CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4838

Heard in Montreal and via Video Conferencing, July 11, 2023

Concerning

ONTARIO NORTHLAND TRANSPORTATION COMMISSION

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

Discharge of Motor Coach Operator D. Shaver for alleged misconduct on May 20th during the investigation process that followed.

JOINT STATEMENT OF ISSUE:

On May 20th 2019, Ms. Shaver operated Coach 1905 on trip 711. While reversing off of platform 13 at the Yorkdale GO Transit, she hit a cement pole with the rear driver's corner of the coach. Approximately $30,000 in damage was caused to the coach as a result of the impact.

Ms. Shaver failed to remain at the scene of the accident and failed to report the collision. When she later reported the accident at a subsequent stop, she indicated that she "clipped" a pole. Based on Ms. Shaver's verbal reporting, she was allowed to continue operating the bus. It was subsequently determined that the motor coach was not safe to be on the road.

Ms. Shaver was required to attend a formal investigation on May 23rd 2019 for her alleged involvement in causing damage to a motor coach. Following the investigation, Ms. Shaver was terminated from her employment relationship with Ontario Northland Transportation Commission for: a) having a preventable accident, which caused significant damage and which resulted from Ms. Shaver's failure to comply with her training; b) failing to remain at the scene and report the collision; and c) minimizing the extent of the damage, which resulted in Ms. Shaver continuing to operate a motor coach that was not safe to be on the road and put ONTC's customer and other members of the public at risk.

Union's Position:

The Union contends that the investigating officer was not fair and impartial.

The Union contends that ONTC did not prove, on a balance of probabilities, that Ms. Shaver acted with malice and intent to substantiate termination.

The Union contends that Ms. Shaver suffers from several medical conditions including anxiety that ONTC is aware of, and as such, ONTC has an obligation to accommodate Ms. Shaver up to the point of undue hardship under the Canadian Human Rights Act.

The Union submits that the discipline assessed was unwarranted, and in any event, excessive under the circumstances. The Union requests that Ms. Shaver be reinstated and be made whole for all lost earnings, benefits, pension, all with interest.

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

Company's Position:

ONTC disagrees with the Union's claims.
ONTC's position is that it complied with the Collective Agreement.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) M. Kernaghan	**(SGD.) D. Baker**
General Chair TCRC-C-LE	Chief Human Resources Officer

There appeared on behalf of the Company:

G. Ryans	– Counsel, Fasken, Toronto
K. Darbyson	– Manager, Labour Relations, Toronto

And on behalf of the Union:

R. Church	– Counsel, Caley Wray, Toronto
R. Archibald	– PLBO, Chair
M. Kernaghan	– General Chairperson, LE Region, Toronto
J. Currier	– Alt. Vice General Chairperson, Toronto
P. Boucher	– TCRC President, Ottawa
D. Shaver	– Grievor, North Bay

AWARD OF THE ARBITRATOR

A. Background

[1] The Grievor was employed by the Company as a Motor Coach Operator from June 5, 2009 to the date of her dismissal on June 5, 2019. That dismissal occurred after a motor vehicle accident ("MVA").

[2] The Union filed this grievance against that dismissal. For the following reasons, the Grievance is allowed, in part. The issue of remedy is remitted to the parties, under specific direction.

B. Facts

[3] The Grievor has had a complicated work history. In April of 2010, the Grievor had a work-related injury which led to health complications, the repercussions of which have kept her out of the workforce for several years. She was absent from work for approximately six of the ten (10) years she was employed. On the Grievor's return to work in January of 2018, she had a Permanent Accommodation Agreement with a restriction to "avoid work involving cleaning products or work on a cleaning crew". There was no mention in that Accommodation Agreement of any issues with anxiety that would interfere with her ability to carry out her employment.

[4] On May 5, 2019, the Grievor was operating motor coach 1905 on trip 711. That route required her to travel between North Bay, Ontario, to the Yorkdale Mall bus terminal in Toronto, Ontario, and then back to North Bay. She also stopped in Vaughn. She began her route at 0130 and returned to North Bay at approximately 1530 on the same day. This was a fourteen (14) hour day for this Grievor.

