

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

CASE NO. 5027

Heard in Calgary, April 10, 2024

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal on behalf of Locomotive Engineer D, Medvid, concerning the assessment of 25 demerits for “*Conduct unbecoming of a CN employee in your interactions with NWT government officials*” as stated on Form 780 dated October 06, 2021.

JOINT STATEMENT OF ISSUE:

Between November 2020 and September 2021, the Grievor was alleged to have been involved in a series of interactions with Public Health Officers (“PHOs”) in the Northwest Territories (“NWT”) resulting from the need to cross into the NWT from Alberta in the course of his duties. At the time, the NWT had closed its borders to non-essential travel and had set up PMOs to monitor and report travel back and forth across the border.

On September 27, 2021, the Grievor attended a formal employee investigation concerning an allegation made by an NWT PHO with the CN Police Services. After the investigation, the Grievor was assessed 25 demerits for “*Conduct unbecoming of a CN employee in your interactions with NWT government officials*”.

The Union argues that the investigation was neither fair nor impartial and that the discipline assessed was unjust and unwarranted. The Union opined that the request made by the PHO was contrary to restrictions in place at the time regarding cross-contamination and that the grievor was right to try to compromise. Furthermore, the Company assessed discipline based on unreliable hearsay evidence as the accusations made by the accuser were not recorded at the time of the alleged incident and appeared to be made out of self-preservation. Many of the allegations were second-hand accounts of alleged incidents with other individuals. The Union seeks the discipline to be expunged from the record, the Grievor be returned to the working board without loss of seniority, and to be made whole for any lost wages or benefits. In addition, the Union is seeking remedial compensation in the form of punitive damages for all undue hardship suffered by Mr. Medvid as a result of the Company’s actions.

The Company disagrees with the Union’s contentions and has denied the grievance.

FOR THE UNION:
(SGD.) K. C. James
General Chairperson

FOR THE COMPANY:
(SGD.) S. Fusco
(for) N.J., VP Western Region

There appeared on behalf of the Company:

- S. Fusco – Senior Manager, Labour Relations, Edmonton
- R. Singh – Manager, Labour Relations, Vancouver

And on behalf of the Union:

- R. Church – Counsel, Caley Wray, Toronto
- K.C. James – General Chairperson, Edmonton
- T. Russett – Senior Vice General Chairperson, Edmonton
- M. Meijer – Junior Vice General Chairperson, Edmonton
- J. McDonald – Local Chairperson, Div.864, McLennan
- B. Heckley – Local Chairperson, Div.105, Prince George
- N. Irven – General Secretary–Treasurer, Edmonton
- D. Medvir – Grievor, High–Level, AB

AWARD OF THE ARBITRATOR

Background, Issue & Summary

- [1] The Grievor is a Locomotive Engineer. He had over 20 years' service at the time of these alleged incidents, having begun his employment in November, 2000.
- [2] From 2008 until the time of the alleged incidents, the Grievor was based in High Level, Alberta. He worked in the "HR Pool", which meant that he regularly performed work between High Level, Alberta and Hay River, Northwest Territories. He was a resident of Alberta while performing this work.
- [3] It is not disputed that between November of 2020 and September of 2021, the Grievor and his crew members frequently crossed the remote border between High Level, Alberta and Hay River, NWT. They used Hello taxis to get to/from their train at Hay River, NWT. It is also undisputed that in response to the COVID19 pandemic, the government of the NWT had closed its border to all non-residents – which included the Grievor – and had stationed Public Health Officials ("PHO's") at border entry points to control entry into the NWT. The PHO's worked either individually or in teams of two. A team of PHO's was stationed at the provincial border located between Hay River NWT and High Level, Alberta.
- [4] Between March of 2000 and November, 2021, all operating employees of the Company who were required to report for duty were therefore provided with a letter from the Company that identified them as "Essential Workers" (the "Essential Worker Letter" or

“ESL”). An Essential Worker was permitted to travel to and from their work – and in Company vehicles in the NWT. I am satisfied individuals would be required to produce identification when requested by these border officials, to establish they were the individual named in the ESL.

- [5] In September of 2021, a complaint was made to the CN Police Service (“CNPS”) by the supervisor of the PHO’s at this border, after a series of incidents involving the Grievor in late 2020 and in the fall of 2021. There are five incidents at issue in this Grievance. One occurred in November of 2020; two occurred in mid–December 2020 and two occurred in September, 2021. That complaint alleged misconduct on the part of the Grievor towards the PHO’s both when those individuals were on–duty at the border, and also for an incident in late 2020 when PHO Klause was off duty. As part of the incident in November of 2020, the Grievor crossed of the border in his train in defiance of the directions of the PHO’s, after he had been refused permission to cross, due to lack of appropriate ID.
- [6] The CN Police Service investigated these complaints and reported to CN management through a memorandum, dated September 23, 2021.
- [7] The Grievor was called to an Investigation under the Collective Agreement, which took place on September 27, 2021.
- [8] On October 6, 2021, the Grievor was issued 25 demerits for “conduct unbecoming of a CN employee in your interactions with NWT government officials”.
- [9] The issues between the parties are:
- a.** Was the Investigation fair and impartial?
 - b.** Was there cause for discipline?; and
 - c.** Was the discipline assessed just and reasonable?
- [10] For the reasons which follow, the Grievance is dismissed. Even assuming that the only incidents that can support discipline are those which occurred in September 2021, as the other incidents were dated, cause for discipline was established for that incident and the discipline assessed was reasonable for that incident alone.

