

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

TAYLOR ENTERPRISES

and

TEAMSTERS LOCAL UNION NO. 43

Case 28  
No. 45767  
MA-4788  
Raymond Moore

Appearances:

Teamsters Local Union #43, 1624 Yout Street, Racine, WI 53404 by Mr. Charles Schwanke, President, appearing on behalf of the Union.

Mr. Jack Taylor, Transit Manager, 1900 Kentucky Street, Racine, WI 53405 appearing on behalf of the Employer.

ARBITRATION AWARD

Pursuant to the provisions of their collective bargaining agreement for the years 1990-1993, Teamsters, Chauffeurs and Helpers Union No. 43 (hereinafter referred to as the Union) and Taylor Enterprises (hereinafter referred to as the Employer or the Company) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning a three day suspension imposed upon Driver Raymond Moore. Daniel Nielsen was so designated. A hearing was held on August 2, 1991 at the County Board offices in Racine, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties agreed not to submit post hearing arguments, and the record was closed at the end of the hearing.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes the following Award.

ISSUE

No formal stipulation of the issue was reached. From the grievance, the answer and the arguments presented at the hearing, the issue may be fairly framed as follows:

"Did the Company have just cause to suspend the grievant, Raymond Moore, for three days? If not, what is the appropriate remedy?"

PERTINENT CONTRACT LANGUAGE

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ARTICLE 9. Posted Rules

It is agreed between the parties hereto that any Employer posted rules that have been approved by the Union must be observed by the employees. All present employees shall be given a copy of such rules and new drivers shall be given a copy of such rules upon hiring.

The following rules and regulations set forth and the penalties to be charged for the violations of these rules are placed in effect so that all employees may know what duties are required of them in the general conduct of the Employer's business. Discipline imposed under these rules and regulations must be imposed within ten (10) working days for minor violations and must be imposed immediately for major violations. Any grievance resulting from discipline of any violations must be filed with the Employer within five (5) days of the violation.

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3. CONDUCT

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(f) Disobeying orders from qualified personnel designated by Employer (Names will be posted)	First Offense - written reprimand Second Offense - 3 days layoff Third Offense - 5 days layoff Fourth Offense - subject to immediate discharge
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(j) Permitting relatives, friends or any unauthorized persons free rides	First Offense - written reprimand Second Offense - 1 day layoff Third Offense - 3 days layoff Fourth Offense - subject to immediate discharge
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5. DRIVING SCHEDULE

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(c) Failure to follow route as designated by Employer, City, and/or Public Service Commission Authority	First Offense - written reprimand Second Offense - 1 day layoff Third Offense - 3 days layoff Fourth Offense - subject to immediate discharge
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The Employer and the Union agree that the Employer has the right to discipline

any employee for violation of any of the above rules and regulations up to and including the maximum penalty. Further, the Employer and the Union agree that any penalty or lack of penalty assessed by the Employer will not be considered a precedent or act as a waiver on any other violation of the above rules and regulations.

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#### ARTICLE 14. Management Rights

The Employer possesses the sole right to operate the mass transit system and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement and the past practices in the departments covered by the terms of this agreement, unless such practices are modified by this agreement or by the Employer under rights conferred upon it under this agreement or the work rules established by the Employer. These rights which are normally exercised by the Employer include but are not limited to the following:

1. To direct all operations of the transit system.
2. To hire, promote, transfer, assign, and retain employees in their position with the transit system and to suspend, demote, discharge and take other disciplinary action against employees for just cause.
3. To lay off employees due to lack of work or funds in keeping with the seniority provisions of the agreement.
4. To maintain efficiency of the transit operations entrusted to the Employer.
5. To introduce new or improved methods or facilities.
6. To change existing methods or facilities.
7. To contract out for goods or services; however, there shall be no layoffs or reductions in hours due to any contracting out of work.
8. To determine the methods, means and personnel by which such transit operations are to be conducted.
9. To take whatever action must be necessary to carry out the functions of the transit system in situations of emergency.
10. To take whatever action is necessary to comply with City, State or Federal law.

In addition to the management rights listed above, the powers of authority which the Employer has not officially abridged, delegated or modified by this agreement are retained by the Employer. The Union recognizes the exclusive rights of the Employer to establish reasonable work rules.

The Union and the employees agree that they will not attempt to abridge these

management rights and the Employer agrees that he will not use these management rights to interfere with rights established under this agreement. Nothing in this agreement shall be construed as imposing an obligation upon the Employer to consult or negotiate with the Union concerning the above areas of discretion and policy.

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#### ARTICLE 24. Grievance Committee

The Employer and the Union agree to process all grievances through duly authorized representatives of the Employer and the Union.

Every grievance must be reduced to writing and filed with the party against whom it was made within five (5) working days after the occurrence of the event which is made the subject matter of the grievance and if the grievance is not filed in writing within such time limitation it will be barred.

Any decision between the Employer and the Union shall be final and binding at any step of the grievance procedure.

#### ARTICLE 25. ARBITRATION

In the event that the Employer and the Union cannot mutually agree to a settlement of any unresolved controversy which may arise concerning any matter or the interpretation of this Agreement, such unresolved controversy shall be reduced to writing and shall be referred to the Wisconsin Employment Relations Commission to have an arbitrator appointed for settlement.

The filing fee required by the Wisconsin Employment Relations Commission for arbitration shall be split equally between the Union and the Employer.

The Employer and the Union agree that the decision of the arbitration committee shall be final and binding upon both parties. The Employer and the Union agree that Union membership shall not be a matter subject to arbitration.

#### BACKGROUND FACTS

The Employer operates the Belle Urban System busses in Racine, Wisconsin. In so doing, it employs personnel in the classification of Driver, who are represented for the purposes of collective bargaining by the Union. The grievant, Raymond Moore, is employed as a Driver. He is directly supervised by Frank Serwatka.

In April of 1991, Jack Taylor, the Transit Manager, received a number of complaints that Moore was permitting a young lady and her child to ride around and around on the bus. Further, the City's Transportation Manager complained to Taylor that Moore had deviated from his route at its western end, by making a U-turn in the divided roadway at Oakes Road approximately 200 feet short of the last stop. Taylor assigned Serwatka to observe the grievant and verify these complaints.

Serwatka boarded the grievant's bus in the downtown area on two occasions and observed the young lady and her daughter. His impression from observing them was that they were riding the bus solely to visit with the grievant. Serwatka also observed that the grievant was indeed cutting his route short when there were no passengers waiting at the last stop or disembarking at that stop. Serwatka spoke with the grievant about both of these matters.

After Serwatka spoke with the grievant, he continued to observe the grievant. On Monday, April 22nd, he was following the grievant's bus when it stopped near the intersection of Highways 20 and 31 on the city's west side. The grievant leaned out of the door, yelled at Serwatka and gestured with his arms. Serwatka claims that the grievant yelled "Stop following me" and returned to his seat, swinging his arm in roundhouse motion, simulating a punch. The grievant claims he yelled "Why are you hassling me" and raised both arms from his side in an exaggerated shrugging motion.

On April 23rd, the grievant received a letter of discipline from Jack Taylor, suspending him for three days. The letter recited the problem with the grievant's girlfriend riding the bus, as well as cutting short the route. It then stated, in pertinent part:

Now on Monday, April 22, 1991, 4:00 P.M. at State Highway 31 and 20, he reports that you stopped your bus, leaned out the door, yelled "stop following me", returned to your seat and made a wide swinging motion at him with your arm and fist.

This is an act of intolerable insubordination to your manager and I absolutely will not stand for such rude behavior.

First, let me be perfectly clear on this matter. Management will follow you when, where and as often as we deem necessary to maintain a good quality of bus service for the bus riding public of this community.

Second, by authority provided in contract management rights, Article 14 item 2, your employment is suspended for a period of three days. Perhaps you will use this time off to reflect on management's right to control and run the bus system minus your rebellious conduct.

Your suspended days are Tuesday, April 30, 1991, Wednesday, May 1, 1991 and Thursday, May 2, 1991.

Yours truly,  
/s/ Jack Taylor  
Transit Manager

The next day, the grievant submitted the instant grievance:

1. He lied by saying that I yelled at him & waved my arm's or fist at him.
2. he told me that my girlfriend cant ride the bus no more on 4/17/91 so I said OK I will go to the Union (and she has a pass for the month)

he has been on me about any thing from the first day he came to work here.

The matter was not resolved in lower steps of the grievance procedure and was referred to arbitration. Additional facts, as necessary, will be set forth below.

#### POSITIONS OF THE PARTIES

##### The Position of the Employer

The Employer takes the position that the grievant was insubordinate and threatened his supervisor. The grievant is a physically huge man, and the Employer has a legitimate concern with not having its supervisory employees intimidated. Furthermore, the grievant called his supervisor a liar in the grievance, and this alone is grounds for discipline. The Employer notes that the grievant also merited discipline for deviating from his established route, and for socializing with his girlfriend on his bus. Thus there are four bases for discipline, and the suspension should be upheld.

The grievance does not seek any adjustment of the discipline, and therefore no remedy is appropriate even if the suspension is found to be inappropriate. The Employer asserts that the grievant and his Union representative had a duty to demand specific relief if they desired it. Having failed to do so, no remedy can be granted.

##### The Position of the Union

The Union acknowledges that the grievant may not socialize with his girlfriend on the bus, but argues that this conduct, if it took place, ended as soon as Serwatka counseled him against it. The same is true of the relatively minor deviations in route the grievant made on those occasions when no passengers needed service at his last stop. The grievant stopped cutting the route short as soon as his supervisor spoke with him. Thus there is no need for a suspension to modify the

grievant's behavior.

As for the alleged insubordination, the Union argues that Serwatka misunderstood the gesture the grievant made. At the hearing, the grievant apologized for giving the wrong impression to Serwatka, but insisted that he meant nothing threatening in his gestures. The Union notes that the possible penalties listed in the work rules for any of these violations begin with a written warning, rather than a suspension. Since the grievant has a clean record, a suspension is, in any event, too severe.

Finally, the Union dismisses the idea that the failure of the grievance to demand that the suspension be removed should bar any relief in this case. The grievant is not a sophisticated man, and may not have expressed himself well, but the Employer had ample reason to know that the grievant and the Union were seeking a reduction or elimination of the discipline.

## DISCUSSION

### Nature of the Discipline

Initially it must be determined exactly what the basis for discipline is in this case. While the Employer argues about the grievant's slight shortening of his designated route and socializing with his girlfriend while driving, these do not appear to have prompted the three day suspension. The penalty specified in the work rules for first offenses against these rules is a written reprimand. 1/ The grievant had already been counselled by Serwatka about these matters on April 17th, and there is no evidence that he repeated this conduct thereafter. Instead, the letter of discipline makes it clear that insubordination is the reason for the suspension. 2/ After reciting the confrontation between Serwatka and the grievant, Taylor wrote:

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- 1/ This assumes that the rules may be reasonably read to include socializing with paying customers, since there is no such express rule, and the only roughly similar rule addresses allowing friends and family to ride free. The Union concedes that such socializing is inappropriate, and there is no reason to believe that the listing of work rules is intended to preclude other reasonable regulation of employee conduct. The existing rule may, however, be looked to for guidance as to appropriate penalties, and it strikes the undersigned as extremely unlikely that a more severe penalty would be imposed for socializing with paying passengers than for allowing people to ride for free.
  - 2/ The Employer's claim at the hearing that the grievant's characterization of his supervisor as a liar is grounds for discipline appears to be a "throw-in" argument. Nothing in the case indicates that this played any part in the decision to initially discipline the grievant, nor is there any proof of additional discipline after the grievance was filed.

... This is an act of intolerable insubordination to your manager and I absolutely will not stand for such rude behavior.

First, let me be perfectly clear on this matter. Management will follow you when, where and as often as we deem necessary to maintain a good quality of bus service for the bus riding public of this community.

Second, by authority provided in contract management rights, Article 14 item 2, your employment is suspended for a period of three days. Perhaps you will use this time off to reflect on management's right to control and run the bus system minus your rebellious conduct....

The work rules prohibit insubordination in the form of disobedience to legitimate orders:

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| (f) Disobeying orders from qualified personnel designated by Employer (Names will be posted) | First Offense - written reprimand<br>Second Offense - 3 days layoff<br>Third Offense - 5 days layoff<br>Fourth Offense - subject to immediate discharge |
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A fair reading of this rule would also include conduct which is disrespectful or threatening to supervisory personnel. Undercutting supervisory authority is commonly understood to be inconsistent with management's right to operate the business, and is insubordinate, even where there is no direct refusal to obey an order. Adding the element of a threat greatly increases the seriousness of the offense, since any unprovoked physical violence directed to a supervisor undermines the Employer's ability to conduct its business, erodes discipline in the work place and violates all accepted norms of behavior.

Just Cause

The grievant admits having yelled at Serwatka, and whether he said "Stop following me" as Serwatka claims, or "Why are you hassling me" as he testified, yelling at a supervisor for carrying out his responsibilities is an act of insubordination. Serwatka's actions cannot be said to have been provocative, and the grievant's response was inappropriate. Observation of employees to insure proper performance of their work is a traditional element of supervision and, despite the grievant's belief that Serwatka had been "on" him for no reason, there was every reason to expect Serwatka to monitor his performance. After all, the grievant had just been counselled about two work rule violations, and he should reasonably have expected management to follow up and make sure he had modified his behavior.

Having concluded that the grievant was insubordinate in yelling at Serwatka, it remains to be decided whether he also attempted to threaten his supervisor. The negotiated work rules call



for a written reprimand for first instances of insubordination, while the grievant received a three day suspension. The only possible justification for this higher level of discipline is the allegation that the grievant made threatening gestures with his arm and his fist. As noted above, insubordination involving violence or the threat of violence is of a far more serious character than a simple refusal to follow orders. As such, it might well justify a serious disciplinary response, even for a first instance. On this point, I conclude that the evidence is insufficient to prove that the grievant intended to threaten Serwatka when he gestured to him on April 22nd.

The grievant admits waving his arms at Serwatka, but claims it was an exaggerated shrugging motion. The shrugging motion displayed at the hearing and the roundhouse motion described in Taylor's letter of suspension are similar enough that the one might be mistaken for the other. Even though Serwatka might well have perceived the gesture as a simulated punch, it is the grievant's intention in making the gesture, rather than Serwatka's impression, that controls the level of discipline. I cannot find on the basis of the record evidence that the grievant intended to threaten his supervisor through his gestures. Thus I conclude that the grievant was guilty of simple insubordination on April 22nd, rather than the more serious offense of threatening a representative of management.

#### Appropriate Measure of Discipline

Under the listed work rules, a first offense of insubordination calls for a written reprimand. Instead, the Employer imposed a three day suspension. The level of discipline is therefore more severe than is warranted by the grievant's conduct. The Employer argues, however, that the written grievance does not seek any relief, and that there can be no remedy. There is no basis for the Employer's argument in the contract language governing grievances:

Every grievance must be reduced to writing and filed with the party against whom it was made within five (5) working days after the occurrence of the event which is made the subject matter of the grievance and if the grievance is not filed in writing within such time limitation it will be barred.

The language does not dictate a particular form for grievances, and the grievance in this case can only be read as a challenge to the discipline imposed on April 23rd. The grievance procedure is not a series of legal pleadings, and must take into account the varying degrees of sophistication among workers and supervisors. Absent evidence that the Employer was misled about the nature of the grievance by the grievant's rather inartful phrasing, it is reasonable to conclude that the parties all understood the aim of the grievance to be more than just a sterile declaration of rights. Where an act of discipline is successfully challenged, the standard remedy is an order making the grievant whole, and the Employer should have understood the grievance to include, by implication, a request for such relief.

The undersigned finds, based upon the record evidence, that the grievant was guilty of insubordination on April 22nd, but that the three day suspension was excessive in light of the

contract provision calling for a written warning for first offenses. The appropriate remedy is to reduce the discipline to a written warning, and to make the grievant whole for lost wages and benefits, if any, for the three day suspension.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The Employer had just cause to discipline the grievant for insubordination. The penalty of a three day suspension is excessive in light of the schedule of penalties for insubordination in Article 9 of the contract, and the Employer is directed to remove any reference to a suspension from the grievant's personnel file, substituting if it wishes a written reprimand. The Employer is further directed to make the grievant whole for any lost wages and benefits resulting from the suspension.

Signed and dated this 3rd day of August, 1991 at Racine, Wisconsin:

Daniel Nielsen /s/  
Daniel Nielsen, Arbitrator