

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

**CASE NO. 5028**

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 35 demerits for "Harassment of owner and employees of a CN contractor Hello Cabs" as stated on Form 780 dated October 06, 2021, effective September 23, 2021."

**JOINT STATEMENT OF ISSUE:**

Between August 31, 2021, and September 24, 2021, the Grievor was alleged to be involved in a series of interactions with CN Vendor Hello Cabs, including its employees and owner ("Hello Cabs").

On September 28, 2021, the Grievor attended a formal employee investigation regarding an allegation made by the owner of Hello Cabs with CN. After the investigation, the Grievor was assessed 35 demerits for the alleged, "*Harassment of owner and employees of a CN contractor Hello Cabs*".

The Union argues that the Company failed to meet the burden of proof to support the accusation of harassment and failed to provide a fair and impartial investigation. Furthermore, the Union finds the discipline assessed to be discriminatory, unnecessary, and unwarranted and notes that if discipline is warranted, that it should be considered excessive under all circumstances. The Union argued that the grievor was disciplined for expressing his concerns about the conditions of the cabs, and a lack of professionalism from some of the drivers employed by Hello Cabs on numerous occasions over several years and that the Company was aware of the grievor's concerns but failed to properly address them. The Union seeks the discipline to be expunged from the record, the grievor be returned to the working board without loss of seniority, and that he 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. Medvid – Grievor, High-Level, AB

### **AWARD OF THE ARBITRATOR**

[1] The Grievor is a Locomotive Engineer. He had over twenty years' service at the time of these alleged incidents, having begun his employment in November, 2000.

[2] As was noted in **CROA 5027**, heard in the same session:

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] **CROA 5027** upheld the assessment of 25 demerits for an incident of bullying, harassment and intimidation by the Grievor against a Public Health Official ("PHO") of the Northwest Territories.

[4] The Company maintains this Grievance involves further incidents of bullying and harassment by the Grievor of drivers and the owner of "Hello Cabs", which is a third party vendor taxi cab company who transfers the Company's employees between their train and the rest location in Hay River, NWT.

[5] It is alleged the Grievor engaged in bullying and intimidation of the drivers and the owner, Mr. Lazorko. Mr. Lazorko filed a formal complaint with the Company regarding this behaviour.

- [6] The issues between the parties are:
- a. Was the Grievor culpable for harassment of the Hello Cab drivers and Mr. Lazorko?
  - b. If so, was the assessment of 35 demerits a just and reasonable response?
- [7] For the reasons which follow, the Grievance is dismissed.
- [8] The Grievor was guilty of harassment against Mr. Lazorko. An assessment of 35 demerits for a second incident of harassment against third parties relating to his work situation, in as many days, was just and reasonable. Given this finding, it is not necessary to determine if the Grievor is also guilty of bullying and intimidation of the Hello Cab drivers.

### **Analysis and Decision**

- [9] This Grievance stems from incidents which occurred between August 31, 2021 and September 24, 2021 which is approximately a three week time period. It is not disputed that during the time period in question, the Company contracted with the Hello Cab taxi cab company to transport their crews between train/rest locations.
- [10] This Grievance is related to that considered in **CROA 5027**, which addressed the Grievor's interactions with Public Health Officer ("PHO") Anderson on September 21, 2021 at the border between High Level, Alberta and Hay River, NWT (the "Border Incident"), while in a Hello Cab taxi. I am satisfied that one of the Grievor's issues which he raised with Mr. Lazorko on September 23, 2021 was with the driver on that occasion – Mike – whom he felt was somehow responsible for the Border Incident.
- [11] While the Union took issue with the delay in this time period between the incidents and the Investigation, that time period was not unreasonable, given that the Company was only made aware of the incidents on September 24, 2021. That delay is not unreasonable or lengthy and did not contribute to any procedural irregularities in the Investigation process. The Company can only investigate what it knows about, and it did so in a timely manner. The Grievor is not prejudiced by that passage of time. In any event, this Award has determined that the final event – which took place on September 23, 2021, has provided cause for the discipline assessed. There is no issue with the timeliness of the Investigation of that event.

- [12] The Grievor called Mr. Lazorko five times on September 23, 2021, two days after the Border Incident. Mr. Lazorko's evidence was that he picked up the calls from the Grievor each time. His evidence was that during these calls, the Grievor sought personal information from him about Mike and told Mr. Lazorko that he and Mike did not get along. The Grievor also complained about the driver's speeding. He also repeatedly asked Mr. Lazorko for Mike's information on his multiple calls, including his last name. The evidence from Mr. Lazorko was that the Grievor told him he thought that "Mike" had something to do with the Border Incident.
- [13] He also repeatedly directed Mr. Lazorko to "fix the problem" or he would "get a lawyer". There was no explanation from the Grievor of what problem the Grievor wanted Mr. Lazorko to "fix" or what legal action he intended to take, as the Grievor denied he made this comment.
- [14] After the fifth call, Mr. Lazorko blocked the Grievor's phone number and stopped answering his calls.
- [15] On September 24, 2021 - the next day - Mr. Lazorko sought the Company's help in stopping what he described as "all the harassing phone calls" from the Grievor, and also for the distractions his drivers had reported that the Grievor was causing in the cabs. Those distractions were finding fault with the drivers, and having lights on his phone on, in the dark taxi. Mr. Lazorko also stated he "assumed" the phone calls related to the "incident at the border that we had nothing to do with". That assumption arose from his conversation with the Grievor, as noted above.
- [16] An Investigation took place on September 28, 2021. Mr. Lazorko was interviewed as part of the Grievor's investigation.
- [17] Mr. Lazorko's evidence was that the Grievor phoned him multiple times on one day and said he "thought that Mike had something to do with telling the girl at the border to report him". Mr. Lazorko's evidence was that "we had nothing to do with this". He stated he documented five phone calls from Mr. Medvid but that after the sixth call, he blocked the Grievor's number. He stated that over the five phone calls, the Grievor was "after Mike's information....and he wanted me to fix the problem. If I didn't supply Mike's last name or fix the problem, that he was getting a lawyer" (Q/A 39). He assumed the "problem" was

the “border problem” (Q/A 40). He testified that the Grievor had contacted him regarding the “unsafe ride condition of the van and the tight difficult seating conditions” (Q/A 41).

- [18] The Union did not have any questions for Mr. Lazorko.
- [19] When asked about his calls to Mr. Lazorko on September 23, 2021, the Grievor stated he “asked Dennis to help remedy the situation with his drivers’ actions and the poor ride of the van and the tight difficult seating conditions” (Q/A 26), which he stated he had shared with TM Bartel “many times over”. He denied stating that Mike had anything to do with Border Incident. He stated the only incident at the border where the driver would be involved would be the “conditions of the van” (Q/A 28).
- [20] When asked why he called Mr. Lazorko, he stated he called him to discuss the “unsafe ride condition of the van and the tight difficult seating conditions.” (Q/A 33). It was not explained why that issue would require five phone calls to address.
- [21] When asked if he ever threatened the Hello Cab owner and/or drivers that they would be facing legal action or discipline, or use belittling or disrespectful language towards them, the Grievor stated:
- I did not threaten or belittle, I wanted Dennis to fix this with his drivers because this was still a concern for us. If Dennis felt that it was threatening or belittling, that was completely not my intention which I am sorry for how it was perceived.
- [22] Being “sorry” for how something is perceived is not an apology. He also denied threatening legal action.
- [23] When asked how many times he called Mr. Lazorko on September 23, 2021, the Grievor could not recall. This appeared to be a very convenient lack of recall, considering the level of detail given by the Grievor in his other evidence.
- [24] The Grievor’s lack of recall for how many times he called Mr. Lazorko must be met with considerable suspicion. Neither do I find his comments on why he called Mr. Lazorko to have a ring of truth. I do not find the Grievor’s version to be consistent with the probabilities that must be assessed in determining which evidence is credible, as that principle is discussed in **CROA 5027**. The clear evidence of the Grievor’s five phone calls

to Mr. Lazarko on September 23, 2021 tell a different story of that interaction. Those multiple calls work against the probability that he called about the van and its tight seating, or that he discussed the matter with Mr. Lazarko, as his narration suggested.

- [25] The consistency with the probability of these circumstances – and I so find – is that the Grievor called Mr. Lazorko *on multiple* occasions on the same day because he was angry at Mike, believed he had some part in the Border Incident (although how is completely confounding); wanted personal information from Mr. Lazorko about ‘Mike’ which he had no right to request; and threatened Mr. Lazorko with legal action to get him to “fix” what he perceived as the problem with Mike encouraging PHO Anderson to report him. I am satisfied the Grievor was angry and failed to manage that anger in order to have a constructive conversation with Mr. Lazorko and that his anger and frustration led him to make multiple calls to Mr. Lazorko on the same day.
- [26] While I accept that in the past he had also contacted Mr. Lazorko about the condition of the van and the tight seating, that was not the subject of the phone calls on September 23, 2021. I accept the subject of that phone call was the Grievor’s frustration over what he felt was ‘Mike’s’ part in having him reported for the Border Incident that led to the multiple phone calls.
- [27] This is not a case where the Grievor “spoke up to protect himself”, as argued by the Union. Conduct to protect yourself does not involve repeatedly calling an individual multiple times in one day and threatening them with legal action, until they must block your calls. Neither do I find credible the Grievor’s evidence he politely “asked” Dennis to “help remedy the situation”. I am satisfied he called him multiple times, told him to “fix” the problem with the Border Incident, and threatened him with legal action if he did not do so.
- [28] There were three statements entered into evidence from two different cab drivers, concerning the Grievor’s conduct in the cabs, which related to the Grievor correcting their driving, accusing them of speeding; looking at his phone in the taxicab in the dark; and communicating with them in an angry, confrontational and intimidating manner. The Grievor denied this was accurate. He stated that he, himself and others have found Dave and Mike (the two drivers) “not to drive professionally and safe”. He stated they missed posted road signs on occasion and also were “driving too fast for road conditions”.

[29] He noted, he

...watched Mike's speedometer and told Mike to slow down and Mike said sorry, he would. I said thank you. Also on many occasions when I would ask to slow down they would slow down a couple few kilometers to which I responded thank you (Q/A 20).

[30] The Grievor stated he reported Mike and Dave on "many occasions" to "TM Bartel" [no relation to the Arbitrator], and that other co-workers had also been "signed witnesses" to his reports to TM Bartel.

[31] When asked about Mike's statement where he stated to the Grievor he was being a bully, on September 22, 2021, the Grievor states he asked Mike to "please" slow down because it was "really rough back here", and that Mike then proceeded to call him a bully and 'go on a rant verbally humiliating me in front of two other CN crew members for a couple minutes. I said there is no reason to personally attack me, to which he kept saying "you are the only one I don't like, you are a bully. I asked him to pull over at the next safe roadside turnout" (Q/A 24).

[32] Given the findings, it is not necessary to determine credibility for the interactions with the cab drivers.

[33] The Union argued the Investigation was "fatally flawed" as the Company "failed to provide the Grievor and Union a chance to interview the two driver witnesses" and their evidence is not reliable, based on Article 86.4. It pointed out that there was no evidence of how the details were gathered from the drivers by Mr. Lazorko. It also argued the Investigating Officer acted with a 'strong bias' against Mr. Medvid. It argued he repeatedly brought up instances from the previous interaction which had "no bearing" on the events.

[34] There are two answers to these concerns.

[35] First, It is not the evidence of the *driver* witnesses that is supporting discipline in this case, but the evidence of Mr. Lazorko regarding the Grievor's conduct towards *him*. It is therefore unnecessary to determine what did – or did not – occur with the Company's drivers, and their evidence is not germane to the ultimate issue between the Grievor and Mr. Lazorko. The choices made by the Grievor to repeatedly call Mr. Lazorko and demand

a “fix” or face “legal action” provide cause for the discipline assessed, regardless of the underlying events with the drivers.

[36] Second, the evidence from the Border Incident has a bearing on this incident, and not just from the Company’s perspective. It has been accepted that the Grievor himself felt that ‘Mike’ had some type of responsibility for the Border Incident considered in **CROA 5027**, *and that he brought this up to Mr. Lazorko in their conversation*. The questions regarding the Border Incident in the Investigation – which were directed to both the Grievor and Mr. Lazorko - were therefore not improper, nor did they demonstrate bias. They were part of the factual context of the conversation between the Grievor and Mr. Lazorko – *that the Grievor brought up himself* – regardless of whether Mr. Lazorko was present at the border or not.

[37] The Union also argued the Company has not established the harassment occurred. 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. <sup>1</sup>

[38] Given the factual determinations noted above, I am satisfied that instead of trying to reason with Mr. Lazorko, as he stated he did, and to calmly and clearly explain his concerns, the Grievor instead chose tactics designed to intimidate and threaten Mr. Lazorko. I have no difficulty in determining that the Grievor’s conduct against Mr. Lazorko on September 23, 2021 meets the above definition and was harassing behaviour. Multiple phone calls to say the same thing all on the same day is harassing behaviour. It was communication which a reasonable person would have found offensive – and which Mr.

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<sup>1</sup> Section 5, emphasis added.



Lazorko did find offensive – as he chose to block the Grievor’s number so as to avoid further calls and to complain to the Company to get help with the Grievor’s behaviour.

- [39] The seminal decision for determining when an employer can discipline an employee for off-duty conduct is *Re Millhaven Fibres Ltd. and O.C.A.W., Local 9-670*<sup>2</sup>. Five factors are set out in that case, and meeting any one of the factors justifies that discipline. One of those factors is whether the Grievor’s conduct harms the Company’s reputation. That factor has been met in this case. I have no difficulty in finding that when a third party contractor to the Company must contact the Company for assistance from a Grievor who is contacting that party multiple times in one day, making vague threats of legal action if he does not “fix” what the Grievor perceives is a “problem”, is conduct which harms the Company’s reputation.
- [40] Threatening vague legal action to get a person to take a certain course of action is also intimidation, whether it was recognized as such by Mr. Lazorko or not.
- [41] Both situations qualify as serious harassing behaviour, which breaches the Company’s Policy.
- [42] The Company has met its burden to establish cause for discipline.
- [43] The second question under a *Wm. Scott* analysis is whether the discipline assessed for this behaviour was just and reasonable.
- [44] An important factor under a *Wm. Scott* analysis is the nature of the offence. Harassment is serious and significant offence, as discussed in **CROA 5027**. For the second time, the Grievor’s actions were directed at third parties who had the ability to influence the ability of the Company to carry on its business in that community. Hello Cabs was the business with whom the Company contracted to transfer its employees between their train and rest locations.
- [45] In harassing a third party contractor of the Company, the Grievor’s actions once again damaged the reputation of the Company, which is a further aggravating factor for discipline.

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<sup>2</sup> [1967] O.L.A.A. No. 4

- [46] The Grievor is a long service employee, which is a mitigating factor.
- [47] A further factor is the Grievor's discipline record. The Union argued the Grievor's record was strong and enviable. While I agree the Grievor did not have an extensive record for a long service employee, it is notable that in 2019, the Grievor received 15 demerits for making inappropriate comments towards employees and violating the same Policy that is at issue in this case.
- [48] For a long service employee, the Grievor did have a positive discipline record, at least until 2019, when he violated the Harassment-Free Environment Policy the first time. Further violations two years later would be aggravating.
- [49] It is also an aggravating factor that the Grievor "doubled down" and refused to take responsibility for his poor behaviour, for which there was no excuse. He maintained that position all through the Investigatory process.
- [50] As was found in **CROA 5027**, the Grievor lacked key insight into the egregiousness of his behaviour; had no remorse or accountability; and was dishonest about that behaviour, to the very end. It is telling that the Grievor sought to blame the taxi driver for the Border Incident, when it was his own behaviour that was at fault. That is a further example of his lack of accountability and responsibility for his own actions.
- [51] The jurisprudence regarding conduct unbecoming offences was mentioned and canvassed in **CROA 5027**. In this case, this is the second harassing incident against a third party in as many days. On October 6, 2021, the Grievor was assessed the 25 demerits considered in **CROA 5027**, for the incident which occurred on September 21, 2021. This offence then occurred on September 23, 2021 and the assessment of 35 demerits was also made on October 6, 2021. The incidents – and the discipline – happened in quick succession.
- [52] While the Union argued the Company issued "just enough" demerits to have the Grievor dismissed, it is the Grievor who must take responsibility for the fact he has placed himself in this dismissible position by having 60 demerits on his discipline record. It is *his* actions that took him to this situation. Even if the Company chose to treat the incidents as one and to assess 60 demerits for both incidents resulting in discharge, that would also have

been a reasonable response to two serious harassing incidents to two different third parties, negatively impacting the reputation of the Company with those third parties, in the span of two days.

[53] The Union also argued the Company was “stockpiling”. I cannot agree. In this case, there were two separate incidents, against two different individuals, close in time. The Company was justified in treating them as two different incidents, attracting two different discipline measures.

[54] As in **CROA 5027**, in this case the Grievor also had control over how he chose to approach Mr. Lazorko. Once again, he made a very poor choice by failing to control his anger. This was now a *pattern* of behaviour, which occurred two days after he chose to harass PHO Anderson.

[55] As noted in **CROA 5027**, the Company exercised leniency with its first assessment relating to PHO Anderson.

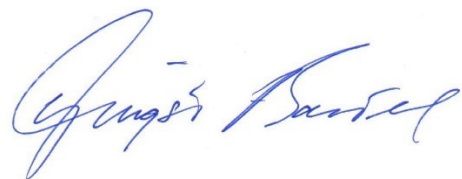
[56] The mitigating factors in this case are not sufficient to balance or outweigh the considerable and significant aggravating factors. Harassing behaviour – especially when accompanied by an egregious lack of insight and accountability – must be dealt with as the serious and significant threat to health and safety that it is. For this Grievor, that behaviour has also been demonstrated to have impact on the reputation of the Company, being directed to third parties who have the ability to influence the Company’s business interests in this community.

[57] The Company’s response of 35 demerits was just and reasonable.

[58] The Grievance is dismissed.

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

June 27, 2024



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**CHERYL YINGST BARTEL  
ARBITRATOR**