

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Corporation of the City of Cornwall,

Employer,

-and-

Amalgamated Transit Union, Local 946,

Union

BEFORE: Michael Bendel, Arbitrator

APPEARANCES: **For the Union:**

Riley Palmer, Counsel

Richard Jarvo, President

Kevin Moquin, Grievor

For the Employer:

J.D. Sharp, Counsel

Negeen Yazdani, Counsel

Bruce Donig, Manager, Employee Relations

James Levert, Shift and Training Supervisor

Hearing held by videoconference on December 22, 2022; April 18 & 25, September 18, and October 12 & 31, 2023; and January 24, March 28 and July 9, 2024.

ARBITRAL AWARD

I

The grievance of Kevin Moquin, a bus operator, challenges the employer's decision on November 10, 2022, to terminate his employment. The disciplinary action taken against him resulted from a brief physical altercation between the grievor and a pedestrian at about 9:45 p.m. on October 25, 2022. The employer's grounds for the discipline, as set out in the notice of discipline, are (a) that the grievor's behaviour that evening was "intimidating and aggressive", (b) that he was "not initially truthful in [his] report and characterization" of the incident, and (c) that he had persisted in his lack of candour.

The incident giving rise to the termination occurred after the grievor, being ahead of schedule, had stopped his bus on a downtown street for a few minutes, in accordance with an accepted practice. There were nine or ten passengers on the bus. Together with some of them, the grievor exited the stationary bus and smoked a cigarette on the sidewalk. Another of the employer's buses, driven by Mr. Dean Melnyk, had also stopped at that same location, and Mr. Melnyk, like the grievor, had exited his bus.

There were several eye-witnesses to what occurred next on October 25, but the grievor was the only one called to testify. In the first place there was the other party to the altercation (who will be referred to in this award as "Mr. B"). Secondly, there was Mr. Melnyk, the other bus operator. Thirdly, there were the grievor's passengers who had taken advantage of the brief stop to stretch their legs and maybe have a smoke on the sidewalk. Fourthly, there were the passengers who had remained on the grievor's bus. I was not asked by either counsel to draw any inferences from the failure of any of these to testify, and I have drawn none. I should also note here that both of the buses were equipped with video cameras, which were functioning and recording during the entire altercation. The video cameras, however, which were located inside the buses, could not capture all that was happening on the sidewalk adjacent to the buses, since part of their view of

the action on the sidewalk was blocked by the buses themselves. In addition, the sidewalk was poorly lit, leaving many of the images blurry at best. A significant part of the hearing was consumed by viewing and listening to the video footage to determine whether or not it confirmed the grievor's account of the altercation between himself and Mr. B.

The incident on the sidewalk, as described by the grievor, can be summarized as follows:

- 1) Shortly after exiting the bus, the grievor was approached by Mr. B, who was walking along the sidewalk.
- 2) Mr. B, seeing the grievor smoking, asked him for a light for his cigarette.
- 3) The grievor proffered a cigarette lighter, which he took from his jacket pocket.
- 4) Mr. B then grabbed the grievor's wrist or hand and twisted it, hurting the grievor.
- 5) After the grievor had freed his hand or arm, he and Mr. B engaged in a shouting match, using foul and abusive language. They were standing very close to each other at this time. The grievor told Mr. B several times to "get out of my fucking face".
- 6) The acrimony increased. The foreheads of the two men came into contact.
- 7) Shortly thereafter, the grievor placed his hands on Mr. B's chest and pushed him away. Mr. B stumbled backwards. He collided with the bus forcefully, whereupon he regained his balance.
- 8) Mr. Melnyk, who had observed the altercation from about one or two bus-lengths away, radioed to his supervisor to come to that location as soon as possible as an altercation was in progress between the grievor and a pedestrian.
- 9) The grievor told the passengers with him on the sidewalk that he was ready to depart and that they should reboard the bus. The grievor told Mr. B to "wait there – I'll be right back". Mr. B, however, walked away in the direction from which he had come. The grievor drove away, and radioed his supervisor to report the incident.

10) The entire interaction between the grievor and Mr. B lasted less than a minute.

II

Mr. Richard Carroll was the employer's Shift Supervisor who was on duty at the time of the altercation and to whom both Mr. Melnyk and the grievor reported it by radio. He testified that, immediately after receiving Mr. Melnyk's message, he headed by car to the location given to him. While on route, he received the grievor's radio call, in which the grievor told him that he had just been "head-butted" by a pedestrian. Mr. Carroll asked him if he was all right, to which the grievor replied in the affirmative, adding that, for his own protection, he had had to push the pedestrian away from himself, for which he felt bad. By the time Mr. Carroll arrived at the location given to him by Mr. Melnyk and the grievor, both buses had departed.

Mr. Carroll testified that the grievor had given him a description of Mr. B when he made his report by radio. Mr. Carroll had called the police while on route. On approaching the scene of the incident, he spotted Mr. B and identified him, from the description he had received from the grievor, as the person involved in the altercation. When he relayed this information to the police dispatcher, he was requested to keep Mr. B under surveillance until an officer was available to attend. He followed Mr. B for about 20 minutes, when he received a call from the police dispatcher asking him for his location. A few minutes later, Police Constable Boileau arrived. Following a brief conversation, Constable Boileau told Mr. Carroll that the person involved in the altercation with the grievor was "Mr. B" (whom he named), a person who was well known to the local police from numerous encounters, adding that Mr. B had "severe" mental health issues. Constable Boileau said that he planned to take Mr. B to the local hospital "to get him the help he needs". Mr. Carroll then contacted the grievor and asked him for a written statement on the incident. He also asked the grievor if he was all right.

Later that evening, Mr. Carroll prepared a brief memorandum concerning the events of the evening. He also removed the hard-drives from the video systems on the buses driven by the grievor and Mr. Melnyk that shift, and gave them to Mr. James Levert, the Shift Training Supervisor.

Mr. Carroll, in his testimony, expressed the view that, while the grievor had made an appropriate report to him about the incident, he, as well as Mr. Melnyk, should have remained at the scene of the incident until he (Mr. Carroll) arrived there. He had not given them a specific instruction to remain there, but he had expected them to do so in accordance with the normal practice.

In cross-examination, Mr. Carroll testified that in recent years the issue of bus operators being assaulted while at work had become a prominent one across Canada, including in Cornwall. Several operators had been subjected to verbal abuse and threats, and there had been at least one previous case in Cornwall of an operator being physically assaulted at work. The situation worsened after the start of the Covid-19 pandemic. Mr. Carroll testified that operators had received no training in de-escalating the potentially abusive or violent behaviour they encountered in the course of their work. They were expected to contact a supervisor or fend for themselves in such situations. There had been some discussion within management of instituting "de-escalation" training for operators in Cornwall. He was not previously aware of the employment of any operators in Cornwall being terminated for assaulting, or for being assaulted by, a member of the public in the course of their work. He recalled, however, a situation in December 2022 where a bus operator who struck a mail courier with his bus and failed to report it to the employer was required to take a course in defensive driving and was warned of disciplinary action in the event of any similar occurrence in the future. As for the incident between the grievor and Mr. B, Mr. Carroll did not know whether the police had brought any charges against Mr. B.

Mr. Carroll testified that the practice with unionized employees was that they were offered union representation at any meeting that could lead to disciplinary action. On the evening of October 25, he did not

suspect that the grievor had committed a disciplinary offence. He did not personally make the offer of union representation to the grievor on October 25 or at any subsequent time.

Mr. Carroll testified that he was not aware of any complaints being made to the employer or to the police, by Mr. B or by anyone else, about the grievor's behaviour on October 25.

Mr. Carroll interviewed the grievor on November 2, in the presence of Mr. Matt Levac, the then president of the bargaining agent, and took notes of the grievor's replies. The grievor told Mr. Carroll that Mr. B only started yelling and swearing at him as he (the grievor) pulled his arm away from the grip of Mr. B. The grievor maintained that Mr. B initiated the head-butt, but did so without first "winding up". As for the push he had given Mr. B, the grievor did not regard it as a "hard" push, explaining that he just wanted Mr. B to back off, to move away from him. The grievor acknowledged that he raised his voice at Mr. B and was angry with him. While the grievor stated that he did not check on Mr. B's condition after the push, he added that he made sure that Mr. B had "got up" after being pushed and hitting the side of the bus. Although the grievor told Mr. Carroll that he felt bad about having pushed Mr. B, he maintained that he had just been protecting himself when he pushed Mr. B away.

Mr. Carroll added that while, on the night of the incident, he did not believe that the grievor had committed a disciplinary offence, he had not yet seen the video footage of the incident.

III

Mr. James Levert, the Shift Training Supervisor, testified that he had been in his current job for about 18 months, having previously worked for the employer as a Shift Supervisor and as a bus operator. The

employer had 28 full-time bus operators in all, as well as a few part-time ones. The initial training programme for new operators, he said, consisted of four weeks of in-class training, followed by two weeks of in-bus instruction. He added that the employer required operators to make a report by radio to their supervisors of any incidents involving members of the public, and to do so immediately.

Mr. Levert testified that, during the Covid-19 pandemic, the employer's bus ridership had been reduced by as much as 80% (although there had been no lay-offs of operators). The demographics of the ridership also changed during this period, with a noticeable increase in the number of unhoused passengers and of passengers with mental illnesses. Passenger complaints against operators did not increase. However, as the pandemic subsided and ridership picked up, the employer noted a significant increase in operators' complaints about aggressive behaviour towards them by passengers, including several complaints to the police about such behaviour. No specific training had been given to operators on dealing with aggressive passengers, but the employer had been considering giving them "de-escalation" training.

Mr. Levert testified that he received Mr. Carroll's report about the incident of October 25 the next day, and the grievor's report on October 27. He noted that there had been no injuries recorded and that the incident had been reported to the police. He had also received the video of the incident that Mr. Carroll had retrieved from the buses being operated by the grievor and Mr. Melnyk that evening.

Mr. Levert stated that, on viewing the video footage from the two buses in the company of Mr. Carroll, he felt that there was a discrepancy between what he had seen on the footage and what he had read in the reports of the grievor and Mr. Melnyk, in particular as regards the grievor "screaming" abuse at Mr. B.

Mr. Levert described the video system installed on the employer's buses. Each bus, he stated, was equipped with five cameras, which operated continuously. He viewed the video footage from the evening of the altercation on his own office computer in the company of Mr. Carroll. As regards the video recorded from

Mr. Melnyk's bus, he and Mr. Carroll only looked at the footage from the front-pointing camera. Of the video from the grievor's bus, they watched the output of all five cameras, although they were mainly interested in what had been captured by the back-door and the front-door cameras, which faced the sidewalk.

Mr. Levert noted that the footage recorded on Mr. Melnyk's bus did not capture any sound of the altercation. It did show some pushing between the grievor and Mr. B. He testified that he watched the exchange between the two of them on the footage, and was "shocked" to see the grievor head-butt Mr. B and shove him against the side of the bus.

After watching the video footage, Mr. Levert concluded that this was a "bad" situation, which he had to refer to a higher level of management, specifically to Mr. Jean Marcil, the Division Manager of Cornwall Transit.

At the time of viewing the footage, Mr. Levert had not yet seen the grievor's written report. When he did read it, he concluded that it contradicted, to some extent, what was shown on the video footage. He watched the footage again after receiving the grievor's written report. Mr. Levert testified that, particularly in light of several recent incidents between bus operators and aggressive passengers, he wanted to ensure that the grievor received refresher training on "de-escalation" techniques. The operators as a whole were stressed at the time and morale was low. He communicated these concerns to Mr. Marcil by e-mail, and suggested that the grievor should receive some anger management training.

In the course of testifying, Mr. Levert also viewed the video footage of the altercation, and offered these additional observations about the altercation:

- 1) He was concerned that the grievor had driven away from the scene without following the normal procedure, which was to remain at the scene until being advised by a supervisor that he was

free to leave. The grievor, in fact, drove away even before reporting the incident by radio to Mr. Carroll.

- 2) Mr. Levert commented on the manner in which the grievor was driving after leaving the scene of the altercation, as revealed by the footage. The grievor made a right turn shortly after pulling away and, in doing so, he drove the bus into the path of Mr. B, who was crossing the road as he walked away from the scene, resulting in contact between Mr. B and the side of the bus. As the grievor had prepared to make his right turn, Mr. Levert stated, he should have yielded to Mr. B, who was clearly intending to cross at that intersection. In addition, the grievor should have stopped the bus immediately and checked to see if Mr. B required any assistance after his contact with the moving bus, which the grievor failed to do.
- 3) Mr. Levert was concerned at the manner in which the grievor was yelling at Mr. B on the sidewalk, and noted that he had heard no raised voice from Mr. B at the beginning. Mr. B, however, did raise it after being pushed by the grievor. It was apparent to Mr. Levert that passengers in the grievor's bus had reacted to hearing the yelling and swearing on the sidewalk.
- 4) Mr. Levert concluded from the video footage, particularly from that recorded by the front-facing camera on Mr. Melnyk's bus, that the grievor had administered the head-butt to Mr. B, and not vice versa.
- 5) Mr. Levert saw nothing to confirm that Mr. B had initiated the altercation by grabbing and twisting the grievor's arm.

Mr. Levert testified that a meeting was held on November 10 to receive the grievor's answers to various outstanding questions relating to the altercation. In attendance, in addition to himself, were the grievor, Mr. Levac, and Ms. Dawn Harvey, a Human Resources Generalist. Ms. Harvey was tasked with recording the grievor's answers to the employer's questions, which had been prepared in advance. This was

the grievor's first opportunity to comment on the video footage, which was played at the meeting. At the meeting, among other things, the grievor continued to maintain that Mr. B had head-butted him. He added that Mr. B had used the "N word" towards him near the end of their encounter.

Following the meeting on November 10, Mr. Levert testified, he discussed the case with Ms. Harvey. He noted that the grievor had stuck to his story of Mr. B having been the aggressor, despite the video evidence to the contrary, and that he was showing no remorse. He also found it "unbelievable" that the grievor, after pushing Mr. B against the side of the bus, would not have checked to see whether Mr. B was injured. Mr. Levert testified that it was decided at this meeting with Ms. Harvey that the grievor's employment should be terminated.

At the end of Mr. Levert's examination-in-chief, he was asked about a meeting he had with Constable Boileau concerning the altercation. Counsel for the union objected to the introduction of Constable Boileau's opinions about Mr. B and the altercation through the testimony of Mr. Levert. I reserved a ruling on the objection.

I have now decided that I should not receive the evidence of this meeting with Constable Boileau on the ground that the hearsay evidence which was being specifically sought from Mr. Levert, while admissible under the Labour Relations Act, 1995, S.O.1995, c. 1, Sched. A, as amended, could not properly have been used by me in arriving at my ruling (see, e.g., Regina v. Barber et al., ex parte Warehousemen and Miscellaneous Drivers' Union, Local 419, [1968] 2 O.R. 245 (C.A.), and Toronto Transit Commission v. Amalgamated Transit Union, Local 113, 2006 CanLII 79656 (ON LA) (J. Johnston), at para. 114). If either party believed that Constable Boileau's opinion on the case was relevant, it could have called him to give evidence. For the same reason, I uphold an objection to evidence being given by Mr. Levert about a detective visiting the employer's offices on December 1, 2022, to see the video footage of the altercation.

In cross-examination, Mr. Levert was asked about the grievor's training for his job. He stated that there had been no specific training for bus operators on "de-escalation" or on "handling difficult passengers" as of the date of the altercation, even though there had been several recent incidents, including at least one passenger being banned from the employer's buses. The issue of handling difficult passengers had only surfaced as a serious one towards the end of the pandemic. Mr. Levert's attention was drawn to several incidents in recent years involving difficult passengers, including assaults between specific operators and these passengers, none of which, he testified, had led to major discipline for the operator.

He described the training which was usual for new bus operators. It consisted of a four-week course, followed by two weeks of on-the-job training. The grievor, however, had only three days of on-the-job training, specifically June 28 and 29, and July 3, 2021, before being assigned to operate a bus of his own. He did not subsequently receive any further formal training. In re-examination, Mr. Levert stated that the absence of regular drivers probably explained his reduced training schedule. He added that, although ridership was low during the pandemic, the usual number of buses were in service and the usual number of bus operators were on the road.

Mr. Levert testified that neither the grievor nor the union had had independent access to the video recording of the altercation.

Mr. Levert's attention was drawn to an article in a local weekly newspaper from the summer of 2020. According to the article, a person named in the article, who, it had been suggested by other witnesses, might be Mr. B, had been arrested the day before the article appeared and charged with various offences - including uttering threats, criminal harassment, causing a disturbance, resisting police, assault and assault with a weapon - after attending at three local businesses, where he allegedly assaulted three employees, including one with a bottle, and threatened to harm two individuals. Mr. Levert stated that he had no way of knowing if the person named in the article was indeed the person involved in the altercation with the grievor.

Mr. Levert confirmed that his opinion after viewing the video footage was that the grievor needed some "de-escalation" training, at the very least. He was not thinking in terms of termination of the grievor's employment at that time. The grievor had not been suspended and was still driving his bus, although Mr. Levert questioned with management colleagues whether the grievor should still be working before management had taken a formal decision on his case. The issue of the quality of the grievor's driving as he drove away after the altercation had not been raised with the grievor, he testified, and was not a consideration in the decision on the action to be taken against him. Mr. Levert was of the opinion, after viewing the video footage, that it did not disclose whether the grievor had initiated the head-butt to Mr. B. It also failed to show whether Mr. B had grabbed or twisted the grievor's wrist or arm as the cigarette lighter was being proffered. It was, however, apparent to Mr. Levert from the audio recording, in particular, that the grievor was doing all, or almost all, of the screaming and yelling on the sidewalk. In re-examination, Mr. Levert added that he did not see on the video footage any assault by Mr. B on the grievor.

Mr. Levert testified that, before the discharge, he had felt that the grievor's attitude had been "remorseful". He referred to the grievor's repeated comments that he "felt bad" about having pushed Mr. B during the altercation, that he "felt awful" about the altercation, that he should have handled the whole incident better, and, in particular, that he "should have just walked away" after Mr. B had let go of his wrist. Mr. Levert felt that the grievor had learned from the experience. In re-examination, however, he stated that he did not know if the grievor's expression of remorse was genuine.

IV

Mr. Jean Marcil, the Division Manager of Cornwall Transit for about two years, testified that he had been employed by the employer for 22 years, starting as a bus operator.

Mr. Marcil testified that he did not see the video footage of the altercation until about a week after the incident. He was off work for a few days at the time, and he asked Human Resources to view the video in his absence. During that time, he had seen various e-mails relating to the situation. After returning to work and viewing the footage, his attitude towards the altercation changed: in particular, he felt that the grievor had been aggressive with Mr. B and that there were better ways for the grievor to have dealt with Mr. B. He also noted that there was no video evidence of Mr. B assaulting the grievor. The employer's senior managers met to review the video footage.

Mr. Marcil testified about the effects of the pandemic on the employer's transit operations. His principal concern throughout had been the safety of the operators. On a daily basis, he testified, he was receiving reports of passengers engaging in belligerent or aggressive behaviour towards operators, of which the employer and the bus operators had had very little prior experience. The employer had displayed some public information messages or notices on the buses to try to reduce these incidents. Some transit systems had introduced "de-escalation" training for their operators. The Ontario Public Transit Association and the Canadian Urban Transit Association were both engaged with the problem.

Mr. Marcil testified that he expected drivers to remove themselves from a potential confrontation with a member of the public and, where appropriate, to call the police. This was the message conveyed in the "Ambassador Training" programme, offered by the Canadian Urban Transit Association, which had been used for the employer's operators for about 12 years. He noted, though, that the training module entitled

"Managing Stress" had only been introduced for these operators recently, after the grievor's altercation with Mr. B.

Mr. Marcil testified that he was involved in every discipline situation for bus operators. In examination-in-chief, he was asked to comment on four recent cases of employee discipline, some of which had previously been alluded to by union counsel. He could not remember all of them in detail. In the circumstances, I do not think that any useful purpose would be served in examining the incomplete information I received about those four cases.

Mr. Marcil also commented on some ridership issues related to the pandemic. He stated that, at one point, the employer was offering "free rides" on its buses, which attracted a new class of rider. In addition, the "Covid shield", designed to provide the operator some protection from the virus, interfered with communication between the operator and passengers. Operators, concerned to protect themselves, were also reluctant to touch passengers' hands to take money. All these issues contributed to tensions between operators and passengers during the pandemic, not just in Cornwall but across the country.

In cross-examination, Mr. Marcil acknowledged that, at one point, management was tending to the view that the grievor should receive some training on the "de-escalation" of conflict situations and on handling difficult passengers, training he had never received, and that he should be kept on staff. He, however, did not regard the altercation as being one where the grievor was defending himself. The grievor, in his view, should have removed himself from the situation. He could also have asked Mr. Melnyk for assistance in dealing with Mr. B.

Mr. Marcil also acknowledged that the grievor had no history of being dishonest with the employer. He agreed with counsel's suggestion that the employer would likely never have found out about the altercation if the grievor himself had not reported it.

Ms. Dawn Harvey, the employer's Human Resources Generalist for about eight years, testified that her job was to assist the employer in handling grievances, negotiations, investigations and other labour-related matters. On November 1, 2022, she was asked to investigate and review the grievor's altercation with Mr. B. She met with Mr. Levert first, then with the grievor and Mr. Melnyk (who, at the time, was also under investigation concerning his role in the altercation).

Ms. Harvey testified that she approached the task as she would have approached a workplace investigation, of which she had conducted about 25, and in respect of which she had been trained. She met several times with the grievor and with Mr. Melnyk. She also met with their supervisor, with other employees, and with union representatives. She viewed the video footage. On November 1, after meeting with Mr. Levert, she suspended the grievor with pay pending the completion of her investigation.

On November 3, after reviewing the notes of her first round of interviews, Ms. Harvey again met with the grievor, who was accompanied by his union president, Mr. Levac, to obtain his responses to certain questions. She then prepared her Investigation Report, dated November 9, 2022, and submitted it to senior management.

In her Investigation Report, Ms. Harvey concluded, among other things, that the grievor was not being totally honest about the altercation. There was a gap between his version of the incident and what was revealed on the video footage. She concluded that the grievor had exaggerated Mr. B's aggressiveness, that the grievor had been the aggressor, and that the grievor had acted violently. She also criticized the grievor for not checking whether Mr. B was injured after he had pushed him into the side of the bus. She

recommended discipline for the grievor, but it was not part of her mandate to recommend the severity of the disciplinary sanction.

After submitting her report to senior management on November 9, Ms. Harvey met with Mr. Marcil and Mr. Geoffrey Clarke, the Director of Human Resources. She was instructed to view the video footage once again in the presence of the grievor, and to ask him to comment on what it showed. This was intended as a final opportunity for the grievor to be completely honest about the altercation. The severity of any disciplinary measure to be imposed would depend on his honesty and his remorse, Ms. Harvey stated. Mr. Levert was to accompany Ms. Harvey to this final viewing of the footage, and a union representative was also invited to attend.

After meeting with the grievor and Mr. Levert on November 10, Ms. Harvey and Mr. Marcil reviewed the grievor's answers given the previous day, and it was decided that his employment should be terminated forthwith. That was to be the end of her involvement in the grievor's case, Ms. Harvey stated.

However, on November 25, Ms. Harvey stated, she e-mailed Mr. Clarke to let him know that Constable Boileau had telephoned her to protest the employer's decision to terminate the grievor's employment, insisting that Mr. B should have been in a mental institution at the time and that the grievor had done nothing wrong.

In cross-examination, Ms. Harvey commented on her recommendation in her Investigation Report of November 10 that "Cornwall Transit needs to explore options to deliver a comprehensive training package to employees on how to interact and deal with difficult situations". This was a necessary step for the employer to take, she stated, although she was not entirely certain what training programmes were being used with bus operators at the time.

Ms. Harvey testified that Mr. Melnyk had told her that his view of the altercation was partly obstructed. She did not speak to the other person in the altercation, Mr. B. The video footage did not capture Mr. B asking for a light or grabbing the grievor's wrist. When asked if she saw the images of the grievor and Mr. B approaching each other aggressively, she replied that she only saw the grievor approaching Mr. B. The footage did not show the start of the altercation, to which, she agreed, the grievor was the only available witness. She did not know whether the grievor and the union had seen the footage before her investigation, but after the investigation she offered to provide them with a copy.

Mr. Harvey testified that she was aware of the increase in assaults on the transit system since the start of the pandemic, with training on "de-escalation" of difficult encounters only being introduced after the grievor's termination. She confirmed that she was aware, during her investigation, that the grievor had no history of harassment or violent behaviour. As far as she knew, the altercation with Mr. B was the first occurrence of that kind for the grievor. She was aware that the grievor had stated, before her involvement in the matter, that he "felt bad" for pushing Mr. B, and that he had only "got mad" at him after his wrist was grabbed. The grievor had described the contact between his forehead and Mr. B's as "head-butting" and "foreheads touching", and he claimed to have acted in self-defence in that regard.

In her Investigation Report, Ms. Harvey had written that "[t]here should have been no delay in the investigation of this incident". She testified that her concern about delay was related to memories fading with time. The delay in this case, she testified, had been "significant", but she did not think that the delay had detracted from the thoroughness of her investigation.

In her testimony, Ms. Harvey fully supported the conclusion in her Investigation Report that the grievor was the aggressor in the altercation. She also criticized him for not checking on Mr. B after he had been shoved into the side of the stationary bus, even though the video footage clearly showed that Mr. B got right back up after colliding with the bus and that he then moved towards the grievor. Even in the absence of

training for the grievor in dealing with difficult passengers or in providing first-aid, she stated, the grievor should have checked on Mr. B's condition. She maintained that her conclusion that the grievor was the aggressor was not affected by the absence of video footage showing the start of the altercation. She was able to see the two of them approaching each other. The footage, Ms. Harvey stated, did not show Mr. B grabbing or twisting the grievor's wrist or arm.

A further conclusion in Ms. Harvey's Investigation Report had been that the grievor "did not accurately report in writing or when interviewed, how the interaction occurred and the severity of his actions, as indicated in the video evidence available." This was primarily a reference to the grievor's written report to management immediately after the altercation, which, she testified, she did not find to be "credible". She did not accept that Mr. B had initiated the head-butt. Nor did she accept that Mr. B had grabbed the grievor's hand or wrist, something that was not captured by the video. Nor did she accept that Mr. B had been swearing and yelling at the grievor, something else that had not been captured by the video. She also did not accept as accurate his description, in his written report, of the contact between their two foreheads as being "head-to-head bumping". She did not remember whether she asked the grievor about these specific matters on November 10. As a result, she conceded, the grievor may not have been afforded the opportunity to respond to all her specific doubts about the accuracy of his report in those respects. While much of his report was accurate, she testified, it was not truthful in every respect. Ms. Harvey added that she did not know if the employer had offered the grievor access to Employee Assistance at any time after October 25, but she expressed the view that such a referral would have been appropriate.

In her Investigation Report, Ms. Harvey included a section entitled "Credibility Assessment", in which she wrote the following:

I do not consider the Operator Report and testimony provided by Mr. Moquin to be credible. While Mr. Moquin admitted he pushed Mr. Billings he downplayed the interaction that occurred...The video footage shows evidence contrary to the reports and testimony of ...Mr. Moquin.

In relation to this passage from her report, she explained that the video footage contradicted the grievor's written report and the answers he had given her in their interviews. She agreed with counsel that he had not been offered the opportunity to review his written reports before she interviewed him. The delay in launching her formal investigation had been "unacceptable", she conceded. She was further of the view that it was more likely than not that Mr. B had grabbed the grievor's arm or wrist, which had provoked the grievor's angry reaction, as the grievor had been saying consistently since the evening of October 25. In her testimony, Ms. Harvey further conceded that the grievor was likely telling the truth in his written report as well as he could, considering that he had not yet seen the video footage. She accepted that his recollection of the events of the altercation was not perfect, but she did not know if that could be entirely attributed to the delay in conducting the investigation. Despite these concessions or reservations, Ms. Harvey testified, she stood firmly by the conclusions in her Credibility Assessment.

Ms. Harvey stated that the manner in which the grievor had driven away after the altercation, when his bus and Mr. B came into contact with each other as it made a right turn, was not within the scope of her investigation. Similarly, she took no account of the grievor's failure to remain at the scene until Mr. Carroll arrived. Ms. Harvey was asked whether she had considered whether Mr. B had "provoked" the grievor, to which she replied that there could have been no "provocation" unless one accepted the grievor's account of Mr. B grabbing the grievor's arm or wrist in the first place, an account which she did not accept.

Union counsel drew Ms. Harvey's attention to several relevant facts which were not mentioned in her Investigation Report, namely

- 1) The increased incidence of assault on operators since the start of the pandemic;

- 2) The absence of any history of violence by the grievor;
- 3) The grievor's expression of remorse;
- 4) The absence of any training on "de-escalation" or handling difficult passengers;
- 5) The delay in undertaking her investigation;
- 6) That the video cameras on the buses could not capture everything that was happening on the sidewalk;
- 7) The failure to interview Mr. B; and
- 8) That Mr. B was known to the police and was known to have mental health issue.

Ms. Harvey denied that she had been pressured to produce her report quickly. She conceded, though, that her conclusions might not be entirely consistent with all the facts.

Ms. Harvey was questioned about any discussions she had with the police about this case. She replied that she had reported to senior management her conversation with Constable Boileau, but none of his comments caused her to change her analysis of the case.

Ms. Harvey was asked to review the conclusions in her report and to state whether she stood by them. She replied that she was no longer of the view that the grievor had been aggressive with Mr. B "from the very outset". She agreed that she had not considered the effect of any possible provocation by Mr. B on the grievor's conduct. She stated that, while she had not previously considered whether the delay in the investigation had affected the grievor's memory of the evening of the altercation, she stood by her view that he had not been entirely truthful in the course of her investigation. She stood by her criticism of the grievor for not having checked whether Mr. B had been injured after being pushed onto the outside of the bus.