Credibility Issues

- [11] Grievances involving allegations of harassment and conduct unbecoming are “evidence heavy”. They require a careful review of all of the facts, and often involve assessments of the credibility of that evidence. This case is no exception.
- [12] As explained by the British Columbia Court of Appeal in the leading case of *Foryna v. Chorny*, a person’s recounting of events must be viewed to determine its consistency “with the probabilities that surround the currently existing conditions...which a practical and informed person would readily recognize as reasonable in that place and in those conditions”.¹
- [13] While no *viva voce* evidence was received in this case, that same Court cautioned that the demeanour of a witness is not in fact determinative. Determinations must be made by considering *all* of the evidence and then determining what the probabilities support.
- [14] Evidence of witnesses may “stand alone”, but that evidence also may also stand in conjunction with other evidence, which then contributes to the probabilities mentioned. While one type of “other evidence” would be corroborating evidence of other people, that is not the only type of evidence that is relevant. If a person has acted consistently with their evidence – such as taking other steps with third parties – that is also evidence that can be relied upon. These are only a few examples of evidence which can influence the determination of an arbitrator as to what is consistent “with the probabilities that surround the currently existing conditions...”. Evidence can also be inconsistent, or lack common sense, which impacts its credibility.
- [15] Often in this industry, the evidence which exists comes from fellow co-workers or Company officials, who are then interviewed as part of an Investigation under the Collective Agreement. While that is usually the case, in this case, third party individuals were involved in these alleged interactions, being government officials of the NWT. It is a well-known principle that there is no “property” in a witness. Third party witnesses may – or may not – be willing to be interviewed and to participate in an Investigation into an employee’s conduct. Either party is free to approach that witness, or seek the evidence

¹ [1952] 2 D.L.R. 354 at 357.

of that individual to support its position. It is not up to the Company to “let” the Union interview a third party witness, as the cooperation of that witness is not in the Company’s control.

- [16] Against this background regarding these various principles, the facts in this case must be assessed.

Facts

- [17] It is not necessary to depend on the incidents in November 2020 or December 2020, which the Union maintained were dated, as I am satisfied the September 21, 2021 incident itself occurred as PHO Anderson described and is sufficient to both provide cause for discipline and support the level of discipline assessed.
- [18] However, even if that were not the case, I have concerns with the partiality exhibited by Inspector Jones. He stated the behaviour of the Grievor was unacceptable, before he even spoke to any of the witnesses firsthand.
- [19] Given these statements, it would not be appropriate or fair to the Grievor to rely on that evidence. However, that still leaves the incidents in September of 2021, which were reported and investigated in a timely manner. Those incidents are supported by a statement by PHO Anderson.
- [20] However, the earlier alleged incidents from 2020 do provide important context and background for PHO Anderson’s concerns expressed in September of 2021. Therefore, findings of fact for what occurred earlier must be made, to determine that context, and assess the evidence of both the Grievor and PHO Anderson.

November 2020 Incident

- [21] The Grievor’s evidence regarding this incident is noted, below, when the Investigation is discussed. The other evidence comes from PHO Anderson.

- [22] On November 10, 2020, the Grievor's taxi approached the NWT border and was stopped by PHO Klause, who requested the paperwork and identification for each crew member in the taxi. PHO Anderson was also present.
- [23] I am satisfied the Grievor did not have any government-issued ID, as was required to cross the border. PHO Anderson stated that the Grievor insisted that because he "was CN he is an essential service and cannot be denied entry" and that he had the ESL, which exempted CN workers "that he pretty much threw at my partner, Dwayne Klause".
- [24] PHO Anderson then indicated that while they agreed that CN workers *were* an essential service, the Grievor was told "we can't bypass the need for government issued identification". The Grievor then provided a paper CN ticket with his name handwritten on it as identification, and she reiterated that government issued identification was needed. The Grievor got "very angry"² at this point; got out of the van to walk to the back; dug around and found a pill bottle with his name on the label. He was told this was also not acceptable ID. As the internet was not functioning, PHO Anderson stated they told the Grievor to "return to service and have someone send him a photo of his ID".
- [25] She noted he refused. She stated the Grievor threatened the PHO's that "this was the last day we would be working here".
- [26] Her evidence was the Grievor then "*had the cab driver take them across the road to the railway to drive the train they had parked there the rest of the way to Hay River, bypassing us entirely.*"³ PHO Klause described that he heard the train "fired up" and that it headed north and continued into Hay River, without proper authorization.
- [27] I am satisfied the Grievor effectively used the Company's train to circumvent the requirements of the NWT government officials for identification and to cross into the NWT, at a time when he had no authorization from government officials to cross that closed border, without proper government-issued identification.

² The words used by PHO Anderson.

³ Emphasis added.

The Events of December 2020

- [28] PHO Anderson also mentioned an incident on December 18, 2020, where the Grievor was unnecessarily argumentative when crossing the border. PHO Anderson's evidence was that on December 18, 2020, the Grievor was noted to be "needlessly argumentative" with the PHO's at the border and "still angry that we turned him around last time", but that the Grievor did have his ID and his ESL. PHO Anderson's recollection from this incident was her feeling that the Grievor "would still try to get us fired".
- [29] As Inspector Jones' summary has not been accepted as reliable and persuasive evidence, the only evidence from the PHO's regarding the December events at the Rooster comes from PHO Anderson's conversations with PHO Klause, and is therefore hearsay.
- [30] While arbitrators can accept hearsay evidence, it is less persuasive, as it is 'second hand' evidence. PHO Anderson's evidence does not go into any detail regarding the incident at the Rooster, only stating that the Grievor approached PHO Klause where she states the Grievor "argued that its unconstitutional that we enforce the Public Health Orders and calling him an idiot and threatening him in some way that I was aware of". It is not necessary to summarize the Grievor's evidence of this interaction, as it is PHO Anderson's perceptions from PHO Klause that inform her later concerns in September of 2021. I am satisfied that – whatever the details of the altercation at the Rooster – PHO Anderson was told by PHO Klause that the Grievor was argumentative and threatening towards him.

The September 2021 Incidents

- [31] PHO Anderson described two more incidents where she alleged the Grievor behaved in a rude manner toward her, both in September of 2021.
- [32] In the first incident, on September 16, 2021, the Grievor asked her to come around to his side of the taxi to talk to him, said his name and that his crew "worked for him". When she said she remembered him from the last incident, he said "really?" in what she described as a very angry tone. She refused to make eye contact to try to de-escalate and did not

answer him, and he said “really?” again. She mentioned in her evidence that the PHO’s are at least an hour from help and she was worried if she made eye contact with him, it would escalate into something “unpleasant and unnecessary”.

[33] This incident – even if accepted as she has stated – would not be sufficient to ground discipline. It was a minor incident.

[34] However, the same cannot be said of the September 21, 2021 incident.

[35] On that day, PHO Anderson described that during an overtime night shift, a taxi cab that she recognized approached. When she requested from the driver to see the information from the people in the taxi cab, she described she heard an “angry male voice” in the back, and the driver relayed a message he wanted her to go around to the other side of the taxi cab.