[5] Throughout the trip, the door of coach 1905 was not functioning properly. The Grievor noted in the Investigation that she had been told by the previous driver of the coach to "jiggle, kick or pull the [bus] door" as it had a "new seal". It was stated in the Investigation you had to "hold the button and kick the door sometimes" for it to close. The Grievor reported the difficulties with the door to Company dispatch early in her trip (at 0145; 15 minutes after she started her shift).

[6] It is not disputed that at approximately 09:55, the Grievor was reversing out of the Yorkdale Mall bus terminal and backed into a cement pole, which damaged the back of the bus. The Grievor indicated she was relying on the backup camera and her left mirror to reverse the coach. This reliance was considered by the Company to be in breach of Company policy and procedure, which required her to use her rear view mirrors on both sides of the bus and not the back up, rear camera to reverse the bus. According to the Grievor, she was not provided any training on the use – or non-use – of the backup cameras. There were twenty-seven (27) passengers on the bus at the time of the collision.

[7] It is not disputed that the collision with the pole caused significant damage to the bus. The parties filed pictures taken of the bus after that collision. The pictures demonstrate damage to several quadrants of the back of the bus, on the left hand side, including a mesh/grill that wrapped around to the left side of the bus, in the top quadrant. The bus was taken out of service for several weeks for repair. The Company maintained there was approximately $30,000 in structural damage caused to the bus by the collision. While the Union disputed that figure, I am prepared to find the damage was not minor and was significant.

[8] Grievor made what she described as a "judgment call" that the bus was roadworthy and that the lights were all working as far as she could tell and continued on her route to North Bay. According to the Dispatch Daily Event Log, at approximately 10:20 a.m. (25

minutes after the MVA had occurred, and while at the next stop in Vaughn), the Grievor reported to dispatch that “while reversing she had backed into a pillar causing some very visible damage to the body. Coach is still able to drive and will continue heading back to North Bay”. Under the “Action Taken” heading of the Dispatch Daily Event Log, the dispatcher states: “She will fill out a collision report and once the coach is back in North Bay @ 15:30 (will send out pictures)”. The Log also noted the “unrelated door issue” the Grievor had been dealing with.

[9] In the Grievor’s collision report filed after she returned to North Bay, she indicated she had “clipped” a cement pole. In the investigation she also described it as she had “backed into” a cement pole, which I am satisfied is an accurate description of what occurred.

[10] I also find factually that the Company did not provide any direction to the Grievor after she reported the collision. She was not asked to wait while dispatch determined what should be done; she was not put on the phone with the mechanic to describe the damage; and the Company did not insist on her providing any pictures of the damage. I find the Company agreed with the Grievor’s decision to continue to North Bay and raised no issues regarding her judgment of the roadworthiness of the bus.

[11] The Grievor’s conduct was investigated on May 23, 2019. When asked what she would have done differently, the Grievor indicated “I don’t know”. When she was told the Company considered she had downplayed the damage to the bus by describing it as having “clipped” a cement pole, the Grievor stated she had told dispatch that the damage was “bad”, and also told dispatch of a difficulty she had been having with the bus door. The Grievor indicated she was “put on with the mechanic about the door” [put on the phone with the mechanic], and that they discussed whether all fluid levels were checked. It was also the Grievor’s evidence that she told dispatch that “…you’re not going to want to send this bus beyond me”, as she knew they would not want to send the bus back out. She stated she was not concerned that parts might fall off while traveling on the highway, even though she had described the damage as “bad”. The dispatcher was interviewed and denies being told by the Grievor that the damage was “bad” and that the Grievor

indicated to her the bus should be taken out of service when it reached North Bay. In my view, nothing turns on this discrepancy.

[12] The Grievor indicated that she did "speak to the mechanic that day about the door, he didn't ask about the damage". When asked whether in hindsight the Grievor would have mentioned the damage to the mechanic, she replied "I don't know". She also stated she did not realize she had violated sections A2, A6, A7 and 53 of the Operator's Manual, although she acknowledged she should report a collision "most likely right away". The Grievor stated she did not stay at the Yorkdale Mall and report the collision there, because she has anxiety and PTSD from a work-related collision.

[13] No medical documentation had been provided to the Company prior to this MVA that the Grievor was unable to perform any of the functions of her employment as a result of a disability. While the Union noted the Grievor had been off for two weeks due to anxiety in August of 2018, there is no indication the Company was aware that was why the Grievor was off. The Company indicated that it had asked for information regarding the Grievor's stated anxiety after the collision, but had not been provided that information.

