CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5101

Heard in Edmonton, November 13, 2024

Concerning

VIAL RAIL CANADA INC.

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Appeal the assessment of a 30-day suspension of Mr. R. Orton for improper use of a company vehicle.

JOINT STATEMENT OF ISSUE:

The Employee had used the company provided vehicle to drive to his home rather than the company provided rest facility.

The Union contends that this discipline was extreme and punitive. The practice of using the company vehicle for other than conveyance from the station to the rest facility and return was not a rare occurrence and was known to the company. Further, because of an alleged speeding infraction on his train operating into Capreol earlier that morning, the Employee was directed to return to Capreol for Drug and Alcohol testing. The employee freely revealed that he had used cannabis and a couple of beers on his arrival at home so he had his wife, a recently retired locomotive engineer, to drive him in the vehicle. The Union requested the loss of earnings suffered during the 30-Day Suspension.

The Corporation contends that the 30-day suspension was reasonable in the circumstances. The Employee has access to and use of a company vehicle for which he is well aware is intended for company use only and only to be driven by him. Despite this, the Employee knowingly used the company vehicle for personal commuting to his home on a number of occasions and in particular on November 15, 2022. Later, the employee also permitted his wife (a non-authorized and non-VIA Rail employee) to drive the company vehicle. These acts were notably in clear contravention of the VIA Rail *Financial Policy, Practice, and Authority Manual* (FPPA), the VIA Rail *Code of Ethics* and *Code of Conduct,* all of which the employee was well aware. Further, the Employee as well as a select number of other employees were reminded of their obligations regarding company vehicles, and notably that they were not for personal use by the manager of train operations.

The Corporation asserts that the Employee's contention that he was not aware of the applicable policies is not credible in the circumstances. Further, the Corporation contends that

the Employee had other options for transit available to him that would have prevented operation of a company vehicle for personal commuting and by an unauthorized individual. The Corporation denied the grievance request by the Union.

For the Union:
(SGD.) P. Hope
General Chairman

For the Company:
(SGD.) R. Coles
Senior Advisor, Employee Relations

There appeared on behalf of the Company:

C. Trudeau	– Counsel, Fasken, Montreal
Y. Montplaisir	– Human Resources Business Partner, Montreal

And on behalf of the Union:

M. Church	– Counsel, Caley Wray, Toronto
D. Dunn	– Senior Vice General Chair

AWARD OF THE ARBITRATOR

Background and Issues

[1] The Grievor is employed as a locomotive engineer.

[2] On November 15, 2022, upon arriving at Capreol after his tour of duty, the Grievor decided to use the Company's vehicle to transport himself to his own home in another community, rather than to transport him to the Company's rest accommodations in Sudbury. The Grievor's home was approximately 114km from Capreol. When the Grievor was called back for drug & alcohol testing (the subject of **CROA 5102**), he had his wife drive him back in that same Company vehicle (Q/A 10).

[3] The Grievor was assessed a 30 day suspension for this improper use of a Company vehicle for this incident. This Grievance was filed from that assessment.

[4] The Grievor had six years and ten months of service in November of 2022. The Grievor had also been assessed 30 demerits for violation of CROR 43 which took place on his previous tour of duty (November 14/15, 2022). That discipline was not disputed to arbitration and cannot be challenged.

[5] In **CROA 5102**, heard in the same CROA session, discipline of 25 demerits was upheld for the Grievor's failing to abstain from drug and alcohol ("D&A") use *after* the events which resulted in the CROR 43 violation, above, and before he was advised whether he would be subject to D&A testing, in breach of the Company's policy.

[6] As a result, the Grievor's record stands at 55 demerits, before this 30 day suspension. Under the Brown System, dismissal occurs at 60 demerits.

[7] The issues between the parties in this Grievance are:

a) Did the Grievor breach the Company's policy with respect to a Company vehicle when he chose to drive it home and have his wife drive him to D&A testing?; and, if so

b) Was the discipline assessed just and reasonable? If not,

c) What is the appropriate discipline that should be substituted by Arbitrator discretion?

Decision

[8] Upon arriving at Capreol early in the morning of November 15, 2022, the Grievor made an unfortunate and indefensible choice, which had significant consequences. On that morning, the Grievor chose to use a Company vehicle to transport himself *home* from the terminal at Capreol (a distance of approximately 114 km) instead of choosing – like his crewmate – to use the vehicle for what was its permitted use, which was to transport he and his crewmember to the Company's rest accommodations in Sudbury (30 km away from Capreol).

