

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

CASE NO. 4864

Heard in Edmonton, September 12, 2023

Concerning

ONTARION NORTHLAND TRANSPORTATION COMMISSION

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discharge of D. Jackson for alleged unbecoming behavior of a Motor Coach Operator on February 12th 2023 at the Barrie Bus Terminal.

JOINT STATEMENT OF ISSUE:

On February 12th 2023, Ms. Jackson worked trip #1216 as a Motor Coach Operator from Sudbury to Yorkdale.

On that particular day, Ms. Jackson had passenger Robert Dunlop riding Sudbury to Yorkdale. Mr. Dunlop had two duffel bags that he wanted to bring on the bus with him. Ms. Jackson informed Mr. Dunlop that the bags were too big to be brought on board and would have to be placed underneath the bus, with an extra charge to do so. Mr. Dunlop went into the Sudbury Terminal and paid the extra luggage fee. Mr. Dunlop then returned to the bus and voiced his displeasure to Ms. Jackson about paying the extra fee.

When the bus arrived at Orillia another passenger boarded with two pieces of luggage. Mr. Dunlop asked this passenger if they paid for the second piece of luggage and they said no. At the next stop in Barrie Mr. Dunlop exited the bus and Ms. Jackson asked Mr. Dunlop to get back on the bus. Mr. Dunlop stated in response that he needed to stretch his legs briefly as he had bad circulation. During this exchange between Mr. Dunlop and Ms. Jackson, Mr. Dunlop asked why he was charged an additional \$15 for the second bag when the passenger who boarded in Orillia was not. Ms. Jackson advised Mr. Dunlop that he was being argumentative and Mr. Dunlop responded that he was not being argumentative but just asking a question. At one point during their conversation Mr. Dunlop advised Ms. Jackson that he was recording their conversation. Ms. Jackson eventually advised Mr. Dunlop that she was calling the police to have him removed as he was being argumentative.

At 18:20 on February 12, 2023 Ms. Jackson informed control (ONTC dispatch) that passenger Dunlop was removed from the bus by the Barrie police.

Ms. Jackson was required to attend a formal investigation on February 21st 2023, for her alleged unbecoming behavior of a Motor Coach Operator on February 12th 2023 at the Barrie Bus Terminal. As a result of this investigation, Ms. Jackson was assessed with 40 demerit points and subsequently discharged for accumulation of 75 demerits.

Prior to the February 12, 2023 incident Ms. Jackson had 35 demerits on record.

Union's Position:

The Union contends that Ms. Jackson was denied a fair and impartial hearing.

The Union contends that the Company did not prove, on a balance of probabilities, that Ms. Jackson acted in an unbecoming manner towards Mr. Dunlop to substantiate termination.

In the alternative, the Union argues that there are mitigating factors which would warrant the removal of discipline, such as but not limited to, Ms. Jackson did her duties as prescribed, by following the Company's excess luggage policy, Ms. Jackson was verbally abused by Mr. Dunlop on two separate occasions during the trip, calling Ms. Jackson a he/she and referring to Ms. Jackson as a "Sir". This a direct violation of the passenger code of conduct and is not tolerated on board Ontario Northland transportation services or in the stations. Ms. Jackson asked Mr. Dunlop to stop, Mr. Dunlop continued, Ms. Jackson felt the passenger was acting irrationally by continuing to argue and refusing to get back on board. Ms. Jackson filed a report of the situation, to the MCS Operations Controller, detailing why the passenger was removed.

The Union submits that the discipline assessed was unwarranted, and in any event, excessive under the circumstances. The Union requests that Ms. Jackson be reinstated without loss of seniority and benefits, and that she be made whole for all lost earnings with interest.

In the Alternative, the Union requests that the penalty be mitigated as the arbitrator sees fit.

Company's Position:

The company disagrees with the Union's claim and submits that Ms. Jackson was given a fair and impartial hearing.

The investigation revealed that there were no indications Mr. Dunlop was escalating their behaviour to warrant the action taken by Ms. Jackson of removing Mr. Dunlop from the bus. The actions of Ms. Jackson constitute behaviour that is unbecoming of a professional Motor Coach Operator.

