BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 695

and

CITY OF MADISON

Case 210
No. 57214
MA-10552

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen,** 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local Union No. 695.

Mr. Michael Deiters, Labor Relations Manager, City of Madison, City-County Building, Room 502, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53710, appearing on behalf of the City of Madison.

ARBITRATION AWARD

Teamsters Local Union No. 695 and City of Madison (Transit System) are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union, by request to initiate grievance arbitration received by the Commission on January 22, 1999, requested the Commission to appoint Commissioner Paul Hahn to serve as arbitrator. The Commission appointed Paul A. Hahn as Arbitrator on January 26, 1999. Hearing in this matter was held on May 12, 1999 at the offices of Teamsters Local Union No. 695 in Madison, Wisconsin. The hearing was transcribed. The parties filed post-hearing briefs which were received by the Arbitrator on July 15, 1999 (City) and July 20, 1999 (Union). The record was closed on July 20, 1999.

ISSUE

City

> Did the grievant violate Article 4.2 of the contract which states: "In the event of any strike, work stoppage, slowdown or interruption or impeding of work, the Employer shall notify the Union thereof, and the Union shall take all reasonable means to induce such employees to return to their jobs during any

period of stoppage and the Employer shall have the sole and complete right to immediately discharge any member of the bargaining unit inciting or participating in any strike, slowdown, walkout or other cessation of work and such members of the bargaining unit so discharged shall not be entitled to or have any recourse to any other provision of this agreement. This provision shall not prevent or limit either party from making or advocating such agreement as to the termination of such action as it may feel will best serve to re-establish the public service of the employer. It is further agreed that in all cases of a strike, slowdown, walkout or any cessation of work in violation of this agreement, the Union shall not be liable for damages resulting from such acts of its members, unless the action of the employees is condoned, ratified or approved by full-time employees of this union.

Union

Did Alan Woodman violate the contract by engaging in a prohibited work slowdown? If not, what is the appropriate remedy? Or, did the Employer have just cause to suspend Alan Woodman for 45 days? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1 – RECOGNITION AND NON-DISCRIMINATION

1.1 Recognition: The Employer agrees that it recognizes the Union as the sole bargaining agent for all drivers, office employees, and garage employees, including mechanics, washers, janitors, and helpers, and excluding guards, supervisors, confidential, professional and managerial employees as defined by Section 111.70, Wisconsin Statutes.

. . .

ARTICLE 4 – NO STRIKE - NO LOCKOUT

4.1 No Strike: The Union recognizes the validity of Section 111.70 of the Wisconsin Statutes and agrees not to support any action in violation of said Statutes. The Union agrees that for the duration of this Agreement, Union Officers, Representatives or members will not authorize, assist or support any strike, work stoppage, slowdown, interruption of work or interference with operations of the Employer.

4.2 In the event of any strike, work stoppage, slowdown or interruption or impeding of work, the Employer shall notify the Union thereof, and the Union shall take all reasonable means to induce such employees to return to their jobs

during any period of stoppage and the Employer shall have the sole and complete right to immediately discharge any member of the bargaining unit inciting or participating in any strike, slowdown, walkout or other cessation of work and such members of the bargaining unit so discharged shall not be entitled to or have any recourse to any other provision of this Agreement. This provision shall not prevent or limit either party from making or advocating such agreement as to the termination of any such action as it may feel will best serve to re-establish the public service of the Employer. It is further agreed that in all cases of a strike, slowdown, walkout or any cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from such acts of its members, unless the action of the employees is condoned, ratified or approved by full-time employees of the Union.

. . .

ARTICLE 8 – GRIEVANCE AND ARBITRATION

8.1 Having a desire to create and maintain labor relations harmony between them, the parties hereto agree that they will promptly attempt to adjust all complaints, disputes, controversies, or other grievances arising between them involving questions of interpretation or application of the terms and provisions of this Agreement.

. . .

8.4 The arbitrator shall have no power to change, modify or add to or detract from any of the terms of this Agreement. The award of the arbitrator within the term of authority conferred upon him/her by this Agreement shall be final and binding upon both parties. Any question of excess of authority, fraud or arbitrary action shall be subject to the usual legal remedies.