[14] I am satisfied the Grievor did not request any accommodation from the obligations of her role, due to anxiety.

[15] When asked during the Investigation what she would have done differently, the Grievor indicated "I don't know". The Grievor confirmed she had been in and out of the Yorkdale bus terminal "many times". The Grievor stated she did not check for any damage to the concrete post on the day of the MVA, but checked on the day after and did not see any damage. At the Investigation the Grievor summarized:

> I'd just like to say I made a judgement I got out to make a call to see if it was road worthy, when I left it didn't drive any differently, no one was injured. If it had been driving differently, I wouldn't have driven it. The lights were working from what I could see. This is the first time I have had passengers on board for an accident. I have not had any accident training at a motor coach company. The wall also in question is a safety issue, it's all grey and parts that stick out which is what I caught, it would be better if they were yellow.

[16] She also indicated the lighting "was not very bright, which is why I said in Vaughn, after I looked again to dispatch that the bus should be taken off the road after this".

[17] In describing her state of mind, the Grievor stated:

> The state of mind, I was fighting with the door all night. It was a tough day, it was a long shift. Other than the door? Passengers, battles we always have. I think I had a complaint that day, not sure where he got on. People complaining about having to pay for extra bags, luggage being too heavy.

[18] The Dispatcher indicated that the Grievor was more concerned about the door problem than the road worthiness of the bus. She stated that when she spoke to the Grievor after her shift, the Grievor stated that there was a "lot going on, the door would not stay shut" and that she was "distracted by the door opening when she was reversing".

C. Arguments

[19] Both parties provided information regarding the Grievor's history with the Workplace Safety & Insurance Board (WSIB) and certain decisions of that body surrounding this accident. The Company pointed out the Grievor had already received payment from the WSIB for loss of earnings since the accident, stemming from an earlier decision of the WSIB, which made a connection between the anxiety and her accident. It also noted that she has not been required to repay those earnings, even though that decision was overturned on appeal and it was determined that her disability did not impact the accident or what occurred after the accident. The Company argued this was relevant to any remedy, should its decision be set aside.

[20] The Company further argued the Grievor had not provided any documentation regarding a need for accommodation from the Company's policies due to disability, even though the Company requested that information after the MVA; that she was cleared to work without accommodation in January of 2018 and had not indicated any restrictions since that return to work; that had the Company been aware of such an issue it would have removed the Grievor from the role of Motor Coach Operator; and that the WSIB confirmed that the Grievor's psychological injuries were not the cause of her actions leading to this collision. The Company argued that it had satisfied its burden to establish cause for dismissal. It argued it was a violation of Company policy to back using the backup camera instead of both rear view mirrors (Section S3); that the Grievor also violated the Motor Coach Operator's Manual of the Company regarding protocols following an accident (Sections A6 and A7), which include prompt reporting and staying at the scene; that photographic evidence of the condition of the bus establishes this was

a significant collision; that the accident was preventable and in violation of the Company's policies; and that the Grievor drove a bus for a further three hours when it was in an unsafe condition, creating danger to passengers. It argued she was evasive, dishonest and inconsistent during the Investigation and failed to show remorse or take responsibility.

[21] The Company maintained it was a just and reasonable disciplinary response to terminate the Grievor.

[22] The Union argued there was no indication of deliberate misconduct, deceit or delay, rather the Grievor was in an anxious mindset after the MVA. It outlined the Grievor's workplace injury and her medical history and argued the Grievor's anxiety prevented her from reporting at Yorkdale, as she had an anxiety attack, but that she did report the accident a short time later. The Union urged her judgment was impacted by this anxiety attack brought on by her previous disability; that the anxiety was connected to her conduct and that this should have a "mitigating application of the Company's statutory duty to accommodate to the point of undue hardship". The Union noted the Grievor was off work for two weeks for anxiety, in August of 2018.

[23] The Union also pointed out it was a difficult and long day for the Grievor. It noted the door of coach 1905 was not functioning properly; the Grievor reported the damage from the collision was 'bad'; the Grievor inspected the bus after the incident and nothing appeared to be hanging and that the vehicle appeared to be roadworthy; that the Company authorized the Grievor to return to North Bay; that the event details had been sent to management; that none of the management who had those details objected to the action taken as noted in the Dispatch Log; that she was not directed to discontinue operation of the coach; and that the coach was operated for the remainder of the trip without incident. It also argued the Grievor was not provided training on what to do in case she contacted a pillar while backing.