[9] The Company has argued that its vehicles were only to be used for Company, which was clearly communicated to the Grievor. It argued he breached that policy and his explanations for his understanding are not credible. It pointed out it had communicated its Policy for how this particular (GPS monitored) vehicle was to be used, in an email of August 2, 2021.

[10] That email said:

> The VIA vehicle will be equipped with GPS tomorrow **in Capreol**. Please be advised that the vehicle will be monitored for fuel conservation, excessive speed ***and that it is not being used other than to pick up supplies going to eat, etc in Sudbury.***

[11] The Grievor's evidence was he felt he was entitled to use the vehicle in this manner and he also pointed out in his Investigation that his choice "saved" the Company the cost of a hotel bill.

[12] The Union has argued the Policy was vague, and the Grievor felt he was complying with the Company's policies regarding use of Company vehicles. The Grievor did not dispute he was a recipient of the email of August 2, 2021 regarding proper use of the vehicle (Q/A 30, 31) but maintained the policy was "very vague" and that he did not feel it was communicated properly, even though he acknowledged receipt of the Company's email.

[13] The Union argued that there was nothing expressly prohibiting the Grievor's use of the vehicle in its vehicle policy or in the email. It argued that just because the email said the truck was to be used in Sudbury did not limit it to use in Sudbury. The Grievor maintained the email did not set out a "clear expectation" on the "proper use of the vehicle" and did not "state clearly enough what personal vs. business use is" (Q/A 34) and that he did not think of his use driving the vehicle home as "personal use" as it was "common practice" "it was just how it was used. I thought I was saving the company hotel money by using the vehicle to get home as opposed to utilizing the hotel room in Sudbury" (Q/A 35); and he "did not see it as personal use to travel to my home. ***I would have considered this use the same as shopping in Sudbury or running errands while at the hotel***" (Q/A 36).

[14] I cannot agree the Grievor's evidence is credible or convincing, or that these arguments are compelling.

[15] The Policy was not unclear or vague. The Policy provided the vehicle would be monitored by GPS technology and also set out the circumstances for when that vehicle could be used. The limitation on *what* the vehicle was to be used for and *where* is clear. The email from the Company was clear that the only personal use contemplated was <u>in Sudbury,</u> to "pick up supplies going to eat, etc.".

[16] Employees driving the vehicle to their own residence does not equate to employees using the vehicle "in Sudbury" for meals and supplies while on rest. It was not up to the Grievor to determine his own rules for how the Company vehicle could be used; to determine that use from how others may have used the vehicle; or to argue that since he *believed* he could do so, he was acting in "good faith". Using a Company vehicle to travel to and from work is "personal use" and not "Company use". Neither is it any type of

use "*in Sudbury*", which is clearly stipulated as the location for use of the vehicle. It is illogical and unconvincing for the Grievor to equate picking up supplies while on rest "in Sudbury" to traveling 114 km to his personal residence in French River.

[17] That connection made by the Grievor to equate the two uses and to see "confusion" makes no logical or rational sense. It does not qualify as a "good faith" belief as argued by the Union. A "good faith" interpretation is one which the wording of the policy can reasonably bear, which does not exist in this case.

[18] Neither is there any evidence the Grievor sought authorization for his personal use. In fact, the Union was not able to point to any Policy which allowed this Grievor to use the Company vehicle in the manner in which he did, to support the Grievor's alleged belief the use was proper.

[19] The Union's argument was that the *Company* was required to point to a provision which *prevented* the Grievor's use. That is a misunderstanding of the burden of proof. Where the Grievor is disciplined for unauthorized use of a Company vehicle – which is a vehicle not owned by him – and the Grievor asserts in defence that the use *was* authorized – it is up to the *Grievor* to demonstrate that authorization and that his was therefore not an improper use of Company property.

[20] The Grievor also acknowledged he had used the Company vehicle in a similar manner in the past, to drive to his residence (Q/A 20), on September 20, 2022, October 18, 2022 and October 30, 2022 and that he was aware this vehicle was tracked (Q/A 22; 23). He further stated he used the Company vehicle this way on every second or third assignment; and he acknowledged that the vehicle was fueled by him using a Company credit card on the day before and after his uses on September 21, 2022 and October 19, 2022(Q/A 28), which was supported by Company documentation regarding use of the company credit card.