8.5 The arbitrator's decision may or may not be retroactive as the equities of the case may demand, but in no event shall any award with respect to back pay, in discharge or suspension cases, be retroactive more than ten (10) days before the date on which the grievance was first presented in writing in Step One above. In the case of a discharge or disciplinary layoff grievance, the arbitrator shall have the power to uphold the action taken by the Employer or to return the grievant to his/her employee status with or without restoration of back pay, or mitigate the penalty as equity suggests under the facts.

. . .

ARTICLE 22 – DISCIPLINE

22.1 The Employer shall not discipline any employee without just cause.

. . .

22.3 Suspension shall only be after written warning notice to the employee with a copy to the Union, except for the following serious offenses:

A. Failure to turn in cash or tickets.

B. Misconduct resulting in a chargeable accident.

C. Loss or expiration of commercial motor vehicle license required by State law.

D. Conduct resulting in being charged with a morals offense may be cause for suspending an employee as a bus operator but not necessarily from all employment.

E. Employee issuing worthless check payable to Employer.

F. Willful refusal or failure to carry out a direct order or instruction.

G. Off route without authorization.

H. Abandoning coach or failing to wait for proper relief.

I. Leaving coach unsecured.

STATEMENT OF THE CASE

This grievance involves the City of Madison (Transit System) (hereinafter City), and Teamsters Local Union No. 695 (hereinafter Union) representing the employes set forth in Article 1, Recognition. (Jt. 1) The Union alleges a contractual violation by the City for the 45-day suspension of the Grievant. The suspension was effected by a letter to the Grievant from Ann Gullickson, Transit Service Manager, dated October 27, 1998. (Jt. 5) The Union alleged a violation of Article 22, Sections 22.1 and 22.3 of the agreement by notice of a written grievance dated October 28, 1998 to Employer representative Gullickson. (Jt. 2) The grievance was denied by Gullickson for the City on October 29, 1998. (Jt. 2)

The City operates a metropolitan transit system which serves the citizens of the City of Madison and Dane County. The City operates in excess of 100 buses; the number of buses in operation vary daily and particularly as between the Monday through Friday operation and on the Saturday-Sunday weekend. City buses are parked, maintained and serviced in a City garage. As part of the effective operation of the transit system it is incumbent that buses that come in from the road each evening are parked in a manner that facilitates their being returned to service the following day.

The Grievant works on what is called the service lane. The service lane consists of several tasks which include: vaulting (emptying money from the bus fare boxes), fueling, vacuuming, parking (assigning where the buses are to be parked in the evening) and driving the buses through the garage to their appropriate parking location. Buses are parked in numbered parking spaces. (Er. 1) Service lane employes select which of the aforementioned duties they wish to do by seniority. The service lane employe responsible for assigning the parking of buses does not physically park the buses, he assigns the parking location with the help of a status sheet which lists the buses that need repairs, need fumigating, and are held out from service for various other reasons. (Er. 3) Prior to the service lane employe assigning the parking, another service lane employe has come in an hour earlier to do what is commonly called set-up which involves organizing the information about buses that are coming in which the service lane employe, responsible for parking, utilizes to assign the buses to particular parking spaces. (Tr. 49, 50)

On Friday, September 25, 1998, the Grievant was scheduled and worked from 4:00 p.m. until 12:54 a.m. (Tr. 131) Grievant was assigned or chose the responsibility for assigning buses to the appropriate parking spaces. (Tr. 35, 131) That particular evening the employe who was to do the set-up did not come to work so set-up had not been performed prior to the Grievant assuming the parking duties. Grievant was in the process of completing doing the set up work when told by his supervisor to start parking the buses, which Grievant initially refused to do without doing the set up. (Tr. 36-38) When directed again to start parking the buses Grievant did so and proceeded to assign parking spaces without the benefit at that point of a status sheet. (Tr. 38, 135)

The buses were ultimately parked in a manner that resulted in mechanics reparking the buses later that Friday evening and Saturday morning in order that enough buses were ready to be used on Saturday, September 26, 1998. This activity of reparking the buses properly also resulted in mechanics not being able to perform their work.

On October 2, 1998, the City placed the Grievant on leave with pay in order to investigate the events of Friday, September 25 and Saturday, September 26, 1998. (Jt. 3) On October 19, 1998, the parties held a pre-determination hearing to address the issue of the parking of buses on Friday, September 25, 1998; the Grievant was represented by representatives of the Union. (Tr. 91) (Jt. 4) At the pre-determination hearing on October 19, 1998, the City advised the Union that it was taking disciplinary action against the Grievant under Article 4, the No Strike/No Lockout article of the parties' collective bargaining agreement. (Jt. 1 and Tr. 90) The City took the position that the Grievant intentionally misparked the buses because of a dispute with his immediate supervisor. Because of this alleged intentional misconduct, the City suspended the Grievant for a period of forty-five days, from Wednesday, October 28 through Friday, December 11, 1998. (Jt. 5) On October 28, 1998, the Grievant and the Union filed a grievance alleging a violation of Article 22, Sections 22.1 and 22.3. (Jt. 2) The Union alleged that the Grievant was disciplined without just cause and did not violate any provision of the contract which would warrant the 45-day suspension without pay. (Jt. 2)

The parties processed the grievance through the contractual grievance procedure and were unable to settle the grievance; the grievance was appealed to arbitration. No issue was raised as to the arbitrability of the grievance. Hearing in this matter was held by the Arbitrator on May 12, 1999, in the City of Madison, Wisconsin at the offices of Teamsters Local Union No. 695.

POSITIONS OF THE PARTIES

Union

The Union first takes the position that Grievant did not engage in a prohibited work slowdown in violation of Article 4. The Union points out that there was no evidence that the Grievant purposely parked the buses incorrectly and that purposefulness or willfulness is a crucial element of a work slowdown. Further the Union, citing cases, submits that a work slowdown, in the context of a No Strike/No Lockout article, is generally perceived as a deliberate reduction of output by a group of workers used as a means to attempt to gain some concession from an employer. (Union brief p. 6) The Union takes the position that the Grievant's conduct does not meet the definition of a work slowdown under the context of a no strike clause. The Union also takes the position that if the Grievant had engaged in a work slowdown, the contract would not allow the City to discipline him because the City never sought the Union's intervention in preventing the slowdown; such a request for intervention is required by the labor agreement. (Jt. 1) (Tr. 19, 93) The City relied exclusively on the alleged work slowdown as a grounds for disciplining Grievant and, as the Union argues, since there was no proof of a work slowdown, the Union takes the position that the arbitrator should overturn the discipline without considering any other grounds for discipline.

In the alternative, it is the position of the Union that the City violated the collective bargaining agreement when it suspended the Grievant without pay for 45 days. Union argues that on September 25, 1998, a series of events took place that resulted in the improper parking of the buses. The service lane crew, including Grievant, arrived at work at about 4:00 p.m. on September 25, 1998. Operations were already an hour behind schedule. The service lane employe who normally arrives an hour early to do set-up had not shown up but had called in sick. (Er. 4) None of the service lane employes senior to the Grievant were willing to assume the parking responsibilities when there had been no set-up. Although the parking could be accomplished without set-up, it was more difficult, as the City would not assign someone to do set-up for an hour each day if it were not important. The Union points out that the Grievant was willing to park the buses but he first tried to do some of the set-up. His supervisor, Jack Laylan, according to the Union, stopped Grievant twice from doing the set-up and just told him to "just park the buses." The Grievant objected once but obeyed his supervisor's directive the second time. The Union argues that the Grievant proceeded to park the buses the best he could without any set-up and that his efforts did not cause the parking disarray. The Union takes the position that the lack of any organizational scheme combined with Grievant's supervisor's refusal to tolerate any delay caused the parking problems. The Union argues that Grievant was further handicapped in parking the buses without a status sheet which indicates which buses are to be set aside for maintenance and other work. The Union points out that even management witnesses

for the City admitted that parking is made more difficult without a status sheet. The Union submits that there were two supervisors on duty – Laylan and Bonnie Baxter for the Grievant's entire shift and neither of them told the Grievant that he was improperly parking the buses. The Union also points out that the Grievant mainly parks buses on the weekend and was not experienced with parking them during the week when substantially more buses are needed to be parked. Therefore the Union argues the suspension violated the just cause requirement of the collective bargaining agreement.

For these reasons, the Union states that the Arbitrator should order the City to rescind all discipline against the Grievant for the events of September 25, 1998 and to make him whole for his 45-day suspension, including all losses in pay and benefits, less interim earnings and unemployment compensation benefits and order the City to pay directly to the Department of Workforce Development, State of Wisconsin, any unemployment benefits received by the Grievant.

The City

The City takes the position that the Grievant violated Article 4, No Strike/ No Lockout, of the labor agreement (specifically Section 4.2) arguing that the Grievant intentionally caused an "interruption or impeding the work." (City Brief p. 4) The City bolsters its argument by stating that the Grievant was experienced at parking buses and should have known the proper procedure even if a status sheet were not available. The City raises the issue of Grievant's inconsistent testimony about the status sheet and argues that the Grievant never pursued asking his supervisor Jack Laylan for the status sheet according to the Grievant's own testimony. (Tr. 154) The City subpoenaed other service lane employes who worked on September 25, 1998 who testified that the status sheet is not totally necessary to park buses of similar makes and models. The City's position is that Grievant intentionally parked the buses "every-which-way causing disorder to the organization and forcing mechanics to stop doing their work and re-park the buses in the proper manner." (City Brief p. 4) The City argues that Grievant's alleged statement to mechanic supervisor Jack Langsdorf that "job action was needed so that Mr. Kelly would be advised to tell Mr. Jack Waylan to stop micro-managing in the service lane." (City brief p. 4) is further evidence of an intentional slowdown. Finally the City argues that the Union well knew that the City was considering discipline under Article 4. Ann Gullickson, Transit Service Manager, testified that she informed the Union at the pre-determination meeting that "management was looking into the possibility of discipline in the line of Article 4 of the contract." (City Brief p. 3) That position of the City was made clear by the opening statement of City representative Mike Dieters at the arbitration hearing and by the City's statement of the issue. The City was relying solely on Article 4 for the 45-day suspension of the Grievant. Lastly the City argues that Grievant's willful and intentional action could have resulted in termination under Article 4 but that after considering all aspects of the matter, the City reached a decision to give the Grievant a long suspension. The City asks that the grievance be denied and the suspension upheld.

DISCUSSION

This case involves the discipline of Grievant for allegedly impeding the work of the City by intentionally parking buses in an improper manner on September 25, 1998. The City bases its discipline solely on a violation of Article 4, the No Strike/No Lockout provision of the parties' labor agreement. 1/ The Union argued that Grievant did not violate this article, and, in the alternative, argued that the City did not prove just cause for discipline under Article 22, Discipline. However, whether Grievant deserved discipline under a just cause standard for his actions on September 25th is not before me. Because the City bases its entire case and Grievant's discipline on a violation of Article 4, I only have to decide whether Grievant violated Article 4. To decide this question it is appropriate to set forth the standards accepted by arbitral authority as to what constitutes a slowdown or impediment of work under a No-Strike clause, the same as or similar to the clause in this case.

1/ At the arbitration hearing in this matter, on May 12, 1999, the City by its representative stated the issue as "did the grievant violate Article 4.2 of the current contract, if not what is the appropriate remedy?" This statement was taken down by the arbitrator as, after a reasonable period of delay, the parties commenced the hearing without the reporter who arrived during the testimony of the first witness. This statement of the issue is confirmed in the City's post hearing brief found at page two (2).

