BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
AMALGAMATED TRANSIT UNION LOCAL 519	Case 241 No. 48720 MA-7688
and	
CITY OF LaCROSSE	

Appearances:

Mr. Peter B. Kisken, Assistant City Attorney, appearing on behalf of the City of LaCrosse.

Davis, Birnbaum, Marcou, Seymour & Colgan, Attorneys at Law, by Mr. James G. Birnbaum, appearing on behalf of Amalgamated Transit Union Local 519.

ARBITRATION AWARD

Amalgamated Transit Union Local 519, hereinafter referred to as the Union, and the City of LaCrosse, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the City, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held in LaCrosse, Wisconsin, on September 14, 1993, and January 25 and 26, 1994. The hearing was transcribed and the parties filed briefs and reply briefs, the last of which were exchanged on April 19, 1994.

BACKGROUND:

The grievant, Basil Martin, was employed as a bus driver for the City of LaCrosse starting in July, 1986. On November 12, 1992, the grievant was driving the bus on route #3 and worked from 2:10 p.m. until 10:40 p.m. At approximately 8:20 p.m. the grievant picked up Michelle Raisbeck at the bus stop located at Losey Boulevard and Farnam Street. Raisbeck testified that the grievant drove the bus from that location to 31st Street and State Road, a location where the busses usually stop if they are ahead of schedule. Raisbeck testified that she was the only passenger on the bus at that time and location and that the grievant shut the inside bus lights off, came over to her seat and sat next to her in the first seat on the door side of the bus. She asked him what he was doing and he said he wanted to have some fun. She told him no and to go back to his seat. Raisbeck then alleged that he touched her breast and she told him to leave her alone and to go back to his seat. She testified that he then touched her vagina and she again told him to leave her alone and he tried to take her hand and put it on his penis. He then asked if she would give him a "blow job" and she told him no, to which he responded okay, just watch me "jack off." She testified that she turned her head the opposite direction and didn't know what he did. She testified he then tried to force her head in his direction and he said that he wanted her to give him a kiss, just one kiss and he would leave her alone, and that's when her head hit the back of the window. She stated no and he indicated he was sorry, went back to his seat and drove the bus from that point on its regular route.

When the bus got on Cass Street, according to Raisbeck, a female

passenger, who was later identified as Carrie Jick, got on the bus and rode the bus as far as the vicinity of the Country Kitchen Restaurant. Jick later testified that she got off at Ninth and Cass. After Jick exited the bus, Raisbeck testified that the grievant shut the lights off again and she told him to turn them on. He did not turn them on and they arrived at Fifth Street and State Street in downtown LaCrosse. There a passenger was waiting to get on the bus, whom both the grievant and Raisbeck described as having some type of a mental or physical incapacity. The grievant again left his seat and came and sat by Raisbeck and she testified that he grabbed her breast again. She told him not to touch her anymore and he said he was sorry and should never have done it. The passenger who was waiting was now banging on the door to get in. She told the grievant to open the door and the grievant did and she exited.

On the next evening, Friday, November 13, 1992, Raisbeck told her boyfriend, Don Thayer, about the incident. The next morning, Saturday, November 14, 1992, Thayer contacted the Municipal Transit Utility and spoke to Tim Schick and reported this incident. Schick requested further information and Thayer called a little later and gave more information, and during the second call, Tim Schick asked to speak with Raisbeck. Raisbeck then spoke with Schick and told him what had occurred on November 12, 1992.

On November 16, 1992, at approximately 2:00 p.m. the City conducted a meeting with the grievant, the Union President Gregory Johnson, and the Union Executive Board Member Darrell Hodson. Present for the City was James Geissner, the City Personnel Director, and the Transit Manager, Keith Carlson. The grievant was informed that the City had received a complaint from a passenger alleging that he had sexually harassed her and touched her sexually and that this incident occurred at approximately 8:20 p.m. on November 12, 1992. The events were described that at approximately 8:20 p.m. on November 12, 1992, the grievant made various verbal and physical sexual advances to the complainant. The complainant had boarded the bus at K-Mart and by the time the bus had reached 31st and State Road she was the only passenger on the bus. The grievant stopped the bus at 31st and State Road, turned off the interior lights, got up from the driver's seat and sat next to the complainant, had tried to kiss her, touched her breast and thigh area and said that he could take his pants down and she could watch him "jack off." The grievant admitted that he probably did touch her, that he did talk to her about sex, that she was the only person on the bus, that he did turn the lights off, that he did leave his seat and sit next to her but he did not force her, and he indicated that if they were talking about a girl named Michelle that he could explain. The grievant indicated that he had been out with her on two or three occasions, the last time being six weeks ago, that he met her on the bus, and that he had sex with her two or three times, but never on the bus. At this meeting, the grievant was suspended with pay pending further investigation by the City.

Also, on November 16, 1992, at approximately 6:05 p.m., Tim Schick, Transit Supervisor, and Pamela Ghouse, met with Michelle Raisbeck and Don Thayer at her apartment where she reiterated the events of November 12, 1992. She denied that she had ever dated or had had sex with the grievant. She was asked to provide a written statement at that time, and she did so. The City held another meeting with the grievant on November 20, 1992, and at that time his attorney was present and did not allow the grievant to answer any questions without a written pledge that the results of the discussion would not be used against the grievant in any criminal proceedings. Because of time constraints another meeting was requested. That meeting occurred on November 23, 1992, at which time the City presented the grievant and his attorney with a written pledge that they had previously discussed at the prior meeting. The attorney objected that the pledge was not signed by the District Attorney's office and that the grievant refused to sign the document or to agree to answer any questions. Another meeting was held with the grievant on December 21, 1992, at

which time the grievant was given all of the documents compiled by the City with respect to its investigation. The grievant answered no questions. A meeting was held on December 30, 1992, at which point the grievant was discharged for the incident which occurred on November 12, 1992. The grievant grieved his discharge which has culminated in this proceeding.

ISSUE:

The parties stipulated to the following:

> Was the grievant suspended and/or discharged for cause? If not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

> Section 6
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> Management Rights
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> Except as otherwise specifically provided herein, the management of the Municipal Transit Utility and the direction of the work force included but not limited, to the right to hire, discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, to make reasonable rules or regulations governing conduct or safety pursuant to Section 22, to be able to determine the methods and process of performing work, are vested in the management.
>
> The exercise of the foregoing functions shall be limited only by the express provisions of this contract and the

City has all rights which it has at law except those which were expressly bargained away in this agreement. This article shall be liberally construed.

The exercise of the employer of any of the foregoing functions shall not be reviewed by arbitration except in case such function is so exercised as to violate express provisions of this contract.

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Section 10

Suspension or Discharge

The MTU Manager or Assistant Manager may, for cause, suspend or discharge any employee within his/her jurisdiction. Within forty-eight (48) hours of a discharge or suspension, an employee shall be given notice of the reasons for the action and notice that he/she may request a hearing before the Wisconsin Employment Relations Commission. A copy of such notice shall be given to the Director of Personnel. If such employee requests a hearing within seven (7) calendar days of the notice of discharge or suspension, said hearing shall be before the Wisconsin Employment Relations Commission. If exonerated and reinstated, such employee shall be reimbursed for the time lost with Common Council approval.

Discipline, discharge and suspension shall be administered according to the City Operating Rules promulgated to Section 22.

During investigation, hearing or trial of any employee in any civil action or on any criminal charge, when suspension would be in the best interest of the City, an employee may be suspended by the MTU Manager or Assistant Manager for the duration of the proceeding. The suspension shall terminate within ten (10) days after completion of the proceeding by resignation or dismissal of the employee, by reinstatement with back pay or by other appropriate action.

CITY'S POSITION:

The City contends that it has clearly established that it had proper cause to terminate the grievant. It submits that the testimony points to only one conclusion--that the grievant sexually and verbally assaulted his passenger, Michelle Raisbeck, while on duty on November 12, 1992, between 8:20 p.m. and 8:40 p.m. The City asserts that it has met the burden of proof that such misconduct warranted termination and that the contractual requirements were observed in substance as well as in form. It submits that Raisbeck's accounting of what took place on November 12, 1992, while she was a passenger on the grievant's bus, has been substantially the same each time she has told it, referring to the interview with Mr. Schick, the interview with Mr. Carlson, her statement to the Police Department and her testimony at the grievant's criminal trial. It notes that the investigation on November 16, 1992, when Schick met with Raisbeck cleared up confusion that was present in

the initial complaint over the telephone. It submits the most telling meeting took place on November 16, 1992, when Martin was interviewed by Keith Carlson. At that meeting, after the events of November 12, 1992, between 8:20 and 8:40 p.m. were relayed to the grievant, the grievant admitted that he had touched Raisbeck and that he had talked to her about sex. He further confirmed that she was the only passenger on the bus at that time, and that he did, in fact, turn off the lights. It points out that Union President, Greg Johnson's notes of the November 16, 1992 meeting corroborate the notes of Carlson.

The City submits that the evidence established that its investigation was thorough and complete. It notes that Martin was suspended with pay after the meeting on November 16, 1992, and that he was not discharged until its investigation was completed. It submits that the City's conclusions were based on substantial evidence of the grievant's guilt in that the grievant had violated several written rules and policies of the Municipal Transit Utility relating to misconduct in the operation of the bus, including use of profane language and making sexual advances. The City asserts that the grievant was adequately informed of the consequences of his actions and was aware of the rules as indicated by his receipt of the employe handbook. It submits that prior to his termination, the grievant was advised of his misconduct in writing and was afforded the opportunity to explain his actions, and he was supplied with a comprehensive investigative report including the statements of the complainant. The grievant had several opportunities to explain his position; however, after the November 16, 1992 meeting, he made no statements in his defense.

The City contends that this is a case in which all of the seven tests of just cause formulated by Arbitrator Daugherty merit an affirmative response. The grievant was given advance warning of the probable disciplinary consequences of his conduct in writing through the medium of work rules and of the penalties for their violation. It notes that this is not necessarily required because the offenses here are so serious that any employe would properly know such conduct is offensive and heavily punishable. The City asserts that it has shown that the rule prohibiting lewd and lascivious behavior and the other rules are reasonably related to the efficient operation of the City of LaCrosse Transit Utility, and the Union has not argued that the rules are unreasonable. Before administering discipline the City claims it conducted a thorough investigation, and this investigation was conducted fairly and objectively. The City argues that investigation produced overwhelming evidence of guilt, particularly in light of the grievant's "confession" which took place on November 16, 1992. It notes that the grievant was notified of the details of the offense with which he was being charged in order for him to defend his behavior. It submits that there was absolutely no evidence that the Utility has not applied its rules and

penalties evenhandedly and without discrimination to all employes. It insists that the discipline meted out in this case was reasonably related to the seriousness of the offense.

With respect to the testimony of the alibi witness Carrie Jick, the City submits that according to her testimony that when she got on the bus at 31st and Denton that she and Raisbeck were the only passengers on the bus; however, this clearly contradicts the grievant's testimony, who indicated that there was an additional passenger on the bus. Additionally, it notes that the grievant claimed that a lady he knows quite well got on at Seventh and Cass and that he knows where she works, yet she was not called as a witness in this case, even though the grievant's testimony was that this witness was on the bus at Fifth and State where the second sexual touching took place on November 12, 1992. It should be noted that at no time during the investigation by the City was there ever any mention of Carrie Jick or the other female passenger, or for that matter, the transfer passenger on the bus at the time in question. On the contrary, the City's notes of the meeting as well as President Johnson's notes of the meeting on November 16, both indicate that the grievant admitted that he was alone on the bus with Raisbeck.

It submits that throughout this proceeding the Union has attempted to make it appear as if Raisbeck had changed "her story"; however, the evidence fails to established this and her recount of the events that took place on November 12, 1992, have been remarkably consistent. It submits that it was the grievant who has changed his story. First he admitted on November 16, 1992, that on November 12, 1992, he touched Raisbeck and then he tried to justify it through a prior relationship story, and then finally denied that it took place at all. It submits that the grievant's story that he had simply put his arm around the grievant several days prior to November 12, 1992, were not reflected in the notes of either Carlson or Johnson from the meeting that took place on November 16, 1992. It submits that Union President Johnson's testimony of what his recollection was on November 16, 1992, is inconsistent with what is contained in his notes. It notes that Johnson testified that the date of November 12, 1992, was not mentioned; however, under cross-examination and after he produced his notes of that meeting, the first entry was that the incident occurred on Thursday, November 12, 1992, at 8:20 p.m. It points out that under cross-examination, Johnson was also asked if he had ever heard of Carrie Jick and he testified that he had never heard of that person. The City contends that the Union has failed to demonstrate any motive as to why Raisbeck would fabricate her story. It submits that she had nothing to gain and that the Union's assertions of motive are pure speculation. It concludes that the grievant was convicted in a criminal court for the exact same incident for which he was terminated. It submits that the burden of proof is greater in a criminal court than in an arbitration. It notes that the conviction is part of the record in this proceeding and should be given due weight by the arbitrator. It submits that the Municipal Transit Utility is a public entity and is dependent on the public's confidence in its services, which includes the belief and trust that all men, women and children will be transported in a safe and professional manner free from fear of sexual harm. This is particularly true where the passenger is a lone female on the bus. The City asserts that it has established that the grievant committed the offenses charged contrary to the City's rules and regulations and that such misconduct warranted termination. It respectfully requests that the arbitrator deny the grievance in all respects.

UNION'S POSITION:

The Union contends that the burden of proof required in this case is proof beyond a reasonable doubt. It submits that this highest level of proof is necessary where there is an accusation of criminal conduct that reflects negatively on the reputation of the employe or where there is an accusation of immorality. It asserts that both of these circumstances are present in this

case. It claims that arbitrators have required this high level of proof where the accusation carries a stigma of general social disapproval, and in cases where improper physical contact with a female is alleged, the charges carry an enormous social stigma. The Union states that it may seem peculiar that the more reasonable an employer's wish to get rid of an employe, the more difficult it becomes for the employer to prove; however, when management charges the employe with not merely breaking the rules of the labor agreement but the greater rules inherent in society, the rise in the quantum of proof is commensurate with the gravity of the charge. It submits that given the gravity and circumstances of these charges, if they are proven, it will virtually eliminate the grievant's ability to continue in any employment. Because these stakes are so high, not only with respect to his current employment but with respect to his future employment, it asserts that it is imperative to take the necessary steps to insure that the grievant is not wrongfully discharged. It submits that the power to set the required burden of proof is with the arbitrator. It points out that the collective bargaining agreement does not establish any particular burden of proof and the burden of proof should be set consistent with general arbitration practices and that is proof beyond a reasonable doubt.

The Union submits that the grievant did not engage in any on-duty misconduct with Michelle Raisbeck at any time. It asserts that the allegations of November 12, 1992, never occurred. It claims that in cases involving accusations of sexual impropriety, the determination of whether any conduct occurred involves a determination of credibility between the accused and the accuser. In regard to the credibility of the grievant compared to the lack of credibility of Raisbeck, the Union asserts that there is no question that the events of November 12 never occurred and never could have occurred. It notes that Raisbeck alleged that on November 12, 1992, the grievant committed a sexual assault on her at two separate locations. It points out that the grievant adamantly denies any such conduct with Michelle Raisbeck at any time, and particularly on this date. It argues that at the intersection of State Road and 31st Street, there was a witness, Carrie Jick, who testified as to her recollections of the events of that date, and that absolutely nothing occurred between the grievant and Raisbeck at that location. It maintains that the record also established at the intersection of Fifth and State Street, fellow bus driver, Dale Anderson, was present, as well as another female passenger on the bus, and again to credit Raisbeck's testimony, the arbitrator would have to conclude that not only the grievant, but Anderson and Jick were not truthful. It states that the record overwhelmingly reveals that Raisbeck is an incredible liar. It claims that she has never been able to repeat the same story more than once, and that not only has she changed her story every time she was told it, but she has contradicted herself within her own testimony. It alleges that on November 14, 1992, in her first conversation with the City, she changed her story and reported that the bus driver was "Eugene" and that the grievant had given her a hug down at Fifth and State and stated, or words to that effect, "Eugene, it's your turn." It refers to November 16, 1992, in a written statement that she alleged for the first time that the grievant touched her breasts at Fifth and State. It notes that it wasn't until November 19, 1992, in a statement to the police officer that she augmented her story again suggesting now that the corner of 31st and State, the grievant took her hand and put it on his penis. It submits that her incredible meanderings continued in her trial in the criminal case. It argues that there is a constant and incredible shifting of stories practically every time she talks about the matter and she even acknowledges telling different stories at the arbitration and admitting that her testimony was directly opposite of her testimony at the criminal trial. It submits that the old adage that the truest measure of a person's telling the truth is if they can tell the same story twice, needs to be applied to Raisbeck. It points out that Raisbeck testified that Eugene Byerson was the driver on November 12, 1992, yet Byerson testified he did not

work on November 12, 1992, and his testimony is supported by the City's own time records. It claims that although Raisbeck denies that she ever made any statement to bus driver Wade Gresseth soliciting his silence, Gresseth testified that she did and the arbitrator would have to conclude that he was lying. The Union states that perhaps the most incredible display of dishonesty was Raisbeck's attempt in surrebuttal to explain how the events of November 12, 1992, would have occurred in the presence of witness Carrie Jick. It submits that Raisbeck conjured up a story that she distinctly remembers that Carrie Jick was not on the bus at 31st and State Road, but that Carrie Jick boarded the bus at Ninth and Cass and that Carrie Jick exited the bus on the corner of Seventh and King. The Union goes on to argue that not only was this story refuted by Carrie Jick but it would require Jick to engage in a ridiculous, meaningless exercise.

The Union asserts that Raisbeck incredibly denies that she had any prior sexual relationship with the grievant. It submits that the record establishes that they had conversations intimate enough for the grievant to know that she had moved, that she was short of money, that she needed a stove and that he had procured for her a stove. It submits that while denying any personal relationship with the grievant, she conceded that she was discussing going away for a weekend with him and wearing his favorite nightie, a conversation which took place in the presence of Eugene Byerson. The Union points out that the grievant testified that Raisbeck played a tape for him at her apartment which was a "dirty tape." Although she denied that she had such a tape, it submits that Darrell Hodson testified that he too had heard this "dirty tape." It claims that in the final analysis to conclude that she is a credible witness, one would have to conclude that the grievant was untruthful as was Byerson, Gresseth, Hodson and Jick.

It submits that the allegations of November 12, 1992, are not plausible. First, the locations at 31st and State Road as well as Fifth and State are very busy intersections, well lit with significant visibility from heavy traffic. It is simply not plausible to believe that if inappropriate behavior would occur, it would occur at the busiest locations with the greatest number of witnesses possible. It points out that Raisbeck also asserted she was sitting in the front seat. It submits that the record demonstrates that the front of the bus is visible from virtually all angles because of the windows on the bus, the front window is not tinted and the front seat is the most visible seat in the entire bus with the interior lights on or off. It is improbable according to the Union that any alleged improper conduct would incur in the most visible location on a City bus. The Union further asserts that it is not plausible to believe that any bus driver would engage a passenger in inappropriate physical conduct at Fifth and State in front of another passenger. It was asserted that another passenger was pounding on the door. It was also asserted that the interior lights of the bus were off at Fifth and State Street; however, this would be an event that would draw attention from all the other drivers. Not only is the assertion, according to the Union, implausible, but it is an event which would draw attention and be memorable in the minds of all the other bus drivers. It submits that Carrie Jick was clear, truthful and it is not plausible to believe that any conduct would have occurred in her presence. It alleges that if the grievant was inclined to engage in any inappropriate conduct, there were numerous locations before 31st and State Road, where the conduct could have occurred where it is dark, isolated and would have gone unnoticed. It asks why would a bus driver select the busiest, most well traveled intersection in front of witnesses to engage in inappropriate behavior? It submits that the accusations are not only incredible, but implausible. It further states that they are unreasonable. The Union notes that the complaining witness, Raisbeck, could have exited the bus and gotten on another bus, but that she elected not to do that, and the reason that she didn't do so is not reasonable and her allegations are not