The assessment of 40 demerits is justified in this instance given the serious nature of the infraction. Prior to the February 12 incident, Ms. Jackson's had 35 demerits on record resulting in an accumulation of 75 demerits in total. In accordance with the ONTC discipline policy termination occurs at 60 or more demerits.

Therefore, in all the circumstances, termination for cause is justified and the grievance should be dismissed.

FOR THE UNION:**(SGD.) M. Kernaghan**

General Chair LE-C

FOR THE COMPANY:**(SGD.) K. Darbyson**

Manager Labour & Employee Relations

There appeared on behalf of the Company:

G. Ryans	– Counsel,
E. Segriff	– Senior Manager Motor Coach Operations, Toronto
K. Mantha	– Labour and Employee Relations Specialist, Toronto
K. Darbyson	– Manager Labour and Employee Relations, Toronto

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
M. Kernaghan	– General Chairperson, Toronto
D. Hayes	– Vice General Chairperson, Central Region, Toronto
P. Boucher	– President, TCRC, Ottawa
R. Finnson	– Vice President, TCRC, Ottawa
D. Jackson	– Grievor, Barrie

AWARD OF THE ARBITRATOR

Background and Issues

- [1] The Grievor is employed as a Motor Coach Operator for the Company. She was hired in May of 2021. On February 12, 2023, the Grievor was operating a motor coach from Sudbury to Toronto, with various stops, including in Barrie.
- [2] The Incident leading to this Grievance took place on February 12, 2023. At that point, the Grievor had twenty-one months of service and 35 demerits on her disciplinary record. Under the Company's progressive discipline policy, termination occurs once an employee reaches 60 demerits.
- [3] The Incident involved an altercation with a passenger, referred to as "Mr. D". Mr. D. boarded the bus in Sudbury and was removed from the bus at the Grievor's insistence at Barrie, which was before he was scheduled to disembark.
- [4] The Grievor was assessed 40 demerits for two forms of misconduct: a) inconsistent application of the Company's Baggage Policy; and b) improperly ejecting Mr. D. from the bus. Her discipline record then stood at 75 demerits. As a result, the Grievor was dismissed for accumulation of demerits.
- [5] The issues in this Grievance are:
- a. Was the Grievor's conduct worthy of discipline?
 - b. If so, was the assessment of 40 demerits reasonable? and
 - c. If not, what disciplinary measure should be substituted?
- [6] For the reasons which follow:
- a. The Grievor's conduct was worthy of discipline for both of the forms of misconduct alleged; and
 - b. The assessment of 40 demerits was reasonable.
- [7] The termination for accumulation of demerits is upheld.
- [8] The parties have agreed to several facts in the JSI. Additional facts are noted in the Analysis section of this decision.

Arguments

- [9] The Company argued the Investigation was fairly conducted; that it had met its burden of proof to establish the Grievor was guilty of misconduct, and its discipline was reasonable. It argued the Grievor inconsistently applied its Baggage Policy and that Mr. D's complaints were legitimate given that inconsistency; that the Grievor gave as her reasons for removal of Mr. D being "argumentative" "chauvinism" and "interrogating customers" which are not valid reasons; that the Union has brought forward facts at the hearing about Mr. D's conduct that were not brought forward at the Investigation, which is not proper in the CROA process; that the Grievor did not know how many customers Mr. D. had actually talked to when she determined he had been harassing passengers; that her unjustified removal of Mr. D left him stranded, without funds to continue; and that the Grievor was expected to have a level of professionalism and tolerance to unruly passengers. It also argued it had received another complaint from another passenger on the same bus that the Grievor's actions towards Mr. D. made that individual feel uncomfortable and afraid she would also be removed from the bus if she asked any questions of the Grievor. The Company argued there were no mitigating factors, as the Grievor was a short-service employee with a significant disciplinary record. It maintained its assessment of 40 demerits was reasonable and appropriate given the Grievor's misconduct; its emphasis on exemplary customer service; and the emphasis in the industry on a high standard of professionalism.
- [10] The Union argued the Grievor was denied a fair and impartial hearing; that the Company had failed to meet its burden to establish the Grievor acted in an untoward manner toward Mr. D; and that in the alternative, there were mitigating factors not appropriately considered by the Company These included that that Mr. D, spent four hours complaining of the luggage fee at every opportunity, harassed other passengers about their baggage and verbally abused the Grievor and misgendered her; and that the Grievor made a "judgment call" that Mr. D. was "causing a disturbance beyond what can reasonably be dealt with by the employee or where health and safety becomes an issue".

