BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 43

and

RAY WILKINSON BUICK-CADILLAC

Case 1
No. 59192
A-5877

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. 43.

Quarles & Brady, LLP, by **Attorney Robert H. Duffy,** 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, appearing on behalf of Ray Wilkinson Buick-Cadillac.

ARBITRATION AWARD

Teamsters, Chauffeurs & Helpers Union Local No. 43, hereinafter Union, and Ray Wilkinson Buick-Cadillac, Inc., hereinafter Employer, 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 parties, by joint request, received by the Commission on October 23, 2000, requested the appointment of Commissioner Paul A. Hahn to serve as arbitrator. Mr. Hahn was appointed by the Commission to serve as Arbitrator on October 23, 2000. After unsuccessful settlement efforts by the parties, an arbitration hearing was held on January 16, 2001. The hearing took place at Ray Wilkinson Buick-Cadillac in Racine, Wisconsin. The hearing was transcribed. The parties were given the opportunity and filed post hearing briefs. The parties' post hearing briefs were received by the arbitrator on March 5, 2001 (Union) and March 12, 2001 (Employer). The parties were given the opportunity and declined to file reply briefs. The record was closed on March 13, 2001.

ISSUE

The parties stipulated at hearing to the following issues:

1. Did Ray Wilkinson Buick-Cadillac have just cause to discharge grievant?

2. If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1, RECOGNITION

Section 1. The Employer recognizes the Union as the exclusive bargaining agent for a single collective bargaining unit consisting of the employees of the Employer employed at the Employer's facility located at 6001 Washington Ave., Racine, WI., engaged in the classifications of work set forth in Article 9 of this Agreement, excluding **part-time lot helpers and general clean-up employees,** professional employees, managerial employees and managerial trainees, new and used car salesmen, office clerical employees and guards and supervisors as defined in the National Labor Relations Act, as amended.

. . .

ARTICLE 4. GRIEVANCE PROCEDURE

Section 1. The Union and the Employer agree that there shall be no strike, lockout or tie-up for the duration of this Agreement. Grievances shall be taken up between the Employer involved and the Union in accordance with the following procedure. A grievance is defined as any controversy between the Employer and the Union concerning compliance with any of the provisions of this Agreement.

. . .

Section 5. The impartial arbitrator shall have the sole and exclusive power and jurisdiction to determine whether a particular grievance, dispute or complaint is arbitrable under the terms of this Agreement. The decision of the impartial arbitrator on any matter submitted to him shall be final and binding on all parties. The impartial arbitrator shall issue his decision no later than thirty (30) days after the case has been submitted to him.

. . .

ARTICLE 5. DISCHARGE & DISCIPLINARY CASES

Section 1. Just cause warranting discharge shall be for reasons such as the following: proven dishonesty; willful destruction of Employer, customer or employee property; unprovoked physical violence upon another person upon Company premises; reporting to work under the influence of controlled substances or intoxicating beverages; refusal to perform work assigned without just cause.

> For less serious offenses, a repetition of which will constitute cause for discharge, there shall be progressive discipline, as follows: (1) first offense – written warning, a copy of which shall concurrently be given to the steward of the employee and the union; (2I) (sic) second offense – three day suspension; and (3) third offense – discharge.
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> **Section 2.** In the event of a discharge or other disciplinary action the employee and his steward shall be notified concurrently. Prior to a discharge or disciplinary layoff, the employee, in the presence of his steward shall be informed of the facts relating to the discharge or layoff and shall be given an opportunity to discuss the matter privately on company premises. Either the Union or the employee may file a grievance within five (5) days after which any discharge shall be final. In the event it shall be determined that any disciplinary action, including discharge, was wrongfully taken then the employee affected shall be reinstated to his former status and shall be reimbursed for any loss in wages resulting from such action.
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> Warnings or disciplinary actions for any offense shall not be considered in the taking of any future disciplinary action for any offense occurring more than nine (9) consecutive months after the giving of such warning or taking of such action.

STATEMENT OF THE CASE

This grievance involves Teamsters Local Union No. 43 and Ray Wilkinson Buick-Cadillac, Inc. (Jt. 1) The Union alleges that the Employer violated the parties' collective bargaining agreement when the Employer discharged the grievant on August 17, 2000. Grievant was discharged for a driving incident occurring on August 16, 2000, where Grievant allegedly drove the Employer's blue pickup "very fast – squealing tires down highway 31." (Jt. 5 and 7) Grievant began his employment with the Employer on August 24, 1999. During his approximately one-year of employment with the Employer, Grievant's primary job was as a parts driver. This job involved Grievant picking up and delivering auto parts with the Employer's only pickup truck. The pickup is identified by several logos and names which identify it as being owned by the Employer. (Er. 9) At the time that Grievant began his employment, he received a copy of the Employer's employee handbook and acknowledged in writing that he agreed to conform with its terms. (Jt. 2 and Er. 8) The handbook required that:

> Drivers should be mindful of the fact that all Company vehicles are identified with the Company. Careful, courteous driving is mandatory, as your behavior as a driver reflects upon your Company. Improper use of Company vehicles may be cause for disciplinary action. (Jt. 2, pg. 4)

Grievant was involved in two prior incidents in which he was disciplined for reckless driving. The first incident occurred on March 29, 2000. A private citizen called the Employer to report that the parts truck was speeding and ran a red light. The Employer investigated the incident, met with the Grievant and his Union steward and Grievant received a disciplinary notice. (Jt. 3) The Grievant was advised when he met with Employer representatives and his Union Steward on April 6 that a repeat violation of the same nature would result in a three-day suspension. The Grievant acknowledged receipt and understanding of the disciplinary notice. (Jt. 3) The second warning was received by the Grievant because of an incident that occurred on June 22, 2000. On that date the Employer received a phone call from a private citizen complaining about the manner in which the Employer's parts truck was being driven. The private citizen alleged that the parts truck driven by the Grievant on this particular occasion, was being recklessly driven, weaving in and out of traffic, speeding and almost rear ended the private citizen. The Employer representatives met with the Grievant and his Union steward on June 27, 2000 to discuss the June 22nd incident. The Grievant received a disciplinary warning notice; the three-day suspension was waived. The Employer made clear on the warning notice that a third violation would result in discharge. (Jt. 4) The Grievant acknowledged receipt of the warning notice and that he understood the consequences of a third violation. (Jt. 4) The Grievant did not grieve either the first warning notice (Jt. 3) or the second warning notice. (Jt. 4)

The incident that led to the Grievant's discharge occurred on August 16, 2000. On that day, a private citizen identified the Employer's parts truck traveling south on Highway 31 (Er. 12) in the City of Racine weaving in and out of traffic, speeding, and squealing away from a light at the intersection of Highway 31 and Highway 11 and called the Employer to advise the Employer of what the citizen considered was unsafe driving. Employer representatives met with the Grievant and his Union representative on August 17, 2000 and confronted the Grievant with the description of his alleged driving as reported by the citizen caller. The Grievant denied that he engaged in any of the conduct as reported, but did not dispute that he certainly could have been driving the parts truck on Highway 31 on August 16th. Based on the Grievant's previous two incidents, the description of the truck by the witness caller, the description of the driver, although there was no positive identification, the Employer credited the caller's observations over the Grievant's denial and discharged the Grievant on August 17, 2000. (Jt. 5)

The Union filed a grievance on August 21, 2000 by Union Steward/Secretary-Treasurer Jerry Jacobs. (Jt. 6) The Employer denied the grievance by letter to Mr. Jacobs from Tom Fisher, Parts Manager, on August 21, 2000. (Jt. 7) The parties processed the grievance through the grievance procedure of the parties' collective bargaining agreement and the Union appealed the matter to arbitration. Hearing in the matter was held by the Arbitrator on January 16, 2001 at Ray Wilkinson Buick-Cadillac, Inc., in Racine, Wisconsin. No issue was raised as to arbitrability of the grievance.

POSITION OF THE PARTIES

Union

The Union concentrates its argument on the August 16, 2000 incident that led to the discharge of the Grievant which the Union submits was based entirely on the testimony of witness Eisenbart who had called the Employer on August 16, 2000 with his concerns regarding the way the Employer's parts truck was being driven. The Union submits that there is a "dearth of evidence" to support Eisenbart's criticism of the Grievant's driving. The Union points out there was no accident, no property damage, no personal injury and no citation. The Union posits that it is "not entirely clear" that Eisenbart even saw the Grievant. The Union takes the position that Eisenbart wrongly described the color of the parts truck and told Union Representative Jacobs when he talked to him by telephone, that he only got a quick glance at the driver. Eisenbart told Jacobs that he concluded the driver was male because he sat up high and that the driver had shoulder length sandy hair. The Union takes the position that this is not a confident identification because the Grievant has relatively short gray hair and a prominent mustache.

The Union additionally submits that the Employer failed to offer conclusive proof that the Grievant was even in the vicinity of Eisenbart on August 16, 2000. The Union points out that the Employer offered no invoices or other documentation that the Grievant had any pick ups in the area of Highways 31 and 11 on that day, and such evidence should have been presented to the Arbitrator, the failure of which indicates that such evidence does not exist.

In the alternative, the Union also takes the position that even if Eisenbart did see the Grievant on August 16th the description that Eisenbart gave of the Grievant's driving does not provide just cause for discharge. Union points out that Eisenbart testified that the truck he saw was only traveling a few miles over the speed limit, that the truck was changing lanes too quickly and squealed its tires at the intersection of Highways 11 and 31. The Union points out that Eisenbart testified that his own speedometer was inaccurate so he could only determine that the driver was going faster than him not that the driver (Grievant) was exceeding the speed limit and that as to the squealing tires, Eisenbart did not see the Employer's parts truck actually squeal tires but assumed it was the Employer's truck because it was the first vehicle that crossed the intersection. Eisenbart only opined that the truck changed lanes too much and that was only Eisenbart's opinion, not any allegation of reckless driving or a violation of the law.

The Union discusses three arbitration cases where discharges and discipline were not upheld by arbitrators based on the opinion of a lay person regarding unsafe driving without corroboration and where the incidents were found not to be as serious as alleged by the employers in those cases. 1/ Lastly, the Union takes issue with the Employee Handbook and argues that the statement "careful, courteous driving is mandatory, as your behavior as a driver reflects on the company. Improper use of company vehicles may be cause for disciplinary

action." is too vague to necessarily put employees on notice that they can be terminated for driving a few miles over the speed limit or violating a stranger's notion of appropriate lane changes.

1/ FOREMOST CORRUGATED CO., INC., 106 LA 1106 (BRAUFMAN, 1996); ACF INDUSTRIES, INC., 82 LA 459 (MANISCALCO, 1984); ST. JOHN TRANSPORTATION CO., 73 LA 1157 (MODJESKA, 1979)

In conclusion the Union submits that the Employer should not rely on a stranger to conclude that an admittedly good, reliable employee was driving recklessly, elevating a stranger's word and opinion over the Grievant's word and impeccable driving record. The Union requests that the grievance be upheld and that the Grievant be reinstated and made whole.

Employer

The Employer initially submits to the Arbitrator that the Employer has a right to discharge an employee for just cause when it has followed the three step progressive discipline procedure provided for in the parties' collective bargaining agreement. (Jt. 1) The Employer takes the position that it is generally accepted that if discharge is for just cause and the employer's decision is based upon fact and is not arbitrary, capricious or discriminatory the Arbitrator should not substitute his judgement for that of the employer relating to the degree of discipline administered. The Employer avers that the Union conceded that the Employer exercised progressive discipline in this case and that the Union acknowledges that it did not dispute Grievant's first disciplinary warnings of March 29 and June 22nd of 2000 which were based on reckless driving. The Employer submits these incidents establish a pattern as shown by the driving the Grievant engaged in on August 16, 2000.

The Employer argues that the credible evidence established that the Grievant drove recklessly while operating the Employer's parts truck during the incidents on March 29, June 22nd for which he was issued disciplinary warnings (Jt. 3 and 4), and for the incident on August 16th for which he was discharged. (Jt. 5) The Employer notes that each incident was reported by a private citizen having no connection with the Grievant or with the Employer. The Employer points out the similarities in the alleged conduct and reminds the Arbitrator that the Grievant never disputed his reckless driving as reported in the incidents on March 29 and June 22 of 2000. The Employer avers that neither the Union nor the Grievant offered any explanation as to why three private citizens, none of whom knew him or the Employer or its employees, would have lied or could have been mistaken about the Grievant's behavior.

The Employer also points out that the Grievant in his own testimony admitted that he repeatedly attempted to squeal the truck's tires in traffic, that it was only after taking a break and meeting with counsel that he changed his testimony on redirect claiming that he only attempted to squeal the truck's tires in the Employer's parking lot and not on the street.

Employer further argues that the Union's attempt to impeach Eisenbart's testimony is unavailing. The Employer points out that Eisenbart gave the same description of the incident on August 16 to Employer representatives, Union representative Jerry Jacobs and before the Arbitrator. The Employer submits that Jacobs, in his testimony before the Arbitrator, admitted that in his conversations with Eisenbart, Eisenbart stated that he "was almost positive it was a man or a guy that was driving the truck." The Employer submits that Eisenbart's description of Grievant was consistent with his appearance.

Employer argues that the Grievant's taking issue with Eisenbart's description of the parts truck itself is not convincing as Eisenbart described the truck to Union representative Jacobs as being blue and black with purple lettering. The parts truck, as described at the arbitration hearing, is midnight metallic blue with tan lettering and as such it is difficult to tell the difference between blue and black. The Employer takes the position that although the lettering was mis-described by Eisenbart, what is more convincing is that Eisenbart read the Employer's logo on the truck which was the only way he had enough information to call the Employer on August 16th to report the reckless driving by the Grievant. The Employer argues that Eisenbart had nothing to gain from calling in and reporting the Grievant's behavior. Contrary to Eisenbart, the Grievant had everything to gain by denying that he engaged in the conduct Eisenbart observed and promptly reported to the Employer.

In its conclusion the Employer submits that Ray Wilkinson had just cause for terminating the Grievant. The Employer articulated a reasonable rule requiring courteous driving, and it relied upon credible observations in progressively disciplining the Grievant for violation of that rule. The Employer warned Grievant concerning the consequences of future discourteous, reckless driving, and ultimately only discharged him when Grievant continued to drive the parts truck in a discourteous and reckless manner despite the progressive discipline it had provided. The Employer requests that the Arbitrator deny the grievance in its entirety.

DISCUSSION

This is a discharge case involving the discharge of the Grievant from his employment with Ray Wilkinson Buick-Cadillac, Inc. The Grievant was hired by the Employer on August 24, 1999, and the discharge occurred on August 17, 2000. Grievant was discharged for unsafely driving the Employer's parts truck on August 16,2000 in the City of Racine, Wisconsin in violation of the Employer's handbook and following discipline within the previous six months for similar incidents.

The Union concedes that the Employer followed progressive discipline up to the point of the discharge. (Tr. 10) And the Union concedes that the underlying discipline was never grieved by the Grievant or Union. (Tr.10) Further, the Grievant admitted on the record that he knew that if the incident for which he was accused actually happened on August 16th, that this would violate the Employer's handbook and be an act of discourteous driving toward the public. (Tr. 89-90) Grievant also testified that he received the Employer's handbook and that he understood that he would be disciplined if he did not abide by its rules. (Tr. 85) (Jt. 2 and Er. 8) I believe the Union correctly fashioned the real issue in this case in its opening statement as an issue of creditability. (Tr. 11)

The issue is who is more creditable, Eisenbart the citizen who called the Employer on August 16 about Grievant's alleged unsafe driving or the Grievant who denied the driving activity reported by Eisenbart. Because the Grievant never grieved or disputed the incidents that led to disciplinary action by the Employer for the first two incidents, it is not necessary to discuss them in detail. Those acts of unsafe or discourteous driving involved speeding, weaving in and out of traffic and running a red light. (Tr. 14 and 19) Eisenbart described Grievant's driving on August 16 as speeding, weaving in and out of traffic and squealing tires from a controlled intersection at highways 31 and 11. Therefore if true, the August 16th incident clearly follows a pattern of conduct in driving. Employer witness Fisher also testified that Grievant on one occasion failed to secure a boxed seatbelt in the back of the pickup truck Grievant drove and when Grievant accelerated it fell out and was never retrieved. Grievant was not formally disciplined for this event. (Tr. 34)

Eisenbart testified that the Employer's pickup truck was weaving in and out of traffic on highway 31 and was speeding as the truck was going at least faster than Eisenbart who estimated he was traveling at the speed limit. (Tr. 37) When the parts truck stopped at the intersection of highways 11 and 31, Eisenbart was able to identify from the logo on the truck that it was from the Employer. (Tr. 43) Eisenbart also testified that the parts truck had to have been the one to squeal its tires when the light changed as it was the first vehicle in the intersection. (Tr. 38) Eisenbart immediately used his cell phone and called the Employer to advise the Employer that someone was driving its truck unsafely. (Tr. 44 and 45) (Er. 13) Eisenbart did not make a positive identification of Grievant as the driver from his observation when he was stopped next to the parts truck at the intersection. In a phone conversation with Union representative Jacobs, who was investigating the incident on behalf of the Grievant, Jacobs testified that Eisenbart described the person driving the Employer's truck as most likely a man with shoulder length, sandy, light brown hair. (Tr. 67 and 74) Eisenbart also testified that he told Union representative Jacobs that the driver had collar length hair. (Tr. 51) Eisenbart confirmed on the record that Grievant's appearance at the hearing was consistent with the individual driving Employer's parts truck on August 16. (Tr. 43)

Eisenbart's description of the parts truck was not totally accurate but he saw enough of it to identify the logo that gave him the Employer's name so that he could make the phone call to make the Employer aware of what he considered unsafe driving. Eisenbart was consistent in

his description of the August 16th incident to Employer representatives, to Union representative Jacobs and at the arbitration hearing. Eisenbart also testified that he did not know the Grievant and had no connection with the Employer or any of its employees. (Tr. 36)

Against this testimony is the testimony of the Grievant denying that on August 16th he was speeding, weaving in and out of traffic and squealed the tires on the parts truck. (Tr.81 and 82) Grievant testified that he could have been on Highway 31 that day. (Tr. 81) It is also clear that during the work week no else drove the parts truck and it was the only pickup and parts truck owned by the Employer. (Tr. 18 and 58) Grievant further testified that he did try to accelerate in a fast manner from a stop sign early in his employment as part of his test to see what the truck could do in the process of familiarizing himself with the vehicle he was to drive. (Tr. 82 and 83) After a break off the record, the Grievant then testified that he tested the truck's acceleration in the Employer's parking lot. (Tr. 91 and 92) Grievant also testified that he only signed the warnings from the first two disciplines with the understanding that he was not admitting anything. (Tr. 90)

I find Grievant's change in his testimony about testing the acceleration of the truck after an off record break does not help his creditability. It seems more likely to me that his initial testimony that he tested the acceleration on the streets of Racine is more believable. One can legitimately wonder why the Grievant would accelerate at his Employer's place of business when a resulting squeal of tires could be seen and heard by Employer representatives. Further, Grievant's denial about the August 16th driving has to be considered in the context that he knew that one more driving incident could lead to his discharge.(Tr. 87 and 88) Grievant had much more at stake than did Eisenbart. Grievant's credibility is further adversely affected because of his failure to grieve the warnings in the prior two driving incidents. It seems well accepted in arbitration case law that where an employee fails to grieve discipline the legitimate and accepted presumption is that the employee committed the offense for which he was disciplined. In this case, not only did the Grievant not grieve the warnings of March 29 and June 22, he never disputed that the driving incidents happened in meetings with his steward and Employer representatives Fisher and Johnson. (Tr.18 and 24)

I have considered the Union's argument regarding the lack of proof that Grievant was driving the parts truck on August 16. I also acknowledge that Eisenbart could not positively identify the Grievant as the driver on that day. I also accept that at the time of this incident and arbitration the Grievant had a clean driving record as far as the State of Wisconsin is concerned. (U. 11) But in a decision that I must make on creditability I believe these factors do not override Eisenbart's testimony, the prior ungrieved discipline, the strong probability that no one else was driving the parts truck on that day and Grievant's readily admitted acknowledgement at the hearing that he knew that one more incident of "discourteous" driving under the terms of the handbook could lead to his discharge.

The Union may also be correct that the driving on August 16, 2000 would not have resulted in a citation. But that is not what is in the Employer's handbook. Discourteous driving is the rule. The very fact that three private citizens called the Employer after

witnessing Grievant's driving is adequate proof the rule is necessary and I find the rule reasonable. It is a legitimate concern of the Employer to be concerned about its image to the general public. (Tr. 60) and, as noted above, Grievant agreed that if he had driven as described on August 16th, that driving would violate the Handbook. I have also considered the cases the Union submitted in support of the Grievant. Although they are cases dealing with discipline for driving incidents, the facts in those cases are significantly different from the facts before me in this case to offer significant guidance in making my decision.

I find that the evidence before me shows that this Employer acted in good faith after a fair investigation in which the Employer cooperated with the Union in making witnesses accessible to the Union. The Employer followed progressive discipline and the Grievant was clearly on notice of the consequences of his actions. I find that just cause has been proven by the Employer. I further do not find the amount of discipline, in this case discharge, to be arbitrary or excessive.

Based on the foregoing and the record as a whole I issue the following

AWARD

Ray Wilkinson Buick-Cadillac had just cause to discharge the Grievant. The grievance is denied.

Dated at Madison, Wisconsin this 27th day of March, 2001.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

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