Ms. Harvey agreed with union counsel that the grievor had expressed remorse over the incident when she met with him on November 10, and that he had nevertheless been terminated. She stated that it

was not her role to decide what disciplinary measure should be imposed on the grievor. She conceded that it may not have been consistent with what she had understood to be the purpose of the November 10 meeting to have terminated his employment after he had expressed remorse. Ms. Harvey added that she had prepared two letters to the grievor before the November 10 meeting: one was a termination letter, the other a suspension letter. The plan was that senior management would decide which letter to give him after receiving Ms. Harvey's report on her meeting of November 10.

VI

The grievor testified that he was 48 years old, married with three sons (two of whom still lived at home). He had been a bus operator for the employer since May 2021. Before the altercation, he had no disciplinary record. He had received several awards for safe driving and for excellence in customer service since May 2021. He enjoyed driving and he enjoyed dealing with people, which made the job of bus operator a good fit for him.

In his experience, the public generally treated bus operators well. However, he had encountered a lot of yelling and screaming. He was aware of assaults on bus operators in Cornwall, but he had not personally witnessed any. He heard about assaults, in both Cornwall and other Canadian cities, from other operators, from his union and on the news.

Although he had received some training from the employer, he did not complete the employer's usual operator training since the employer was short-staffed at the time. None of his training had dealt with handling abusive or difficult customers, with self-defence, or with "de-escalation".

As for the altercation itself, the grievor testified that he recognized Mr. B on the sidewalk. Mr. B, a member of the public, who appeared to be about the same age as him, "was not a happy person", he testified, one whom he had previously seen on the street yelling at other people for no apparent reason. The altercation started as the grievor handed his cigarette lighter to Mr. B. Mr. B grabbed the grievor's hand "quite tight" and twisted it awkwardly, he testified. It hurt him. The grievor was taken by surprise and was scared. Mr. B swore and "got in my face", according to the grievor. The grievor did not know what to do. His heart was beating faster. He pulled his hand free from Mr. B's grip. The two of them were "nose to nose", he testified. Then, Mr. B head-butted the grievor. The grievor denied having initiated the head-butt. The grievor testified that he pushed Mr. B back, following which Mr. B made contact with the bus, fell to the ground and then quickly got back up. He had pushed him "hard", he said, being angry and scared. He had lost his temper. The grievor realized that he had not reacted appropriately. He should not have laid his hands on Mr. B, he testified. It was quite out of character for him to act like that. After Mr. B had got back up, "he got in my face". The grievor swore at him, telling him, among other things, to "get the fuck out of my face" and "don't fucking touch me", which, by the time of testifying, he realized was not something he should have done. It was a "confusing" situation, he testified. He felt bad for having pushed Mr. B away. Mr. B called the grievor a "Nigger", a "Faggot" and a "Fucking Ass-hole", both before and after the push, the grievor testified. The grievor turned to get back on the bus and to drive away. He made a radio report to Mr. Carroll, telling him that he had pushed Mr. B.

The grievor testified that he later spoke to Constable Boileau, who asked him if he needed any medical help. The grievor told Constable Boileau that he felt bad for having pushed Mr. B, stating that it followed an assault on himself. Constable Boileau replied that Mr. B was well known to the police for engaging in assaults and making threats.

According to the grievor, he saw Mr. Carroll at the scene that evening, when Mr. Carroll asked him a few questions about the incident, without offering him union representation. The grievor testified that he

was not thinking straight at the time. He felt he should have had union representation at that stage. He was anxious to get home, he testified.¹

Following the incident, the grievor testified, his mental health declined. He had already been under stress for unrelated reasons. He was not in good mental health during the investigation.

The grievor testified that he continued working for about a week after the altercation. He was then summoned to a meeting to be held on November 10, where he was shown the video for the first time. He remembered being asked some questions and, a few minutes later, being informed that his employment was terminated. He testified that his memory was hazy and he did not remember any prior investigation meeting or viewing of the video footage, which he attributed to the delay between October 25, the date of the altercation, and November 10, the date of his meeting with Ms. Harvey and Mr. Levert.

In cross-examination, the grievor maintained that he was terminated for defending himself against Mr. B's assault. He said that he had had no personal interaction with Mr. B before the altercation. (Counsel drew the grievor's attention to an interview he had on November 2 with Ms. Harvey, in the course of which he stated that Mr. B had been on his bus "once a long time ago". In his cross-examination testimony, the grievor stated that he did not remember saying that to Ms. Harvey, and he maintained that Mr. B, to the best of his knowledge, had never been on his bus.) He heard from the police that Mr. B was well known to them and had been arrested previously for assaults, among other things.

The grievor maintained that he gave Mr. Carroll an accurate account of the incident. He wrote the report at home at about 1:00 a.m. on October 26. He testified that, in retrospect, he should have waited to

¹ This meeting, I note, was not mentioned in Mr. Carroll's testimony, or in anyone else's testimony. According to the grievor's testimony, this meeting had taken place at the scene of the altercation, whereas all the other evidence, including the grievor's, indicated that the grievor had departed the scene before Mr. Carroll had arrived there.

write the report since he was tired at the time. He felt his report would have been clearer if he had taken more time to prepare it.

According to the grievor, Mr. B's grabbing and twisting his hand when the cigarette lighter was passed to him was a more violent act than the head-butt, which, he insisted, had been initiated by Mr. B. He was asked specifically by counsel for the employer if he stood by the statement he wrote at 1:00 a.m. on October 26, that Mr. B was getting "more aggressive" after the heads had made contact, whereupon he pushed Mr. B. The grievor maintained that that was what happened.

Counsel for the employer then took the grievor, almost frame by frame, through the video footage from the two buses. In particular, he drew the grievor's attention to the following:

- 1) At 21:45:40, Mr. B is seen coming into view, walking towards the grievor's parked bus;
- 2) At 21:46:06, Mr. B puts a cigarette to his mouth;
- 3) At 21:46:08, the grievor takes the cigarette lighter from his pocket;
- 4) Also at 21:46:08, the grievor's head moves slowly towards Mr. B's;
- 5) At 21:46:09, the grievor yells "Get the fuck out of my face!";
- 6) At 21:46:10, the two heads make contact, and the grievor pushes Mr. B into the side of the bus with his two hands; and
- 7) At 21:47:06, the grievor closes the doors of his bus in preparation for departing.

The video footage, counsel suggested, established conclusively that only approximately two seconds elapsed - from 21:46:08 to 21:46:10 - between (a) the grievor taking the cigarette lighter from his jacket pocket and (b) the grievor pushing Mr. B into the side of the bus. How, counsel asked, could the grievor reconcile what was revealed by the video footage with his testimony? Two seconds, counsel suggested, was not long enough for everything described by the grievor to have happened, i.e. the grabbing and twisting of the

grievor's hand, the release of the grievor's hand, the contact between the two heads, the escalation in Mr. B's aggressiveness, and the push administered by the grievor. The grievor responded that he stood by the accuracy of his report, which was in no way contradicted by the video footage.

Counsel drew the grievor's attention to the video, at 21:46:34, when he said to Mr. B "that's the second time with you!", and he asked the grievor what he had meant by that. The grievor replied that he had seen Mr. B screaming at another bus operator once before, an incident of which he could no longer remember the details.

The grievor commented on the force of the head-butt. He described it as "mild". He agreed with counsel that the mild head-butt did not justify shoving Mr. B onto the side of the bus.

Counsel drew the grievor's attention to the video footage, which showed the following:

- 1) at 21:46:08, there had not yet been any contact between the heads, but the grievor's head appeared to be moving towards Mr. B's;
- 2) at 21:46:09, Mr. B's head moved backwards;
- 3) at 21:46:10, the grievor was moving forwards and Mr. B was moving backwards; and
- 4) at 21:46:10, the grievor administered the shove to Mr. B.