[24] It argued that within 30 minutes the Grievor had reported the MVA and complied with the requirements and that the body damage did not interfere with her operation of the coach. It also urged the Company has provided no evidence to substantiate its claim of $30,000 in damage to the bus and that there was no indication the vehicle was not

roadworthy; rather it was pulled from service to repair body damage only; and it was back in service in three weeks.

D. Analysis and Decision

[25] The analysis in *Re Wm. Scott & Co*[1] requires an arbitrator ask three questions when assessing the reasonableness of discipline. The first question is whether any cause for discipline has been established. The Company bears the burden of proof to establish that cause. The Union argued the Grievor's anxiety should be a "mitigating application of the Company's statutory duty to accommodate to the point of undue hardship". When a failure to accommodate is alleged, an arbitrator must first assess the validity of that claim, as that will result in a different analysis. For that claim, the Union bears the initial burden of establishing the grievor was suffering from a disability and that a Company policy or procedure had an adverse effect as a result of that disability. The burden then shifts to the Company to establish it has complied with its duty to accommodate obligations.

[26] Accommodation is a tri-partite obligation. It places obligations on the Union, the Grievor and the Employer. An Employer can only accommodate what it knows about.

[27] In this case, the Grievor was subject to a Permanent Accommodation Agreement on her return to work in January of 2018. That Agreement was only limited to chemical sensitivity in the workplace, due to the impact of the Grievor's allergies. Even though the Union has argued the Grievor was suffering from anxiety prior to this collision, it is relevant that she did not seek any accommodation for her anxiety from this Company. She did not maintain her anxiety condition impacted her ability to perform the duties of her role.

[28] While the Union has argued there should be a "mitigating application of the Company's statutory duty to accommodate" the Grievor, and that her anxiety should act as a "mitigating circumstance", I cannot agree that is the case. Even if it were accepted she *had* an anxiety attack at the time of the MVA and that the impact of that attack prevented her from complying with the Company's policies, the cases on which the Union relies for this proposition involve issues of drug and alcohol addiction. In those cases, it

[1] [1976] B.C.L.R.B.D. 98

is well-established that "denial" that an individual *even has* an addiction is in fact a symptom of that disease. The fact that the condition is not disclosed until after an incident may be part of the mechanism of that denial. It is accepted that with such denial, the *fact* of termination itself can bring awareness to an individual of her need for help.

[29] I am not satisfied from the evidence in this case that the same can be said of anxiety, or that the Grievor was in any type of denial regarding the impact of that disease.

[30] In this case, the Grievor was aware she had anxiety. The Union urged she was off work for two weeks as a result of anxiety in August of 2018, nine months before the accident. However, she had returned to work seventeen (17) months before this accident, which was ample time for her to determine if she required accommodation for her anxiety.

[31] It was incumbent on the Grievor to disclose her need for accommodation to the Company if she is now asserting that the condition prevented her from carrying out the obligations of her employment. She cannot wait and then raise her condition as a reason she cannot comply with employment obligations, once an accident occurs. To do so denies the Company the ability to assess whether she was capable in the first place of performing her job, or whether she should be accommodated in another role. Put another way, the Grievor cannot have it both ways. She cannot represent to the Employer she is medically capable of performing her role, then insist she suffers from a disability when an accident occurs.

[32] I am satisfied the Grievor represented on May 5, 2019 that she was fully capable of performing her position, so long as her Permanent Accommodation Agreement was complied with by the Company. While MVA's are stressful whenever they occur, the Grievor did not represent she was not capable due to disability of performing the duties of her employment.

Assessment of Discipline

[33] The Company's support for its discipline is three-pronged: the Grievor hit a cement pole; the Grievor failed to follow Company policy by reporting the accident in a timely

manner and staying at the scene; and she drove a bus that was not roadworthy to North Bay, creating risks to other road users as she did so.

[34] I accept that the Grievor struck the cement pole. I further accept that this demonstrates she failed to take appropriate care and attention to backing her coach. The accident occurred in mid-morning in May. The pole was there to be seen - and could easily have been seen – had the Grievor walked around her bus prior to backing it up.