[21] In summary, the Grievor knew – or should have known – his use was not authorized. I am satisfied the elements of the *KVP* test regarding communication of the Policy to the Grievor was clearly communicated to the Grievor. He acted in breach of that Policy when he chose to use the vehicle to transport himself to his home. I am satisfied that given this industry and the Grievor's experience, he was well aware that the Company

accommodations were located *in Sudbury* and that the use of the truck was limited to transporting the crew from Capreol to Sudbury, and for use *in Sudbury* for picking up supplies and going for meals *while on rest in that location*, which is clear and concise from the reference to "in Sudbury". Instead, the Grievor chose to take this Company vehicle home so he could rest there instead of in Sudbury. The Policy was not vague and it was not reasonable for the Grievor to maintain the felt he was in compliance with the Company's policies when he chose to use the vehicle to transport himself to his own personal residence, instead of to Sudbury. Had it been his desire to rest at home in French River, he should have made arrangements to get himself to his home without using Company property to do so.

[22] Even if the email of August 2021 did not exist, the Grievor would have been required to seek authorization to use Company property for his own personal use in traveling home. He did not seek any permission to use this Company vehicle for his own personal use.

[23] The Grievor's use of the Company's vehicle was not a use that was authorized. He was in breach of the Company's policy regarding use of this vehicle.

[24] The Grievor's choice to take this Company-owned vehicle to his home – to use it for his personal use – was then *compounded* when he chose to give permission to his wife – who was a third party – to operate that vehicle back to Capreol when the Grievor was required to be tested for drugs and alcohol, which was admitted.

[25] The Grievor offered no explanation for that use beyond that he had the vehicle at his home and so brought it back (see Q/A's 10-12).

[26] There was no explanation offered for why the Grievor's wife did not operate her own personal car to bring the Grievor to testing, since the Grievor did not feel he could operate a vehicle back himself, and did not want to take a taxi. The Grievor acknowledged the Company was likely not aware he had this vehicle at his home (Q/A 15).

[27] While the Union pointed out the Grievor's wife had previously worked for the Company, that is an irrelevant fact for resolving this Grievance. I am satisfied the Grievor's wife did not retain any permission from the Company to operate a Company vehicle.

[28] The Union argued the Grievor's choice was a responsible one, given the Grievor admitted he consumed drugs and alcohol to relax, upon returning home.

[29] However, this explanation is not convincing, given that the Company had offered to send a taxi for the Grievor, to bring him back for testing, as acknowledged by the Grievor (Q/A 17).

[30] The Union also pointed out that at no time did the Grievor or his wife use the vehicle for personal errands, in defence of the Grievor's actions.

[31] Presumably this argument means ***beyond*** the personal use of driving it to his home and then being driven in it back in it, in the first place. The Grievor's lack of using the vehicle for the further use of personal errands in the short time he was at home is not mitigating, when he had no permission for any use at all.

[32] The Union has argued that the Company is "piling on" with the two assessments of discipline which have followed an incident of "speeding". The reasoning in **CROA 5102** is adopted on this point. There are three very distinct and different offences for which the Company has issued discipline. Each of those choices involve an independent and distinct choice by the Grievor. There is no "piling on" in these circumstances.

[33] First, the Grievor was found culpable for *speeding* and assessed 30 demerits, which penalty was not pursued to arbitration. That is a distinct offence resulting from his operation of his Train. Second, the Grievor then chose to go home and *consume both drugs and alcohol before he knew if he would be tested*, in what has been found to be a breach of the Company's Policy, for which he was assessed 25 demerits, which penalty was upheld in **CROA 5102**. Third, the Grievor then chose to *travel home* in a Company vehicle, instead of staying in the Company's accommodations – or having his wife come and pick him up there if he desired to go home. His decision was in defiance of a policy which was clearly communicated.

[34] The Grievor then compounded that culpable conduct when he allowed his wife to drive him back to the Company testing site, when she did not have permission to drive a Company vehicle. Even though both instances of culpable conduct involved the same vehicle, the Company did not assess two different sets of discipline for these last two

choices of misconduct, but combined the two offences into one discipline decision of a 30 day suspension.

[35] While the Union argued this placed the Grievor at 55 demerits, and under this Grievance also a 30 day suspension from a two day period, stating that fact does not support that the penalties are excessive or that this was “piling on”.

[36] Unfortunately for him, the Grievor made three distinct and very poor choices in a short period of time have left him in his current position. That fault does not rest on the Company.

[37] While the Union argued it was “only 60 km” each way *past* Sudbury that the Grievor used the vehicle for, the Company pointed out the Grievor’s total travel was 114 km, from the terminal to his residence; and a further 114 km back. In any event, it is not the amount of kilometres used, but the fact the Grievor acted in defiance of the Company’s policy and chose to take a Company vehicle for his own personal use, and allowed that vehicle to be driven by his wife – a third party that is at issue.