[36] PHO Anderson deemed it would be “needlessly hazardous” to do so, since it would mean going out of the range of the cameras, which are on the driver’s side of the vehicle and she said “no”, because he sounded angry. She again asked that the passengers pass their ID’s to the front of the cab.

[37] While one of the employees obeyed this request, the other two employees exited the cab and walked around to the driver’s side. One of those individuals was the Grievor.

[38] She described that the Grievor “walked up to me in a manner I perceived as angry and demanded “What is your name? I gave it to him and he wrote it on a piece of paper on the hood of the vehicle”. She then stated that “[w]hile I took the information off of his driver’s license, I said “That was a simple request that would have harmed no one”. She then stated he yelled at her “How many people do you want to touch this card?!”. She stated she told him it made her uncomfortable when people come out of their vehicles “*especially you*”. The Grievor then asked “Why’s that?”. PHO Anderson then stated she told him she had heard he had an altercation with one of her coworkers at the Rooster in Hay River (noted above). He then said “*Oh, you mean Dwayne?*” and she stated “*he sounded happy about it*”. The Grievor was then alleged to have said “*He’s just bitter about being fired from the mine*”.

- [39] While PHO Anderson's evidence was that was an inaccurate statement, she did not correct him.
- [40] She noted the driver apologized to her "for this" before they left.
- [41] The Grievor's evidence of this altercation is noted below, when the Investigation evidence is summarized.
- [42] PHO Anderson stated she emailed her boss, Steve, immediately, because
- ... the interaction left me with the concern that he may try to get me fired; as I still remember the threat the first interaction we had with him of it being our "last day" and he once again had my name. I don't trust that he would be an honest individual.
- [43] The reference to the 'first interaction' is a reference to the November 10, 2020 incident.
- [44] Her email to her supervisor, "Steve" was entered into evidence. She reiterated the information summarized above, and also stated:
- Don is consistent in giving us (at least Dwayne and I) the same attitude. I'm worried he is going to attempt to get me fired. He has threatened to try in the past.
- This is the guy that showed us a paper ticket with a handwritten name on it several months ago and was denied entry to get ID, but took the tracks into Hay River instead.
- [45] This last paragraph is a reference to the November 10, 2020 incident. There was no evidence the Company was made aware of this incident, when it occurred.
- [46] The very next day – September 22, 2021 – Richard Jalbert, the Manager Highway Border Compliance, for the Covid-19 Task Force of the Government of the NWT directed an email to Brian Jones, Inspector-Mountain Division of the CNPS and asked him to "look into this matter as our border officers are doing their job. Totally unacceptable behaviour". He also noted in that same email that the Director [of the NWT] would "*cancel travel privileges if this type of behaviour continues*".
- [47] The role of police constables is set out in the *Railway Safety Act*. The CNPS is independent from CN and investigations which they carry out are not the same as the Investigation that is required under Article 86 of the Collective Agreement: **CROA 4763**.

- [48] During its own investigation, the CNPS obtained a statement from PHO Anderson. It provided that statement to the Company. This is not a transcript of an interview with PHO Anderson, but is her own statement.
- [49] Inspector Jones also provided a summary statement received from his conversations with several other PHO's, but he did not obtain statements from those individuals. As noted above, I have disregarding Inspector Jones' summary and have not considered this evidence, given his partiality.
- [50] On September 27, 2021, the Grievor was investigated under Article 86 of the Collective Agreement. The Company filed PHO Anderson's statement, and the summary document from Inspector Jones, into that Investigation.
- [51] In that Investigation, the Grievor was asked about the CN Code of Business Conduct, which included protocols at the AB/NWT highway border crossing. He stated he had a "vague understanding as the protocols at the border varies to some degree every time that we cross". (Q/A 15). When asked to explain that answer, the Grievor stated:
- ...at time we have provided all documentation and ID and gotten through, even some times we were not stopped at all because they knew the driver of the taxi. At times we did not step out of the cab, but more often than not, *we stepped out of the cab to stretch and to give our ID*, and prior to this situation we had not had anyone tell us otherwise of our wrongdoings (Q/A 16)⁴
- [52] When asked if he understood the Code of Business Conduct, the Grievor stated "I have a vague understanding of the Code, because it has never been completely laid out for me to understand" (Q/A 17).
- [53] This was an evasive answer. It is not clear how the Code of Business Conduct was supposed to be "laid out" for the Grievor to understand.
- [54] When asked to explain, in his own words, the interaction in November 2020, the Grievor stated "*This was all new to us, I believe this was the first time that I went across in a taxi and we were told by TM Bartel that all we needed was a letter and CN ID to pass. Which I had, and showed*".

⁴ Emphasis added.

- [55] This answer is actually inconsistent with the answer given to Q/A 15, which refers to varying protocols “every time that we cross”, which implies more than one crossing; and to later answers as well, which also refer to other crossing events.
- [56] Further, it is confusing how the Grievor could *not* have understood that an ESL letter had little force without corresponding ID to establish that the Grievor was *in fact* the person who was named in that letter. Otherwise, the letter could be carried by anybody. The assumption that ID would not be required was an unreasonable and confusing assumption for the Grievor to hold, and one that lacks credibility. The Grievor should have known ID would be required to corroborate that he was the individual named in the letter.
- [57] The Grievor stated he did have government–issued ID on him, and that he attempted to provide the PHO’s with “alternative government ID”, being his “PAL” which is a firearms licence, and this was not a valid form of ID for the PHO’s and he was told it had to be a driver’s licence.
- [58] When asked how many times he had crossed the border prior to the November 2020 incident, the Grievor “reverted” to his previous answer, which was that this was the first time he had crossed in a taxi. This did not answer the question of how many times he had crossed the border prior to this incident and in fact is inconsistent with his other evidence of the “varying protocols” that existed when he crossed the border.
- [59] The Grievor denied being angry or frustrated with the NWT officials when he was denied entry on November 10, 2020, stating “*No, I was more worried about TM Bartel yelling at us for not making it across*”. He also denied physically approaching or raising his voice at the PHO’s during this incident in a way that could be perceived as threatening or intimidating, and denied threatening the PHO’s regarding their employment, or using belittling or disrespectful language towards them. He also denied making any disparaging comments regarding the PHO’s adherence to the Covid–19 protocols. He also did not recall any encounter on December 18, 2020 where he was needlessly argumentative and being “*still angry that we turned him around the last time*”.
- [60] He denied being asked to pass his ID up through the driver’s window and when asked stated he “*did not recall*” how he provided his ID the next time he went through the border, if it was *not* passed up through the window.

- [61] The Grievor also denied being hostile on September 16, 2021. He stated he asked the PHO to come around to his side *“like has been done many times before⁵, the door opened. I showed her my ID....she stepped away said “have a good day then closed the door”*. He stated his demeanour and actions were the *“very same as prior trips with other PHOs that have let us proceed without issue”* and that he didn’t either physically approach or raise his voice in a manner that could be perceived as threatening or intimidating. He also stated he may have “coughed” because of his mask.
- [62] Again, the reference to what was done on “prior trips” is a confusing statement, given his inconsistent answer to Q/A 15 that this was the “first time” he had crossed the border in a taxi.
- [63] Regarding the September 21, 2021 incident, the Grievor agreed he was asked by the PHO to provide his ID through the driver’s window and that he refused *“because of Health and Safety issues”*, but he denied having an “angry tone” when he requested she come around to his side. His description of the incident was that the Conductor had passed his ID to the driver *“to touch and show the PHO. I said, “I don’t want to have it touched by 2 or 3 individuals, when you can come over to the side or we can get out like we have done before”*.
- [64] The Grievor agreed he was never asked by the PHO to step out of the vehicle to show his ID. When asked why he did so, he said:
- I was just doing something that I, and we as crew members have done before. I thought the PHO would be highly skilled and understand that we should take every and all health and safety precautions in regards to COVID (Q/A 50).
- [65] This second part of the Grievor’s answer is confusing. It is not clear what expectation he had for the PHO to be *“highly skilled and understand”* the health precautions he felt were reasonable, or why he felt his *own* understanding of what appropriate precautions *were* should take precedence over what the PHO was requesting.
- [66] The Grievor disagreed his conduct could be perceived as threatening *“because many times before we have done it with no questions asked, also there are no signs saying that*

⁵ Emphasis Added

we couldn't. But after the fact, I see it is possible" (Q/A 51). He also stated he never yelled as described by the PHO, and that he "*had to approach to show my ID*", which he explained was for "*health and safety reasons*":

[t]he reasons put forth by CN rail and Canadian government to help eliminate the spread of COVID-19, an unnecessary touching of personal, private ID, information, which could lead to the spreading of the virus.

[67] The Grievor stated he believed passing his ID to government officials "*poses a risk to myself and others*", although he admitted he had never formally reported health and safety concerns, as "*we have never had this issue with any other PHO's it has only been limited to PHO Lindsay*", as

...PHO Lindsay has from day 1 been very confrontational towards CN Rail. She has turned taxi and other crew members away before that have had all necessary and proper documentation to which they have crossed the border before (Q/A 57).

[68] The Grievor obviously felt his own feelings on what was appropriate should prevail.

[69] The Grievor did not explain why his health and safety "concern" of handling ID – and potentially spreading the virus – would only have only been limited to *one* PHO, when ID was requested by more than one PHO at the border. When later asked if he always insisted on showing his own ID and not passing it to the driver, the Grievor stated there were "*varying degrees of protocol at the border between the PHOs. I have always followed their instructions and I have took extra precautions to prevent the possible spread of COVID.*" (Q/A 66).

[70] This again is not responsive to the question, which was whether he always got out to show his ID.

[71] The Grievor did not follow the instructions of the PHO on September 21, 2021 to pass his ID up, nor did he even have ID to show on November 10, 2020, so he did not follow instructions on that date, either.

[72] The Grievor also stated that the PHO had a "*confrontational manner*" of refusing taxis in the past, even with all documentation, and that her "*professional opinion*" varied from "*all other PHOs at the border*", however, no examples of actual events where this occurred were provided by the Grievor, nor did the Union call any evidence from other individuals

of where this had occurred, or any other evidence to demonstrate the PHO was other than professional with individuals who had the appropriate documentation.

- [73] The Grievor insisted he was “*just doing what I have done before to reduce the spread of COVID*” (Q/A 60).
- [74] Apparently, the Grievor felt he was not required to comply with the requests of NWT government officials, if he had done something differently in the past.
- [75] Why the Grievor felt the PHO should “compromise” the demands of government border officials – as argued by the Union – was never appropriately explained.
- [76] When asked why he would not just disinfect his ID with wipes provided by CN, he stated that the disinfectant provided by CN was either in the bunkhouse or on a train, and he was in a taxicab.
- [77] The Grievor denied he was angry or frustrated with the PHO for requesting he follow the procedures of the NWT government.
- [78] When asked if there was any other incident with any other person beyond those listed in the Investigation with PHO’s Anderson and Klause, the Grievor noted “[y]es, every other PHO that has let CN Rail crews through without hassle” (Q/A 77). This answer was also not responsive to the question, either.
- [79] When asked if he understood how cancelling travel privileges would impact the Company, the Grievor’s response was that “*My actions aren’t the only one in question here as it shows there is varying protocol at the border between PHO’s...*” and that he hopes that in future “*all PHOs are all on the same page with procedures and protocols*” (Q/A 78).
- [80] This is an example of the Grievor deflecting responsibility and accountability for his behaviour, by referring to the conduct of others.
- [81] The Grievor disagreed the Company’s reputation could be tarnished by his actions as “*right after the alleged incident, CN trains still kept moving*” (Q/A 79).
- [82] One of those trains was of course the Grievor’s train, when he got in and operated it despite not having the authorization from the PHO’s to enter the NWT.

- [83] The Grievor also stated he was being “*extra cautious*” with COVID protocol, and that with the “*inconsistency at the border between PHO’s it has been difficult*” and that if there was “*constant exact protocol at the border this would have been a non–issue*”.
- [84] He does not explain how it was “difficult” for him to pass his ID up through a driver when requested, yet his other crew members were able to comply with that direction without difficulty, or calmly provide their ID to the PHO when they exited the taxi, as did his crewmate.

Arguments

- [85] The Company argued that it properly and appropriately investigated the Grievor’s conduct as soon as it became aware of it. It argued it obtained testimony from three PHO’s. It argued the Grievor’s evidence simply “denying” all events was not credible and the evidence of the PHO’s should be preferred. It pointed out that PHO Anderson was concerned with the Grievor’s behaviour, which she experienced as ‘angry’ and which she was concerned would escalate. It also argued that it was very serious if the NWT banned CN employees from future entry into the province, based on the Grievor’s “totally unacceptable behaviour”. The Company argued the Grievor’s actions breached several company policies and work rules, including the CN Code of Business Conduct which required its employees to “respect all applicable laws in the jurisdiction” where they worked; and that the Company was committed to a harassment–free environment. It noted that “harassment” included intimidating, offensive or hostile behaviour; that it is considered misconduct; and that it will not be tolerated. It argued that violations of the Company’s rules and policies can form the basis of discipline, up to termination.
- [86] It pointed to the requirements of its Policy on Harassment–Free Environment and its Workplace Violence Prevention Policy, by which the Company commits to investigating and addressing all allegations of harassment, including hostile or unwanted conduct that is repeated over time. It noted training on these policies was mandatory for all employees. It also pointed to the duties imposed on the Company by the *Criminal Code* to protect its employees; and to its prohibition against uttering threats; and to its obligations under the *Canada Labour Code*, to prevent violence in the workplace and ensure the safety of the

members of the general public. It argued these legislative provisions contributed to the gravity of these offences.

- [87] The Company argued the Grievor's behaviour was grounds for a significant disciplinary response, as his behaviour was aggressive, confrontational and, at times, threatening to at least one other person. It also had the potential to negatively impact the Company's business. For the Grievor's off-duty conduct it relied on what have come to be known as the "*Millhaven Fibres*" factors, which it argued were appropriately considered alongside the *Wm. Scott* factors. It argued the Grievor's conduct satisfied those factors.
- [88] It also argued that the Grievor's behaviour was aggressive in his verbal communications with the PHO's while on-duty, when he was asked to follow the Covid-19 protocols of the NWT. It noted that behaviour included throwing paperwork and an empty coffee cup at PHO's. It argued this conduct could amount to assault and if not, was still needlessly aggressive. It argued there was no excuse for the Grievor's intimidation tactics.
- [89] It argued the Grievor engaged in a pattern of intimidating and aggressive conduct over a period of ten months between November 2020 and September 2021, including repeated harassing behaviours, unnecessarily argumentative responses, refusals to follow instructions and protocols, and outwardly aggressive actions, which the Company termed as "disproportionately confrontational behaviour", and that he knew – or ought to have known – it would not be welcomed by the recipients. It also argued the Grievor showed no remorse or acknowledgement of wrongdoing, and that his behaviour negatively impacted the Company's reputation. It argued the Union in its Step 3 Grievance conceded the Grievor's poor behaviour.
- [90] The Company argued this was not a case where a reduction in penalty was appropriate. It argued that maintaining respectful relations between a provincial government and its employees is of the utmost importance; and that the post-termination evidence from the Grievor's fellow workers expressing concern if he were to be returned was relevant.
- [91] The Company also argued the Investigation was fair and impartial, and adhered to the Article 86 procedure; that he was represented by a Union official, received the proper notice and was provided with two recesses. It noted there was no ambiguity regarding the

Grievor's accusers or the allegations and he was given an opportunity to respond to those allegations. It argued the Grievor's conduct was cumulative over this time period.

- [92] For its part, the Union argued the Grievor had no active discipline on his record, prior to the three sets of discipline considered at this CROA session, for alleged misconduct between September 15, 2021 and September 23, 2021. It argued the earliest incidents from 2020 are very dated, having taken place almost one year prior to the Investigation and had never been brought to the Grievor's attention. It argued the delay deprived the Grievor of the chance to properly defend the allegations, but also showed the complainants were not bothered enough at the time to take any action against the Grievor. It argued this was a basis to dismiss the discipline entirely, as those officials had waited many months to contact the Company and were only doing so to "protect their own jobs". It also pointed out PHO Anderson's statement that the incidents were a "very long time ago" and that she stated her memory "isn't perfect".
- [93] The Union also pointed out the Grievor was not given the opportunity to question the PHO employees who submitted the statements during the Investigation, which is a gross violation of natural justice, of the collective agreement, and of CROA jurisprudence. It argued this resulted in procedural unfairness, as the PHO employees were not presented as witnesses, despite the fact they were clearly available to Company representatives to ask questions, but not the Grievor or the Union.
- [94] The Union further argued that the actions of the Grievor were not deserving of any discipline, much less a significant penalty of 25 demerits. It argued the Company has not pointed to any specific legal requirement breached by the Grievor by not having identification, and noted the Grievor had both an ESL and a "ticket" with his name on it.; that "pretty much throwing" a letter is not the same as 'throwing the letter'; that there was no evidence of the Grievor saying or doing anything in anger, as that is only opinion evidence of the witness; and that Inspector Jones' summary states that PHO Klause puts the incident which occurred in November 2020 as occurring in spring 2021, which is incorrect.
- [95] It noted that no specific details of the December 18, 2020 interaction were recalled; just a "feeling" that the Grievor would try to get the PHO's fired; that there is no detail regarding

this incident; and that the September 16, 2021 incident consists of the Grievor saying 'really' twice and does not justify such a heavy handed penalty.

- [96] Regarding the September 21, 2021 incident, it argued was the cab driver and not the Grievor who relayed that the PHO should go around the other side and the PHO did not even hear what the "angry male voice" said; that it is an absurd statement for the PHO to state the Grievor approached her "angrily" and this was subjective; and that the Grievor had provided his ID. It also argued the Grievor "reasonably" put the question to the PHO employee that he did not want other individual's touching his ID; and that the PHO's evidence he "yelled" is entirely an opinion and subjective.
- [97] It also noted the "reason" the PHO reported the statements was not because they were worthy of discipline or because she was unsettled by them, but rather was strategic as she felt the Grievor may try to get her fired.
- [98] The Union argued the off-duty allegations made by PHO Klause were not brought forward at the time and were unparticularized, and the Grievor never had the opportunity to question PHO Klause. It noted there is no date to these allegations. It argued the Company requested an opportunity to question PHO Klause, but the Union was not given the same opportunity.
- [99] The Union argued the Company had pre-determined the Grievor's guilt in the Investigation, failed to give the Grievor the opportunity to interview witnesses, and assessed the Grievor just the "right amount" of discipline in this and the next Grievance to end the Grievor's employment with the Company, which level was not coincidental. It argued the Company was required to keep an 'open mind'. It also argued the Notice to Appear was vague and failed to identify the exact circumstances about which the Grievor was to be questioned; and that the Company was not entitled to withhold serious allegations for a substantial period of time. It argued that whether or not attributable to the Company, it has the same detrimental affect on the Grievor. The Union also argued the evidence relied upon was a "pre-determination of the Grievor's guilt", when Inspector Jones' assertions were used repeatedly and that the Investigating Officer demonstrated bias toward the Grievor when he is repeatedly questioned over the incidents of off-duty conduct. It also argued the Company failed to allow the Grievor and his union

representative to be present and offer rebuttal to witnesses whose evidence had a bearing on his responsibility, breaching Article 86.4. It argued the Company arranged to interview the witnesses on September 22, 2021, but no effort was made to give the Union and Grievor the opportunity to be present. It argued these procedural flaws rendered the discipline *void ab initio*.

[100] Even if not procedurally unfair, the Union argued there was no wrongdoing proven against the Grievor and the Company had not met its burden of proof, as the Grievor denied making any disparaging comments and no witness can substantiate the allegations made against the Grievor.

[101] Even if there is culpability, it argued the discipline of 25 demerits is excessive and unwarranted. It argued this was the Grievor's first attempt to cross the border since the government-enforced closure; that he was an essential services worker and that he was under the impression this was all that was required. It argued this was no more than "unfortunate miscommunication", and that when the Grievor was denied passage he was "rightly caught off guard" and was unaware his driver's licence would be required. It argued there was no contemporaneous corroboration for PHO Anderson's comment the Grievor became "angry". It argued that "unlike previous interactions", PHO Anderson treated the Grievor differently by demanding his ID through the driver.

[102] It also argued PHO Anderson admitted "she directly escalated the incident with personal accusations" towards the Grievor when she accused him of threatening one of her off-duty co-workers, which the Grievor denies. It argued the Grievor had 'justifiable reasons' for questioning the request made by the PHO and that it was alarming the PHO did not have concern for cross-contamination by passing his ID through the taxi driver. It also noted PHO Anderson waited until the next day before making a complaint to her supervisor and that her complaint is "skeptical, hearsay and void of any evidence" and there is "no formal documentation supporting the allegations", which are "merely hypothetical recollections of events" from – in some cases – more than a year before.

[103] It also noted the Covid-19 pandemic was at its "peak threat" resulting in "constant changes in government policies and rules" and that there was "constant confusion as to the application of these policies" across the country. It argued that information was

related to the public that Covid-19 was transferable via physical touch and surface contact and that the Grievor was rightfully concerned about contracting the virus via cross-contamination. The Union argued the Grievor's reactions were done "solely to prevent the potential spread of the Covid-19 virus".

[104] The Union argued in the Grievance process that the Grievor was tired and frustrated that the PHO "would not compromise" and that it was not unreasonable for an employee to be frustrated to the point of raising their voice, and that different people react to stress differently.

Analysis and Decision

[105] As earlier noted, the evidence from Inspector Jones was disregarded and not relied upon coming to the conclusions in this Award. I am satisfied that – prior to even speaking directly with the PHO's involved in the incident – Inspector Jones made a judgment in an email to Richard Jalbert that the Grievor's behaviour was "totally unacceptable". He came to this judgment *only from only talking to supervisors and receiving second hand information* – at least at that point. In that same email, he requested an opportunity to speak to the "officer that was on the ground this morning", demonstrating he had no first-hand information for his conclusion.

[106] This assessment of wrongdoing before he even spoke with the individuals directly involved demonstrated a bias against the Grievor. His evidence is not persuasive or reliable as a result, and has been disregarded.

[107] However, the investigation of Arbitrator Jones was not an Article 86 Investigation. I accept as established in CROA jurisprudence, that the Investigation of the CNPS is distinct from that of the Company under Article 86. I agree with the Company that the Grievor was afforded the procedural safeguards which an Article 86 Investigation is to ensure.

[108] I cannot agree with the Union that "the Company" was given an opportunity to question PHO Anderson but the Union was not.

[109] First, it was not the Company but the CNPS that took PHO Anderson's statement.

[110] Second, there is no evidence of “questioning” in that statement, nor is it a summary of her evidence. It is her own written statement, and her email to her supervisor shortly after the incidents occurred.

[111] This is not a situation akin to **CROA 3214**, or **3214**, where there was a fellow employee investigated. Unlike a typical Article 86 Investigation, this case involves third-party witnesses.

[112] There is no property in a witness. Had the Union wanted the opportunity to question PHO Anderson about her statement, they could have contacted her to question her. It would be up to her – and not the Company – as to whether she would be willing to allow that questioning. If she refused to provide that cooperation, that is not the fault of the Company, nor does it render the Investigation procedurally flawed. The “primary” evidence which was filed by the Company into the Investigation was the first-hand statement of PHO Anderson. That statement does not respond to any questioning by the Company. Rather, it is her own first-hand account of what occurred. It is reliable evidence from a person actually involved in the incidents.

[113] As noted below, it is also evidence which is credible and compelling.

[114] Neither was the process used in this Investigation similar to **CROA 3061**, (where the Investigating Officer was also the accuser).

[115] The entirety of the Investigation transcript has been reviewed multiple times. This is not a case like **CROA 4655** or **AH837**, where it cannot be determined what occurred between these parties, so the Company has not met its burden of proof, as argued by the Union.

[116] I have carefully reviewed the Grievor’s evidence – given in the Investigation – and PHO Anderson’s evidence. The Grievor’s answers and evidence during the Investigation were often evasive, lacked common sense, were not compelling, credible, convincing or consistent. The Grievor has no recall of certain events. He offered reasons which lack common sense for other actions he says occurred. Other excuses appear contrived for the purposes of the Investigation and there were glaring inconsistencies in his account.