[35] The Grievor did not "clip" the cement pole; she hit the cement pole as she described in her Collision Report. The Grievor offered no other explanation of why the accident occurred, other than the ongoing frustration with the door, which had been ongoing. She struck the pole and I accept she caused significant damage to the bus as a result. Whatever the amount, I accept the damage was not minor. While the Union has urged it was "only" body damage", "the pictures themselves do not support that conclusion. Even if it were "only body damage", such significant damage.

[36] Considering all of the facts and circumstances of this case, the Company had cause to discipline the Grievor for her carelessness in not being appropriately aware of her circumstances, for striking a concrete pole and for causing significant damage to the bus.

[37] However, I do not find the Company has established cause for the other "prongs" on which it relies to support its disciplinary choice. I accept that Article A6 of the Motor Coach Operator Manual states that accidents are to be reported "immediately" to dispatch. However, that section also states that collision reports are to be prepared "immediately", yet also says reports are to be prepared by the next day, demonstrating that the word "immediate" may not always be considered as "before any movement". This is not a case where the Grievor failed to report a collision. Nor is this a case where she lied about where it occurred. There is not a large gap of time between the accident and her report. In this case, the accident was reported inside of 30 minutes and the collision report itself was made 3 hours later, yet no issue was taken with that time lag of that formal reporting. The Grievor *did* report the collision; she just did so 25 minutes after the collision had occurred.

[38] In considering the reasonableness of the Grievor's actions, and all the circumstances of this case, I cannot agree with the Company that this 25 minute delay was not timely reporting and so supported a significant disciplinary response. Even assuming breach of the Company's policies, the Company has not satisfied me that "time was of the essence" in this case and that it would have done anything differently had the accident been reported 25 minutes earlier and had the Grievor stayed at the scene.

[39] In view of this finding, it is immaterial what impact the Grievor's anxiety may or may not have had on her ability to report the accident.

[40] Turning to the Grievor's decision to continue on when the bus was not roadworthy, (and therefore fail to stay at the scene) this basis for discipline is also problematic for the Company.

[41] The Log indicates the Grievor told the Company there was "some visible damage" to the bus. The Grievor therefore reported the collision to the Company dispatch. She also indicated that "visible damage" had occurred. She did not downplay the accident. There was no other vehicle involved in this collision. I find that once the Grievor advised the Company of the accident, the responsibility transferred to the Company to both take responsibility to address the roadworthiness of the bus and provide direction to the Grievor. I am also satisfied the Company did neither. For example, the Company did not require the Grievor to send in pictures before she continued on, so it could have its trained personnel assess the damage to the bus – and its roadworthiness - once it knew from the Grievor that "some visible damage" had occurred. Neither did the Company did not instruct the Grievor to "stay put" until it could assess that damage – as it could have. The Company also did not have its mechanic talk to the Grievor to help assess the roadworthiness of the bus before moving.

[42] While the Grievor talked to the mechanic when she reported the collision, that discussion was regarding the issue of the door and not the roadworthiness of the bus. It was up to the Company at that point to instruct the mechanic to talk to the Grievor about the damage; that responsibility did not remain with the Grievor, once the accident report was made. Instead, the Company appears to have been distracted – as was the Grievor – by the issue with the door.

[43] From a review of the evidence, I accept the Union's argument that the Company acquiesced in the Grievor's plan to continue on to North Bay, *with the bus in the condition in which it was in.* The Log demonstrates that this was the Grievor's plan and there is no indication the Company disagreed or directed her to do otherwise. It does not now lie with the Company to suggest that the Grievor bears responsibility for that choice and should be disciplined for that plan.

[44] I am not satisfied the Grievor was dishonest in the Investigation or not forthcoming. While she described her action as "clipping" the bus, she also said she backed into it, and reported there was "some visible damage" to the bus. She did fail to show sincere remorse, however, which is an issue for mitigation under the second question, rather than one which provided cause for discipline under the first question.

[45] To summarize the first question, there *is* cause for discipline to the Grievor for the collision with the cement pole, which caused significant damage to the bus. There was a minor delay in reporting, which I am not satisfied has provided cause for significant discipline (a warning would have sufficed) and cause for discipline has not been established for the fact the bus was not roadworthy when it was operated to North Bay.

a) <u>The Second Wm. Scott Question: Was Discipline Just and Reasonable?</u>

[46] This leads to the second *Wm. Scott* question, which is whether dismissal was an appropriate disciplinary response for the cause which has been established. If it is not, a third question then arises, which is what discipline an arbitrator should substitute, to reach that end. There are several factors an arbitrator generally considers when making an assessment of the reasonableness of discipline. Some of these factors are outlined in *Re Wm. Scott & Co.*, however it must be emphasized the factors in that case are not an exhaustive list. Arbitrators can consider whatever factors they consider reasonable and relevant to the discipline.