true. It states that if someone had been victimized sexually, it would be reasonable to believe that they would seek the comfort of a fellow passenger. Yet, she never talked to any of the passengers after the alleged assault occurred. It submits that Raisbeck had an admitted motive for making the allegation. It notes that she did not make these initial allegations; rather, her boyfriend did, and it was only after he required her to repeat the fabrication she had told him that these allegations were made. It asserts it would be difficult for a young person who is romantically interested in Mr. Thayer to have to admit that in fact the allegations were not true. It submits that her concern for losing her boyfriend is corroborated by the testimony of the City's own witnesses in that Mr. Schick clearly remembers conversations with her in which she expressed a concern about losing her boyfriend. It claims that Raisbeck was induced to lie, which was fostered by her boyfriend and the City itself. It maintains that her boyfriend induced her and forced her to make the call to the City. Further, the Union alleges that it is uncontroverted that she told Eugene Byerson that she had no desire to pursue her accusation, but was pressured into doing so by City agents. It argues that the events of November 12, 1992, never happened as the only evidence indicating that anything improper happened on November 12 was the testimony of Raisbeck. It submits that that testimony is incredible, implausible, unreasonable and motivated by a carefully cultivated desire to hide her immoral indiscretions. It asserts that the conduct of the grievant on November 9, 1992, was not inappropriate. It notes that Raisbeck did not complain about that conduct and in fact sought out the grievant to ride his bus. It submits that on November 10, 1992, she engaged in a conversation with the grievant off the bus at the intersection of Fifth and State, and during the course of the conversation, which was witnessed by Eugene Byerson, Raisbeck discussed the possibility of a weekend trip and submits that at no time did Raisbeck ever express any displeasure with the conduct or the comments of the grievant.

The Union submits that the grievant did not refuse to cooperate with the City's investigation. It alleges that the City has conceded that it has based, in part, its discharge of the grievant upon what they believed to be his non-cooperation. It argues that the City's initial conduct was deplorable, and that without any notice whatsoever, it summoned him in and confronted him with a nameless and less than precise allegation of sexual impropriety. It submits that during the course of that discussion, the grievant truthfully and honestly indicated that he had a prior sexual relationship with a female bus passenger, but that at no time did he ever engage her in any type of inappropriate sexual conduct while on the bus or while on duty. It claims that the City violated the grievant's fifth amendment rights which was inexcusable. It submits that public employes cannot be required to chose between constitutional rights and their employment. It maintains that this reality was lost on the City because they not only used his assertion of the fifth amendment as the basis for discharge, but they admitted this in arbitration. Finally, the Union submits that the City violated it stated promises of confidentiality. It alleges that the City stated repeatedly that at no time would it disclose the content of any of its investigative results; however, it argues that the City did not remember its commitment because as a result of their investigation notes which were handed to the District Attorney three-fourths through the criminal trial, the grievant was denied an opportunity for a pre-trial suppression motion based on those statements. It further submits that the City's refusal to accept an offer of a polygraph exam is instructive in that the grievant through his attorney offered such an exam; however, the City was not interested. The Union further contends that during the pendency of proceedings, the collective bargaining agreement specifies that the Employer may suspend the employe, but it does not permit the employe's discharge. It submits that the grievant was discharged on December 30, 1992, long before there was any trial or hearing on the merits of the allegation. It states that the City's conduct was not only a

violation of fundamental fairness due process, but also of the specific terms of the collective bargaining agreement. It submits that such highhanded, bully tactics of the City ought not to go unnoticed and not to go unsanctioned. It maintains that the only appropriate remedy is reinstatement. It submits that there is absolutely no basis for any disciplinary action, and the only appropriate remedy in this case is reinstatement with a make-whole order. It asserts that the grievant is not a sex abuser and he is not a liar; he is a conscientious employe who has been subjected to an unsupported accusation of sexual misconduct. It asks that the arbitrator address a complete remedy to reverse this travesty. It requests that the grievant be determined to be an innocent man, that he be reinstated to his driving position forthwith, that he be made whole for any loss of wages, hours or conditions of employment as a result of his improper dismissal, and that this be done without delay.

THE CITY'S REPLY:

The City contends that the Union's brief is replete with unsupported conclusions, half truths, fabricated events and outright untrue assertions. It argues that for lack of substance in its argument, the Union resorts to a vicious attack upon the victim and the City. The City contends that the quantum of proof in this matter should not be the "beyond a reasonable doubt" standard because arbitration is in the nature of a civil rather than a criminal proceeding. The City contends that the standard in this case should be that of clear and convincing evidence. It cites a case cited by the Union, Armour-Dial, 76 LA 96, 99 (1981), in which Arbitrator Smith asserted that the standard of proof should be clear and convincing. The City cites arbitration authorities for its argument that the standard of proof in this matter should be the clear and convincing evidence standard.

With respect to the allegations of November 12, 1992, it notes that the Union asserts that it never occurred and the Union alleges that Raisbeck is a liar, that the allegations are not plausible, are not reasonable and that Raisbeck had a motive and was induced to lie. It submits that the Union's argument is not supported by the record. The City notes that the grievant testified that he knew a lady who had allegedly been present during the incident at Fifth and State, who rides the bus frequently and he knows where she works, yet this witness did not appear in this case, nor did she appear in the criminal case, nor was there any mention of her at any investigation and there has been no explanation by the Union why she was not called as a witness in this case. The Union had also asserted that Carrie Jick was present on the grievant's bus at State Road and 31st Street, but it notes that Jick testified under cross-examination at the time she got on the bus at 31st and Denton, she and Raisbeck were the only passengers on the bus. This testimony contradicts the grievant's where he stated that he picked up an additional transfer passenger who was on the bus. The City also points out that there was no mention of Jick at the November 16, 1992 investigative meeting. Next, the City refers to the Union's claim that Raisbeck has changed her story every time she has told it. The City contends that to the contrary, Raisbeck's accounting of what took place has been substantially the same each time she has told it. It submits that the Union improperly relies on the testimony of Tim Schick to substantiate its charge. The City maintains that Schick's testimony was that he misunderstood Raisbeck in his initial report and consequently he got two separate incidents confused, and the Union is now attempting to attribute Schick's statements to Raisbeck alleging that she changed her story. The City contends that if Exhibit No. 7 is examined, which is the face-to-face interview between Raisbeck and Schick, as well as the Police Department statement of Raisbeck, as well as Raisbeck's criminal testimony, one can only conclude that Raisbeck's story has remained constant throughout these proceedings and she has not changed her story. The City notes that Raisbeck did become momentarily

confused under cross-examination by the Union's attorney; however, this is to be expected and under redirect she maintained her story from beginning to end. The City contends that there were no internal inconsistencies with regard to Raisbeck's testimony. It asserts that she did not discuss her personal finances with the grievant nor did she discuss personal conversations and that any personal conversations were brought up by the grievant and her constant response to his request to go away on trips with him was no. With respect to Raisbeck's testimony concerning her boyfriend's drinking, the City points out that Raisbeck admitted that she testified at the criminal trial that her boyfriend had not been drinking and four months later in the arbitration proceeding, she testified that he had been drinking and this was because she either remembered that he had or that he had told her that he had, but this does not point to a lack of credibility on the part of the witness as she honestly thought at the criminal trial he had not been drinking. It suggests that the Union's attempt to assert that Raisbeck stated the driver of the bus on November 12 was "Eugene" was merely an attempt to confuse two events due to a misinterpretation made on Schick's initial report. It submits that the Union confused Raisbeck during cross-examination; however, it is very clear that Eugene Byerson was no way involved in the incident on November 12 and it submits that the Union is blowing smoke by attempting to mix two different incidents.

With respect to the conversation which occurred on November 10, 1992, where Eugene Byerson was present, the City asserts that the Union is again using a statement by Mr. Schick which he took down during the initial telephone conversation and which was in error to assert that Raisbeck's testimony is inconsistent. Additionally, it claims that an examination of Byerson's testimony indicates that he did not hear the entire conversation. With respect to the credibility of Carrie Jick, the City submits that a jury did not believe her when it found the grievant guilty of all three counts of sexual assault. It states that the grievant is attempting to mitigate the allegations of sexual assault upon a passenger on a bus by claiming a prior sexual relationship with Raisbeck and by the Union's assertion that Raisbeck was a liar when she denied the sexual relationship. It points out that throughout the hearing, Raisbeck has denied any sexual relationship with the grievant, and there is no credible evidence in the record to suggest the two had a prior sexual history. The City submits the Union's reference to the "dirty" tape is not supported by Hodson's testimony because Hodson's testimony reveals that this tape is far from "dirty." It suggests that the "dirty" tape is actually a popular song. It alleges that the Union's outlandish claims of sexual promiscuity on the part of Raisbeck are irrelevant and completed unsupported by the record. It takes the position that the only conclusion from a review of the entire record is that Raisbeck remains a credible witness.

The City submits that the Union's arguments that it would be irrational for a person to assault someone at Fifth and State is that it is futile to argue that a personal who does an irrational, illegal act will do it in a rational manner by choosing the most appropriate location for his act. The City disputes the Union's argument that Raisbeck had a motive to lie. The City submits the Union bases its argument on the unsupported assertion that Raisbeck was afraid of losing her boyfriend. It claims there is no connection between such a fear and Raisbeck fabricating a sexual assault. It contends the Union is grasping at straws. It insists that the Union's feeble attempts to cast Raisbeck as a liar with a motive to fabricate a story is completely false, and the Union's assertion that Raisbeck was induced to lie by agents of the City of LaCrosse is not supported by the record and the allegation that the City somehow coerced Raisbeck does not even justify argument. The Union's reference to the grievant's conduct on November 9 and 10, 1992, according to the City, is irrelevant because it is not a basis for his termination. It asserts that his conduct on November 12, 1992, instead, was the basis for his discharge and the

conduct by which he was convicted by a jury of his peers. The City contends that its investigation was proper, that the questions asked at the November 16, 1992 meeting were very precise as evidenced by Exhibit Nos. 8 and 31, as well as the testimony of Keith Carlson. According to the City, the answers given by the grievant amount to a confession by him, and they were recorded by both Keith Carlson and Union President Greg Johnson. It submits that the Union's argument that it relates to a different date contradicts the answers that he gave on November 16, 1992. It maintains that the Union's assertion that the City violated the grievant's fifth amendment right was not a factor. It submits that the grievant refused to provide any information to the City and accordingly, the City, on the basis of the information it had, including the November 16, 1992 meeting, decided to terminate the grievant. As to the allegations with respect to a promise of confidentiality from the City, the City insists this is totally unfounded because the grievant's attorney never agreed to accept the offer of confidentiality. Likewise, the City insists the offer of a polygraph exam by the grievant is not in the record, and notwithstanding that, the admissability of the results of a lie detector test should not be permitted in an arbitration case. Finally, the Union's argument that the City violated the contract by not waiting until after the trial to dismiss the grievant is not supported, and according to the City, this argument should be rejected as it was in Continental Paper Company, 16 LA 27 (Louis, 1951). It notes that Section 10 of the contract only provides that the suspension is allowed where it would be in the best interests of the City, and Section 6 of the collective bargaining agreement provides that discharge for proper cause is a management right, and nothing precludes the City from discharging an employe when there are parallel criminal proceedings. The City submits that it is critical to recognize the importance of the City's obligation to the public and its customers, and each employe must conduct himself in a manner befitting the public trust. It contends that a bus operator is the most important factor in the creation and maintenance of a good public image in the transit system, and each bus operator must be able to guarantee the safety of each and every passenger. It insists that the only appropriate remedy in this case is to uphold the discharge. It states that when confronted with the accusation, the grievant admitted it and he has been found guilty of the same offense in a criminal court by a jury, thus the City simply cannot employ a convicted sex offender as a bus driver. It submits that the City has met the applicable just cause standard, and the termination must be sustained under any burden of proof. The City requests that the arbitrator deny the grievance.

UNION'S REPLY:

The Union contends that the criminal conviction of the grievant is on appeal and is not a final conviction and has no res judicata or collateral estoppel affect and is not relevant to any issue before the arbitrator. It submits that an arbitration proceeding is a trial de novo. It claims that there are different evidentiary standards in the two proceedings and in criminal sexual assault cases, the defendant is not permitted to introduce evidence of prior sexual behavior of the complaining witness. Additionally, according to the Union, a defendant is not permitted to introduce other acts evidence of the complaining witness. It submits that because of the artificial evidentiary standards no weight should be accorded to what transpired in the criminal court. It further submits that because of the unconstitutional application of these already restrictive evidentiary rules, the grievant has appealed his criminal conviction and it would be grossly unfair to attach any significance whatsoever to the results of the criminal trial. Furthermore, it insists that it is not a final determination. The Union alleges that the results of the criminal trial are irrelevant to the instant case because it was not a factor in the decision of the City to discharge the grievant. It notes

the grievant was discharged on December 30, 1992, and was not criminally tried until September 29, 1993. It alleges that if the City intended to place any significance on the outcome of the criminal trial, it should have waited until the final outcome before the discharge. It concludes that the appealed criminal conviction of the grievant has no relevancy to any issue before the arbitrator.

