BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
KENOSHA SCHOOL BUS DRIVERS UNION	:	Case 1 No. 49146 A-5964
and	:	
LAIDLAW TRANSIT, INC.	:	

Appearances:

Mr. Robert K. Weber, Hanson, Gasiorkewicz & Weber, S.C., Attorneys at Law, 514 Wisconsin Avenue, Racine, WI 53403, appearing on behalf of the Union.

Mr. Larry Besnoff, Obermayer, Rebmann, Maxwell & Hippel, Attorneys at Law, Packard Building - 14th Floor, Philadelphia, PA 19102-2688, and Mr. Ed Mikalunas, Regional Director of Human Resources, appearing on behalf of the Company.

ARBITRATION AWARD

The Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievances under the grievance arbitration provisions of the parties' July, 1991-July 6, 1994 collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing held at the Company's Kenosha, Wisconsin facility on July 16, 1993. The hearing was transcribed. Both parties submitted initial a post-hearing brief, and neither filed a reply brief. The time for reply brief submission expired on October 12, 1993, marking the close of the record.

STIPULATED ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Was the discharge of Mr. Stoner for just cause?

2. If not, what is the remedy?

PORTIONS OF THE AGREEMENT

> 13. The procedure for administering the Work Rules listed in paragraphs A through M below

will be as follows:

Minor violations to work rules will begin with a verbal warning and explanation of work rules and procedures. Minor violations will be removed from employee's file after 1 year.

Other than minor violations the first violation will be a written notice from the Manager to the driver.
The second violation will be written notice from the Manager to the driver.

The third violation of a similar work rule within 1 year period will call for dismissal.

Extraordinary serious violations to work rules and safety may result in immediate termination, or accelerated violation procedures.

. . .

D. Drivers aManagement of the Company shall be expected to represent the Company in a business like manner. They shall dress neatly, refrain from vulgar language, and be kind and courteous at all times to passengers and to others with whom they come in contact in the line of duty.

. . .

M. Drivers, subject to the agreement by the Union, agree to abide by all company policies and procedures, which will be posted at the beginning of the school year and further agree to abide by all changes to Company policies and procedures thereafter.

BACKGROUND

The Company is primarily engaged in the transportation of children to and from school and school-related activities and also in providing charter bus services to passenger groups not limited to school children. The primary function of its Kenosha, Wisconsin terminal is to provide contracted transport services to the Kenosha Unified School District (herein District).

The Union represents the drivers employed by the Company at

that terminal.

Prior to his discharge on January 29, 1993, the Grievant had worked as a driver for the Company at the Kenosha terminal since October of 1991.

During his morning run on or about January 21, 1993, Grievant was contacted by radio to pick up an additional student who needed to be dropped off at the Hillcrest School, an alternative school for the special education needs of students who are severely emotionally disturbed alcohol and/or adjudicated delinquent. The student Grievant picked up was a 17 year old female who had been adjudicated delinquent, was emotionally disturbed and had a history of alcohol dependence.

During the course of Grievant's transporting the student, there was a period of about 15 minutes when they were alone in the bus, after the other students on the regular run had been dropped off. Sometime after Grievant dropped the student at Hillcrest, either the same day or the following day, the student told School officials about her interaction with Grievant during the period when they were alone on the bus. School officials then contacted the Sheriff's Department, the County Department of Social Services and the Company, all of which conducted investigations. Grievant was not questioned, arrested or charged by the Sheriff's Department which ultimately decided not to pursue the matter further. The Company did not interview the student, but rather relied on information about the student's statements and truthfulness as provided to it by District and Sheriff's Department personnel.

Grievant was questioned by the Company on three occasions. In each instance he was offered the opportunity to have Union representation present, however no Union representative was available or therefore present during the first interview. Following the first interview on the afternoon of January 21, Grievant was suspended pending further investigation. After completing its investigation and after District officials made it clear to the Company that the District did not want Grievant to transport any District students in the future, the Company, on January 29, 1993, discharged Grievant, issuing him a written notice containing the following:

> Date of Violation: January 21, 1993
>
> Has employee been previously warned? yes ____ no ____ No smoking policies have been covered and been posted.

> Nature of Violation: Union contract page 5-M allowed student to smoke on the bus after student requested permission from him. Page 5-D engaged in a extraordinarily inappropriate conversation in regards to meeting the same student on the same day to meet the student outside of employment at Sergio's Night Club.
>
> Company Remarks: During investigation with union representatives present employee admitted allowing student to smoke on the bus after student requested permission from him. He also admitted with union representatives present to having a conversation with the same student in regards to meeting the student a Sergio's Night Club. due to the serious nature of the violations and the combination of both the decision to terminate the employees employment has been made.

The instant grievance was then promptly filed. In it, Grievant identified the nature of the grievance as, "I don't agree with my termination. I do not believe the 2 violations are extraordinarily serious reasons for my termination." As the "settlement desired," Grievant specified that he sought to be "reinstated for job and my back pay for time lost."

The grievance was submitted to arbitration as noted above.

The Company did not attempt to call the student as a witness at the arbitration hearing, in deference to the District's policy against students being questioned as witnesses in legal proceedings. Over Union objections to its hearsay nature, the Arbitrator heard testimony from District and Company personnel about what the student said to District and Sheriff's Department personnel. However, the Arbitrator reserved ruling on whether the hearsay testimony would be given weight if it were contradicted by first-hand testimony. As noted in the summaries of the parties' positions below, Grievant's statements to the Company and at the arbitration contradict in some but not all respects the statements attributed to the student by Company witnesses.

Additional background matters are noted in the summaries of the parties' positions and in the discussion, below.

POSITION OF THE COMPANY

The Company had just cause for its discharge of the Grievant.

Grievant, who is 28 years old, was alone in his bus transporting the 17 year old female student for a period of about 15 minutes. After the students on the regular run left the bus the girl moved to the upper front right-hand side seat and asked Stoner if she could smoke. There are federal, state and local laws, regulations and rules against both drivers and students smoking in school buses. Grievant admits that, although he knew it was contrary to law and Company policy, he gave the girl permission to smoke on the bus after she told him her other bus drivers permitted her to do so. In addition, Grievant admits that when the girl told him that she and her sister hung out at at Sergio's Night Club he told her to let him know when she would be there because he might show up. It was inappropriate for him to suggest that he meet any student at a night club, but particularly so as regards a girl whom Grievant knew was attending a program for students with delinquency and/or emotional problems.

The Grievant has denied the girl's further assertions that, while they were alone on the bus, Grievant: told her that he would lick her lipstick off of her cigarette butt so that no one would not know that a student had been smoking on the bus; repeatedly asked her for her phone number, explaining that he wanted to call her at home, come by, pick her up and take her cruising in his car; told her not to tell anyone that he had asked for her home phone number; told her that she could call him because his telephone number was in the phone book; and told her that if she called him he would come by, pick her up and they would go "cruising." Grievant also denied the student's assertion that he had asked for her phone number during a conversation they had on a previous occasion when Grievant and she were alone during transport.

School personnel testified that the girl was uncharacteristically visibly upset and near tears; that she complained that Stoner was "coming on to her"; and that she told them she was afraid that if she caused Grievant trouble by reporting him he would retaliate because he knew where she lived and that she hung out at Sergio's. They believed the girl, noting that she did not have a history of lying. They also testified that it is the District's policy not to make students available to testify regarding incidents of this kind because to do compounds the emotional stress on the student.

The Company did not attempt to call the student because the District's policy represents its judgment that to do so would be harmful to students emotionally. Even though Grievant denied most of the girl's assertions about their conversation, the testimony about the girl's statements is reliable because it provides further support Grievant's own admissions.

Even though no criminal charges resulted, the Grievant's conduct was understandably of serious and continuing concern to the School District and the Company. The District did not have occasion to formally exercise its contractual right to insist that Grievant no longer be assigned to transport its students, because, following a fair and complete investigation, the Company decided to discharge the Grievant.

Grievant's record of service is not a basis for imposing a lesser penalty than discharge. Since beginning work for the Company as a driver in October of 1991, he had at least five previous disciplinary warnings for tardiness. Some were verbal, some were in writing and he was suspended for five days from charter runs due to a charter run tardiness situation. In the context of the latest incident, Grievant's dangerous propensity to ignore rules places the Company in untenable danger of losing its contract with the District.

The Agreement expressly authorizes immediate discharge where, as here, the employe engages in "extraordinary serious violations to work rules." Grievant knew from his training that smoking by students was not allowed under federal law, state law, District and Company policies. He did not merely fail to notice a student smoking, he explicitly granted permission to the student to smoke on his bus. He admits both of the violations cited in the employe warning that formed the basis of the discharge. Grievant further admits that he expected to be punished but not terminated for those violations. The Company must transport the District's students safely, on time and in conformity with law and the Company's contract with the District. Both allowing a minor student to smoke on the bus and offering to meet a minor student at a night club after work hours are extremely and extraordinarily serious, especially as regards a student who was emotionally disturbed, adjudicated delinquent and in a special program to deal with those problems. Either of the admitted violations would have justified discharge; together, they clearly do. Grievant's admissions alone fully support the discharge.

For the foregoing reasons, the Arbitrator should conclude that the discharge was for just cause and deny the grievance.

POSITION OF THE UNION

The Arbitrator should reduce the discharge to some lesser disciplinary penalty.

The evidence shows that the Company discharged Grievant at least in part because it shared the District officials' belief that Grievant had sexually propositioned the student on the morning in question, and perhaps on one or two previous occasions.

However, the District has failed to prove any misconduct beyond that admitted by the Grievant. The Company did not subpoena the student, even though the student would almost have reached adult age by the time of the arbitration hearing. The Grievant, on the other hand, testified at the hearing, subjected himself to cross-examination, and credibly related the same facts that he readily and repeatedly had admitted from the beginning of the Company's investigation. The Sheriff Department's decision not to even question the Grievant, let alone arrest or charge him with contributing to the delinquency of a minor, make it clear that the Sheriff's Department did not find the minor's story credible. The student's statements cannot be considered or credited because of their hearsay nature and because of the student's history of being alcohol dependent and severely emotionally disturbed. It also appears that the
student did not bring the incident to the attention of District personnel until the day after it occurred. Therefore the record does not reliably establish either that the student was fearful because of her conversation with Grievant or that she was truthful about what had been said between them.

Grievant admittedly permitted the student to smoke. While it was wrong for him to have done so, he initially told the student she could not smoke, and only permitted her to do so when she told Grievant that her regular driver permitted her to smoke on the bus. While smoking on a school bus by anyone is contrary to state and federal law as well as School District and Company policies, it has never before been characterized by the Company as a dischargeable offense, and it was recently the basis for only a verbal warning to another driver.

Grievant also admittedly responded to the student's statement that she went drinking at Sergio's Night Club by stating that she should let Grievant know sometime when she was going and that he might show up. However, as Grievant explained in his testimony, he was only trying to be polite and make small talk, consistent with Company rules about being courteous, and that he had no intention of ever seeing the student again. It was the student rather than Grievant who initiated the interaction by coming forward in the bus to a front seat and who brought up the subject of drinking at Sergio's Night Club. Grievant could not have planned a conversation with the student since she was not on his regular route and was only being driven by Grievant because weather conditions had delayed her regular bus. Grievant's attention was not on the student because he was in a hurry to both complete the extra driving involved in transporting the student and to return to the Company's office to participate in the allocation of extra runs when they were offered shortly after completion of his morning run.

The Grievant's work record is not bad. His previous infractions were limited, minor and unrelated, and he did not have any malicious intent in his interaction with the student in this case. He was merely attempting to be courteous and accommodating to a passenger whom he had gone out of his normal route to pick up as a convenience to the Company and at the risk of returning too late to bid for charter driving opportunities. He admittedly went too far by permitting conduct which might have been acceptable on a charter run, but which was not appropriate for a student transit.

For those reasons, the Arbitrator should reduce the discharge to a lesser penalty.

DISCUSSION

In both his arbitration hearing testimony, and his pre-arbitral statements to the Company, the Grievant has admitted engaging in both aspects of the misconduct for which he was discharged.

To the extent that the Grievant's first-hand testimony denied various aspects of his interaction with the student, the Arbitrator credits the Grievant's testimony and gives no weight to the testimony about what the student told school and law enforcement officials concerning the incident. To credit

second- or third-hand hearsay, where it conflicts with Grievant's first-hand testimony, would unfairly prevent the Union and Grievant from having the student's testimony heard first-hand by the Arbitrator and from cross-examining her at the arbitration hearing.

While Company and District officials seem to believe that Grievant actively tried to arrange a sexual encounter with the girl, the Company is limited in this proceeding to the bases for discharging Grievant that were set forth and explained in the employee warning form as quoted under BACKGROUND, above.

The answer to ISSUE 1 therefore turns on whether the Grievant's admitted misconduct constituted just cause for discharge as opposed to some lesser penalty. Because Dan Gray's testimony suggests that he based his decision to discharge, at least in part, on the conclusion that "there was in fact a sexual proposition made to a student" [tr.43], the Arbitrator gives Gray's determination as to the appropriate penalty less deference than the Company's judgment in that regard would ordinarily be given.

The Arbitrator is persuaded that the Grievant's violations, taken together, did constitute "extraordinary serious violations to work rules" such as "may result in immediate termination" under the terms of the Agreement.

As the Company asserts, allowing a student to smoke on a school bus violates Company policy, District policy, state law, and federal law. The Union's showing that smoking by <u>other than students</u> has been treated as a relatively minor offense does not establish that the Grievant is being singled out for unfair treatment. In no prior case has the Company been shown to have been faced with an employe knowingly permitting a student to smoke on the bus. Grievant's misconduct in that regard is aggravated by the fact that he did not merely fail to stop a student who engaged in smoking, but he affirmatively condoned it, despite his admitted knowledge that it was prohibited. The fact that Grievant at first refused to permit her to smoke confirms his admission that he knew it would be improper for him to do so. The fact that he consented only after the student said other drivers had permitted her to do so is does not excuse or significantly mitigate the misconduct either. Whether giving the student permission to smoke on the bus, by itself, would constitute a sufficient basis for the Grievant's immediate discharge need not be determined here. It is sufficient to conclude that Grievant's doing so constituted a seriously aggravating element regarding the manner in which Grievant interacted with the student on the bus run in question.

Grievant's saying to the student that she should let him know when she was going to Sergio's Night Club because he might show up there also constitutes a serious violation of the Company's rule requiring drivers to conduct themselves in a business-like manner. That would be true whether Grievant intended ever to meet the student at the Club or not. Grievant knew the student was in a school for children adjudicated as juvenile delinquents and/or emotional problems. He admits that he knew from a previous conversation that the student had herself been in jail. Grievant also had been at Sergio's Night Club and knew that alcoholic drinks were served there. Grievant's response to the student encouraged and condoned the student's participation in conduct that would be potentially harmful to the student, and it indicated a possibility that Grievant would join the student in such activity. No matter how it was intended, what Grievant said could have been readily understood by the young woman as an interest on Grievant's part in meeting with her at the Club. Whether the student was actually frightened and concerned about the conversation with Grievant or not, Grievant's admitted response to the student opened him and his employer to serious and justified criticism and continuing concern from the District when the student reported the conversation to District personnel. Grievant's response to the student also placed the Company in an embarrassing and vulnerable position in relation to the District, the principal customer of its Kenosha terminal. Both the District, which has a contractual right to insist that particular drivers not drive its routes, and the Company, have legitimate interests in the students being transported in a manner that is free from serious misconduct of the sort in which Grievant admittedly engaged with this student.

Taken together, Grievant's admitted violations of Company rules showed a reckless disregard of the health and well-being of the student he was transporting, and it jeopardized important Company interests.

It is true that this was the first incident of its kind in Grievant's work for the Company. Grievant's prior disciplinary violations were different than the instant misconduct. Nonetheless those prior disciplines are relevant to a determination of whether Grievant's work record supports the Union's contention that discharge was too harsh a penalty in the circumstances. Grievant's employment record does not mitigate in his favor. During his limited years of service for the Company, he has been disciplined on several occasions, including a 5-day suspension from the charter service.

All things considered, the Arbitrator finds that discharge was the appropriate penalty for Grievant's admitted misconduct in the circumstances.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that:

1. The discharge of Mr. Stoner was for just cause.

2. The grievance is denied and no consideration of remedy is necessary or appropriate.

Dated at Shorewood, Wisconsin
this 13th day of January, 1994 by Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator