BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

L.C.L. TRANSIT COMPANY, ELKHORN, WISCONSIN

and

**TEAMSTERS LOCAL UNION NO. 579,
JANESVILLE, WISCONSIN**

Case 3
No. 60870
A-5996

Appearances:

Mr. Hans Schaupp, General Manager, L.C.L. Transit Company, Inc., P.O. Box 19009, 2100 Riverside Drive, Green Bay, Wisconsin 54307-9009, appearing on behalf of the Employer.

Mr. Darrell Shelby, President, Teamsters Local Union No. 579, 2214 Center Avenue, Janesville, Wisconsin 53546, appearing on behalf of the Union.

ARBITRATION AWARD

Teamsters Local Union No. 579, hereafter Union, and L.C.L. Transit Company, Elkhorn, Wisconsin, hereafter Employer, are parties to a collective bargaining agreement that provides for the final and binding arbitration of certain disputes. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission appoint Coleen A. Burns, a member of its staff, as arbitrator to hear and decide the instant grievance. Hearing in the matter was held on May 7, 2002, in Janesville, Wisconsin. The hearing was not transcribed. The record was closed upon receipt of oral arguments on May 7, 2002.

ISSUE

The parties stipulated to the following statement of the issue:

Did the Employer have just cause to discharge Victor Bartosch?

If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 30
DISCHARGE, SUSPENSION AND VOLUNTARY QUIT

Subject to the provisions of Article 4, Section 1(b), the Employer shall not discharge or suspend any covered employee without just cause, but in respect to the discharge or suspension shall give at least one (1) written warning notice of the complaint to the affected covered employee prior to discharge or suspension, with a copy to the Local Union, except that no warning notice need be given to a covered employee prior to discharge if the cause of such discharge is dishonesty or drunkenness which may be verified by a sobriety test. Refusal to take a sobriety test shall establish a presumption of drunkenness. A prior warning is also not required if the cause of discharge is: drug intoxication as provided for in Article 26, Section 3 of this Agreement; the possession of controlled substances and/or drugs, either while on duty or on Company property; or recklessness resulting in serious accident while on duty; or failure to report any accident which the covered employee is aware of; or unprovoked physical assault on a company supervisor while on duty or on company property. Termination or suspension of an uninsurable driver shall be subject to the grievance procedure.

Further, no prior warning is required where there is a discharge for refusal of a work assignment or the unauthorized use of equipment. Any covered employee who absents himself from work for three (3) successive days without notification to the Employer shall be considered a voluntary quit. However, if requested by the covered employee or the Local Union, a hearing concerning such discharge or voluntary quit will be arranged. Discharge, suspension and warning letters must be postmarked no later than ten (10) days following the Employer's knowledge of the violation, except in those cases where a letter of investigation was issued within such ten (10) day period. A local meeting shall be required between the Employer and the affected Local Union in an effort to resolve grievances prior to docketing grievances in all cases involving discipline unless

otherwise provided herein. A phone conversation shall satisfy this provision where mutually agreed between a Local Union and the Employer.

The warning notice as herein provided shall not remain in effect for a period of more than nine (9) months from the date of said warning notice. Habitual absenteeism or tardiness shall be subject to disciplinary action up to and including discharge.

The parties recognize that where it can be proven that an employee arbitrarily and for no justifiable reason refuses to perform a reasonable work assignment after being given ample opportunity by the Employer to make a clear-minded decision to perform such assignment, may be considered as having voluntarily quit his job pursuant to Article 6, Section 1.

Discharge or suspension for any infraction or offense, whether or not it is listed above, must be by proper written notice to the covered employee and the Local Union. Any covered employee may request an investigation of his discharge or suspension. Should an investigation prove that an injustice has been done the covered employee, he shall be reinstated. The Committee, Panel, and/or arbitrator provided for by Article 8, Section 1, Steps 4, 5 and 6 shall have the authority to order full, partial or no compensation for time off. Appeal from discharge must be submitted by the covered employee in writing to the Employer within ten (10) days of the date the covered employee receives the discharge. Appeal from a suspension or warning notice must be submitted by the covered employee in writing to the Employer within ten (10) days of the date the covered employee receives the suspension or warning notice. If no decision has been rendered on the appeal within thirty (30) days, the case shall then be taken up as provided for in Article 8. Any driver discharged away from his domicile point shall be provided the fastest available transportation to his domicile at the Employer's expense.

BACKGROUND

Victor Bartosch, hereafter the Grievant, was first employed by the Employer in May of 1994. The Grievant left this employment in May of 1996 and returned to this employment in December of 1996. With the exception of a few short hauls, when the Grievant drove for the Employer he and his wife operated as a team.

In May of 2001, the Grievant and his wife were each assigned their own truck. The Employer made this reassignment in order to make more efficient use of personnel and equipment.

Recognizing that the Grievant was not happy about the reassignment, the Union Business Representative met with the Employer and asked the Employer to reassign the Grievant and his wife as a team. This meeting was held shortly after the Grievant and his wife were separated. At this meeting, the Employer indicated a willingness to do what it could to have the two run together or hook up at various terminals. The Employer did not agree to reassign the Grievant and his wife as a team. The Union and the Employer agree that the right of the Employer to make this reassignment is not before the arbitrator.

Every two to three weeks following the Grievant's separation from his wife, the Grievant contacted the Employer and requested that he and his wife be reassigned as a team. The Employer did not respond to these requests.

On August 9, 2001, the Grievant and the Employer's Driver Manager, Ron Payne, exchanged a series of "QTRACS" messages. Payne initiated the exchange by denying the Grievant the pay that the Grievant had requested. Several times during the exchange, the Grievant responded with a profanity. This profanity involved Payne's mother and included swearing at Payne individually, as well as at management collectively. Payne, who did not make any profane or abusive statements, eventually sent the following message:

> I don't need the language, I asked what the "fuel" was for on the breakdown message, you did respond, that's why it was changed, now, if you have pay coming, I'll change it back. What was the "fuel" problem? If it was just to fuel the truck then you know there's no pay

The Grievant responded with a statement in which he used the "f-word" to describe the Company's equipment; called Payne an "f-ng SOB" and told Payne to go "f" himself. When Payne responded by reminding the Grievant that his contract did not provide pay for fueling the truck, the Grievant responded that there was no "f'n" contract; called Payne a dumb SOB and told Payne to shut his "f" mouth.

Thereafter the Grievant and the Employer became involved in a dispute over whether or not the Grievant's truck was being properly maintained. The Grievant, the Union, and the Employer met to discuss the Grievant's concerns. At this meeting, the Grievant continued to maintain his position that the truck was not being maintained properly and the Employer maintained that it was.

Following a meeting on this dispute, the Grievant, who was in Savannah, contacted the Employer to request an oil change. Although the Employer understood that an oil change had just been made in Elkhorn, the Employer agreed to the Grievant's request. Understanding that the Savannah mechanic believed that the oil had not been changed in Elkhorn, the Grievant contacted Employer General Manager Hans Schaupp at Schaupp's home to discuss the matter.

Following this discussion, the Employer had the oil analyzed and concluded that the oil had been changed in Elkhorn.

On November 6, 2001, Hans Schaupp, General Manager, L.C.L. Transit Company, sent the following letter to the Grievant:

> Dear Mr. Bartosch;
>
> This letter is to serve as written notice that your conduct on the Morning of November 3, 2001 will not be tolerated. On November 3, 2001 you called my home with complaints about the service performed on LCL Transit unit #2094. During this conversation you were insubordinate.
>
> The foul language you used including numerous instances where the f word was used in describing the company, the equipment, and company personnel was unprofessional, rude, and uncalled for. This is not how LCL Transit Company's employees are to act in dealing with one another, customers, nor vendors of the company and is being taken very seriously.
>
> Therefore, any further acts of using foul language, or being insubordinate to either myself, the management staff, customers, or outside vendors will be met with more severe disciplinary actions as outlined in the Operating Agreement LCL Transit Company and the IBT local 579.
>
> . . .
>
> CC Teamsters Local 579 (Via Certified Mail # 7000 1530 0000 3241 0718)
> Rob Payne (Driver Manager)
> Personnel File

On January 10, 2002, Robert Payne, Driver Manager of L.C.L. Transit Company, sent the following letter to the Grievant:

> Dear Mr. Victor Bartosch:
>
> This letter is to serve as written confirmation of the telephone conversation we had today in which your employment with LCL Transit Company was terminated. Your termination is the result of your conduct on the afternoon of January 8, 2002 in which you verbally abused Ron Willing.

> Your behavior was rude, insubordinate and unprofessional and created a hostile work environment. Your use of the "f-word" regarding company equipment and personnel is disrespectful and uncalled for. Additionally, your threat to physically assault another employee is completely unprofessional and unacceptable. You were sent a warning letter on November 6, 2001. stating this type of behavior will not be tolerated at LCL Transit Company.
>
> As a result of your actions on January 8, 2002 and your non-compliance with the warning letter, your employment with LCL Transit Company has been terminated effective today January 10, 2002.
>
> . . .
>
> CC: Hans Schaupp
> Personnel File
> Teamsters Local 579 (Via Certified Mail # 7000 1530 0000 3240 9897)

The conduct that lead to the Grievant's discharge was observed by the Employer's Service Manager, Ron Willing; the Grievant; the Grievant's wife and another driver. Neither the Grievant's wife, nor the driver, testified at hearing. The driver, however, submitted a written statement to the Union. In this written statement, the driver relates that as he, the Grievant and the Grievant's wife were talking, Willing approached the Grievant and his wife. This driver further states that then "The thing started to get ugly." The driver's written statement does not relate any statements or conduct of the Grievant, the Grievant's wife, or Willing.

Willing recalls that, on January 8, 2002, he noticed that the Grievant's wife's truck was in the parking lot and was due for service; that he approached the Grievant and his wife in the parking lot as they were having a discussion with another driver; that he told the Grievant's wife that her tractor needed servicing and that he would like to do the servicing now; that she said that she needed the tractor to get home; that Willing said that he could send a pick-up; that she said that it would not work because she would have to get up at eleven to get her tractor and do her pick-up in Milwaukee; that the Grievant then involved himself; that the Grievant was aggressive; that the Grievant's aggression escalated as the conversation continued; that the Grievant used foul language; that the Grievant brought up that Willing had sworn at the Grievant's wife at some time in the past; and that the Grievant said that he would pack Willing's head up his ass and roll him out of there. Willing recalls that, at that point, he told the Grievant that he had had enough; that he was going to talk to Hans; and that the Grievant walked away, turned, and said "Fuck You."

The Grievant recalls the following: that at approximately 4:00 p.m. on the afternoon of January 8, 2002, the Grievant and his wife were in the yard and engaged in a conversation with another driver; that Willing approached the Grievant and his wife; that Willing discussed the need to have both of their trucks serviced and told them that he could service both trucks "now"; that the Grievant and his wife explained that "now" was not convenient because both were scheduled to deliver loads in the morning and that both were going home to sleep; that the Grievant and his wife told Willing that they would bring the trucks back the next afternoon; and that Willing insisted that the trucks be serviced that day and that the next afternoon was not acceptable. According to the Grievant, he then told Willing that he if he ever swore at his wife again that he would "put his teeth up his asshole."

On or about January 11, 2002, the Grievant filed a grievance alleging that the discharge was too severe. The Grievant requested his job back without loss of seniority or benefits and to be made whole in every way. The grievance was denied at all steps and thereafter submitted to arbitration.

POSITIONS OF THE PARTIES

Employer

On January 8, 2001, the Grievant used foul language, physically threatened Ron Willing and was insubordinate. The Employer has a right to protect its employees from threats of physical abuse.

Within the one year period preceding his discharge, the Grievant received a warning letter, which was not grieved. The Employer has followed the contractual procedures for escalating discipline.

The Grievant has admitted to both instances of misconduct. The Employer has just cause to discharge the Grievant.

Union

Prior May of 2001, the Grievant and his wife operated as a team. When the Employer separated this team, it was like a divorce.

The Grievant, who did not deal well with the separation, was particularly concerned about his wife's welfare. The Grievant's outburst resulted from the stress of this separation from his wife. The Union does not condone the Grievant's behavior, but considers discharge to be too severe a penalty.

DISCUSSION

As set forth in the discharge letter of January 10, 2002, the Employer discharged the Grievant for conduct toward Ron Willing that occurred on the afternoon of January 8, 2002. As further set forth in the discharge letter, the Employer considered the Grievant to have verbally abused Willing and to have engaged in behavior that was:

> . . . rude, insubordinate and unprofessional and created a hostile work environment. Your use of the "f-word" regarding company equipment and personnel is disrespectful and uncalled for. Additionally, your threat to physically assault another employee is completely unprofessional and unacceptable. . . .

Article 30 of the parties' labor agreement provides, in relevant part, as follows:

> . . . the Employer shall not discharge or suspend any covered employee without just cause, but in respect to the discharge or suspension shall give at least one (1) written warning notice of the complaint to the affected covered employee prior to discharge or suspension, with a copy to the Local Union, except that no warning notice need be given to a covered employee prior to discharge if the cause of such discharge is dishonesty or drunkenness which may be verified by a sobriety test. . . .

Article 30 identifies other conduct for which discharge may be made without prior warning. The Employer, however, does not claim that the Grievant engaged in such identified conduct.

The initial issue to be determined is whether or not the Grievant engaged in the conduct for which the Grievant was discharged. The only evidence of the statements made by, and the conduct of, the Grievant and Willing on January 8, 2002 is the testimony of the Grievant and Willing. Given the conflicting testimony from the Grievant and Willing, the undersigned cannot be sure if the Grievant told Willing that he "would put his teeth up his asshole," as the Grievant recalls, or if the Grievant told Willing that "he would pack his head up his ass and roll him out of there," as Willing recalls. However, regardless of which version is credited, the statements attributed to the Grievant are rude, unprofessional, and contain a threat to physically assault another employee.

The Grievant did not deny that, when Willing informed the Grievant that Willing would discuss the Grievant's conduct with Hans, that the Grievant responded "Fuck you." Thus, it must be concluded that the Grievant made such a statement. Although this statement does not contain a threat to physically assault another employee, it is rude, unprofessional, and disrespectful.

The Employer's "No-Harassment Policy" addresses "race, sex, national origin, age, disability, religion, or any other characteristics that is protected by law." Thus, notwithstanding the Employer's arguments to the contrary, the Grievant's profane and threatening behavior is not the type of behavior that is prohibited by this policy. Nonetheless, to threaten a fellow employee with a physical assault does create a hostile work environment.

Management has a legitimate need to preserve its authority. The use of objectionable conduct or abusive behavior under circumstances that is disrespectful of this management authority may be insubordinate.

Willing is the Employer's Service Manager. The Grievant used objectionable language and engaged in abusive behavior, in the presence of other employees, at a time in which Willing was exercising management's authority to schedule equipment for needed service and to place the Grievant on notice that the Grievant's behavior was not acceptable and would be reported to the Employer's General Manager. Willing's response to Willing was disrespectful of management's authority and, under the totality of the circumstances, was insubordinate.

In summary, on January 8, 2002, the Grievant was verbally abusive to Willing and threatened to physically assault Willing. As is also discussed above, the Grievant's conduct on January 8, 2002 was rude, unprofessional, insubordinate, disrespectful and created a hostile work environment. Thus, the Grievant has engaged in the conduct for which the Grievant was discharged.

The conduct for which the Grievant was discharged is the type of conduct that normally would warrant discipline. Thus, the next issue to be determined is whether the circumstances of this case require a different conclusion.

The November 6, 2001 letter from the General Manager indicates that this Employer does not condone foul language, in general, and the "f-word" in particular. While acknowledging that, in the past, he has sworn on occasion, Willing stated without contradiction that, in this workplace, it is common for foul language to be directed at equipment, but it is not common for foul language to be directed at another human being.

The Grievant and Willing agree that Willing approached the Grievant and his wife to discuss a legitimate business concern, i.e., the need to service equipment. The Grievant's testimony indicates that Willing was insistent upon servicing the equipment that afternoon. However, neither the Grievant's testimony, nor any other evidence, presents a claim that Willing used profanity, was abusive, or threatened the Grievant, or the Grievant's wife, during the conversation of January 8, 2002.

The record demonstrates that the Grievant's use of the "f-word" was provoked by Willing's statement that he would discuss the incident with "Hans." "Hans" is Hans Schaupp, the Employer's General Manager, and a supervisor of the Grievant and Willing.

Willing had a legitimate business reason to discuss the incident with "Hans." By informing the Grievant of his intent to do so, Willing did not reasonably provoke the Grievant into using the "f-word." Given the lack of reasonable provocation, as well as the evidence that such language is not condoned in the Employer's workplace, the Employer correctly concluded that the Grievant's use of the "f-word" was uncalled for.

The Grievant and Willing agree that the Grievant's threatening comment was made after the Grievant had discussed the Grievant's belief that, some months previously, Willing had sworn at his wife. Given this juxtaposition, the undersigned credits the Grievant's testimony that the threatening remark was a conditional threat. In other words, the Grievant was threatening to take certain action if Willing again swore at the Grievant's wife.

The Grievant's wife did not testify at hearing and Willing did not confirm that he swore at the Grievant's wife. Thus, for the purposes of this record, it is not possible to conclude what, if anything, may have transpired between the Grievant's wife and Willing. Assuming arguendo, that the Grievant correctly understood that some months previously Willing swore at the Grievant's wife for smoking, such conduct by Willing, even if unprovoked and contrary to Employer policy, would not reasonably provoke the Grievant's threat of physical assault. As the Employer concluded in the discharge letter of January 10, 2002, the Grievant's threat to physically assault Willing is unacceptable.

As discussed above, the Employer does not claim that the Grievant's conduct on January 8, 2002 involved conduct for which no prior warning is required. Rather, the Employer argues that it has complied with the contractual requirements of progressive discipline by providing the Grievant with a prior written warning notice of November 6, 2001.

As the Employer argues, the Grievant received a warning letter on November 6, 2001. The Union does not argue, and the record does not demonstrate, that this warning letter is not valid.

The warning letter of November 6, 2001 rebuked the Grievant for using the "f-word" and notified the Grievant that the Employer considered the Grievant's use of the "f-word" to describe the company, equipment and personnel to be unprofessional, rude and uncalled for. The Grievant was also placed on notice that further acts of using foul language, or being insubordinate to the General Manager, management staff, customers, or outside vendors, were unacceptable and would be met with more severe disciplinary actions.

In summary, the record demonstrates that the Grievant engaged in the conduct for which the Grievant was discharged. The record further demonstrates that this conduct is the type of conduct for which the Employer has just cause to discipline. The Union argues, however, that discharge is too severe a discipline.

The Grievant claims that, prior to the time that he and his wife were separated and assigned their own trucks, the Grievant did not have any significant disciplinary problems. The record does not demonstrate otherwise.

The Grievant acknowledges that the Employer's decision to separate the Grievant from his wife created stress. According to the Grievant, this stress increased the longer the two were separated and was exacerbated by the events of September 11, 2001 and reports that drivers went missing in Florida. The Grievant's testimony that his "stress" increased the longer the Grievant was separated from his wife is consistent with the evidence of escalating abusive and threatening behavior towards managers and supervisors.

Recognizing that he needed assistance in dealing with this stress, the Grievant sought medical and psychological treatment. It is not evident, however, that prior to hearing, the Grievant provided the Employer with any documentation that the Grievant was receiving such medical and psychological treatment, or that the Grievant's outburst on January 8, 2002 was due to depression, or any other medical or psychological condition.

The medical "documentation" submitted by the Grievant at hearing, i.e., a handwritten note from Anne Pyle, MSW, CICSW, indicates that the Grievant was initially evaluated on January 7, 2002 for stress, anxiety and depression related to stress in the workplace. This "documentation" falls short of providing a medical diagnosis, or a professional opinion, that the Grievant, in fact, suffers from depression, or any other medical condition that would account for the Grievant's behavior on January 8, 2002. Nor does this "documentation" demonstrate that the Grievant is now able to manage his stress in a manner that would allow the Grievant to resume his work for the Employer without engaging in abusive and threatening behavior towards the Employer's supervisors and managers.

Conclusion

On November 6, 2001, the Grievant received a written warning for using foul language, including the "f-word" and for being insubordinate. Approximately two months later, on January 8, 2002, the Grievant used foul language, including the "f-word," and was insubordinate. Additionally, the Grievant, without any reasonable provocation, made a threat to physically assault the Company's Service Manager.

Given the nature of the Grievant's conduct on January 8, 2002; the fact that the prior written warning was not sufficient to dissuade the Grievant from using the "f-word" and being insubordinate; the absence of any documentation from a medical doctor or mental health professional that the Grievant is now able to handle the "workplace stress" that he claims precipitated his conduct on January 8, 2002; and the evidence that the source of this "workplace stress", i.e., the Grievant's separation from his wife, is not likely to change, it would not be reasonable to conclude that the imposition of a discipline less severe than discharge would be sufficient to correct the Grievant's escalating conduct of abusive behavior towards the Employer's supervisors and managers and insubordination. Notwithstanding the Union's argument to the contrary, the Employer has just cause to discharge the Grievant.

Based upon the above, and the record as a whole, the undersigned issues the following

AWARD

1. The Employer has just cause to discharge Victor Bartosch.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 16th day of August, 2002.

Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

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