[11] The Union argued the Grievor felt Mr. D. was acting irrationally and could become violent when he refused to get back on the bus in Barrie, where disembarking was not permitted. It argued it was reasonable for the Grievor to be fearful of Mr. D. becoming violent in the future if he were not ejected. It also argued that Company officials agreed Mr. D. could be removed from the vehicle. It further argued the Company has not explained why the Grievor would be expected to tolerate Mr. D's harassment when its policy states that harassment will not be tolerated. The Union also argued that the Grievor consulted with the dispatcher regarding her situation, who agreed Mr. D. should be removed.

Analysis and Decision

[12] As this is a discipline issue, the Company bears the burden of proof. The Union argued the evidence must be "clear, cogent and convincing" and requires consideration of the totality of the circumstances: *F.H. v. McDougall*.¹

[13] The Company has relied on two forms of misconduct for its assessment of discipline:

- a. Inconsistent application of the Baggage Policy; and
- b. Improper ejection of Mr. D., from the bus

[14] The Union stated in the JSI that the Investigation was not fair or impartial, but it did not develop this argument in its submissions. I have reviewed the Investigation transcript and did not see any evidence the Investigation was either unfair or was not impartial. The Grievor was asked open-ended questions and provided her explanations of her alleged misconduct.

[15] The framework for assessing discipline is set out in *Re Wm. Scott & Co. Ltd.* ². The first question to be determined is whether there was conduct deserving of discipline. If so, the second question assesses whether that discipline was reasonable, considering both mitigating and aggravating factors in doing so. These include factors such as the seriousness of the misconduct, the Grievor's

¹ 2008 SCCC 53

² [1976] B.C.L.R.B. 98

level of service, the Grievor's discipline record, and whether the Grievor was provoked, although the list of factors is not "closed". If the discipline assessed is not found to be reasonable, the third question is what form of discipline should be substituted through an exercise of the arbitrator's discretion.

[16] The Grievor's termination in this case resulted from an accumulation of demerits of 60 or more under a progressive discipline system. She was not dismissed for the two alleged forms misconduct, but because - when the discipline of 40 demerits was added to her existing 35 demerits - she had reached 75 demerits.

[17] Given this pre-existing disciplinary record, termination would occur if she were assess a total of more than 24 demerits for both forms of misconduct, if established.

[18] The parties have agreed on several facts, as noted in the JSI. In the Investigation, the Grievor noted that Mr. D. began arguing with her about his luggage in Sudbury, which she described as him being a "know it all" and "trying to tell me what our customer baggage policy is". She also said he misgendered her when boarding, by calling her a "he". In the Investigation, the Grievor noted Mr. D's questioning of why another passenger was allowed to bring two bags on "wasn't any of his business". While her Incident Report said that Mr. D. questioned her driving skills, she had a "hard time recalling" when that occurred, during the Investigation. She also claimed two passengers had an anxiety attack due to Mr. D.'s behaviour in questioning her about the luggage policy but did not know their names. She indicated she was "unsure" how many customers Mr. D. asked about their luggage. Her evidence of why she thought he was violent was:

Because he had this issue that started in Sudbury and it carried on the entire trip he was getting worse and something was going to happen and his behaviour would escalate to violence if he wasn't removed.

[19] When asked why the second passenger was allowed to board with two bags, the grievor indicated "I don't remember that incident", and that the "picture looks like its daylight and when I was in Orillia [where the customer boarded] it was dark. That picture looks staged."

- [20] In its Brief, the Union relied on several further facts which were not brought out in the Investigation or in the Report initially filed by the Grievor. These included detailed specifics of an exchange between the Grievor and Mr. D. before he boarded, which were described as “aggressive”. The Union relied on this conduct to support its argument that Mr. D. had been warned about his conduct at the beginning of the trip, and that Mr. D’s abusive conduct as against the Grievor began before he boarded in Sudbury and “continued to escalate over the four hours of the trip; to support its argument that the Grievor ultimately became unable to address Mr. D’s behaviour and was justified in ejecting Mr. D. from the bus. The Company argued none of these facts were brought forward at the Investigation or in the Incident Report, which was unusual if they were considered by the Grievor to contribute to her decision to remove Mr. D. from the bus. Rather, they appeared for the first time in the Union’s Brief. It argued that late arising facts are not appropriate under the CROA model: **AH667**.
- [21] **AH667** found that the CROA model of arbitration “clearly contemplates that there will be no factual surprises at arbitration”. Rather, parties are to address facts and issues prior to reaching the hearing room, through the Investigation process.
- [22] I agree with the arbitrator in **AH667** that under the CROA model, there is no room for last minute factual statements which are not heard under oath or affirmation at the hearing and which do not otherwise appear in the Investigation process or in the documentation.
- [23] That Investigation is the opportunity given to the Grievor to explain her behaviour and to bring forward all bases on which she removed Mr. D. from the bus, which would include any conduct early in the trip. It is curious why the Grievor would not bring out every fact that he or she felt would support her case, during the Investigation process.
- [24] I agree with the Company that the Union’s evidence - presented for the first time in the Union’s brief - regarding conduct of Mr. D. against the Grievor before he boarded the bus and the hearsay evidence from other employees regarding Mr. D. is not evidence that is properly considered in the CROA process.

[25] That said, I do accept Mr. D. was unhappy about having to pay for his extra bag at the beginning of the trip, and that he continued to question the Grievor about her application of that Policy as the trip went on. His frustration was heightened after the second passenger boarded with multiple bags.

[26] Whether that frustration was warranted is the first issue that must be determined.

Application of the Baggage Policy

[27] I accept as a principle that employees who work with the public are held to a high standard of customer service in relation to their interactions with passengers. For common carriers, a driver's actions must "reflect credit upon the organization as a whole" and be "above reproach": *Re Trentway-Wagar Inc. and ATU, Local 1624*.³

[28] I further accept that to do so, a Motor Coach Operator would be expected to apply the employer's policies consistently and fairly and to consider whether a customer's complaint is legitimate, before being dismissive of that concern. Consistent application of policies "reflect[s] credit upon the organization as a whole" and is "above reproach". Inconsistent application of policies is the opposite.

[29] The Company has a Baggage Policy to be applied by its drivers. It states, in part:

Due to space limitations and for the safety and comfort of our passengers, baggage limitation guidelines will be strictly enforced by Ontario Northland personnel

One Piece Limit

Each ticketed passenger is allowed a maximum of one (1) piece of luggage to be stowed in the baggage compartment under the bus and **(1) carry-on which must fit in the overhead compartment of the bus.** Personal items such as purses, briefcases, laptops....are not included in this limit (emphasis added).

³ 1997 *CarswellOnt 6991*, at 4.

- [30] There are also size constraints listed.
- [31] Like on an airplane, a female passenger is entitled to one purse and one carry on piece of luggage, under this Baggage Policy.
- [32] While I accept there is some discretion on the part of Motor Coach Operators in the application of the Company's Baggage Policy, that discretion has to be applied consistently and reasonably to be supported. In this case, it was not.
- [33] The Grievor's evidence was that the second passenger only had a "very large purse" in addition to her carry-on, and that she applied the Baggage Policy fairly and consistently. The Company exhibited a picture of two bags sitting in a seat next to a female passenger, which it argued was the baggage of the second passenger who boarded with two pieces of luggage, while Mr. D. had to check his second bag. Both bags are "luggage" style bags and neither is a "very large purse". The two bags take up the seat next to that passenger.
- [34] The Union took issue with the authenticity of that picture at the hearing, suggesting it was not a passenger on the Grievor's bus. The Grievor in the Investigation suggested it was "staged" as it was dark when the passenger boarded. While the Company argued it was too late in the process to make this objection as it was not brought forward in the Investigation, it is not necessary to address this argument. The Company was able to rebut the Union's concerns with two pictures or "screen grabs" from the bus's own camera from when the second passenger boarded, to support its evidence that she had more than the allowed carry on baggage and further that it was not dark.
- [35] The basis for the Grievor's frustration is made even more obvious when this screen capture is viewed. This camera captures the second passenger boarding the bus with her two luggage bags - shown on the seat in the Company's picture - as well as - with a purse. One piece of luggage is in fact a full duffel bag; the second is a full suitcase type bag. An extra seat was required to accommodate those two bags. This second passenger therefore had two additional bags, apart from her purse. The Grievor's comment that she was not in breach of the Baggage Policy was not credible. This evidence is clear and cogent and supports

the Company's position that the Grievor breached the Company's Baggage Policy and inconsistently enforced it. The second passenger should have been required to check one of those bags, even if her purse was accepted. When this was brought to her attention by Mr. D., she failed to enforce the Baggage Policy.

[36] The evidence also supports a finding that the frustration of Mr. D. was legitimate.

[37] The Company also provided a picture of the Grievor's bag that he was required to stow, which is also "duffel" type of bag. The Union argued in response that this bag was shown "squished down". While that is the case, the fact it *could* be squished meant it could be at least as small - if not smaller - than either of the two bags allowed on the bus with the second passenger.

[38] I accept the inconsistent application of the Baggage Policy - to the detriment of Mr. D. - was culpable conduct which could attract discipline.

Removal of Mr. D. From the Bus

[39] The second basis for discipline was the Grievor's conduct in removing Mr. D. from the bus in Barrie, short of his destination.

[40] I accept that Mr. D. was not blameless in this interaction. While I accept the frustration of Mr. D. with this inconsistent Baggage Policy was not unreasonable, his recourse once the Grievor was not responding to his concerns was to lodge a complaint with the Company upon his arrival at his destination. Instead, he couldn't "let go" of the issue and continued to question the Grievor. Mr. D.'s conduct *is* a relevant factor for consideration under the second question of the *Re Wm. Scott & Co.* analysis – which is whether the Grievor was provoked. His conduct will be addressed at that point in this analysis.

[41] At this point, it must be noted that dealing with argumentative and irritating passengers was a skill which the Grievor was expected to have as a Motor Coach Operator. Encountering such passengers is not unexpected, as noted in *Re Toronto Transit Commission and ATU, Local 113*⁴:

⁴ 1991 CarswellOnt 7180

It is also accepted as a common place proposition that the employer's transit operation represents a public service where unruly and discourteous patrons may create situations that include "provocative" behaviour which the bus operator in exercising a standard of "professionalism" is expected to handle with firmness and self-control.⁵

- [42] The Grievor had been directed not to engage with "provocative" behaviour, but to de-escalate that behaviour or refer the individual to Company officials. That standard is reflected in the Company's policies regarding arguing with passengers:

General Rules

....

G 6. Arguing with Passengers

Bus operators ***must not argue with passengers. Criticism should be received and not made.*** All disputes should be referred to the proper ONTC officials and this manual will be relied upon as justification of conduct.

P 5. Courtesy

Bus operators must extend the ***utmost courtesy*** to the public in all their contacts, as they are the Company's representative and ***must not engage in arguments. When necessary in order to avoid an argument, refer the passenger to Company officials***

(emphasis added).

- [43] The Company's policy *does* recognize that passengers may be removed from the bus by a driver. It sets out two circumstances where that could occur:

P 10. Passengers – Ejection Of

Ejection of passengers is justified for either of two reasons:

- 1) Failure to pay the proper fare or tender proper transportation
- 2) Disorderly or offensive conduct, or when mentally unbalanced or criminally dangerous.