[117] PHO Anderson’s detailed statement was prepared shortly after the September 2021 incidents occurred, which is relevant. That it was reported *within a day* to her supervisor

means it was reported immediately and that it was concerning enough to her to make that report. That statement alleges a pattern of misconduct over a period of time. That is not unusual evidence in a harassment investigation. It is also not unusual for some incidents not to be initially reported, with a hope they are “one off” incidents, until certain behaviour starts to demonstrate a pattern of inappropriate behaviour that is escalating or repeating, or threatening, as I am satisfied it was in this case.

[118] I cannot agree with the Union’s characterization that PHO Anderson was only reporting this to “protect her job”. She had nothing to protect, as she had done nothing wrong. She was reporting threatening and intimidating and bullying conduct directed toward herself as a NWT government border official, from a CN employee who she asked for ID, and who felt that she should “compromise” her role, to suit his own beliefs and concerns about Covid–19.

[119] I find it incredulous that the Grievor attempted to provide his PAL (firearms licence) as he insisted in November of 2020. I did not find this evidence convincing. It was not made clear why the Grievor would have had his PAL licence with him, but did not have his driver’s licence with him. I am satisfied that if the Grievor had his firearms licence as he later suggested he did, that would have been acceptable ID to PHO Anderson, as it was for his co–worker on September 21, 2022.

[120] Upon a review of all of the evidence in this case, I am therefore satisfied that PHO Anderson’s account of the experience of herself is “consistent with the probabilities that surround the currently existing conditions”, although her reference to the December 2020 incidents, which did not involve her, has not been given any weight. As did the Arbitrator in **CROA 4429**, I have no difficulty in accepting the evidence of PHO Anderson over that of the Grievor, where that evidence conflicts.

[121] The Union argued that the Grievor was “unaware” he would need anything but the letter in November of 2020. That explanation lacks common sense: It was not unreasonable or unexpected the Grievor would have to establish he was the person named in the letter and to suggest he did not understand this strains credulity. How did the Grievor expect the government official to *know* he was the person whose name appeared in the letter if he did not offer identification to make that connection?

- [122] Without that identification, the Grievor could have been anybody. A CN ticket or a “pill bottle” – without photographs – do not serve the same purpose as ID and it also strained credulity that the Grievor would assume they would, or would have determined it was unreasonable for the PHO not to accept these as forms of “identification”.
- [123] The PHO was not required – and should not have been expected – to have “compromised” her request, because the Grievor forgot his ID and because he had other ideas of how best to show his ID.
- [124] That the taxicab driver felt the need to *apologize* for the Grievor’s behaviour is further corroborating evidence that PHO Anderson’s account of the Grievor’s behaviour is accurate. There would have been no need to apologize if there was nothing to apologize *for*.
- [125] The Union’s references to the Grievor’s “irritability” in the Grievance procedure are also evidence.
- [126] I do not accept that the Grievor’s behaviour was as innocent and straightforward as the Grievor suggested in his evidence, which was that he got out of the vehicle to “stretch” “as he had done in the past”. Since he stated this was the “first” time he had crossed the border in a taxi since its closure, it is confusing how he could therefore be acting consistently with how he showed ID in the past.
- [127] Rather, I accept the PHO’s evidence that his sole purpose in getting out of the vehicle and approaching her in what I accept was an angry manner was to threaten and intimidate her, and that he approached her with that intent and demanded her information and yelled at her. I accept PHO Anderson’s characterization that the Grievor was “angry” – which caused her to be concerned for her own safety.
- [128] This is not “hypothetical” or “opinion” evidence as argued by the Union; it is the evidence of a first-hand observer. Her evidence is that the Grievor yelled at her, which is also consistent with her characterization of his behaviour as angry, threatening and intimidating. I further accept he threatened her employment, as was her evidence, which was also consistently reported immediately by her, in her report to her supervisor.

[129] It is immaterial whether there was a “rule” regarding the showing of ID, as argued by the Union. Even if the PHO had let individuals through on other occasions without showing ID, that does not provide the Grievor with a basis to insist he should be let through on this occasion as well, or that the PHO was being unreasonable when she protected her own safety by staying within view of the cameras, when she heard the Grievor’s angry voice in the back.

[130] The point to be emphasized is the Grievor was given a reasonable request to support the ESL with ID, by a NWT government official with the power to control the border over which he wanted to cross. He chose not to comply with that request and to be argumentative, confrontational, bullying, intimidating and threatening to that government official. Even if the Grievor *had* legitimate health and safety concerns – which I do not accept – that could have been handled by carefully placing the ID back in his pocket until he had access to a disinfecting wipe, when he got to the locomotive. Touching the door handle and interior of the taxi–cab likely presented a greater risk of contracting Covid–19 than did the handling of the Grievor’s ID by PHO Anderson.

[131] I therefore do not find the Grievor’s “health and safety concern” explanation to be credible, compelling or convincing. His insistence, that he was trying to stop the spread of the Covid virus when he did not obey the request to provide his ID through the driver and so “had” to get out of the car – and presumably had to demand the PHO’s name and yell at her as has been found to have occurred – and his evidence that there were “varying protocols” at the border crossings, not only lacked credibility, but also lacked reasonableness.

[132] That the NWT government thought this to be a serious issue is evident from its decision to place the PHO’s at the border to secure its boundaries. The reputation of the Company was damaged with that government – as was seen in their comment that travel privileges would be suspended if the misconduct continued.

[133] The Company’s Policy on Harassment–Free Environment states that:

Under this Policy, harassment refers to behaviour or communication, whether written or verbal, which a reasonable person would consider to cause offence or humiliation or affect the dignity of an employee, employment candidate, customer or member of the general public and, in the context of employment, results in an intimidating, hostile or offensive

atmosphere....Harassment can occur at or away from the workplace and during or outside working hours if individuals are in a work situation. While harassment typically takes the form of hostile or unwanted conduct that is repeated over time, a single serious incidence of such behaviour that has a lasting harmful effect may also constitute harassment.⁶

[134] I have no difficulty in coming to the conclusion that the Grievor harassed PHO Anderson.

It is unreasonable, unwarranted, and constitutes harassment to argue with – and threaten – a NWT government border official, despite how tired and frustrated an employee may be, or regardless of whether that employee felt that the PHO should have “compromised” their own government requirements, which is in itself an unreasonable requirement.

[135] If a government official asks for your ID to cross a provincial border, that ID is to be provided, regardless of whether the request is considered to be a reasonable one or not, and regardless of personal concerns with the spread of Covid-19.

