor's evidence at the investigation included the following statement:

As I mentioned, something hits my head and after witness[ing] the video it is not the back door [i.e., the tailgate]. I cannot explain what happened because I still feel that something hit me.

16. In assessing the credibility and reliability of the Grievor's information, I have considered the following factors:
 - a. The video shows that the Grievor was standing by the tailgate of the van. From where he was positioned, it seems highly improbable that he would not have noticed (as he later acknowledged) that the tailgate did not descend and hit his head.
 - b. In the video, in the seconds before he places his hand on his neck (suggesting he has been hit), the Grievor appears to be standing and to have reached his right arm above his head. Given the Grievor's position, it seems

improbable that the tailgate (even if it had descended) would have struck him in the neck or head as he claims.

c. Until he saw the video evidence, the Grievor maintained that he was hit in the head by the tailgate. After he saw the video, the Grievor provided no reasonable or alternative explanation as to what else might have hit him.

d. There was no objective or physical evidence of an injury. No lacerations or bruising were observed, including when his doctor examined him the following day. The symptoms recorded by the doctor are based entirely on what the Grievor subjectively reported. The fact that the doctor took steps to treat the Grievor does not, in my view, lend credibility to the Grievor's version of events. The doctor's role is not to assess a patient's credibility, but rather to consider and explore treatment for the symptoms he reported. Certainly, the presence of physical or objective evidence is not always required to establish an injury. However, in this case and without a reasonable explanation as to what (if anything) hit the Grievor, the complete absence of physical evidence is significant.

17. On a balance of probabilities, I find the Grievor's version of events is improbable and not credible or reliable. I do not accept that "something" hit him on the head while he was placing his belongings in the back of the taxi. Instead, I find that the Grievor knowingly and falsely reported a workplace injury.

18. In addition to this, there is no dispute that the Grievor's behaviour towards the taxi driver was inappropriate. The video shows that the Grievor confronted the driver, was accusatory, and disrespectful. The Grievor's behaviour towards the driver was particularly troubling given that he was not, in fact, hit on the head by the tailgate or at all. On balance,

I find that the behaviour was not a momentary outburst but rather part of a pattern of deception by the Grievor.

19. The Grievor's conduct is certainly deserving of discipline. In assessing what discipline is appropriate in the circumstances, it is significant that the Grievor's active record contained a single reprimand, for running a switch. This is the first time he has been found to be dishonest or disrespectful.

20. That said, the Grievor is not a long service employee and his behaviour in relation to the December 30th incident was disrespectful and deliberately dishonest. The Grievor has not acknowledged any wrongdoing or demonstrated that he understands the seriousness of his misconduct.

21. In my view, in all of these circumstances, the Grievor's deceptive conduct is incompatible with the relationship of trust inherent in the continuation of his employment. The dismissal was therefore appropriate.

April 22, 2022



MICHELLE FLAHERTY

ARBITRATOR