> What constitutes a slowdown, therefore, is critically important. One definition, contained in Black's Law Dictionary is "Slowdown – an organized effort by workers in a plant by which production is slowed to bring pressure on the employer for better terms and conditions of working." Another definition, from Webster's Third New International Dictionary, Unabridged, is "Slowdown: a slowing down in the performance of duties by workers as a protest and means toward forcing compliance with demands." Those definitions conform to the usual understanding of a slowdown as a concerted action on the part of employees with the objective of obtaining a certain result. It is a deliberate intent to restrict production as distinguished from an individual employee's poor work habits. 2/

2/ ***PANTRY PRIDE ENTERPRISES, INC., 79 LA 833, 887 1982, CARSON.***

> I believe the definition of slowdown submitted by the Company is as good as any and adopt it for the purpose of this proceeding. Under this definition employees engage in a slowdown when they do so to obtain some concession from management. In this case, then, our inquiry is directed to determining whether or not these employees reduced their rate of production in order to obtain a concession. If they reduced the speed of their effort only

> because they did not feel like working harder or for any other personal reasons, they acted within the right granted by contract and should not have been disciplined. However if they did so as part of an effort to obtain a concession, management had the contractual right to discipline them.
>
> Management has the difficult burden of proving the intent of these employees, of proving their action was engaged in as part of their effort to obtain a concession. 3/

3/ ***MANVILLE CORPORATION, 89 LA 880, 883 1987, ROSS.***

I further believe it is clear from well established arbitral authority that to violate a no–strike clause such as the one in the parties' labor agreement in this case an employe cannot act alone. In other words, the slowdown by Grievant must be intentional and it must involve soliciting other employes to slowdown and it must be an attempt to win a concession from the employer.

> The Arbitrator agrees with the Union's position that in this case the Company's action in discharging the Grievants can only be sustained on the basis of finding that they violated the no-strike clause, Article 14, Section 1, of the collective bargaining agreement. As we have seen, Article 14, Section 1 provides as follows:
>
> > "During the term of this Agreement, there shall be no strikes, lockouts, work stoppages, picket lines, slowdowns, secondary boycotts, or disturbances even of a momentary nature. The employees shall not resort to subterfuge or mass demonstrations or remain away from duty for any reason to evade their obligations under this Agreement. The Union shall support the Employer fully in maintaining operations in every way. Participation by any employee or employees in an act violating this provision in any way will be complete and immediate cause for discharge by the Employer."
>
> The language of Article 14, Section 1 makes it clear that poor work performance by an individual employee, even if that poor work performance were the result of an intentional slowdown of work by that employee, would not fall within its provisions. Since Art. 14, Section 1 speaks in terms of strikes, lockouts, work stoppages, picket lines, and secondary boycotts; it is clear that it is referring to concerted activity on the part of employees. Therefore, an individual slowdown by a single employee would not come within the terms of Article 14. Section 1; and it would not then "be complete and immediate cause

for discharge by the Employer" that the section authorizes. Indeed, the Company has not applied Article 14, Section 1 to individual slowdowns by employees. 4/

4/ ***WALGREEN COMPANY, 100 LA 468, 470 1992 SHIEBER.***

I now turn to the facts of this case as established in the record to determine if the Grievant was guilty of a slowdown or impediment of work under Article 4. Although Grievant had limited experience parking buses on a week night, I believe he knew enough of the general practice of parking buses of similar make together and making sure lift equipped buses were available for Saturday runs to make a reasonable attempt to correctly park the buses even in the absence of the normal set-up procedure and the availability of a status report. The conflicting evidence regarding the availability of that status report need not be resolved; Grievant could have made more of an attempt to ask for it, and his supervisor could have made more of an attempt to ensure that Grievant had it. I note that there were two supervisors on duty while Grievant was arranging the parking of buses; one of those supervisors worked along side Grievant for a period of time while he was assigning the buses to particular parking spots. (Tr. 49, 102, 103) I am left to wonder what those supervisors were doing if Grievant was not parking the buses properly.

There is no evidence in the record that shows even marginally that Grievant disobeyed any direct order on how to park the buses. While his supervisor, I am sure, did not tell Grievant to park the buses "any which way," there is not any testimony to prove that he said anything other than "park the buses" as the crew was already behind that evening. (Tr. 36-38) I believe the main point that the City relies on to argue an intentional work stoppage or slowdown is the alleged statement made to the mechanics foreman, Langsdorf, that the Grievant was slowing down the work by improperly parking the buses to teach Laylan, his supervisor, not to micro-manage the service lane. (Tr. 8) The Grievant denies that he made such a statement. (Tr. 138, 139) Even if I credit the foreman's testimony that the statement was made, which would tend to prove an intentional slowdown, the City still has to meet the other two aspects of the test to justify discipline under Article 4.

There is absolutely no evidence in the record to prove that the Grievant solicited any of his fellow employes to join in a slowdown of work to gain a concession from the City. Grievant joined a few of the service lane employes outside the maintenance garage early in his shift when he first refused to park the buses, but there is no evidence that he asked any of those employes to join him in a slowdown or an attempt to impede work. Further, there is nothing in the record to indicate that the Grievant or any other employe was seeking a concession from the City. I find any alleged complaint about Grievant's supervisor micro-managing the service lane to be just that, a complaint or gripe, not a request for a concession as that word is clearly used in arbitration case law. Absent that concerted activity or request or promotion of that concerted activity to win a benefit from the City there simply cannot be any violation of the contractual No-Strike provision.

This standard test for concerted activity has been consistently upheld by the National Labor Relations Board and the Courts.

II. Concerted Activity

> [1] Section 7 of the National Labor Relations Act, 29 U.S.C. subsection 157, grants employees the right to engage in "concerted activity" for their mutual aid and protection. Section 8(a)(a) makes it an unfair labor practice for an employer to interfere with an employee's exercise of this right. Woolworth argues that the activity at issue here was not concerted since Withers acted alone. Activity is concerted, however, even where only one employee is involved if the employee is enlisting the support of fellow employees. See NLRB V. SENCORE, INC. 558 F.2D 433, 434, 95 LRRM 2865 (8TH CIR. 1977). By pressing for more female employees to be assigned to the shipping department, Withers was seeking to enlist the support of at least some of his fellow employees at MDAC. 5/

5/ F. W. WOOLWORTH V. NLRB, USCA 8TH CIR., 107 LRRM 3261, 3262, 1981.

The other requirement of the No-Strike clause that was not met by the City was not advising the Grievant to stop his alleged slowdown and not enlisting the Union's assistance to stop the slowdown or impediment of the work on September 25, 1998. Article 4, Section 4.2 specifically requires that the Union must be contacted if the City believes a slowdown is ongoing; there is no dispute that this did not happen. (Tr. 93) In a case cited by the Union in its brief, the arbitrator ruled against the company where the facts proved a shift slowdown among the employes, but the company failed to enlist the union's help adequately by making a reasonable attempt to notify the union and did not warn the employes that they were engaged in an unlawful work stoppage or slowdown. 6/

6/ MANN PACKING COMPANY, 83 LA 552, 555, 1984 CONCEPCION.

I can make no other finding in this matter than the Grievant did not engage in a slowdown, impediment of or work stoppage in violation of Article 4 of the labor agreement. As the City did not argue that Grievant in the alternative should be disciplined under Article 22, I do not need and will not consider whether Grievant's performance on September 25, 1998, violated reasonable work standards which would have justified just cause discipline under Article 22.

Taking into account the record and the briefs of the parties I find that the Grievant did not violate Article 4, Section 4.2 of the labor agreement for his actions on the evening of September 25, 1998.

Based on the foregoing and the record as a whole, I enter the following

AWARD

The Grievant did not violate Article 4 of the labor agreement and the grievance in this matter is sustained.

REMEDY

The City shall make the Grievant whole for all losses in pay and benefits for the period of his suspension, less interim earnings and unemployment compensation benefits, and shall remove all evidence of the discipline in this matter from the Grievant's personnel record with the City. The City shall pay directly to the Department of Workforce Development any unemployment compensation benefits received by the Grievant during the period of his suspension.

Dated at Madison, Wisconsin this 20th day of August, 1999.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

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