The Union submits that the record is clear that Raisbeck lacks any and all credibility. It claims that Raisbeck herself has admitted that she has changed her story every time she has told it. It maintains that she has contradicted herself within her own testimony. The Union reviews the record and indicates that there were discrepancies between what Raisbeck told Schick on November 12, 1992, that she change her story on November 16, 1992, and again in her written statement she alleges for the first time that the grievant grabbed her breast at Fifth and State Streets. It notes that on November 19, 1992, in the statement taken by the police, Raisbeck enhances her story again by stating that the grievant took her hand and put it on his penis. It insists that her credibility during the criminal trial is no better. It contends that she initially testified that nothing happened at Fifth and State. It maintains that she has never been able to tell the same story twice and lacks any and all credibility. The Union submits that Raisbeck has clearly perjured herself, first with respect to her testimony that on November 12, 1992, "Eugene" was the bus driver; however, it notes that both the City and the Union do not dispute that "Eugene" did not work on November 12. Additionally, it asserts that Raisbeck's last minute memory of Carrie Jick getting on the bus on November 12, 1992, makes no sense because it would indicate that Jick would have gotten on the bus at Ninth and Cass and exited two blocks from where she was picked up, which would put her two blocks away from her boyfriend's house. To sustain the discharge, it argues that the arbitrator would have to conclude that Raisbeck is credible and that all of the following witnesses lied: Basil Martin, Carrie Jick, Eugene Byerson, Dale Anderson and Wayne Gresseth. It alleges that there are multiple factors establishing that Raisbeck lied. It suggests that the motive for her lies is that she was upset with her new boyfriend and wanted to make him jealous; however, her ploy got out of hand when her boyfriend overreacted and forced her to carry through with her story. It notes that it was her boyfriend who initiated the call and he was present during all of the initial contacts with the City, and once committed to the story she was coerced to pursue the matter by the City.

It submits that the credibility of Carrie Jick stands strong. It contends that the City's attempt to discredit Jick because she did not see another passenger on the bus on November 12, 1992, is not persuasive because she got on the bus after that passenger had gotten on and because that passenger sat in the back of the bus, there was nothing of significance to cause Jick to remember that person's existence. It claims that Jick is an unbiased, disinterested eyewitness who clearly testified that nothing happened at 31st and State Road, and at no time has she changed her story or contradicted herself. It notes that Dale Anderson testified that when the grievant arrived downtown at 8:40 p.m., the interior lights of his bus were on, and that there were six busses already there. It insists that the grievant's credibility is strong. It contends that nothing in the record has been stated by the grievant but an emphatic denial of the allegations in this case. It alleges that at no time did he ever contradict himself as to the sequence of events on November 12, 1992. It submits that the only attempt to discredit him is the City's less than accurate account of what occurred on November 16, 1992. It insists there was nothing to substantiate the specific questions that were asked, and it is undisputed that Carlson cannot remember what questions were asked on November 16, 1992, and no questions were written down. It maintains that the grievant was referring to the incidents on November 9, 1992. It asserts that the prior sexual relationship between the grievant and Raisbeck is

substantiated in the record. It alleges that the last feeble attempt by the City to discredit the grievant is by attempting to discredit Johnson by the notes that Johnson took on November 16, 1992, during the meeting with the City. It argues that Johnson's notes substantiate the fact that no questions were written down, that the grievant denied the allegations at 31st and State Road, that Raisbeck initiated the prior sexual off-duty encounter, that the grievant denied ever having sex with her on the bus and that he did have sexual intercourse with her off the bus. All these facts prove that the grievant is uncontradicted in his denial that anything happened on November 12, 1992, on the City bus.

The Union claims that Martin was entitled to assert his fifth amendment protections. It submits that courts have long held that where the choice is between the rock and the whirlpool, the decision to waive or choose between one right or another is a decision made under duress. It asserts that this is the choice that the grievant faced in giving a statement to Carlson. It claims that it was the grievant's due process right not to disclose the identity of any witnesses in this case, and in light of his upcoming criminal trial, not to disclose any information.

The Union further argues that it is an inappropriate inference to be used in this proceeding concerning the missing witness who was on the bus at Fifth and State Street. It contends that a party need not call every possible witness and any attempt by the City to use this inference highlights the weakness of its case by resorting to such an inappropriate and insupportable proposition. In conclusion, it submits that the grievant was unjustly accused and unfairly treated. It argues that not only is his job and financial security at stake, but also his reputation and respect, and to deny him these things, according to the Union, requires the City to prove beyond a reasonable doubt with competent and credible evidence that on November 12, 1992, he engaged in on-duty sexual misconduct. It asserts the record does not support or justify that conclusion, but in fact, the record establishes his innocence. It asks that the grievance be granted, that the grievant be reinstated and made whole forthwith.

DISCUSSION:

The Union has raised an issue with respect to the burden of proof claiming that it should be the "beyond a reasonable doubt" standard. The Union argues that the social stigma attached to the discharge requires the higher standard of proof. The City argues for a somewhat stricter standard than the normal arbitration case, that being proof by clear and convincing evidence. The undersigned agrees with Arbitrator Schubert in Pacific Bell, 87 LA 313 (1986) wherein he stated:

> While individuals dismissed for alleged illegal activities must have substantial protection against unwarranted dismissal, the stigma and other consequences of such dismissal are obviously less severe than those flowing from a criminal conviction, which may result in incarceration. Furthermore, proof beyond a reasonable doubt may often be an unattainable standard for private firms which lack the criminal investigatory power of the state. In the opinion of this arbitrator, the proper balance was struck by Arbitrator Benjamin Aaron, who stated in Armour-Dial:
>
> > "I agree with the Union that a discharge for theft has such catastrophic economic and social consequences to the accused that it should not be sustained unless supported by the overwhelming weight of evidence. Proof beyond any reasonable doubt, even in cases of this type, may sometimes be too strict a standard to impose on an employer; but the accused must always be given the benefit of substantial doubts."
>
> (Citing Armour-Dial, supra, 78 LA at 99 (1981))

Thus, the undersigned concludes that the appropriate burden of proof in this matter is the clear and convincing standard.