[47] To uphold a discharge, an arbitrator must weigh all of the various factors together in each case, to reach a global determination that the employment relationship is untenable and trust is irrevocably broken. Precedents are of limited use in making this assessment, as no two fact patterns will ever be the same. It is also well-established that

discipline must be proportional to the event. The “time must fit the crime” in the vernacular.

b) Authorities of the Parties

[48] Both parties provided several authorities to support their positions and this assessment. I have reviewed all of these authorities. Several are summarized, to demonstrate the type of analysis that occurs, and the level of discipline which arbitrators have found appropriate for motor vehicle accidents involving professional drivers.

[49] The Union relied on **CROA 3774**. That is a case in which a Conductor failed to report an injury. His failure was not due to carelessness or lack of caution. He was given a warning letter. That is distinguishable from these facts. **CROA 4522,** involved a thirty-four (34) year locomotive engineer who had been dismissed for failing to report an injury, which decision was found to lack proportionality. A written warning was found appropriate. That case is distinguishable from these facts, as the case before me does not involve a failure to report an injury but a collision resulting in significant damage to a commercial vehicle.

[50] In ***CP Railway Company v. Intl. Brotherhood of Electrical Workers System Council No. 11*****,** an employee was involved in minor rear end collision with another vehicle from following too closely, with “minimal” contact and “minimal damage” to both vehicles, which it was found provided cause for discipline. The arbitrator found a “caution” was appropriate discipline instead of a thirteen (13) day suspension. That case is also distinguishable. In the case before me, there was significant damage and the collision is of considerably more severe. Carelessness of action on the part of the Grievor has been established in this case. The Company also relied on ***CN Railway Company and Brotherhood of Maintenance of Way Employees*****,** involving theft. That case can be distinguished and is inapplicable as I have not found any theft or dishonest conduct of the Grievor.

[51] Several cases provided by the Company involved the misconduct of transit operators where discharged was initially assessed. In several of these cases, discharge was vacated and a lesser penalty was substituted: ***Re B.C. Transit and Independent Canadian Transit Union, Local 1***, (short service employee; unblemished record; crash

of a bus into a building after crossing six lanes of traffic due to brake not being put on appropriately; discharge vacated and a lengthy suspension substituted); ***Re Coast Mountain Bus Co. and CAW, Local 111 (Lee)*** (complaints by passengers against a driver who had a blemished record; started up a bus when a passenger was caught in the door, failed to file an incident report relating to that conduct; took off with the doors open while a passenger had one foot in the stairwell; and ran a red light; "persistent refusal to abide by company policy" and safety rules; discharge upheld).

[52] While that case involved more severe incidents of misconduct, it does reinforce the proposition followed by arbitrators that transit operators are hold to a "higher standard of conduct than one might find in other industries" (at para. 151). This principle was also noted in ***Calgary (City) and ATU, Local 583 (Gill)*** (less serious collision of hitting a mirror of a car; dishonest conduct established in falsifying time of accident to coincide with late reporting; did not stop to investigate the accident when he heard the noise; most serious issue found was failure to be honest and forthright; lengthy suspension of more than a year without substituted, due to the lack of forthrightness).

[53] ***Burlington (City) v. CUPE Local 2723*** can also be distinguished (grievor with 17 years of service; in a "final warning" situation; failed to report serious tire damage and drove in a careless and unacceptable manner "for a considerable portion of his shift"; discharge upheld). I have found no dishonesty, so several of the Company's cases are distinguishable, including ***Re Brewster Transport Col. and ATU, Local 1374*** and ***Re CN Railway Company and TCRC (McMillan).***

d) Application to the Facts

[54] A factor of significance to arbitrators is the seriousness of the incident. In this case, the Grievor, as a professional driver, failed to see an obstacle that was there to be seen. It would have been a reasonable expectation that the Grievor would walk around the bus – do a "circle check" – to see all obstacles that were there to be seen, prior to making a reverse movement; and then to take care to avoid those obstacles. The damage caused to the bus in this case was not minor; it was significant. I accept the collision in this case was serious and significant and was caused by the carelessness and lack of attention shown by the Grievor.

[55] A further factor noted in *Re Wm. Scott & Co.* is the Grievor's level of service, as well as what the discipline record is during that service. It is accepted by arbitrators that long-service with an employer should be a mitigating factor, as it has earned a higher degree of loyalty and understanding than that of an employee who is newer to service. Discipline records – especially those which demonstrate a pattern – are aggravating. In this case, the Grievor is not a long-service employee and no previous discipline was alleged. Even accepting the full ten (10) years of employment as relevant for the application of this factor, that level of service would be in the "mid" range between short and long service. It would not be as mitigating as long-service.

[56] The Grievor's disciplinary record was not placed in evidence before me, although in a statement made by the Grievor she indicated she had a clear disciplinary record. The Company did not suggest that a disciplinary record was an aggravating factor in this case and I accept her lack of discipline is a mitigating factor.

[57] A further factor is provocation: What was going on around the Grievor at the time the incident occurred? I accept the Grievor was having a long shift, and that she was having difficulty with her bus door. She also referred in the Investigation to incidents with passengers and dealing with their frustrations.

[58] The incidents referred to by the Grievor are those expected of someone in her position. The difficulty with the bus door – while not usual – was also not unexpected on a commercial bus. The Grievor could have asked to communicate with the mechanic earlier than she did, and not just report the issue at 01:45, but also seek instructions on what to do about the door and how to ensure it stayed closed. I do not accept that the description of the Grievor's day rises to the level of provocation which would impact the Grievor's ability to see the cement pole that was there to be seen. The issue with the door is a factor to be taken into account and weighed, but it does not have a strong mitigating effect.

[59] A further factor to be considered is the level of sincere remorse shown by a Grievor. Remorse demonstrates to an employer that a grievor is aware of where they have erred and provides to an employer confidence - from that awareness - that the mistake will not

be repeated. Sincere remorse is considered a mitigating factor. Lack of remorse has the opposite impact and is considered an aggravating factor.

[60] Upon reviewing all of the documentation, I agree with the Company that the Investigation does not reveal the level of remorse and accountability expected from a professional driver who has hit a stationary object, nor any insight for what she could have done differently to avoid the collision (for example, use rear view mirrors; perform a walk around to raise awareness of the pole). Neither did the Grievor offer an apology to the Company for the accident in the first place, and for the damage her carelessness caused to the bus, which I accept was extensive.

[61] While the Company has focused on the Grievor's language of "clipping" the pole, the damage was there to be seen and I do not find this description to be dishonest or evasive. The Grievor did not try to "hide" the accident; or try to suggest it occurred at a different time. However, she did lack sincere remorse for her actions, and this issue understandably has caused the Company some concern. The Grievor blamed her actions on the lack of yellow painting on the concrete wall, and the lighting, even though the accident happened mid-morning and she admitted to being at the Yorkdale bus terminal "many times" and so would have been familiar with its landmarks.

[62] While this has a different level of impact than the dishonesty argued by the Company, lack of remorse and insight is an aggravating factor for discipline.

[63] I have sympathy for the Grievor, who has suffered various health issues largely stemming from a workplace accident in 2010. However, the work she continues now to perform is work that is largely unsupervised. She is responsible for operating – and protecting – an expensive piece of equipment and is subject to a high standard of diligence, as demonstrated in the jurisprudence. That said, dismissal is the most severe form of discipline available to the Company.

[64] As the Company has not focused on any previous discipline incidents, I am prepared to accept the Grievor had a clean record and was a ten (10) year employee – with four years of active service – who was careless in hitting a cement pole and caused significant damage. Considering all of the facts and circumstances of this case, I cannot agree with the Company that the actions of the Grievor supported dismissal as a fair and

reasonable disciplinary response. That level of response is not supported by the authorities and was excessive and unwarranted.

[65] This triggers the third question in a *Wm. Scott* analysis: what discipline should be substituted as just and reasonable, which also impacts an assessment of an appropriate remedy.

E. What Remedy is Appropriately Substituted?

[66] Section 60(2) of the *Canada Labour Code*[2] provides to an arbitrator the "power to substitute for the discharge or discipline such other penalty as to the arbitrator or arbitration board seems just and reasonable in the circumstances", when the collective agreement does not otherwise contain a specific penalty for the infraction. That section provides to federal arbitrators broad powers to craft an appropriate remedy, based on the circumstances of each case. It is sometimes the case that a general "make whole" direction for the difference between what is an appropriate remedy and what was assessed would not address the particular circumstances. This is such a case.

[67] There are two issues which impact the issue of remedy in this case. First, the issue or remedy is complicated by the fact the Union has raised the issue that the Grievor suffers from an anxiety disorder that impacts her response to – and potential ability to report – accidents that result from her driving. The Company noted in its Argument that if this indeed the case, it would be necessary to remove her from service as a Motor Coach Operator and an accommodation process would need to begin.

[68] Had this not been the case, I would have been prepared to vacate the dismissal and substitute a three month suspension for the Grievor's infraction, without compensation but with no loss of seniority, as a just and reasonable discipline response for a significant accident involving a grievor with a clear disciplinary record, where dishonesty was not established, and where there are both aggravating and mitigating factors to consider. Such a suspension would be consistent with the jurisprudence in this area, although precedents do have limited value.

[2] R.S.C 1985, c. L-2

[69] However, the Union's argument has raised the issue of whether the Grievor is medically capable of even returning to her employment, if she were ordered to be reinstated, or whether she requires accommodation. It was not made clear in the evidence what the Grievor's current medical state is.

[70] Secondly, both parties referred to the process followed by the WSIB in providing certain lost wages to the Grievor after she was dismissed, and to the successful appeal launched against a finding that her accident was related to a disability. The Company has argued the Grievor has received compensation for loss of wages and was not required to repay that compensation, which should impact the financial result of any remedy award.

[71] In view of the Grievor's potential medical difficulty to return to work, and the impact of the WSIB process, the parties are directed to address the issue of remedy as between themselves, in accordance with the following directions:

a. It is the intent of the Award to place the Grievor into the position she *would have* been in had the collective agreement not been breached and had she served a three month suspension.

b. It is not the intention of this Award to put the Grievor in a *better* position than she would have been put in, had she only served a three month suspension.

c. This intent requires the consideration of three issues, not all of which are before me at this point in time.

    i. First, it is not clear whether the Grievor is capable of returning to work as a Motor Coach Operator, given the arguments presented by the Union relating to the impact of her anxiety on her ability to carry out her job duties.

    ii. Therefore, the Grievor is required to provide satisfactory medical information to the Company that her ability to maintain her employment and follow the Company's policies and procedures is not impacted by any disability.

    iii. If she cannot do so, the parties are to engage in a process of accommodation to determine if the Grievor can be accommodated by

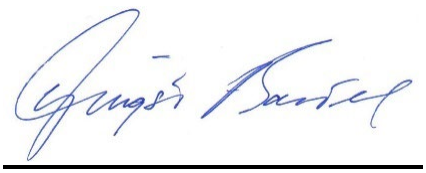
the Company without causing undue hardship, which could impact the amounts owing to the Grievor, if in fact she cannot either be accommodated as a Motor Coach Operator, or cannot be accommodated without providing undue hardship to the Company.

iv. Second, even assuming the Grievor has satisfied that she is in a position medically to be reinstated, I find that any amounts the Grievor has received for lost wages due to the WSIB process plead by the parties – which have not been repaid by her and which have not been demanded by the WSIB as of the date of this Award – must be deducted from any amount which may be owing to her for lost earnings as a result of the assessment of discharge, instead of a three month suspension.

v. Finally, the impact of COVID19 must also be accounted for. If the Company laid off drivers during its response to COVID19 – and if the Grievor would have been laid off and not received wages as a result of the impact of COVID19 – that period of lay off must also be considered in calculating the Grievor's loss of wages.

F. Conclusion

[72] The Grievance is allowed, in part. The parties are to address the appropriate amount of remedy as between themselves, taking into account the above directions. If the parties are unable to reach resolution of the issue of remedy within 90 days of the date of this Award, either party can request that the issue of remedy and/or accommodation be scheduled for the next CROA session over which I preside after that 90 day period has passed, to be addressed as a stand-alone issue.



November 24, 2023

CHERYL YINGST BARTEL
ARBITRATOR