[38] The Union has argued the Grievor did not attempt to downplay or hide his actions in this Investigation. The Grievor is not given “credit” for acting “openly” when he defied the Company Policy in driving a GPS monitored vehicle. All uses would have been discovered by the Company, even if the Grievor did not offer the previous use on October 30, 2022, given this vehicle was GPS tracked.

[39] The Grievor is not only culpable for his own personal use, but also for allowing a non-Company individual to drive a Company vehicle. Discipline appropriately follows for both actions.

[40] The question remaining is whether a 30-day suspension was a reasonable response by the Company for the Grievor’s conduct. Given these circumstances, I am satisfied it was.

[41] In this case, the Grievor is an employee of six years and ten months. His service would be described as “mid-level”. The Grievor’s discipline record is significant. Whether that discipline was gained over the course of time or through three very poor decisions made in quick succession, that record is relevant. Considering the nature of the offence,

using Company property could have been characterized by the Company as theft, rather than just “improper use”. Even characterized as “improper use” it is a significant breach of the obligations owed by an employee to his employer.

[42] Neither is there candidness and openness demonstrated by the Grievor in his Investigation, nor was he particularly remorseful. Admitting use that could be found when the Company checked the GPS tracking does not act to the Grievor’s credit. The Grievor demonstrated a remarkable lack of insight into his misconduct; sought to deflect responsibility by suggesting the policy was vague; offered explanations that were illogical; and justified his behaviour by reference to what other employees did. That evidence does not reflect an individual who has experienced genuine remorse and has developed insight into his actions. The Grievor’s actions in defending the indefensible showed exceedingly poor judgment rather than any type of openness or insight into his own misconduct.

[43] If an employer cannot trust an employee to use its property in a manner which it directs – and not for his or her own purposes – this is cause for significant concern. That is the case especially where – as here – employees work in a largely unsupervised environment. In this case, not only did the Grievor inappropriately use this vehicle, but he also allowed a non-employee third party to operate that vehicle, which had the potential of exposing the Company to significant liability had an accident occurred. That is also an aggravating circumstance.

[44] Considering mitigation, it is not mitigating that by driving to his own residence, the Grievor “saved” the Company a hotel bill. That type of reasoning also demonstrates a considerable lack of insight into the true nature of the Grievor’s misconduct. It causes concern for the Company that the Grievor has not fully understood his misconduct. Without insight, the Company does not have comfort the offence will not be repeated.

[45] The Union relied on *International Union of Elevator Constructors, Local 50 v. Otis Canada Inc.,* 2013 CanLII 3574, a decision of Arbitrator Silverman, involving use of a vehicle to purchase groceries for dinner. However, in that case, the actions were found to have been inadvertent, which is distinguishable from the facts in this case.

[46] The Grievor’s actions cannot be described as “inadvertent”. He admitted to using the vehicle on at least four occasions, with an explanation for his interpretation that is not

credible or logical or defensible. The Union's argument that the Grievor had a "good faith" belief he was entitled to use the vehicle as he did, is not supportable.

[47] No "good faith belief was found and termination was upheld in *Aviscar Inc. and UFCW, Local 401* 2015 CarswellAlta 777.

[48] As noted by Arbitrator Schmidt in *Cancable Inc. c.o.. as Dependable Hometech v. Black* 2013 CanLII 54931, the "liability associated with Mr. Black's misconduct and its potential consequences is very serious" (at p. 1). In that case, the Arbitrator noted that the "misconduct cannot be construed in any way but "wilful" (at p. 2).

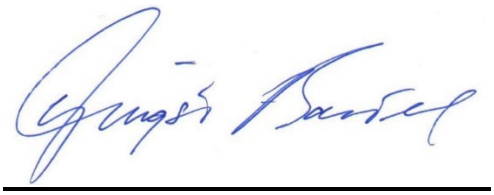
[49] The same conclusion applies in this case.

[50] A suspension always accompanies a financial cost. In this case, that cost is significant, as the suspension was significant. However, there is no evidence that a "special hardship" was worked on this Grievor as a result (as noted in *U.S.W.A., Local 3257 v. Steel Equipment Co.)* 1964 CarswellOnt 498.

[51] Considering all of the circumstances and after review of the jurisprudence, the Company's discipline of 30 days' suspension – in these circumstances – was just and reasonable.

[52] The Grievance is dismissed.

I retain jurisdiction for any questions regarding the implementation of this Award; and to correct any errors; or address any omissions; to give this Award its intended effect.



February 11, 2025

CHERYL YINGST BARTEL
ARBITRATOR