...

[reference to removal of intoxicated passengers]

In either of the above instances and when possible, the Bus Operator should procure the names and addresses of all the passengers as witnesses and forward to their supervisor, also the names of any other witnesses to the

⁵ At pp. 1-2

incident. An Incident Report Form is to be completed whenever a passenger is refused transportation and/or when emergency services are required.

- [44] The Company has issued a more extensive bulletin on “Passenger Removals, Denials and Refusals” to provide guidance to its drivers. Relevant excerpts from that Bulletin are:

Purpose:

This bulletin outlines procedures for dealing with customer-based issues on our motor coach service. It does not remove the decision-making capacity from front line personnel, rather it is intended to provide support and clarify procedures when considering a passenger denial or removal.

Procedure:

Safety of our customers and employees is our number one priority at Ontario Northland. When dealing with customer disturbances or issues, de-escalation techniques should be used as the first step (see Appendix). ***If the customer is causing a disturbance beyond what can reasonably be dealt with by the employee or where health and safety becomes an issue, the employee can consider having the passenger removed from our services or property*** (emphasis added).

...

- [45] There are then listed several factors that should be considered before removing a passenger, including the level of behaviour exhibited, the time of day, the location, weather, age/vulnerability and the point the passenger is at in their journey.
- [46] The “de-escalation technique” listed in the Appendix which are relevant to this situation are to “show you are interested in what the customer has to say” and “watch your tone of voice – ensure it is not hard, bold or confrontational”. While these “techniques” are not particularly descriptive, listening to the customer and assessing whether he has a legitimate complaint – and taking the appropriate action if so - should be self-evident.
- [47] Speaking specifically to the issue of removal, the Bulletin states:

Customers ***can be refused travel or removed from a trip*** on Ontario Northland service ***if they pose a health and safety risk to the operator, other customers or themselves. Motor coach operators are to use discretion and consider all the variables of the situation noted above to protect the safety of all people involved*** (emphasis added)

- [48] It is not disputed that the Grievor got off the bus in Barrie when he was not entitled to do so and that when he did so, he again questioned the Grievor about her inconsistent application of the Baggage Policy. It is also not disputed that he did not immediately get back on the bus when asked by the Grievor to do so, as he should have done. Instead, he kept questioning the Grievor about her baggage decision. I do not accept that “nerve damage” in his legs necessitated him walking outside. I find he got off the bus to continue to question the Grievor about the Baggage Policy. It was at this point the Grievor decided to remove Mr. D. from the bus.
- [49] I have carefully considered the circumstances surrounding Mr. D.’s removal. Several issues arise with the Grievor’s judgment call.
- [50] There is no evidence the Grievor even considered that Mr. D. had a valid and legitimate concern – which he did – and which she would have seen had she taken the time to review the second passenger’s baggage situation, which she did not, since she “could not recall” how many bags the second passenger even had and was incorrect in stating it was one bag and a “very large purse”. Instead, she felt he should mind his own business.
- [51] In failing to take any action or even consider that Mr. D. may be correct, the Grievor failed to apply the appropriate de-escalation techniques, as she failed to listen to the customer. Had she done so – or even considered his point of view – she should have taken action to fairly apply the Baggage Policy and require the second passenger to check her extra bag.
- [52] The Union argued other relevant circumstances were that Mr. D. was bothering other passengers by asking them about their luggage. However, I am not satisfied that Mr. D. asked “multiple” passengers about their luggage. The Grievor stated she did not know how many passengers he asked. I am satisfied he asked the second passenger about her luggage and took a picture of that luggage.
- [53] The Union also noted Mr. D. was listening to a football game without headphones, however it has not been established that he was asked to turn that down or off and would not comply with that direction. The Grievor’s evidence was

she heard it; not that she did anything about it. The Union also relied on the initial encounter before Mr. D. boarded the bus, which I have found is not appropriately considered, other than that he “misgendered” her, which detail she included in the Investigation. I do not find it has been established that Mr. D. caused an anxiety attack in other passengers. In fact, there was evidence the Company was contacted by a different passenger, who complained about *the Grievor’s* treatment of Mr. D, and raised that they were fearful they would be treated the same way if they asked a question.

[54] The Union argued the Grievor made a “judgment call” to remove Mr. D., as the Grievor was concerned he would become violent, even though he had not been violent to that point. I do not find credible the Grievor’s concern that Mr. D was going to become “violent”. There is no evidence to support that concern. There is no evidence that “something was going to happen and his behaviour would escalate”. There is nothing in the exchange before the decision was made to remove Mr. D. that supported that concern; Mr. D. asking another passenger about her luggage did not support that concern; Mr. D. misgendering the Grievor did not support that concern; Mr. D. listening to a football game or getting off the bus in Barrie when he was not entitled to do so and questioning the Grievor also did not support that concern. I am not satisfied there were any other health and safety concerns from Mr. D’s behaviour either towards the Grievor or other passengers.

[55] I am also not satisfied that Mr. D’s conduct was so egregious that the Grievor should not have been expected to continue to deal with him to his destination. While Mr. D. was annoying when he couldn’t “let go” of the unfairness in the application of the Baggage Policy, it is relevant that it was the Grievor’s own conduct in applying that Policy unfairly and inconsistently led to that frustration. Even if that were not the case, the Grievor was expected to deal constructively with argumentative passengers as part of her job requirements, as noted above. She had been given direction and guidance on how to do so, including considering whether Mr. D’s claim was legitimate and taking action if so.

- [56] Considering all of this evidence, I am satisfied that neither of the two circumstances for ejection have been established in this case. The Grievor had the means to address Mr. D's frustration with a fair application of the Baggage Policy and chose not to take that route. I am satisfied upon review of all of the evidence that the Grievor's decision to remove Mr. D. from the bus was because he was argumentative about her application of the Baggage Policy and wasn't minding his own business. I find the Grievor was displeased that Mr. D. was questioning her judgment, she failed to even consider the baggage of the second passenger, felt it was none of Mr. D's business how she applied the Baggage Policy and removed him from the bus for being a "know it all" and questioning her judgment.
- [57] This did not justify his removal. Passengers on a motor coach can be disruptive and argumentative and drivers are instructed how to address that issue. The Grievor's exercise of discretion to remove Mr. D. from the bus was unreasonably exercised. I am satisfied the Company has met its burden of proof to establish the Grievor's behaviour was culpable and deserving of discipline. I find that stranding Mr. D. without cause - and without sufficient funds to get on another bus - was serious misconduct for a Motor Coach Operator, and that it negatively impacted the Company's reputation with both Mr. D. and with his daughter and with a further passenger who was fearful of being treated the same way by the Grievor.
- [58] The Union argued the Company agreed with the Grievor's decision. The evidence does not go that far. No Company officials were on the bus. The Company's dispatch report indicates that the Grievor told the Company she had removed Mr. D. for "harassing passengers", and she was told to fill out an occurrence report as soon as possible. It has not been established that Mr. D. was in fact "harassing passengers" as she reported. All Company officials knew what the Grievor told them. Relying on incorrect information to dispatch does not result in the Company condoning the Grievor's behaviour.

Was the Discipline Excessive?

- [59] The second question is whether discipline of 40 demerits for *both* forms of misconduct was excessive.
- [60] The progressive disciplinary system used by the Company provides that demerits can be issued for misconduct and dismissal will occur once 60 demerits are reached. This is a “culminating incident” system and is a reasonable progressive discipline system. This type of system has also been used in the railway industry. In such a system, the last incident can result in dismissal due to accumulation, even if on its own it would not normally attract that level. .
- [61] Even if 40 demerits *is* found to be excessive and is reduced through the exercise of arbitral discretion, the discipline would have to be reduced to *24 demerits or less* to move the discipline under this 60 demerit threshold. I cannot agree that the two forms of misconduct should together attract 24 demerits or less.
- [62] I will address each form of alleged misconduct separately.
- [63] Considering first the inconsistent application of the Company’s Baggage Policy, the Union argued the Grievor had discretion under the Policy and exercised it appropriately. There are two difficulties with this argument: First, the evidence of the Grievor on this point is not credible. The Grievor’s evidence was that the second passenger only had a “very large purse” and one bag, which did not breach the Baggage Policy. However, the camera capture clearly shows the second passenger boarded with *two* bags and a purse. The second passenger not required to check her second bag, even accepting that her purse was exempted.
- [64] Second, the Grievor’s discretion regarding baggage was to be applied consistently and fairly. In this case, I am satisfied it was not and that this led to the increasing frustration of Mr. D. I am also struck by the fact that the Grievor had an opportunity to address this issue when it was first raised by Mr. D and so de-escalate the situation completely. She could have looked at the baggage, determined the second passenger had three bags, and require her to check the extra bag. That

would have demonstrated she listened to Mr. D. and was consistent in her application of the Baggage Policy. She did not take that opportunity.

[65] The Grievor is a short-service employee with a significant disciplinary record. She described Mr. D. as a “know it all”, she questioned the authenticity of the Company’s pictures (which were established to be authentic by the screen grab from the bus’s cameras) and had no explanation for why she did not exercise her discretion fairly in regard to the second passenger, indicating she “did not recall” that incident. This is a curious response, since the Grievor should have reviewed the baggage of the second customer to dismiss Mr. D.’s concern. The fact that she did not – and couldn’t even recall the baggage – indicates she failed to listen to Mr. D. at all. I find the Grievor demonstrated no remorse or accountability in her actions, nor did she recognize her responsibility to apply her discretion fairly.

[66] Considering the Grievor’s pre-existing disciplinary record which is significant, I assess 10 demerits as a reasonable disciplinary response for her failure to appropriately apply the Baggage Policy. When added to her existing 35 demerits, that increases the Grievor’s disciplinary record to 45 demerits, before her actions to eject Mr. D. are considered. The Grievor can only avoid termination if her actions for unreasonably removing Mr. D. warrant less than 15 demerits. While no similar jurisprudence was offered of a fair disciplinary response for this type of behaviour, I cannot agree less than 15 demerits would be a reasonable assessment for this misconduct.

[67] I agree with the Union the Grievor was provoked. D’s conduct in refusing to “let go” of the issue and getting off the bus when he was not allowed and refusing to get back on were mitigating factors that should have been considered by the Company. I accept he also misgendered her although I do not accept that incident rose to the level of provocation. The Grievor is a short service employee who already had a significant disciplinary record, which is aggravating. There was also evidence other passengers were concerned by the Grievor’s treatment of Mr. D. and contacted the Company about that concern causing further reputational

damage to the Company, which is also aggravating. These facts must be combined with the Grievor's lack of credibility and lack of remorse.

[68] The Company assessed 40 demerits for both forms of misconduct. As I have found 10 demerits would have been a reasonable response for the inconsistent application of the Baggage Policy, that leaves 30 demerits as the Company's response for the improper ejection of Mr. D. from the bus. This amount is one half the way to dismissal, for an employee who does not have any demerits on their disciplinary record.

[69] Considering all factors, I consider 30 demerits - or one half the way to dismissal if the Grievor had no other discipline - was in the reasonable range of responses for ejecting a passenger without sufficient cause, considering the Grievor's short service, disciplinary record, lack of remorse, and the seriousness of stranding a passenger. Even if I had been convinced to exercise discretion to interfere with that assessment, I would not have assessed under 15 demerits for ejecting a passenger in these circumstances, so termination would still have resulted.

Conclusion

[70] The assessment of 40 demerits was not excessive.

[71] The termination of the Grievor for accumulation of demerits is upheld.

I reserve jurisdiction to address any issues with the implementation of this Award and to correct any errors or omissions to give it the intended effect.

January 24, 2024



**CHERYL YINGST BARTEL
ARBITRATOR**