BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS LOCAL UNION NO. 200

and

W.A.S. CORPORATION

Case 1
No. 51361
A-5270

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller, & Brueggeman, S.C. 1555 North Rivercenter Drive, S
Duffey Law Office, S.C. 933 North Mayfair Road, Suite 302, Milwaukee, Wisconsin 53226-3484, by

ARBITRATION AWARD

Teamsters General Local Union No. 200 (herein, "Union"), and W.A.S. Corporation (herein " Company," or "WAS"), are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on August 18, 1994, appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Milwaukee, Wisconsin on September 27, 1994. The parties filed briefs, the last of which was received October 31, 1994.

ISSUE

The parties stipulated to the following statement of the issues:

1. Was Grievant B.T. employed by WAS?

2. If so, was there just cause for termination?

3. If not, what is the appropriate remedy?

BACKGROUND

WAS and C.R.B. (herein, CRB) are trucking firms. When this grievance arose, they were hauling materials to a road construction site.

The Union and WAS, but not CRB, are signatories to a collective bargaining agreement. WAS and CRB share many common facilities and functions. They both work out of the same work yard (along with other renters), and haul materials for the same customers approximately 50-

80% of the time. During the relevant time period, CRB and WAS had all their customers in common, had offices in the same building, and shared a post office box and telephone. Additionally, WAS President William Schneider dispatches for both companies. Schneider does all the bidding for WAS and 60-70% of the bidding for CRB. Schneider had bid the work for the customer being serviced during the time period relevant to this grievance. Schneider is also Vice President for CRB whose President is Linda Miller. Miller owns 80% of CRB stock. The two trucking firms have separate licenses to haul freight from the state of Wisconsin. The record does not contain any other evidence regarding the corporate or financial structure of the two companies.

Some customers prefer to have only union truckers haul their material. During the 1994 construction season, WAS and CRB were engaged to haul material for one such customer, Payne and Dolan. On April 28, 1994, Schneider and approximately seven employes met at Local 200 offices to ratify the contract. One of those employes was Erv Sollazo who worked exclusively for CRB. After that time, all CRB employes had union dues deducted from their paychecks and forwarded to the Union by WAS.

Grievant B.T. was employed by WAS as a truck driver for two or three weeks at the end of the construction season in the fall of 1993. At that time, Grievant voluntarily quit since he knew that the season was about to end and he could get a winter job with a different employer. During the following winter, Grievant occasionally contacted Schneider about a job. Ultimately, there was an opening at CRB and Schneider told Grievant he would recommend him to CRB. In May, 1994, Schneider called Grievant to offer him work with CRB.

When Grievant told Schneider that he preferred to work for WAS, Schneider replied that it was all one and the same except that his paycheck would come from CRB. Schneider told him he would have to be in the Union.

Grievant worked, hauling hot asphalt from the silo in Sussex to the construction site in Brookfield, without incident from mid-May until June 29, 1994. On that day, mechanic Bill Miller told Grievant that he noticed flat spots in the rear axle tires and wanted to ride with Grievant. Miller remained with Grievant for an entire loop from the construction site to the silo at Sussex and back to the construction site, which takes about one-and-a-quarter hours. The only observation he made about Grievant's driving was that he thought Grievant should downshift when coming to the stoplight. Grievant disagreed and asserted that Wisconsin law called for downshifting when it was needed for acceleration. Although Miller said "This is my truck," Grievant did not realize he meant not just that the truck was assigned to him, but that the truck was his personal property.

At the end of the day, Miller told Grievant that he wanted to drive with him again the next day. Grievant insisted that it was unfair for the mechanic to drive with him since he did not check on anyone else's driving by riding with him.

On the next day, when Grievant came to work, he found his personal belongings out of the truck and on the ground. Miller explained that he was going to ride with Grievant that day. Grievant went to Schneider's office to complain, reiterating that it was unfair to watch him so closely when other drivers were not treated similarly and moreover, he had a good record. Schneider reassured Grievant that he was pleased with his job performance and explained to him that Miller owned the truck, and suggested that Grievant pacify him by letting him ride with him for a little while. Grievant refused. At that point, Don Tibbits, the Union Business Agent came upon the scene and suggested to Grievant that he let Miller drive with him. Grievant still refused. Schneider suggested that Grievant take three or four hours to think about it. Grievant left the yard and did not return. When he did not return the next day, Schneider wrote Grievant, notifying him that the Company considered him to have voluntarily quit his position. On July 6, 1994, Grievant filed a grievance contending that he had not quit and that he had been discharged unfairly.

The grievance remained unresolved throughout the grievance procedure and is the subject of this arbitration award.

RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS

ARTICLE X

DISCHARGE OR SUSPENSION

> **Section 1.** The Employer shall not discharge or suspend any employee without just cause, but in respect to discharge or suspension shall give at least two (2) warning notices of the complaint against such employee to the employee, in writing, and a copy of same to the Union, provided, however, that if the Employer considers the conduct of the employee to be so serious that repetition of it should lead to discharge, the Employer may state on the warning notice that it constitutes a first final notice, subjecting the employee to discharge or suspension upon its repetition, provided further, however, that if the Union disagrees that such misconduct warrants a first final notice, it may take the matter up under the grievance procedure.

. . .

POSITIONS OF THE PARTIES

The Union

The Union asserts that either CRB and WAS are a single employer, or, if they are found to be separate employers, Grievant was nevertheless covered by the contract. It points out that by its action, the employer acted as if Grievant were covered by the contract. Additionally, CRB was the alter ego for WAS. To support this argument, the Union points to the meeting at which the Union voted to see if the employes of WAS wished to be represented by the Union. After negotiating with WAS, a vote was taken among the employees which included Erv Sollazo, who drove a CRB truck.

The Union points out that both CRB and WAS employes received the same wages as set forth in the contract and were offered the same health insurance. Dues were collected from Sollazo and Grievant. All employes worked under the same work rules.

After the discharge, Dispatcher WAS President William Schneider treated Grievant as if he were covered by the contract by contacting Union representative Don Tibbits and wrote to him that Grievant refused a legal order under the existing labor agreement.

As to Grievant's discharge, the Union disputes the Company's theory that Grievant voluntarily quit and argues that in fact he was discharged and the Company seeks to characterize the discharge as a quit because his record was good and he had not received warning notices that would be required prior to a discharge pursuant to Article X.

The Union asserts Grievant was discharged when he was not allowed to drive his truck under the same conditions as other employes, that is when he was ordered to have the mechanic accompany him for the second day in a row. He was humiliated and had a reasonable basis to believe that he, the only black employe was discriminated against when, in the midst of delivering a load Miller jumped into his truck to say he was going to ride with him. Notwithstanding the humiliation, Grievant allowed Miller to ride with him.

The removal of Grievant's personal items from the truck before he arrived at work the next day amounted to a discharge. Schneider told Grievant that if he was going to drive he would have to allow Miller to ride with him. Given the driving record of other drivers who were not expected to allow someone to drive with them, the order to Grievant was unfair and offensive. During the time that Grievant spoke to Schneider, Miller drove off in the truck. The Union concludes that he was thereby discharged and that discharge cannot stand.

The Employer

The Employer asserts WAS and CRB are separate and distinct employers and are not alter egos. It insists that there is no showing that WAS controlled CRB or controlled the working conditions of CRB's employes. Although the two entities shared some common facilities they had separate management and control. Although Schneider was the dispatcher for both firms, calling employees of both firms to inform them of when they were to report for work in the morning, he did not hire, manage, control direct or discipline the WAS drivers.

The Company emphasizes its need to supervise the safe driving skills and habits of its drivers who drive large trucks full of heavy loads of hot asphalt. It considers Miller's efforts to accompany Grievant as on-the-job training for which Grievant did not have to pay and during which he received his regular wages.

After Grievant told Schneider that he felt discriminated against, Schneider reasonably told him to take some time off to calm down. It points out that Schneider did not issue the letter stating his position that Grievant had voluntarily quit until after he had failed to return to work the next day.

DISCUSSION AND ADDITIONAL FACTS

A. Jurisdiction

The Company contends that this grievance is not arbitrable because Grievant was not employed by WAS. The record clearly shows Grievant received his paychecks from CRB who also paid the workers compensation premiums on his behalf. Additionally, CRB is not a signatory to the collective bargaining agreement.

The inquiry as to whether Grievant is covered by the collective bargaining agreement, however, does not end there, but rather the undersigned must consider whether CRB is, as claimed by the Union, the alter ego of WAS.

The National Labor Relations Board and the courts have developed a four-part test for determining whether two entities are to be considered as a joint employer or a single employer for purposes of applying the National Labor Relations Act. That analysis considers whether there is: one, interrelation of operations; two, common management; three, centralized control of labor relations; and four, common ownership or financial control. 1/ The Company cites NLRB cases involving determination of single employer status and the undersigned concludes it is appropriate to use that analysis here to determine whether WAS and CRB were effectively a single employer, thereby bringing this grievance within the scope of the collective bargaining agreement.

1/ Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv. of Mobile, 380 US 255, 58 LRRM 2545 (1965); South Prairie Constr. Co. v. Operating Eng'rs Local 627, 425 US 800, 92 LRRM 2507 (1976).