The grievor repeated that Mr. B had initiated the head-butt, but he acknowledged that the video footage did not establish clearly which of them had done so, and he conceded that it appeared likely from the footage that he had been responsible for it. He testified that he was not sure, at the time of his interviews with the employer, which of them had been responsible. He remembered it as Mr. B having initiated it. He was not being untruthful with the employer, he said, but he might have been mistaken.

VII

In his submissions, Mr. Sharp, employer counsel, noted that the grievor was a short-service employee. He started lying to the employer about the altercation as soon as he began driving away from the scene on the evening of October 25, and he had continued to lie throughout his interviews with the employer and in his testimony. While the grievor expressed some remorse over his role in the altercation, the remorse was limited and guarded and, in any event, his expression of remorse was of little or no value in the absence of a full and honest admission of what happened on the evening of October 25. According to counsel, his principal lie, which started on the evening of the altercation, and in which he had persisted until his cross-examination, was that Mr. B had head-butted him, rather than vice versa. In cross-examination, however, the grievor had finally admitted that the video footage showed that he had head-butted Mr. B. Counsel noted that, by driving away from the scene before his supervisor had arrived in response to his radio message, the grievor had dispersed the principal independent witnesses to his misconduct, namely the passengers on his bus. Counsel added that the grievor had done everything possible to minimize his role in the altercation, and his responsibility for it. He had every opportunity to disengage from his encounter with Mr. B, and failed to do so.

The video cameras on board the two buses, however, have prevented the grievor from escaping responsibility for the altercation, according to counsel. The video footage showed that the grievor had head-butted Mr. B, and not vice versa. The footage did nothing to support the grievor's claim that Mr. B was yelling and swearing at the grievor. Since there were only three seconds between the start of the altercation and the head-butt, it was impossible to accept the grievor's account of what had preceded the head-butt. The grievor's entire account of the incident is impossible to reconcile with the video footage, according to counsel. He had failed to give an honest account because he must have realized that he was manifestly in the wrong. He

made an allegation that Mr. B was "well-known to the police", an allegation that had no support whatsoever in the evidence, in a clumsy attempt to paint Mr. B as violent. Counsel noted that there was likewise no evidence for the suggestion in the evidence that Mr. B suffered from a mental illness, but if Mr. B did in fact have mental health issues, that would make the grievor's violent conduct towards him even more unacceptable. Although the grievor tried to lay the basis for an argument that Mr. B had "provoked" him, he failed to allege that he was in fear of being injured by Mr. B.

Counsel reviewed in detail the grievor's account of the incident, as he had given it to the employer at different stages of the investigation, pointing out numerous inconsistencies in his account. In particular, according to counsel, the video footage (and the accompanying audio recording of the sound made by Mr. B in colliding with the bus) showed that the push the grievor gave Mr. B was hard, yet the grievor persisted in denying that it was a hard push. The footage also showed that the grievor had done nothing to satisfy himself that Mr. B was unhurt after being slammed into the side of the bus, while he maintained that he had checked on Mr. B's condition.

The union evidence about the deficiencies in the grievor's training for the job, counsel argued, changed nothing about his misconduct or about his dishonesty. Similarly, there were several allusions in the union's evidence to other employees having received little or no discipline for misconduct that appeared to be more egregious than the grievor's; however the facts were very different from those in the present case, and the employees in those situations had not been engaged in violent conduct towards pedestrians and had not lied to the employer about their misconduct.

Mr. Sharp argued that the absence of union representation in the initial stage of the employer's investigation was a matter of no consequence, according to the case law, and, in any event, not a matter the union had formally raised in this case. Union representation had, in fact, been provided to the grievor, except at the very first interview of the grievor, when the employer was still at the stage of attempting to figure out

what had happened, and in respect of which there was no right to such representation. Counsel referred to Toronto Transit Commission v. Amalgamated Transit Union, Local 113, 2012 CanLII 453 (ON LA) (Slotnick) and Toronto Transit Commission v. Amalgamated Transit Union, Local 113, 2019 CanLII 23860 (ON LA) (Slotnick). Counsel also observed that the collective agreement in the present case had no express provision on the subject of union representation in such circumstances.

Referring to the grievor's claim that he had acted in legitimate self-defence against Mr. B's aggression, counsel cited R v. Khill, 2021 SCC 37, where the Supreme Court of Canada examined the concept of self-defence under section 34(2) of the Criminal Code, R.S.C. 1985, c. C-46. In particular, counsel reviewed paragraphs 51 et seq. of the judgment, and argued that there was no "proportionality" in the present case between (a) the alleged grab of the grievor's hand and (b) slamming Mr. B into the side of the bus.

The grievor's dishonesty in this case, according to counsel, stood front and centre, as it does in any case where reinstatement in employment is a remedy being proposed: Stelco Inc. v. United Steelworkers of America, Local 1005 (O'Neal Grievance), [2003] O.L.A.A. No. 566 (Luborsky), MVT Canadian Bus Inc v. Amalgamated Transit Union, Local 1724, 2014 CanLII 95111 (BC LA) (Sullivan), British Columbia Emergency Health Services v Ambulance Paramedics of British Columbia CUPE, Local 873, 2020 CanLII 471601 (BC LA) (Love), Sheridan College v. OPSEU, 2010 CanLII 7261 (Bendel), and Metro Ontario Inc. v. Unifor, 2021 CanLII 73268 (Bendel). The grievor had failed to take responsibility and had shown no realistic remorse, counsel argued. He had lied about the altercation from the very beginning until the very end, i.e. from his first report to the employer until his testimony at arbitration. Bus operators work alone, without a supervisor in their bus with them. The employer must be able to trust their honesty. There was no principled basis for reinstating him in employment.

VIII

Mr. Palmer, union counsel, argued that the employer's investigation had been flawed, that there was a lack of evidence of the grievor's culpability, and that the employer had shown a disregard for the health and safety of its employees.

Counsel criticized the employer's heavy reliance on the video footage to support the termination. The footage, according to counsel, did not give a complete picture of what happened that evening. It was blurry. It did not pick up all the sound. The grievor's account, according to counsel, should be preferred to the video footage, to which the arbitrator should give little or no weight.

According to counsel, the grievor was assaulted by Mr. B at the start of their brief encounter, and was fearful as a result. The whole altercation lasted only a few seconds. The grievor was provoked by Mr. B's initial assault. It was a traumatic encounter for the grievor, which likely accounted for some confusion on his part in his initial report on the altercation to the employer. There had been several assaults on bus operators in Cornwall, according to counsel, and the employer had failed to provide adequate protection for its workforce.

According to counsel, the union's case could be summarized as follows:

- 1) There was no just cause for termination of employment;
- 2) The grievor had been provoked by Mr. B's initial assault and was entitled to defend himself;
- 3) The employer had failed to ensure that the grievor had union representation at all stages of the investigation;
- 4) There had been a discriminatory imposition of discipline, i.e. in comparison with other situations mentioned in the evidence;

- 5) The investigation process had been delegated, flawed and biased. In particular, Ms. Henry and Mr. Levert had acted in "rogue" fashion in terminating his employment, which was contrary to the understanding about the purpose of the final viewing of the video footage by the grievor; and
- 6) The employer had been guilty of health and safety violations.

Counsel maintained that the grievor had been honest and cooperative throughout the multi-day investigation. He tried his best to recall all the details of the traumatic altercation. He had taken full responsibility for his actions, recognizing that he should not have reacted as he did to Mr. B's assault. The employer was aware of the increase of aggressive behaviour of certain members of the public towards bus operators at the time. The grievor had received no training from the employer on how to act in such a situation. For all those reasons, the discipline imposed on the grievor should be declared null and void, according to counsel.

In addition, counsel pointed to various other factors to which the employer had given little or no consideration in terminating the grievor's employment and which weighed in favour of a reduction in the penalty imposed on him:

- 1) His clean disciplinary record;
- 2) No history of violence or dishonesty;
- 3) His length of service (although a minor factor);
- 4) An isolated incident;
- 5) A momentary aberration;
- 6) Provocation;
- 7) The father of three, of whom two still lived at home; and
- 8) The disparate application of discipline (i.e., that this employer had imposed less discipline, or no discipline at all, on other employees who, according to the evidence, had acted more egregiously).

Counsel cited Corporation of the City of Calgary v Amalgamated Transit Union, Local 583, 2018 CanLII 128731 (AB GAA) (Casey), and Edmonton (City) v Amalgamated Transit Union Local No. 569, 2020 CanLII 103768 (AB GAA) (Casey). In the latter case, the arbitrator had recognized the “vulnerability of transit operators” in setting aside the three-day suspension of a bus operator who had acted forcefully in self-defence against a violent passenger.

Counsel also cited Re Toronto Transit Commission and ATU, Local 113 (Foresheew), 2002 CarswellOnt 9224 (Saltman), Sealy Canada Ltd. v. U.S.W.A., Local 8300 2004 CarswellOnt 10924, [2004] O.L.A.A. No. 391 (Haefling), and Toronto Transit Commission v. Amalgamated Transit Union, Local 113, 2006 CanLII 79656 (ON LA) (J. Johnston). Counsel noted that, in Toronto Transit Commission v. A.T.U., Local 113, 2012 CarswellOnt 220 (Slotnick), the arbitrator expressed the opinion that failure to provide a grievor with union representation could have the effect of voiding the resulting discipline. Counsel also drew my attention to Riverdale Hospital v CUPE Local 79, [2000] O.L.A.A. No. 879 (Surdykowski), where the arbitrator not only refused to acknowledge a distinction between investigation meetings and disciplinary meetings in the context of the right to union representation, but also expressed the view that the right to union representation resulted from the Labour Relations Act, 1995 and not from the collective agreement.

In support of his argument concerning the discriminatory imposition of discipline, counsel cited Re Telus and TWU (Mistry), 2021 CarswellOnt 6673 (Burkett), where the arbitrator set aside a termination on the ground that other employees who had committed the same offence had received minor discipline.

Counsel cited Re Stelco Inc. and USW, Local 8782 (Lombardo), 2023 CarswellOnt 15266 (Albertyn) in support of his argument that the investigation of the grievor’s case by management had been so flawed and so tainted by bad faith that the discharge should be set aside and punitive damages should be considered. He referred particularly to Ms. Harvey having admitted, in cross-examination, that the grievor had shown remorse at the eleventh hour, which, according to the instructions given to Ms. Harvey by senior

management, should have resulted in minor discipline against him at most. To the same effect, counsel cited Re Canada Mental Health Assn. and BCGEU (Ferraro) (2019), 307 L.A.C. (4th) 247 (Jackson), Re Trillium Health Partners and ONA (Rusu), (2017), 274 L.A.C. (4th) 143 (C. Johnston), Re Mobile Climate Control Inc. and UFCW, Local 175 (Nguyen), (2018), 285 L.A.C. (4th) 231 (Marcotte), and Re Imperial Oil Ltd. and Unifor, Local 900 (Gibbs), 2016 CarswellOnt 9891 (Chauvin).

As regards the employer's health and safety responsibilities to the grievor, counsel referred to the Occupational Health and Safety Act, RSO 1990, as amended. The employer had been aware of the vulnerability of transit workers to being assaulted while at work, a feature of their work that had been highlighted in the award in Edmonton (City), (*supra*). Under sub-section 25 (2) of that Act, it had the obligation to "provide information, instruction and supervision to a worker to protect the health or safety of the worker" (paragraph (a)), as well as related obligations under paragraphs (c) and (h) of the sub-section, obligations with which it had not complied. The arbitrator should treat the employer's violation of its statutory health and safety obligations as a mitigating factor in considering the grievor's termination, and should award damages against the employer for the violation of the Act. Counsel cited Re OPPA and Ontario Provincial Police (2018), 294 L.A.C. (4th) 1 (Abramsky).

Counsel added that the employer's negligence in putting the grievor on the road at the wheel of one of its buses without adequately training him was not only dangerous, but was also a mitigating factor in this case. Counsel cited Re Imperial Oil, *supra*, on this point.

In addition to damages for the violation of the Occupational Health and Safety Act, damages should be awarded to the grievor, according to counsel, for the employer's violation of the collective agreement, particularly for having terminated his employment without just cause, for having imposed discipline in a discriminatory manner, and for having denied him his right to union representation. Counsel argued for an award

of \$20,000.00 against the employer for the above-stated violations, and a further \$10,000.00 for having acted in bad faith in the whole matter. The grievor should also be reinstated in employment and made whole.

IX

I have watched the video footage of the altercation that is at the centre of this arbitration several times. I do not disagree entirely with Mr. Palmer's argument on the limitations of the footage. It does not show clearly all the action on the sidewalk. The audio from the recording equipment on Mr. Melnyk's bus was not functioning, although there was audio recording from the grievor's bus. However, even that recording only picked up the raised voices. For the rest of the audio, all one hears is static and some background sounds, probably from traffic on the street. The lighting on the sidewalk was uneven, with the main sources of light being the street lighting and the light from inside the bus. As a result, the images were not sharp. It requires multiple viewings, and some imagination, to figure out exactly what is happening at certain points in the footage.

However, despite the limitations of the video footage, it cannot be disputed that it does provide an entirely objective view, albeit an imperfect one, of the principal phases of the altercation.

In particular, I agree essentially with the timeline, drawn from the video footage, that was put to the grievor by Mr. Sharp on cross-examination, and, in particular, with Mr. Sharp's conclusion that only approximately two seconds elapsed - from 21:46:08 to 21:46:10 - between (a) the grievor taking the cigarette lighter from his jacket pocket and (b) the grievor pushing Mr. B into the side of the bus. I also agree with Mr. Sharp that it is impossible to reconcile the grievor's testimony as to what occurred on the sidewalk with that timeline. The grievor, it will be recalled, testified that

- a) Mr. B grabbed the grievor's hand or wrist, and twisted it, as the grievor passed the cigarette lighter;
- b) the grievor pulled his arm (or hand) out of Mr. B's grasp;
- c) the grievor's head moved slowly towards Mr. B's;
- d) Mr. B's aggressiveness escalated;
- e) The grievor yelled at Mr. B: "Get the fuck out of my face";
- f) The two heads made contact; and
- g) The grievor pushed Mr. B into the side of the bus.

I have no way of knowing exactly what happened on the sidewalk that evening. However, I can state with confidence that it is more likely than not that the events did not unfold in the way described by the grievor, if for no other reason than that it is almost impossible to imagine all the exchanges and the action, as described by him and as summarized above, being completed so quickly.

As for the conclusion about the head-butt that was given by the managers who watched the footage – i.e. that it was initiated by the grievor – I am not entirely certain from the footage itself that that is what happened, and I note that the grievor himself testified in cross-examination that, after watching the footage, he was no longer certain who had initiated it. However, on a balance of probabilities, I have to conclude that the grievor initiated it. The grievor, throughout the footage, came across as, by far, the more aggressive of the two. Mr. B's voice is scarcely heard, whereas the grievor's loud, angry, aggressive voice is difficult to miss. As for the force with which the grievor pushed Mr. B into the side of the bus, the sound generated by his collision with the bus is difficult to reconcile with the grievor's testimony that he had pushed Mr. B "hard", simply in order to get him away: the sound was more consistent with a "very hard", or even "violent", push than with a push whose sole purpose was to get Mr. B to move out of the grievor's personal space.

I cannot therefore accept the grievor's account of the altercation. On a balance of probabilities, I find that the grievor was the aggressor in the altercation; that he initiated the head-butt; that he pushed the grievor aggressively, or even violently, into the side of the bus; and (as he himself admitted) that he did little or nothing to satisfy himself that Mr. B had not been injured by either the head-butt or the push into the side of the bus. I have no insight into the grievor's true motivation for his assault on Mr. B, but, as stated above, I reject his account of how the altercation started.

I have no need to elaborate on the grievor's failure to tell the truth to the employer about the altercation. It is possible, as he alleged, that he had been under stress even before October 25, that he had written his initial report to the employer at 1:00 a.m. on October 26, and that he had become confused. However, looking at the facts as a whole, I have difficulty avoiding the conclusion that he lied throughout the whole piece, from his first contact with Mr. Carroll to the last word in his testimony. For reasons unknown to me, he assaulted Mr. B, and he has been lying in an attempt to avoid the consequences of that assault since that evening. Bus operators work with minimal supervision after starting their route. They are the public face of the transit system in Cornwall. The employer must be able to have confidence in the honesty of its bus operators. It would be unthinkable, in my opinion, that an operator who had committed a violent assault in the course of his work and had consistently lied in an attempt to cover up his culpability should be reinstated in employment.

Prima facie, therefore, his conduct warranted major discipline.

Several arguments, however, were advanced by the union in support of some mitigation of the penalty of discharge.

Firstly, the union relied heavily on what it characterized as a flawed investigation. In Durham (Regional Municipality) v. Canadian Union of Public Employees, Local 132 (X Grievance), [2011] O.L.A.A. No.

410 (Bendel), essentially the same argument was made by the union, and rejected. This is what was stated on the matter in that award:

91 A related argument by the union is that the discipline should be set aside because the employer's investigation process was flawed, particularly by reason of the employer not having discussed with him certain of the allegations before discipline was imposed. It is not necessary to specify where all the alleged flaws lay or whether there is any merit to the union's claim that the process was flawed. The simple answer to the union's argument is that, since X has access to the grievance arbitration process to challenge any discipline imposed without just cause, it is irrelevant how the employer conducted its investigations. If discipline was imposed without just cause, the arbitrator can set it aside. If it was imposed for just cause, any defects in the investigation process are of little or no consequence (except to the extent that provisions of the collective agreement might have been violated or to the extent that the grievor might have been prejudiced). In Canada Employment and Immigration Commission v. Lewis, [1986] 1 F.C. 70 (F.C.A.), Marceau J., in a concurring judgment, concluded that an employee dismissed for assault could not seek to quash the dismissal by way of certiorari on the basis of an unfair investigation since he had available to him the grievance adjudication process established under the Public Service Staff Relations Act, R.S.C. 1970, c. P-35. Marceau J. stated the following:

In my view, the law having set up an adequate system of control over the disciplinary decisions of the Deputy Minister, the Court would not be justified to go beyond the will of Parliament and subject the taking of those decisions to requirements aimed at giving, in effect, a redundant protection.

Similarly in this case, it would be wholly redundant and pointless to examine the thoroughness or the fairness of the employer's investigation since the grievor has available to him the grievance arbitration process whereby he can challenge the employer's conclusion that it had just cause to terminate his employment.

The same conclusion was reached in Northern Alberta Institute of Technology v Nait Academic Staff Assn (Rurka Termination Grievance), [2022] AGAA No 6 (Francis).

Secondly, the union has alleged that the employer violated the Occupational Health and Safety Act by not providing the grievor (and other employees) with training on one of the known risks of the job, namely the risk of being harassed or assaulted at work by passengers. I need not express any opinions whether, in an appropriate case, such a violation of the Act could be invoked as a mitigating factor in a discipline case. The simple answer to the union's argument is two-fold. Firstly, as I have found, the grievor was not assaulted,

but was the assailant. Secondly, the other person involved was not a passenger, but a pedestrian, and there is no suggestion that being assaulted by a pedestrian on the sidewalk adjacent to a parked bus is a notorious risk of the work of a bus operator. I have detected no violation of the Occupational Health and Safety Act that could constitute a mitigating factor in this case.

Thirdly, the union argues that, since other bus operators of this employer, who had committed similar, or even more serious, misconduct had received little or no discipline, the grievor's termination should be set aside on the ground that it was "discriminatory". Given the multi-dimensional nature of any inquiry into the appropriate disciplinary measures for an employer to impose, it seems to me that it is almost impossible to arrive at an objective comparison of the culpability of two or more employees involved in separate acts of misconduct. The only types of situation where such a comparison could be valid, it seems to me, would be (a) if two or more employees had been involved, to the same degree, in the self-same acts of misconduct, or (b) if the employer had established a consistent response to a particular, narrowly defined, category of misconduct (which was what had happened in Re Telus, supra, cited by counsel in support of the argument on discrimination). None of the cases of alleged inconsistent disciplinary penalties by the employer to which counsel had alluded related to a grievor who had assaulted a pedestrian while at work and had lied to the employer about it. I cannot find any basis for concluding that the grievor's discharge was invalidated or tainted by reference to these other situations alluded to by counsel.

Finally, counsel raised the question of the absence of union representation at Mr. Carroll's initial encounter with the grievor concerning the altercation, arguing that it tainted the employer's decision. I have already noted above, that the grievor was the only witness to refer to the alleged meeting at the scene between himself and Mr. Carroll on the evening of the altercation. I very much doubt that the grievor's testimony on this alleged meeting was accurate. However, I have decided that, despite these doubts, I should address the union's argument about the consequences of not offering the grievor union representation.

I note that the collective agreement is silent on the question of union representation at disciplinary interviews. Counsel relied on the case of Riverdale Hospital v CUPE Local 79, *supra*, where arbitrator Surdykowski expressed the view, in *obiter dicta*, that employees had the right to union representation even in the absence of a clause to that effect in the agreement, and that any resulting discipline was invalidated by a denial of that right. He further expressed the view that this right applied even at preliminary investigation meetings with a grievor, *i.e.* before the employer had even suspected that the employee had committed a disciplinary offence. As a result, an inquiry by a supervisor, which led him or her to discover for the first time that the employee had committed an offence, would invalidate any disciplinary measure in the absence of union representation.

I should state that, in my respectful view, the right to union representation at disciplinary interviews is entirely dependent on an appropriate clause appearing in the collective agreement.

I should also state that, in my view, failure to comply with a union representation clause does not necessarily lead to the nullity of the disciplinary measure imposed: see, *e.g.*, Revera Retirement (cob Rayoak Place) v United Steelworkers, Local 8300 (Tulloch Grievance), [2012] OLAA No 230 (Bendel), and Canadian Union of Public Employees, Local 2610 v. Forest Dale Home Inc. (C. Grievance), [2021] N.B.L.A.A. No. 12 (McEvoy).

The only meeting in this case where it is alleged that the grievor did not have a union representative present was the initial meeting with Mr. Carroll, which was a response by him to the radio message he had received from the grievor. Surely, it cannot be right, under any circumstances, that an employee who reported an incident to a supervisor should thereby achieve immunity from discipline as a result of the absence of a union representative at that initial meeting? See, *e.g.*, Toronto Transit Commission v Amalgamated Transit Union Local 113 (McDonald Grievance), [2019] OLAA No 84 (Slotnick).

I find no merit in the union's argument that the absence of a union representative invalidated the discharge.

In all these circumstances, the grievance is hereby dismissed.

DATED at Thornhill, Ontario, this 3rd day of September 2024.

A handwritten signature in black ink, appearing to read 'MBendel', written over a horizontal line.

Michael Bendel,
Arbitrator