[136] I therefore cannot agree with the Union that there is no evidence of the Grievor’s misconduct. The evidence of PHO Anderson – providing detailed information as to the events of September 2021 – shortly before the Investigation – is evidence of the Grievor’s misconduct, which the Grievor has not adequately explained. I am satisfied PHO Anderson’s account is accurate regarding what occurred; that the Grievor exited his vehicle and approached PHO Anderson to intimidate, threaten and bully her; that demanding her information and yelling at her did occur; and that she was fearful for her own safety and for her job. The Grievor unreasonably menaced PHO Anderson on September 21, 2021 and she was reasonably fearful for her own safety.

[137] Cause for discipline was established.

[138] The next question under a *Wm. Scott* analysis is whether the discipline was just and warranted.

[139] When all of the circumstances, submissions and authorities are considered, I am satisfied it was.

⁶ Section 5

[140] The *Wm Scott* factors are to be applied in assessing the reasonableness of discipline. I have reviewed all of the jurisprudence offered by the parties. Precedents are of limited use in considering the second question in *Re Wm. Scott*, as it is fact-dependant.

[141] From that review of jurisprudence, I am satisfied that conduct unbecoming offences are considered serious in this industry, and in fact in *any* industry. Legislative obligations – as well as moral obligations – underpin this reality. Whether or not an individual has concerns, there is a decidedly wrong way to address those concerns: There is no justification for choosing to do so through intimidation or bullying behaviour.

[142] A further and significant aggravating factor in this case – especially in a case of alleged harassment and conduct unbecoming – is that the Grievor demonstrated a complete lack of insight into the outrageousness of the behaviour which was found to have occurred. He showed no understanding that his attempts to intimidate PHO Anderson were wrongful. He lacked remorse or accountability for his actions. Instead, he “doubled down” during the Investigation, rather than taking responsibility for the fact this may not have been his best day.

[143] For example, he noted that the Company’s reputation was not “tarnished” by his actions, since “CN trains kept moving”. This statement was made when part of that “movement” of trains *was the Grievor moving his train across the border in November of 2020 without authorization to cross that border and in defiance of the border official’s direction that he was not to cross without showing proper ID.*

[144] Blatantly disobeying the dictates of border officials is conduct unbecoming.

[145] Further, the Grievor’s position ignores that the actions of the Grievor *led* the NWT government to *specifically state to CN* that travel privileges could cease if such conduct continued. For the Grievor to suggest – in the face of that clear and concise comment – that “CN trains kept moving” is to lack *any* insight into the significance of his misconduct, which is very troubling.

[146] The Grievor also attempted to deflect blame for his actions on the “varying protocols”, suggesting that had consistent protocols been in place, this incident would not have happened. Deflecting blame is failing to be accountable for behaviour, which is

aggravating for discipline and shows a lack of insight for his own responsibility. Whatever the various protocols in place, had the Grievor not acted in a threatening and intimidating manner towards PHO Anderson, this discipline could have been avoided. That situation was entirely within the Grievor's control. That is not the fault of "varying protocols".

[147] Further, there was no evidence offered that the protocols in fact *had* "varied" to the point the Grievor had any reasonable confusion as to what was required of him.

[148] The Grievor felt he could argue and force NWT government officials to "compromise" in their role of carrying out their duties to protect their border, and that *he* knew best how to respond to the issues of Covid-19 and knew best how to provide his ID. He also felt he could bully PHO Anderson to see things his way by exiting the vehicle, demanding her information and yelling at her. He was wrong. An attitude that is threatening, argumentative, confrontational, intimidating and bullying is an attitude that constitutes harassment. It must attract significant and serious discipline, especially where – as here – the context was the attitude was displayed *to officials of the government of the NWT*, acting to protect their own borders. The request for government ID in these circumstances was not only reasonable, but it was necessary, to ensure that the worker named in the ESL was the worker attempting to cross the border.

[149] That the Grievor felt he could intimate government officials is unusually brazen. This incident is significantly more serious than the jurisprudence relied on by the Union, which supported 20 demerits for that less significant conduct (**CROA 4398, 4411-A**; and **4429** for example). In certain of those cases, the grievor apologized and showed remorse; and in none of the cases was reputational damage *vis-à-vis* third parties an issue.

[150] The Company offered several cases, including **CROA 4429**, which has similarities with the present case. In that case, the grievor threatened a supervisor, assaulted another, and spewed "intolerable racial epithets". While the misconduct was arguably more serious than the misconduct in that case, the discipline was also likewise more serious, being dismissal. That case also involved a long service employee who had not been disciplined for similar conduct before. The arbitrator found the grievor to be a threat to a healthy work environment. In that case – as in this case – the arbitrator found the evidence of the

grievor to be inconsistent with the totality of the evidence. The arbitrator found the intent of the grievor in that case was to “intimidate” and “threaten”.

[151] I have found that same intent in this case.

[152] It was also found in that case the grievor was dishonest in the investigation and that “he has no insight or understanding of his outrageous conduct”. That is also a sentiment which can be echoed in this case.

[153] While there was some remorse expressed in that case, it was found to be “self-serving rather than genuine”. In the present case, there is no remorse at all.

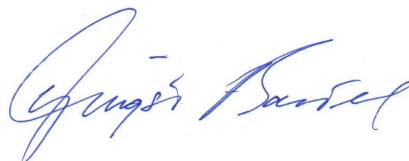
[154] I am satisfied the Company was in fact lenient in *not* terminating the Grievor’s employment for what I have found was intimidating, threatening, argumentative and confrontational behaviour toward an NWT government official on September 21, 2021, 2021. The Grievor’s conduct damaged the Company’s reputation with an important government, whose cooperation was required for it to continue servicing its customers. As in **CROA 4429**, the Grievor’s length of service and disciplinary record is not sufficient to weigh against these significant aggravating factors.

[155] The discipline assessed by the Company of 25 demerits was just, reasonable, warranted and in fact lenient, considering the jurisprudence. I have been provided no reasonable basis on which to interfere with that penalty.

[156] The Grievance is dismissed.

I retain jurisdiction for any questions relating to the implementation of this Award; to make any corrections; and to address any omissions, to give it the intended effect.

June 27, 2024



CHERYL YINGST BARTEL
ARBITRATOR