Considering the first two criterion together, it is clear there is a high level of interrelated operations and common management. The two firms work out of the same yard, have office space in the same building and share the same telephone and post office box. They share the same customers most of the time and in the construction season of 1994, their common customer is the result of Schneider's bidding on the job for both concerns. The provision of services to that customer was fulfilled by Schneider's acting as dispatcher for both concerns. There is no evidence of any on-site CRB manager other than Schneider.

The area of greatest commonality in this case is the one considered most important in NLRB analysis, labor relations. 2/ CRB employes received the same wages and benefits that WAS employes received. Schneider conducted all the labor relations and employer functions for CRB. Although he told Grievant that he would recommend him to CRB, there is no evidence that anyone in CRB made any independent decision regarding the hiring. In fact, there is no evidence of any CRB manager having any functions regarding CRB employes. Nor is anyone alleged to have performed such functions; nor did anyone representing CRB testify at the hearing. On the two days of the dispute it was Schneider who talked to Grievant, Schneider who talked to the Union Business Agent about the problem, and Schneider who wrote the letter telling Grievant he was considered to have voluntarily quit his job. The only appearance of anyone purporting to represent CRB was Linda Miller who appeared by way of her signature as CRB President on the letter.

Additional evidence of centralized control of labor relations involves the ratification of the contract that took place when Schneider and approximately seven employes, one an employe of CRB, met at the Union office to ratify a union contract. This action was taken in response to Payne and Dolan's concern to have union contractors on its job site. After that time, union dues were deducted from all employes, including Grievant and another employe who worked for CRB.

Evidence regarding the final criterion, ownership, is quite sketchy. The only evidence regarding financial structure of the two companies was that Linda Miller owned 80 of the stock of CRB. There was no evidence regarding the ownership of WAS. This record is insufficient basis for any conclusion about common ownership of the two companies.

Despite the lack of sufficient evidence regarding ownership, the undersigned concludes that the totality of the record indicates that WAS and CRB acted as a single employer for labor relations functions and therefore this grievance is arbitrable.

B. The Merits

2/ Soule Glass & Glazing Co. v. NLRB, 652 Fd2 1055, 107 LRRM 2781 (1981).

The basic events of June 29 and 30, 1994 are set forth in the Background section, above. In order to resolve the parties' fundamental dispute over whether Grievant voluntarily quit or was discharged, those events must be closely reviewed. If Grievant voluntarily quit, he terminated his employment and does not have rights to return to his employment, but if he was discharged, the validity of that discharge must be reviewed pursuant to ARTICLE X, DISCHARGE OR SUSPENSION, of the contract.

It is clear that Grievant felt insulted by Miller's sudden arrival in the cab of his truck and announcement that he was going to ride with Grievant to check his driving. Grievant responded by asking Miller if other drivers were subjected to having someone accompanying them while driving. Grievant found Miller's announcement the more demeaning because some of the other drivers who were not subjected to such close supervision were drivers with trucks whose problems that could reasonably be seen as the result of bad driving habits. Considering that he had a good driving record, that he had no moving violations, and that he had the highest rating, Class A Commercial Drivers License which entitled him to drive a 120 ton gross truck, he felt wrongly singled out. In short, Grievant believed he was being unfairly treated, and his resentment increased when Miller told him he wanted to ride with him on a second day. The sense of disparate treatment could have been increased by the Grievant's being an African-American.

In this situation, Grievant's anger is understandable. However, notwithstanding the indignity visited upon Grievant, the situation was not so egregious that he was justified in walking off the job. An employer has the right to direct the work force, and give employes orders that are within the scope of their employment, so long as they do not violate law or endanger the employes' health and safety. Or, as framed by conventional wisdom, an employe receiving an onerous directive should work now and grieve later.

The undersigned concludes that the order given to Grievant, to allow Miller to ride with him the second day, was difficult and distasteful, but it was not so outrageous that it forced Grievant off the job. In fact, Schneider did not insist that Grievant immediately comply with the order, but suggested he take some time off to calm down. Schneider gave Grievant additional time to change his mind by waiting until the next day, July 1, before determining that he had quit. The Union's argument, that the order to allow Miller to ride along was in fact a discharge, must be rejected.

The undersigned is satisfied that the circumstances did not justify Grievant's refusing to work and leaving the work site. He did therefore voluntarily quit his position and is not entitled to reinstatement.

In the light of the record and the above discussion, it is the arbitrator's

AWARD

1. Grievant was effectively employed by WAS for purposes of applying the collective bargaining agreement.

2. Grievant B.T. voluntarily quit his position, thereby creating just cause for his termination.

3. The grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 28th day of February, 1995.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator