

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

CASE NO. 4362

Heard in Montreal, February 11, 2015

Concerning

CANADIAN PACIFIC RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The 30-day suspension of Conductor Frank Commisso.

UNION'S EXPARTE STATEMENT OF ISSUE:

Following an investigation, the Grievor was assessed with a 30-day suspension from Company service for "conduct unbecoming as evidenced by your failure to ensure a prompt and accurate tie up from duty resulting in an inaccurate and inappropriate 10-hour violation and subsequent \$80.00 NG claim for your tour of duty on October 13, 2013 and stat holiday ticket on October 14, 2013 while working as Conductor on train 420-20 in Schreiber Ontario".

Union's position: The Company relied on video taken at Schreiber Station and Computer logging to impose unjust discipline on the Crew. The Union objects to the Company's use of video cameras at Schreiber Station in order to engage in surveillance of its members and impose discipline. The video is inaccurate, misleading, intrusive, and a violation of the Collective Agreement, privacy rights, and statute including the *PIPEDA*. The Union objects to the video evidence and asks it be excluded.

The Employer is in violation of Article 24.06, having ordered the crew to run light engines back to White River approximately 60 miles, to wye their power and then run light engines back to Marathon.

It is the Union's position that the Company wrongly assessed a 30-day suspension in these circumstances. The suspension was unwarranted. The Union seeks full redress. The Union asks that the Company expunge the 30-day suspension without pay and make Mr. Commisso whole for all wages/benefits lost. In the alternative, the discipline was excessive in all the circumstances and the Union asks that the penalty be mitigated as the Arbitrator sees fit.

The Company disagrees and denies the Union's request.

FOR THE UNION:

(SGD.) B. Hiller

East General Chairperson

FOR THE COMPANY:

(SGD.)

There appeared on behalf of the Company:

N. Hasham	– Legal Counsel, Toronto
L. Bryson	– Assistant Superintendent, Brandon
B. Scudds	– Labour Relations, Minneapolis
G. Parmar	– Director Crew Management Centre

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
B. Hiller	– General Chairperson, Toronto
W. Apsey	– Vice General Chairperson, Smith Falls
T. Tubman	– Local Chairperson, Terrace Bay
J. Campbell	– Vice General Chairperson, Toronto
N. Veneziano	– Local Chairperson, Thunder Bay
B. Brunet	– General Chairperson, Montreal

AWARD OF THE ARBITRATOR

The Issue

1. The Union is not pursuing the grievance regarding the application of Article 24.06. The two issues are the Company's entitlement to reply upon the video surveillance evidence, and the fairness of the discipline of a 30-day suspension issued to Mr. Commisso.
2. Frank Commisso, a Conductor, has been employed by the Company since 2006. At the time he was issued the 30-day suspension he had no current demerits.
3. The Collective Agreement allows crews to be relieved of duty within 10 hours of the start of their shifts. To be so released they must give notice of that intention. That notice must be within the first five hours of the start of their shift.

4. The 10-hour entitlement has become a point of contention between the Union and the Company. The Union has been concerned that, despite adequate notice, its members are too often not being relieved of duty within the 10 hours. It filed a grievance on the “over 10” issue (**CROA 4078**). The Company is also concerned with the issue. It prefers not to have to pay the \$80 premium, as happens when the employees’ shift goes beyond the 10 hours. The Trainmaster for the territory in which Mr. Commisso worked, Lisa Bryson, had become vigilant in trying to ensure that the 10-hour limit was achieved.

5. The Memorandum of Settlement of December 5, 2007 addressed the terms of the parties’ arrangement:

When employees provide proper notice of rest to be in and off in 10 hours specified in the Collective Agreement and have not arrived at the objective terminal within 10 hours the \$80 payment is based on the following:

- the Company, in consultation with the Union will establish a time (a relief time) from locations where crews are commonly relieved on a subdivision based on the normal transit time by taxi, from that location to the off duty point at the objective terminal;
- It is recognized that the transit times may differ depending upon the seasons and will be based upon changes in operations, routes, weather conditions and congestion etc.
- The employees who have given proper notice of rest, and who have not departed the relief point to facilitate being in and off within 10 hours, with the transit times designated above will be entitled to an \$80 penalty.
- The transit times will be based on the departure time of the taxi from the relief point to arrival time at the off duty point at the objective terminal time and includes a standard tie up time.

6. The Memorandum of Settlement contemplates agreement between the parties on the transit times and on what is considered standard tie up time. What became clear from the parties’ submissions is that they may not have such agreement for the territory in which

Mr. Commisso (and his co-worker, Vince Maggio, the subject of **CROA 4363**) work, as I describe below. Such agreements exist for other territories.

7. The Company's case is that Mr. Commisso and Mr. Maggio deliberately dawdled in tying up and finishing their shift. Tying up involves making entries into the computer system recording details of the shift just completed.

8. Both Mr. Commisso and Mr. Maggio know and understand that they have a responsibility to work efficiently to ensure they tie up within 10 hours.

The facts

9. On October 13, 2013, Conductor Commisso and Locomotive Engineer Maggio were called out of White River, at 04:55, to deadhead by taxi to Marathon to re-crew train 421-11 and then take the train through to Schreiber. The taxi took them to Marathon at 06:20. There they discovered mechanical problems with the locomotives. They were told to run light engines back to White River, a distance of approximately 60 miles, to wye their power and then run light engines back to Marathon.

10. After Mr. Commisso and Mr. Maggio gave their notice of rest, they were to be conveyed by taxi from Marathon to Schreiber, Ontario. The re-crew, called out of Schreiber to relieve them, arrived at 13:30.

11. The Company's internal record of the transit time for the trip from Marathon to Schreiber is 1 hour and 20 minutes. This was unknown to the Union. The Union produced a document, of which the Company was unaware, which the Union evidence suggests is a local agreement between the Union and the Company. It provides that the transit time for that trip is 1 hour and 30 minutes. This 10 minute difference is important. There is also a difference between the parties on what the standard tie up time is. The Company's position is that 10 minutes is sufficient for the tie up. Ms. Bryson had discussions with the Union's local Chairman and with some crew members, though not with Mr. Commisso or Mr. Maggio, in which she conveyed this view. The Union document of the local agreement stipulates 15 minutes for tie up. The Union also produced written correspondence that revealed an agreement between the local Union and the local Company management for a different territory (Belleville/Brockville/Winchester Sub) of a 15-minute standard time for tie up. This 5 minute difference is also important to this case.

12. Ms. Bryson was operating on the assumption of the Company's own transit time from Marathon to Schreiber, 1 hour and 20 minutes. She arranged the relief taxi for Mr. Commisso and Mr. Maggio at Marathon at 13:30. Their shift had started at 04:55. This meant that their 10 hours would expire at 14:55. Any work time over that would exceed the 10 hours, and entitle them to the \$80 premium (plus an additional \$80 premium as the day was a holiday). On the Company's standard transit time, the taxi would be expected to arrive at 14:50, which would have given the crew only 5 minutes to tie up before their 10 hours; on the Union's standard time document, the taxi would be expected to arrive at 15:00, 5 minutes after their tie up time. In fact the taxi arrived in Schreiber somewhere

between 14:40 and 14:45. The taxi company says it was at 14:45. Ms. Bryson later phoned the driver himself and he could not remember exactly. He estimated his arrival to be between 14:40 and 14:45.

13. The Union has objected to the video tape evidence being admitted. I deal with that issue below. I have viewed the video tape evidence (three camera recordings) as part of my consideration to determine whether taking the video was a reasonable act by the Company, and whether the method of recording was itself reasonable.

14. The Company's case is that the video camera evidence inside the booking-in room shows Mr. Commisso and Mr. Maggio to be continuously looking at the clock on the wall and, Mr. Commisso, at his watch. The Company argues this was to determine when their bonus would be payable.

15. Mr. Commisso and Mr. Maggio do periodically look at the clock, and Mr. Commisso looks twice at his watch. I have the impression that Mr. Commisso's looking at his watch is associated with the entries he makes into the computer. My overall impression of the video tape evidence is favourable to Mr. Commisso and Mr. Maggio. It shows that, barring a few seconds, Mr. Commisso worked diligently at the computer making his entries. At times he refers to a paper document he uses to assist him in making the entries, and at times he talks to Mr. Maggio to get his views on a particular entry he makes into the computer. If anything, the video evidence should have exonerated the two men; it strongly suggested to me the absence of any delays or dilatoriness. Mr. Commisso is continuously

making entries into the computer, as is expected of him in doing the tie up at the end of their shift. Barring a few seconds when he looks at the clock, or to the side, he is continuously making entries and reading what is on the computer screen. Consequently, I gained quite the opposite impression from that advanced by the Company of someone dawdling deliberately.

16. So, from my observations of the video tape, and the Company's record of what Mr. Commisso did on the computer – i.e. what menus he entered – the following narrative describes what he and Mr. Maggio did on arrival at the Schreiber station, until they left. I note that the computer log on time is 14:47:58, though, from the cameras, the time was 14:44:58. I have therefore added 3 minutes to my observation of the camera entries.

17. Mr. Commisso is more adept at doing the tie up in the computer than is Mr. Maggio, and he was expected to do so. On arrival in Schreiber, and exiting the taxi, Mr. Commisso enters the station at 14:43:20 (camera 14:40:20). Mr. Commisso has his bags with him. He puts them down and takes off his outer jacket. He unpacks the bag, taking out certain items. At 14:44 Mr. Commisso takes off his glasses and cleans them. The Union explains he did so so that he could work more clearly on the computer screen. He completes cleaning his glasses by 14:45. He then leaves the entrance area for the washroom. He returns from the washroom at 14:46:45. He attends to some forms, his delay sheet, at 14:47:15 at which point he enters the booking-in office to begin making his computer entries for the tie up.

18. Only one crew member can tie up; the other is present to assist in recalling the events of the day for entry by the other. Mr. Commisso does the computer entries. He logs in at 14:47:58, so just over 7:02 minutes before the 10-hour cut off. He first looks at the spareboard positioning on MAC8 within the computer system, for 5 seconds. He plainly decides not to pursue this inquiry. Doing so is not an essential task for tying up. The Union explains, though, that a conductor tying up will need to check the spareboard to understand when the crew might be required to work in the period ahead, to determine when they will next likely be on duty. This is something that can be done on the employee's own time, but would normally be done on Company time.

19. After this Mr. Commisso accesses the train lineup inquiry (MAN0), at 14:48:05. This was to determine where he and Mr. Maggio fell on the lineup list, so they would know when they would likely be required to work. Like the spareboard, this is something that could have been done on Mr. Commisso's own time, but it was not irregular for him to do in Company time.

20. Mr. Commisso accesses MAC4 (Main Menu) at 14:49:07 and then returns to the MAC8 (the Spareboard Inquiry) at 14:50:18, as he explained at the investigation, to protect his own, and Mr. Maggio's vacancies. So the total time he accessed the spareboard and the lineup was 4:54 minutes. He then turns to the tie up screen, at 14:52:28, less than 2:32 minutes before the 10 hour limit.

21. There had been some complications that day for Mr. Commisso and Mr. Maggio. The tie up entry at the end of the day was complex, requiring more detailed entry than is usual. Mr. Commisso enters the delays and his and Mr. Maggio's rest. He discusses with Mr. Maggio the mileage that was to be claimed. He says he wondered whether they were entitled to extra miles / terminal time on account of running into a terminal (at White River) and departing again.

22. Mr. Commisso enters all of his and Mr. Maggio's claims and delays from 14:52:28 until he ties up. According to the Company, he ties off at 15:00 (14:59:35 on the MAD9 screen); according to the Union he ties off at 15:03:45, ending his period on Company time. The Union claims this later time because that was the last time that Mr. Commisso entered the tie up screen (MAD9). From my observation of the video recording he continues making entries until 15:03:45, and thereafter he views the screen, with some entries, until 15:06:34, when he logs off and leaves the booking-in room. On the Company's timing his tie up took 7:32 minutes; on the Union's timing the tie up took 11:17 minutes.

23. Mr. Maggio did some computer entries when he was in the booking-in office between 14:47:09 and 15:01:04. He moved between viewing a computer screen and observing what Mr. Commisso was doing, and answering questions put to him by Mr. Commisso.

24. After the tie up, Mr. Commisso and Mr. Maggio went their separate ways, Mr. Maggio to his home. It happens to be located right beside that of Ms. Bryson. They are neighbours.

She was sitting on her porch when he arrived in his own vehicle. It was about 15:15. Ms. Bryson was particularly alert to the 10-hour issue and she was bothered that Mr. Maggio and Mr. Commisso might have tied up late, and so secured a bonus for themselves. She phoned Mr. Maggio and asked why he and Mr. Commisso had exceeded their 10 hours. He referred to the transit time of 1 hour and 30 minutes in the chart (the chart the Union presented in evidence, above). Ms. Bryson then contacted the taxi company and obtained the information that the taxi had arrived at 14:45. She later contacted the driver, as described.

25. Ms. Bryson thought that Mr. Commisso and Mr. Maggio had deliberately delayed their tie up. She decided to view the video recording in the booking-in room to watch the recording of their behaviour during the time they were in the room. She went to the station for that purpose and did so.

Decision on Misconduct

26. The Company refers to the honour system on which it operates. Mr. Commisso was trusted to respect his obligation to the Company to tie up in a timely manner, without unnecessarily advancing his own, and Mr. Maggio's, interests in obtaining a bonus to which they were not entitled. Both Mr. Commisso and Mr. Maggio take exception to the accusation, and they strongly deny any intention to defraud the Company. The question is whether their conduct reveals a deliberate intention to secure a bonus to which they were not entitled. On all the evidence I cannot find that to be the case.

27. The taxi appears to have arrived at Schreiber 14:43:20. Had Mr. Commisso logged into the computer immediately (without taking things from his large bag, without taking off his jacket, nor cleaning his glasses, nor visiting the washroom after a 1:15 hour taxi ride), with his tie up taking 7:32 minutes (on the Company's shorter calculation), he would have had 3:33 minutes to spare. That is what is involved in this case – whether the delay of 3:33 minutes was the result of a deliberate intention by Mr. Commisso and Mr. Maggio to defraud the Company, by procrastinating in order that they might earn the \$160 premium for exceeding 10 hours?

28. Mr. Commisso's and Mr. Maggio's behaviour on arrival in Schreiber was not unusual, dilatory or untimely. The act of tying up from arrival at Schreiber took either 7:32 minutes or 11:45 minutes. It would be normal to go to the washroom after a long journey. It was reasonable to wash one's hands after using the facility and before using the computer. Wiping one's glasses is a useful precaution. These activities on their own likely took up more time than the 3:33 minutes that is at issue in this case. Once on the computer, Mr. Commisso did not act improperly. Checking the spareboard and the lineup list is not an irregular activity. It is the kind of check a crew, tying up, would do. There was minimal discussion between Mr. Commisso and Mr. Maggio during this time. The combination of all of these activities is presumably why, in other territories, the Company and the Union have agreed that 15 minutes is the "standard tie up time". Beyond that length of time would require an explanation, less than that does not.

29. Given the above, and notwithstanding the video tape evidence, the Company has not proven its claim that Mr. Commisso abused his obligation to complete his tying up punctually and efficiently. I find no misconduct has been established, for the reasons stated. In the circumstances, the discipline of a 30-day suspension is set aside.

Decision on Videotape Admission

30. The parties wish to have a decision on this aspect of the case. Otherwise, given the conclusion I have reached on the merits of the grievance, I would have considered doing so unnecessary.

31. I recognize too that, having made close observation of the video tapes myself, it is artificial for me now to make a determination on the admissibility of the video tape evidence. Nonetheless, the parties require a determination, and I must do so on the established jurisprudence between them.

32. The video cameras were introduced into the Schreiber station in January 2011. The Company's notice of introduction made clear the limited purpose for which the cameras were being installed:

The cameras in Schreiber cover the booking in room, the lobby and both the front and rear entrances only, additionally we do not actively monitor these cameras to watch employees. The only time these cameras are reviewed are to investigate claims of theft or break and enter, which we recently had a couple of months ago where a non-employee entered the Yard office and stole some employee belongings.

33. The Union argues that the manner in which video cameras were used is contrary to the Company's stated purposes and represents an unprecedented and unjustified

incursion into the Union's members' privacy and dignity in the workplace. Employees have had no notice that the cameras in the booking-in room would be used to monitor performance; in fact, that purpose was disavowed by the Employer when the cameras were installed. Accordingly, the Union submits, Mr. Commisso and Mr. Maggio had an expectation of privacy while working in the booking-in room.

34. The Union refers to *PIPEDA Case Summary #114*, in which the Privacy Commissioner posed certain questions for determining if the use of video evidence was appropriate: Was the viewing demonstrably necessary to meet a specific need? Is the viewing likely to be effective in meeting that need? Is the employees' loss of privacy proportional to the benefit derived from viewing the video record? Is there a less privacy invasive method of achieving the same end?

35. The Company argues that the video surveillance was not surreptitious. The cameras are in fixed locations, clearly visible, and they capture the images directly in front of them. There is no sound recording. Although the purpose of the cameras is for security and not to measure employees' productivity, where misconduct is suspected, as here, the Company argues that management may legitimately view the images captured, and rely upon them. As was said in *Eastmond v. Canadian Pacific Railway* (2004) FC 852 at 181, the images were only viewed once an "incident requiring an investigation" occurred. This was not part of a general monitoring of employee productivity in order to attempt to "catch" an employee engaging in conduct deserving of discipline. Relying on **CROA 3877**, the Employer submits that Ms. Bryson consulted a particular portion of the video recording

only after she had taken steps through other means to determine whether there was misconduct:

... it must be recognized that the incidental observation of events on a security camera system does not, of itself, make those events inadmissible at arbitration merely because it was observed on a video screen which was in fact being used for another purpose.

36. The Company disputes there was any intrusion in the employees' right to privacy in the workplace, but, if so, the intrusion was minimal and reasonable. The Company relies on *Re McKesson Canada Corporation and Saskatchewan Joint Board, Retail, Wholesale and Department Store Union* 201 L.A.C. (4th) 60 (Hood) and on *O.L.B.E.U. v. Ontario (Liquor Control Board)* 2005 CanLII 55216 (ONGSB), in which it was held that, even where the video images were obtained for another purpose, an employee's reasonable expectation of privacy at work will yield if the employer has a reasonable suspicion justifying viewing the video recording.

37. Having regard to the questions posed in *PIPEDA Case Summary #114*, I find that the Company has not met the required tests. Viewing the tapes was not demonstrably necessary. The Company had sufficient information on which to rely from the details of the computer entries made by Mr. Commisso. Viewing the video tape achieved no greater insight. Consequently the intrusion into the crew's privacy was unnecessary and disproportionate to the small benefit of doing so. Further there were less invasive means of determining whether the crew were abusing the Company's trust, by the detailed checking of the time of arrival and of what Mr. Commisso did on the computer. These determinations were made, and the video evidence was not a necessary adjunct to the information obtained without intruding on the employees' privacy.

38. Most important, though, was the specific undertaking given to employees by the Company when the cameras were installed. They are intended only to monitor security. They are not meant to be used to measure employee productivity. In acting as Ms. Bryson did, the Company breached the undertaking it made when the video cameras were introduced. It undertook they would be used only “to investigate claims of theft or break and enter”. That was the Union’s understanding at the time. That was not the purpose for Ms. Bryson’s viewing. In the circumstances, the Company was not entitled to view the video recording when Ms. Bryson did so, and it cannot rely upon them. Accordingly, as was said in **CROA 2707** I find it was not reasonable for the Company to have regard to the video tape evidence.

Summary

39. For the reasons given, I find that the video tapes should not have been accessed. The grievance is upheld. The 30-day suspension issued to Mr. Commisso is set aside and Mr. Commisso is to be made whole for any loss incurred as a result of the suspension.

40. I remained seized of the implementation of this award.



**CHRISTOPHER ALBERTYN
ARBITRATOR**

March 5, 2015