The main issue in this case is what occurred on November 12, 1992. The grievant has testified in this matter that nothing occurred on that date, that he did not sexually assault Michelle Raisbeck at 31st and State Road or ever physically touch her on his bus on November 12, 1992, that he did not make any sexual statements to her on that date, that he did not try to touch her breasts or her vagina and that nothing occurred on Fifth and State at approximately 8:40 p.m. on November 12, 1992. 1/

Michelle Raisbeck testified that the grievant stopped the bus at 31st and State Road, turned off the inside bus lights, came over and sat by her and when she asked what he was doing, he stated he wanted to have some fun. At that time he touched her breast and she told him to leave her alone and to go back to his seat. He then touched her vagina and she again told him to leave her alone, that she didn't want anything to do with him, that he tried to take her hand and put it on his penis, he asked her to give him a blow job, she told him no, and then he told her to just watch him "jack off," he asked for a kiss and then he would leave her alone. She stated no, at which point he said okay, I'm sorry, went back to his seat and drove the bus on down the bus route. She testified that the only persons present were herself and the grievant. She testified that a woman passenger got on the bus someplace on Cass Street and exited the bus somewhere around the Country Kitchen area. After this passenger exited the bus, the grievant again turned off the inside bus lights and when the bus arrived downtown at Fifth and State, he got out of his seat, came over and sat down by Raisbeck and he again grabbed her breast, at which time she told him not to touch her anymore. He said he was sorry and should never have

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1/ Tr. III, pages 252-258. (Tr. I refers to the transcript of September 14, 1993; Tr. II to that of January 25, 1994, and Tr. III to that of January 26, 1994.)

done it, at which point he opened the door and she left. 2/ The Union has argued strongly that Raisbeck is an incredible liar and has asserted that her story has changed every time she has told it, and that if she is to be believed, all of the other witnesses for the Union in this matter would have to be found to be lying. On the other hand, the City contends that Raisbeck is truthful and that it is the grievant who is doing the lying. Thus, the issue of credibility is squarely presented to the arbitrator.

With respect to the issue of credibility, the undersigned concludes that the grievant's testimony is simply not credible. On November 16, 1992, the grievant corroborated Raisbeck's allegations. A review of the notes of the investigative meeting that occurred at or about 2:00 p.m. on November 16, 1992, convinces the undersigned that the grievant did in fact assault Raisbeck both physically and verbally. A review of the notes 3/ taken by the City establishes that at that meeting the grievant admitted touching Raisbeck and talking to her about sex, that she was the only person on the bus, and in fact he did turn off the lights and that he left his seat and sat next to her but did not force her. The notes taken by Union President Johnson 4/ of this same meeting of November 16, 1992, refer to sexual harassment charges against the grievant, the incident was on Thursday p.m. 11-12-92 at 8:20, the grievant fondled the woman more than once; that Keith Carlson refused to give the name of the woman; that the grievant claimed that he did not force the woman; he admitted that he talked to her about sex; he admitted that at 31st and State Road he turned off the lights for two to three minutes; and he further indicated that there were no witnesses. These notes establish that the grievant admitted sexually assaulting the passenger both verbally and physically on November 12, 1992. Additionally, the notes include the statement that he did not force her which indicates consent which belies his denial that anything occurred.

Although the Employer did not name the woman, the grievant did name Raisbeck and said he could explain. The grievant went on to explain that they had been out two or three times, the last time being six weeks ago, and that he had had sex with her two or three times, but not on the bus. In his testimony, at the hearing the grievant testified that he and Raisbeck had sexual intercourse on or about the first of June and that was the last time he had any sexual contact with her. 5/ If he had no contact with her since June of 1992, his statement of a date within the last six or so weeks was false. I conclude that his testimony is not credible. Additionally, it should be noted that the grievant has a great deal at stake in the outcome of this case, and this further supports the conclusion that his testimony in this proceeding is not credible. This conclusion is supported by his assertions of the "dirty tape" which according to the testimony of Darrell Hodson, certainly does not come within the definition of a "dirty tape." 6/ Having concluded that his testimony is not credible, I find that his allegations that he had a prior sexual relationship with Raisbeck is totally false and furthermore I find that it is not relevant to these proceedings.

2/ Tr. III, pages 24-30.

3/ Ex. 8.

4/ Ex. 31.

5/ Tr. III at 228.

6/ Tr. III, pages 336-337.

The undersigned finds that the grievant's testimony with respect to the events of November 9, 1992, is a complete fabrication solely to explain away his admissions on November 16, 1992.

I conclude that Michelle Raisbeck's testimony is credible. A review of her various statements does indicate there have been some additions and minor inconsistencies; however, this is not unusual given the passage of time and the stresses put on a witness who has been sexually assaulted. It certainly does not indicate that she is fabricating her testimony. The Union has pointed out that there were inconsistencies with respect to whether or not "Eugene" was the driver of the bus on November 12, 1992. This was based on Schick's report of his initial telephone conversation with Raisbeck on November 12, 1992, which he indicated was an error on his part, where she was talking about two separate incidents and he thought she was talking about the same incident. This error was cleared up in the report of the investigation of the meeting with Raisbeck and Schick on November 16, 1992, at 6:05 p.m. 7/ Additionally, toward the end of her cross-examination in this proceeding, it was clear that Raisbeck was confused about the date that was being discussed with respect to when "Eugene" was dropping her off downtown and her testimony that "Eugene" was the driver on November 12, 1992, was obviously in error, and she testified that she was confused. 8/ She later testified after the noon break that she knew for a fact that Eugene was driving one of the busses when the incident that the grievant hugged her occurred and that from the record that was on the 10th of November, 1992. 9/ Thus, this confusion does not establish that Raisbeck fabricated any story.

The grievant has relied on the testimony of Carrie Jick as an alibi witness. Jick testified that on November 12, 1992, she got on the bus at 31st and Denton and rode it until Ninth and Cass where she exited the bus. That would mean that she would be on the bus at the stop at 31st and State Road when the sexual assault occurred. A close review of Jick's testimony was that she always got on the bus near her mother's house in the evening and rode the bus to her boyfriend's house, and that nothing occurred while she was on the bus between Raisbeck and the grievant. I conclude that Jick was testifying truthfully as to her habit with respect to how she normally travelled the bus; however, I do not credit the testimony with respect to November 12, 1992, for the following reasons: First, at the November 16, 1992 meeting, if the grievant had an alibi witness, he would have certainly not made the admissions that he did and would have indicated that Jick was on the bus at that time. Jick testified as to her usual mode of travel rather than more specific facts as to the date in question. Also, Jick testified that the only persons on the bus were herself, Raisbeck and the grievant, 10/ and the grievant testified that a transfer was also on the bus. So I conclude that on November 12, 1992, Jick did not get on at 31st and Denton, but got on the bus at some location after 31st and State Road. It is noted that the undersigned has not concluded that Jick is lying. She may very well have thought she got on the bus as was her normal habit, but I conclude she was mistaken and did not. It is therefore concluded that Jick does not provide an alibi to the grievant and the incidents that he admitted to on November 16, 1992, which occurred on November 12, 1992, have been established by his admissions as well as by Raisbeck's testimony.

7/ Ex. 6 and 7.

8/ Tr. 143-147.

9/ Tr. 150-151.

10/ Tr. III, page 16.

The Union at page 14 of its brief states that Raisbeck conjured up a story that Jick boarded the bus at Ninth and Cass and exited the bus at the corner of Seventh and King. It references Volume III of the transcript, page 309. However, a review of that page finds that there is no reference to the corner of Seventh and King and the transcript states that Jick exited the bus at Ninth and Cass. Inasmuch as the facts cited by the Union are not supported by the record, the undersigned has not considered the Union's argument with respect to those facts.

Inasmuch as the undersigned has found that Raisbeck's testimony is truthful and the grievant's is not, it is not necessary to comment on the Union's speculation as to any motivation for her making her story up. It must be concluded that the evidence establishes that the grievant was guilty of the misconduct alleged.

The Union has raised a number of other issues related to the discharge of the grievant. The first involves the City's investigation of the complaint filed by Raisbeck. I see nothing wrong with the City's calling in the grievant to meet with them on November 16, 1992, to discuss this allegation. It was a serious allegation of sexual assault on the part of the grievant. The grievant had two Union representatives with him. The allegations were explained to him and he essentially admitted and corroborated the report. The Employer did not immediately discharge him, but suspended him with pay. It should be noted at this time there were no criminal charges pending against the grievant nor was there any report made at that time to the Police Department. There was absolutely nothing outrageous about the conduct of the Employer in this case and there was no showing that the two Union officers were not able to assist the grievant in his investigative interview. It should be noted that the grievant never indicated that he requested the presence of an attorney nor has the Union cited any authorities for requiring the presence of an attorney during this investigative interview. The Union has also asserted that the grievant was discharged for the exercise of his fifth amendment rights. Keith Carlson, the Transit Manager for the City, testified that after the first meeting on November 16, 1992, the grievant thereafter did not make any statements. He took the fifth amendment. 11/ On cross-examination Mr. Carlson indicated that a factor in the decision to terminate the grievant was that no further information from the grievant was available to help the City in its investigation and that was a factor in his termination. Carlson testified that they did not terminate the grievant solely on the basis that he pleaded the fifth amendment. 12/ In Garrity vs. New Jersey, 385 U.S. 493, 17 L.2d 562, 87 S.Ct. 616, 1967, the United State Supreme Court was confronted with a case where police officers were advised that they could invoke the fifth amendment, but if they did so they would be removed from office. The court held that the use of the threat of a discharge by the state to secure incriminating evidence against an employe was a form of compulsion prohibited by the fourteenth amendment. The court stated that the choice between self-incrimination or job forfeiture is prohibited by the fourteenth amendment. The facts of the present case do not come within the rationale expressed in Garrity, supra. The grievant was not informed that if he exercised his fifth amendment rights he would lose his job. The Employer had serious allegations made against the grievant which the City investigated on a number of occasions and gave all of the information it had to the grievant with respect to that investigation and asked him to comment. The grievant did not respond to these allegations. The

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11/ Tr. I, page 125.

12/ Tr. I, page 199.

City therefore relied on the allegations against the grievant and he was not under any compulsion to incriminate himself or lose his job. He remained silent and the City relied on the information it had to discharge him and not on any incriminating statement coerced from him. Thus, the rationale in Garrity as asserted by the Union is misplaced and the grievant's fifth amendment rights were not denied to him. The Union has also asserted that the City has violated Section 10 of the collective bargaining agreement by terminating the grievant prior to the culmination of his criminal trial. I find no violation of Section 10. Section 10 provides, in part, that:

> . . . when suspension would be in the best interest of the City, an employee may be suspended by the MTU Manager or Assistant Manager for the duration of the proceeding.

Here serious charges of a sexual assault were alleged against the grievant. The City's investigation established and was supported by the grievant's own admissions that in fact he had engaged in such conduct. The grievant had been suspended with pay from November 16 until his discharge on December 30, 1992. Given the information that the City had at the time of the discharge, there is nothing to suggest that it would be in their best interest to continue the grievant on a suspension with pay pending the outcome of any possible criminal proceedings. The City had substantial evidence of the grievant's guilt in this matter and that as a public utility where the grievant came in daily contact with members of the public, based on his conduct it could properly discharge him without waiting the outcome of a criminal matter or investigation in this case.

The final issue for determination is whether discharge was appropriate for the grievant's offense. The undersigned concludes that it clearly was. The evidence clearly and convincingly establishes that the grievant committed both a verbal and physical sexual assault upon a passenger on his bus. The City's employes manual which the grievant acknowledged that he had obtained, clearly provides in Section 2.01 as follows:

> 2.01 LANGUAGE AND CONDUCT
>
> Profane language and disorderly actions, while on transit system property or operating transit system vehicles, will not be tolerated.

Section 4.26 requires:

> 4.26 INTERIOR LIGHTS
>
> Interior lights should be turned on during non-daylight hours. Exceptions are fog and severe weather conditions to minimize glare, but the lights must be used when passengers are on board. Interior lights should be used during daylight hours if weather conditions warrant.

Section 9, B, provides:

Section 9

. . .

B. Without limitation by enumeration, the Transit Utility views the following types of conduct to be extremely serious offenses, the commission of which justifies the imposition of disciplinary penalties up to and including summary discharge for a first offense.

. . .

> Lewd, lascivious or indecent behavior on duty or on MTU property.
>
> . . .

Clearly the grievant violated these rules. Even if there were no rules, a person with common sense would know that the type of conduct engaged in by the grievant would be prohibited. As noted by the City, the City bus system must maintain confidence by the public. Passengers cannot be subject to the type of conduct engaged in by the grievant. A great number of riders are female who depend upon the bus for their sole means of transportation and ride the bus at all hours. Although the grievant's prior record was satisfactory, the type of conduct engaged in by the grievant is so inimical to the interests of the Employer that the appropriate penalty for the grievant's inappropriate conduct is discharge.

Based on the above and foregoing, the undersigned makes and issues the following

AWARD

The City had proper cause to discharge the grievant, and the grievance is denied in all respects.

Dated at Madison, Wisconsin, this 18th day of July, 1994.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator