

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 38
 TAYLOR ENTERPRISES INC. : No. 49721
 : A-5117
 :
 and :
 :
 TEAMSTERS, CHAUFFEURS & HELPERS :
 LOCAL NO. 43 :
 :

Appearances:

Mr. Jack Taylor, Transit Manager, on behalf of Taylor Enterprises.
Mr. Charles G. Schwanke, President, on behalf of Teamsters, Chauffeurs & Helpers, Local No. 43.

ARBITRATION AWARD

The above-captioned parties, hereinafter referred to as the Employer and the Union respectively, are parties to a collective bargaining agreement providing for final and binding arbitration. Pursuant to said agreement, the parties requested the Wisconsin Employment Relations Commission to appoint a member of its staff to hear the instant dispute. The undersigned was designated by the Commission to hear the matter. Hearing was held on November 17, 1993, in Racine, Wisconsin. No stenographic transcript of the proceedings was made. The parties completed their briefing schedule on December 6, 1993. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

The parties at hearing stipulated to the framing of the issue as follows:

Was the employe, William Reeser, fired for just cause pursuant to collective bargaining agreement? If so, what is the appropriate remedy (backpay warranted)?

PERTINENT CONTRACT LANGUAGE:

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 as set forth and the penalties to be charged for the violations of these rules are placed into 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 of the violations must be filed with the Employer within five (5) days of the violation.

. . .

3. CONDUCT

- (e) Theft or dishonesty of Subject to immediate discharge
a serious nature

. . .

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 by 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:

. . .

- 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.

STATEMENT OF FACTS:

The Employer operates a transit company for the City of Racine. The grievant, William Reeser, was employed by the Employer as a mechanic's helper primarily engaged in washing bus interiors. According to a co-worker, Nick Ambrosini, Reeser was also working a second job as a roofer for Accu-Rate Roofing, at the same time. On June 25, 1993, Reeser sustained head and neck injuries in a non-job-related motor vehicle accident. He remained off on sick leave until the date of the alleged incident receiving disability benefits from the Employer's insurance provider. The grievant, during this time period, supplied periodic doctor's disability slips to the Employer as required for his continued absence.

In late July and early August, Jack Taylor, the Employer's Transit Manager, was being told by Reeser's co-workers that Reeser was working for another employer although he was taking sick leave and receiving the above-noted disability benefits.

According to Taylor, on Wednesday, August 11, 1993 at 8:10 a.m., he followed an Accu-Rate Roofing truck to a job site in Racine County where he observed Reeser working on top of a two-story building rolling out what appeared to be tar paper with another man. Because he observed Reeser on the roof engaged in work for the other employer, Taylor concluded that Reeser's physical condition, which allowed him to climb a ladder to a two-story building and to perform roofing work in the hot sunlight, did not preclude him from performing the less strenuous task of washing bus interiors. He sent Reeser a letter of termination that day suggesting that Reeser inform the insurer that he was gainfully employed by another company in order to stop the weekly disability checks and to avoid a charge of fraud. Taylor insists that by collecting disability while working for the other employer Reeser violated Article 9, Section 3 (e), pp. 6, 7, which requires immediate discharge for theft or dishonesty of a serious nature.

Reeser testified on his own behalf. He testified that he doesn't "feel that he was working at the time." Reeser stated that he did not do any work after June of 1993. He indirectly disclaimed working for Accu-Rate Roofing on the date that Taylor allegedly observed him. Reeser also presented a one-sentence document on Accu-Rate Roofing letterhead which was executed before a notary public. The signature on the document is not fully legible but it appears to be signed by an O. Mab. Reeser could not tell the undersigned who from the company actually executed the document nor could he name any official from Accu-Rate, not even his supervisor. The sentence states that "William Reeser did

not work for me in 1993 after March."

Upon being terminated from the Employer's employ, Reeser then filed a grievance with the Union. It states, in pertinent part, "Having suffered neck and lower back sprain from traffic accident, went on disability on 6-25-93. Jack Taylor supposedly (sic) followed me to another job, he heard I was working at. Showing no proof (picture, actually talking to me.) And me (William Reeser) having two witnesses. Find Jack Taylor's response to be mistaken identity. When my therapy for back discomfort is finished I will of course resume work. As settlement upon grievance, I request my job, all back wages, and benefits entitled to me (William Reeser)."

Other witnesses were called to testify. Julie Furuglyas, another co-worker of the grievant, gave relevant testimony. She stated that she was aware that Reeser had been employed repairing roofs for the other employer for quite some time. Furuglyas claimed that she had a conversation with Reeser some time in early August. According to Furuglyas, Reeser came to her house and told her that he was going to be off for awhile because the doctor hadn't released him yet because of his back injury. He mentioned that "he saw Jack (referring to Taylor) while he was at the other place." He said "Now that Jack has seen me, I'll have to lay low for awhile." Then he said that "he'd have to be losing that money by not working for the roofing company." Furuglyas then testified that Reeser asked her if he could switch hours when he came back to work at the bus company so that he could work the night shift.

Other evidence was offered as to the appropriate remedy should Reeser be reinstated to his position with the Employer.

POSITIONS OF THE PARTIES:

Employer

The Employer's sole contention is that Reeser's employment with another company while receiving disability benefits was dishonest and warrants discharge. According to the Employer, Reeser unwittingly admitted to this fraud in his handwritten grievance statement which states, "and me with two witnesses". The Employer also refers to the Unemployment Compensation determination as evidence that Reeser showed a substantial disregard for the Employer's business interests.

The Employer points to the testimony of Ambrosini and Furuglyas as establishing that Reeser told both of his co-workers that he was working for Accu-Rate Roofing Company. It distinguishes Reeser's actions in working for another employer while on sick leave from the actions of other employees who have

merely held second jobs while in the employ of the Employer. Reeser's actions of collecting sick leave disability checks while working for another employer were, in the Employer's opinion, both dishonest and illegal.

With respect to any potential remedy, the Employer argues that no backpay is due even if the Arbitrator should find that he is entitled to be reinstated. It argues that because he has lost his Commercial Drivers' License, he is not entitled to back wages to the present time.

In conclusion, the Employer asserts that Reeser violated his employment with the Employer when he covered his schedule with sick leave to work corresponding hours for another employer. If Reeser was physically able to climb a ladder and repair a roof, he was able to perform the less strenuous tasks at the Employer's place of employment. The Employer believes that Reeser was dishonest by collecting sick benefits from the Employer's insurer while working for someone else. This, it argues, is good cause for discharge.

Union

According to the Union, Reeser did not violate any article of the work rules or the collective bargaining agreement. His actions, in particular, did not violate work rules for which discharge is warranted. Reeser had doctor's slips which proved that he had injuries which did not allow him to work. Reeser also submitted continuance of disability forms executed by his physician which support his contention that he was unable to perform work for the Employer. This evidence, it suggests, establishes Reeser's continuous inability to work during the time period in controversy.

The Union also points to the document from Accu-Rate Roofing to buttress Reeser's claim that he was not working for Accu-Rate on or around August 11. This evidence, it asserts, demonstrates that Reeser did not work for the roofing company during the time in question.

The Union argues that Reeser is entitled to reinstatement with or without backpay. It maintains that the monies lost during Reeser's absence from work are important but not as important as returning Reeser to work, when qualified, and being made whole for health and welfare payments. The Union argues that the grievant is a bus washer who would not need to possess a Commercial Driver License to perform his employment. Whether or not he needs his license, in the view of the Union, is still an open question. In any event, the Union argues that page 10 section 7(b) should cover the penalty for loss of a driver's license if it is determined

that Reeser does not possess the proper license for his employment.

DISCUSSION:

The primary issue for determination is whether or not the Employer had just cause to discharge the grievant. In many respects this case essentially boils down to the issue of whom the arbitrator believes. If Reeser was in fact on the roof performing roof repairing duties for another employer while on sick leave and receiving disability benefits, there is cause to discharge him for serious dishonesty as provided in Article 9, Section 3.(e). Representing oneself to be too disabled to report to work, while working for someone else at tasks equally or more strenuous constitutes intentional, serious misrepresentation and dishonesty.

The undersigned concludes that the Employer, Jack Taylor, did observe Reeser performing roofing work on August 11, 1993. Taylor testified forthrightly and without contradiction as to his observations on that day. Moreover, the testimony of Julie Furuglyas buttresses Taylor's observations in that it appears that Reeser made statements to her which are adverse to his interest. According to Furuglyas, Reeser told her that Taylor had observed him and that he would have to "lay low" for awhile. I do not credit Reeser's version of the incident because his denial regarding his working that day was indirect and qualified at best.

The document which he presented from Accu-Rate is suspect because whoever executed it did not appear to testify and Reeser was vague as to who exactly signed the document and who his superiors were at Accu-Rate. He could not provide the names of the Accu-Rate official who signed the document or of any of the other management person from the roofing company. Reeser's testimony as to the last time he worked for Accu-Rate contradicts the statement from Accu-Rate. He testified that he did not work for Accu-Rate after June of 1993, while the statement indicates that he did not work after March of 1993.

The medical slips and the executed continuation of disability forms from Reeser's physician simply do not establish a continuing disability on Reeser's part where the first-hand observations of Taylor and Reeser's own statements suggest otherwise. Accordingly, the undersigned finds that just cause did exist for discharge. It is my decision and

AWARD

That employe, William Reeser, was fired for just cause pursuant to the parties' collective bargaining agreement.

That the grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 28th day of December, 1993.

By Mary Jo Schiavoni /s/

Mary Jo Schiavoni, Arbitrator