

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

WISCONSIN COUNCIL 40, AFSCME, AFL-CIO

and

THE SCHOOL DISTRICT OF STURGEON BAY

Case 35
No. 59766
MA-11402

(James R. Southard Grievance)

Appearances:

Mr. Neil Rainford, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

Davis & Kuelthau, S.C., Attorneys at Law, by **Mr. Clifford B. Buelow**, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein “Union” and “District”, are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Sturgeon Bay, Wisconsin, on October 12, 2001. The hearing was transcribed and the parties there agreed that I should retain my jurisdiction if the grievance is sustained. Both parties filed briefs that were received by December 26, 2001.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

Did the District have just cause to discharge grievant James R. Southard and, if not, what is the appropriate remedy?

BACKGROUND

Grievant Southard, a combination bus driver/custodian, was employed by the District from 1993 and up to the time of his December 11, 2000 termination.

Prior to the December, 2000, incidents leading to his discharge, Southard was counseled over his work and he received a January 27, 2000, letter of reprimand from District Administrator Robert E. Grimmer (Joint Exhibit 7) which stated in pertinent part:

. . .

On January 19, 2000, the parent of a fifth grade student contacted the school alleging that on January 18, 2000 you kicked a crutch from under their son causing him to fall down two steps of the bus you were driving. An investigation and interviews conducted by the Administrative Assistant and Elementary Principal confirmed that this incident occurred. What was not firmly established was whether or not the kicking of the crutch was a deliberate act.

In the course of interviewing student riders from your bus, other serious issues became known. Specifically, students complained about your use of language and swearing on the bus, particularly referring to students as "assholes" and "shitheads". Some complained about you slamming on brakes when students were standing on the bus causing them to fall into seats and other individuals and some complained that you did not respond or help them when they reported physical or verbal assaults to you. It was discovered in the course of the investigation that there is a general lack of discipline on your bus and that you have not filed discipline or behavior reports about the physical or verbal assault incidents.

The following corrective actions and job reassignment will be implemented immediately upon your return to work as a bus driver on January 27, 2000. (1) You will be assigned to a different bus route as determined by the Administrative Assistant. (2) You will be required to assign

students to specific seats on the bus to aid in learning the identity of the students and to aid in maintaining discipline. (3) A video camera will be installed and made operational on your bus to record student conduct and your disposition of disciplinary measures. (4) You may not ridicule or question students about any handicapping conditions. You must accommodate students with handicaps. (5) You must operate your bus in a safe and prudent manner at all times. (6) You will document and report all incidents of misconduct on your bus that endanger the physical or mental health of a student(s) or that affect your ability to safely operate the bus.

You are hereby placed on notice that if you repeat any of the unacceptable actions referred to above, perform any unacceptable actions of a similar nature to those cited above or fail to satisfactorily perform the corrective actions specified in this letter, you shall be liable for termination of employment with The School District of Sturgeon Bay.

. . .

Southard did not grieve that letter of reprimand or file a rebuttal to it.

Southard was subsequently counseled over his work via a September 27, 2000, letter from Grimmer (Joint Exhibit 10), which did not constitute formal discipline.

Grimmer issued a memo on November 13 (Joint Exhibit 12), which stated:

PLEASE POST

November 13, 2000

TO: All Bus Drivers

FROM: Bob Grimmer

RE: DOWNTOWN BRIDGE CLOSURE

Beginning this afternoon, the downtown bridge is scheduled to be closed for approximately three weeks. We are taking the following steps to assure the safety of the students.

1. All drivers on the west side are advised to use the light at Duluth to cross the highway to reach the east side.
2. Please make sure the two rear seats are left empty due to the increased possibility of a rear end collision.

If you run late on any given day, please notify Carol who will give your bus # to the principals.

On December 7, 2000 (unless otherwise stated, all dates hereinafter refer to 2000), Southard caused about \$920 in damage to the District's dump truck he was driving out of the District's garage when the truck's rear, swinging doors hit the side of the garage. The door repair involved about 12 hours in labor. On December 8, Southard was responsible for helping clear the snow at Sunset School. On December 8, he disregarded Grimmer's November 13 memo by turning left onto the Highway 42/57 bypass, rather than driving to Duluth Avenue and using the light there as directed by Grimmer in his November 13 memo.

Maintenance Supervisor Russell Cross testified about some of the concerns he had with Southard's work in September, 2000 and said that Southard had the worst evaluation of all the maintenance employees. He also testified about the new snow removal policy he implemented (Joint Exhibit 11) which called for Southard to help clear the snow at the Sunset School and said that Southard on December 7 did not follow that policy. Cross added that bus drivers were told about the November 13 memo relating to the closing of the downtown bridge at an employee meeting that Southard attended. He also explained how Southard on December 7 had damaged the rear, swinging door of the dump truck.

On cross-examination, he testified that another employee was not disciplined over her failure to report for early snow removal duty on November 20.

Building Engineer John Sullivan testified that he was not disciplined when his truck damaged a private vehicle and bus mechanic/bus driver Brian Sargent testified that about 15 drivers were at fault over the years in accidents, and that none of them were ever disciplined. He said that he was asked by Bruce Webster to ask Superintendent Grimmer whether employees could use the Lansing Street entry to the Highway 42/57 bypass at different times of the day and that Grimmer replied, "absolutely not." He also said that he had seen Southard use the Lansing Street entrance when he improperly turned onto the Highway 42/57 bypass; that he never spoke to Southard about that incident; and that he instead reported it to William Buechner, the Director of Buildings, Grounds and Transportation.

Maintenance/bus driver Bob Konrad testified that he saw Southard drive by his house on December 8 while Southard may have been going to the Sunset School to perform his shoveling duties; that there was only a "dusting of snow" at the Sunset School that day; that he did not have any trouble clearing it off in time to perform his bus driving duties; and that "there wasn't a whole lot to do, really."

Buechner testified that Southard in 2001 received the worst evaluation of any employee he supervised; that he was told on December 7 that Southard on that day had made a left-hand turn from Lansing Street onto the Highway 42/57 bypass; that he personally saw Southard do the same thing the next day when there were children on his bus; and that he that day reported what he had seen to Grimmer (Joint Exhibit 19). On cross-examination, Buechner said that he could have radioed Southard on December 7 not to make that left hand turn, but that he chose not to do so.

Sturgeon Bay Police Chief Dennis McIntosh testified about the safety hazards faced on the Highway 42/57 bypass because of its very heavy traffic. He said that there have been 13 fatalities in the City of Sturgeon Bay since 1983, nine of which were on the 42/57 bypass. He explained that the bypass was dangerous because it was originally a 55 mile an hour bypass in 1978 and that:

Since then, we have had several single-family subdivisions develop on the corridor, multi-family home developments on the corridor, a tremendous amount of commercial properties have opened on the corridor, as well as our industrial park, which has expanded tremendously since 1978.

The highway was never intended to handle the traffic that it is currently handling out there, and I think that's evidenced not only by the number of fatalities we have out there as well as the number of accidents in general that we have on that corridor.

It's very dangerous. It's not just my opinion; it's recognized by the Wisconsin Department of Transportation. I want to say it was about 7 years ago when they looked at that and lowered the speed limit to 45 miles an hour because of all the growth and development along there and the increase in traffic.

He added:

It's always dangerous out there whether the bridge is open or closed, the Michigan Street bridge. But it gets worse when the Michigan Street bridge is down.

You have to keep in mind that we are doubling the amount of traffic that has to cross the only bridge that has been available. We are putting all of the traffic onto one bridge and on one stretch of road in the city.

He also said it was a “wise move” for Grimmer to have issued his November 13 memo (Joint Exhibit 12), which directed all bus drivers not to turn left onto the Highway 42/57 bypass. Afternoons were particularly dangerous, said he, because “you’ve got several factories getting out and an industrial park also trying to get out on that highway.” Asked whether a school bus with children should try to turn left, he replied: “that’s inappropriate and dangerous when you have less than a half mile away an intersection that’s protected by traffic lights.”

District Administrator Grimmer testified about Southard’s work record, the events of December 7 and 8, and why he fired Southard. He explained that he issued the November 13 memo banning left-hand turns onto Highway 42/57 because:

We became aware of the fact that the Michigan Street bridge, the downtown bridge, was going to be closed for repairs. This happened a number of times in past years or months perhaps, and we knew that when that bridge went down there was a substantial increase in the volume of traffic on Highway 42/57.

We were very concerned about that because we also knew the number of accidents that occurred out there. And we wanted to protect the safety of our students as best we could so we advised drivers who were on the west side that they need to use the light at Duluth Avenue in order to enter the highway and proceed back to the east side of the school district.

He also said that he and others met with Southard on December 11 and that Southard then was given the chance “to attempt to change my mind about this”, i.e. terminating him, and that Southard did not do so. Grimmer then hand-delivered the termination letter to him (Joint Exhibit 17) at the end of their meeting. It stated:

. . .

As a result of the incidents of December 7, 2000 and December 8, 2000 you are hereby being terminated from employment with The School District of Sturgeon Bay effective immediately.

On Thursday, December 7, 2000 your careless operation of a school district truck resulted in damages in excess of \$900 to the vehicle plus labor charges to repair the damages. The associated reckless driving of the vehicle, as you exited the maintenance area, posed a potential endangerment to persons and property in the middle school parking lot.

On Friday, December 8, 2000 your disobeyed a written directive from your supervisor dated October 27, 2000 with respect to snow removal duties at the Sunset elementary school.

On Friday, December 8, 2000 you disobeyed a directive from the District Administrator, dated November 13, 2000, advising all bus drivers to use the signal lights on Duluth Avenue when entering Highway 57 to proceed in an easterly direction. This directive was also reinforced by verbal communication from Director of Transportation, William Buechner to all bus drivers. On December 8, 2000, you were observed by Mr. Buechner leaving Sawyer Elementary School, turning left onto Lansing Street and turning left from Lansing onto Highway 57.

Your action on December 8, 2000 is also in disregard of corrective action #5 contained in a letter to you dated January 27, 2000 from the District Administrator requiring you to "operate your bus in a safe and prudent manner at all times." The January 27, 2000 letter also informed you that if you fail to "satisfactorily perform the corrective actions specified in this letter, you shall be liable for termination of employment with The School District of Sturgeon Bay."

You are hereby terminated from employment with The School District of Sturgeon Bay and you are prohibited from entering any building or property belonging to The School District of Sturgeon Bay.

. . .

Southard testified that he was given new duties in 2000 which sometimes caused him to run late; that he never had a vehicle accident before December 7; and that he thought Cross was going to close the rear doors on his truck that day rather than the overhead doors, which is why he drove off with the rear doors still open. He added that he reported for snow shoveling duties at the Sunset School at about 5:30 a.m., and that he returned home because he assumed another employee would be able to shovel the snow without him. He said that he disregarded Grimmer's November 13 memo and turned left from Lansing Street onto the Highway 42/57 bypass on December 8 because it was safe to do so and because he earlier "had a near accident when I was at the stop light at Duluth there with a tanker truck coming through. . ." the green light at Duluth Avenue. He said that he related that incident to Cross that day who told him "well, you got to do it the safe way", which is why he decided to turn left at Lansing Street.

Southard also said that when he met with Grimmer and others on December 11, Grimmer handed him a letter of termination at the very outset of the meeting and that there were no questions at that time relating to his December 7 accident, the December 8 snow shoveling incident, or turning left onto the Highway 42/57 bypass on December 8. On re-direct examination, he said that he also turned onto the Highway 42/57 bypass because he was running a little late that day and that is why he took that short cut.

On cross-examination, Southard testified that he never spoke to Buechner about the tanker truck incident and that he on December 11 never told Grimmer about that incident or that Cross had told him to “do it the safe way”.

Cross was recalled as a witness and testified that Southard never told him about the tanker truck incident and that he never told Southard to “do it the safe way”. Buechner was recalled as a witness and testified that Grimmer on December 11 gave Southard his letter of termination at the end of the meeting, rather than at the beginning.

Southard grieved his termination on January 3, 2001 (Joint Exhibit 2), hence leading to the instant proceeding.

POSITIONS OF THE PARTIES

The Union claims that the District lacked just cause to terminate Southard because “Accidental damage to truck does not warrant termination”; because Southard’s “decision not to engage in unnecessary overtime duty [not shoveling the snow at the Sunset School] does not warrant any form of discipline”; and because his “Choice of route. . . is not a terminable offense.” In addition, the Union asserts that the City failed to follow some of the procedural requirements encompassed by the just cause standard and which are set forth in such cases as ENTERPRISE WIRE CO., 46 LA 359 (Daugherty, 1966). As a remedy, the Union requests a traditional make-whole order that includes Southard’s reinstatement and a backpay award.

The City, in turn, contends that it had just cause to terminate Southard because he was negligent on December 7 when he drove the dump truck out of the garage with its rear doors open; because he failed to help shovel the snow at the Sunset School; because he placed children in danger when he turned onto the Highway 42/57 bypass; and because his actions here were not arbitrary or capricious and thus must be sustained. The City also states that the Union has “not satisfied its burden of proving unfair treatment” since it, in fact, conducted a fair investigation; since the Union has “failed to prove discriminatory treatment”; since the Union has “failed to prove mitigating factors”; and since its discharge of Southard was “neither arbitrary nor capricious.”

DISCUSSION

In agreement with the Union, I find that Southard's December 7 dump truck accident and the subsequent December 8 snow shoveling incident are insufficient to warrant Southard's discharge. Hence, they need not be discussed any further.

This case turns entirely on Southard's flat-out refusal to follow Grimmer's November 13 letter (Joint Exhibit 12) and his turn from Lansing Street on to the Highway 42/57 bypass on December 8. The need for Grimmer's memo and its prohibition on turning onto the bypass was established via Police Chief McIntosh's testimony on pp. 5-6 above which explained why Grimmer's memo was a "wise move" and why any such turn is "inappropriate and dangerous. . ."

By turning onto the bypass on December 8, Southard therefore deliberately placed all of the children in his school bus in a dangerous situation. Moreover, he did so after Grimmer warned him in an earlier January 27, 2000, written warning (Joint Exhibit 7), that he would "be liable for termination of employment. . ." if he did not properly perform his bus driving duties in the future. That warning satisfied the District's need to follow progressive discipline under the unique facts of this case because the District did not have to wait until Southard had an accident on the Highway 42/57 bypass before it took more serious disciplinary action and because Article 24 of the contract, entitled "Discipline", does not mandate that an employee must be suspended before he/she can be terminated.

Here, by gambling with the lives of the school children on his bus, Southard on December 8 most certainly did not perform his bus driving duties properly, which is why the District had just cause to terminate him for that offense.

I therefore find without merit Southard's claim that he did what he did on December 8 because of the tanker truck incident and because he thought it was too dangerous for him to turn at the Duluth Avenue light as directed by Grimmer. For, even if the tanker truck incident did happen, Southard had no right to disobey Grimmer's November 13 directive even if, as claimed, he subsequently spoke to Cross who told him to "do it the safe way". The "safe way" here, as explained by Chief McIntosh, was only one way – i.e. to turn at the Duluth Avenue light. On re-direct examination, Southard also claimed that he was running late on December 8 and that is why he took the shortcut on Lansing Street. This excuse, too, is without merit, as the safety of the bus children was far more important than any possible lateness.

The Union also claims that Grimmer did not talk to Southard before he was terminated and that the District did not follow all of the procedural requirements encompassed by the just cause standard and as set forth in ENTERPRISE WIRE, *supra*.

Arbitrable law is clear: an accused must “have an opportunity, before a sentence is carried out, to be heard in his own defense. . . This is the process, not the result which is at issue.” See Elkouri and Elkouri, *How Arbitration Works*, (BNA, 5th Ed., 1997) p. 919, quoting MCCARTNEY’S INC., 84 LA 799, 803-04 (Nelson, 1985). See too, St. Antoine, Ed., *The Common Law of the Workplace – The View of Arbitrators*, (BNA, 1998), p. 190, which states:

. . .

6.13 Notice of Charges and Hearing.

Just cause requires that employees being disciplined or discharged are entitled to be given notice of the charges against them and a meaningful opportunity to be heard (Boldface in original.)

. . .

That same work also states:

6.14 Investigation

Most arbitrators require that an employer’s decision to discipline or discharge an employee be based on a meaningful, more-than-perfunctory factual investigation. (Boldface in original). Id., at 192.

. . .

The District therefore should have fully investigated and should have fully spoken to all of the individuals involved in all three incidents, including Southard, before he was terminated. That does not appear to have happened for the vehicle accident and the snow shoveling incident. As related above, however, it is unnecessary to address these two incidents since they were insufficient to warrant Southard’s discharge.

Moreover, I credit Grimmer and Buechner’s testimony that Grimmer gave Southard the December 11 letter of termination only after Southard was given the opportunity to speak. In addition, it is undisputed that Southard, in fact, turned onto the Highway 42/57 bypass. Since Grimmer earlier spoke to Buechner who personally witnessed that incident, there was little, if any, need for any further investigation at that time.

Nevertheless, Grimmer should have spoken to Southard before he wrote his December 11 letter of termination, as it is not enough for an employer to give an employee the chance to change the employer's mind, which is what we have here via Grimmer's testimony that: No, we had the meeting. We asked questions. When that was concluded, since there had not been anything brought up to change my mind, then I hand-delivered the letter."

The Union rightfully objects to such a procedure because it is often more difficult to change one's mind than it is to make it up in the first place. The District thus acts at its peril if it does not conduct a proper investigation and if it does not give an accused the chance to speak before the decision to discipline has been made.

Here, though, Southard was not prejudiced by the District's actions since his own explanations here as to why he turned from Lansing Street onto Highway 42/57 are so lacking in merit. Hence, it is clear that Grimmer would have terminated Southard even if he had spoken to Southard before he made up his mind and before he prepared his December 11 termination letter. Absent any prejudice, and absent any sensible reason for engaging in such deliberate, dangerous conduct, his discharge must be sustained. See BEATRICE/HUNT-WESSON, 89 LA 710 (1987), where arbitrator Mei Bickner sustained a suspension after she found that the grievant was not prejudiced by the employer's failure to speak to him before he could explain his position.

In light of the above, it is my

AWARD

1. That the City had just cause to terminate grievant James R. Southard.
2. That his grievance is therefore denied.

Dated at Madison, Wisconsin, this 29th day of March, 2002.

Amedeo Greco /s/

Amedeo Greco, Arbitrator

AAG/gjc
6358.doc

