BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LAIDLAW TRANSIT, INC.

and

KENOSHA SCHOOL BUS DRIVERS AND MONITORS INDEPENDENT UNION

Case 8
No. 64231
A-6147

(J.G. Grievance) [1]

Appearances:

Jacob M. Sitman, Obermayer, Rebmann, Maxwell & Hippel, LLP, One Penn Center, 19th Floor, 1617 J.F.K. Boulevard, Philadelphia, PA 19103-1895, appearing on behalf of Laidlaw Transit, Inc.

Robert K. Weber, Weber & Cafferty, S.C., 704 Park Avenue, Racine, Wisconsin 53403, appearing on behalf of Kenosha School Bus Drivers and Monitors Independent Union.

ARBITRATION AWARD

According to the terms of the 2001-04 Collective Bargaining Agreement between Laidlaw, Inc. (the Company) and Kenosha School Bus Drivers and Monitors Independent Union (Union), the parties requested that the Wisconsin Employment Relations Commission designate an impartial arbitrator to hear and resolve a dispute between them regarding the interpretation and application of certain provisions of the Agreement as they pertain to the discharge of J. G. (the Grievant) that took effect on September 13, 2004.

The Commission designated the undersigned, Commission Chair Judith Neumann, to hear and resolve the dispute. A hearing in the matter took place on Thursday, February 24, 2005, at the Best Western Executive Inn in Kenosha, Wisconsin, and was transcribed by court reporter Sheila K. Fairchild. The parties filed written briefs on or before April 11, 2005, at which time the proceedings were closed.

[1] To protect the Grievant's privacy, she will be referred to throughout this award as "the Grievant" or by her initials, "J.G."

ISSUE

At the outset of the hearing, the parties stipulated to the following issue: Was the grievant discharged for just cause and, if not, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

* * *

24. PREVENTABLE ACCIDENS AND INCIDENTS

Decisions with respect to actions taken against drivers on account of preventable accident violations are controlled exclusively by the following provisions:

A. A driver may be either suspended or terminated for just cause for the first preventable accident, depending on the circumstances, including the seriousness of the accident.

B. Two preventable accidents within a two (2) year period, or one preventable accident, and two preventable incidents, may be just cause for driver termination, depending on the circumstances, including the seriousness of the accident and preventability of the accident.

C. Incidents are defined as follows:

Property damage to all vehicles and/or property that are involved in an accident totals less than $1000.00

D. Under certain circumstances, incidents will also subject a driver to disciplinary action. Differentiating between accidents and incidents, however, is for the purpose of encouraging drivers to report minor damage to vehicles before it develops into a safety hazard.

1. Three (3) preventable incidents in one (1) year period may be cause for termination, depending on the circumstances and seriousness.

2. A flagrant incident may be cause for termination. A flagrant incident is defined as an act demonstrating the driver's disregard for equipment, passengers and/or Company policies.

E. After every incident and/or accident, the Company must give the employee involved a written statement of the disposition of the incident or accident, including the Company's determination of whether the accident or incident was preventable or non-preventable. The written statement shall include a space for the employee's signature and date, which will be an indication of notice.

F. Accidents or incidents that occur and are not reported by the driver may result in discipline, including termination for serious violations.

* * *

26. SAFETY BONUS

A. Drivers

There will be two (2) bonus periods each year. Bonus period A will commence with the first day of school and conclude with Friday following the December safety meeting. Bonus period B will commence on January 1st and conclude on the last day of school. In order to receive any of the five (5) safety bonus payments explained below, a driver must drive on the last day of school at the end of each bonus period.

(i) Safety bonus No. 1 (attendance) will be paid to eligible employees at the end of the bonus period A. An eligible employee will receive 1 ¼ % of the gross amount of the base wages he/she earned during bonus period A. To be eligible for safety bonus No. 1, an employee must have attended all three safety meetings during bonus period A.

(ii) Safety bonus No. 2 (safe driving) will be paid to eligible employees at the end of the bonus period A. Each eligible employee will receive 1 ¼ % of the gross amount of the base wages he/she earned during bonus period A. To be eligible for safety bonus No.2, an employee must have

driven during bonus period A accident-free and have no more than one (1) preventable incident and the employee must have attended all three (3) safety meetings during bonus period A.

(iii) Safety bonus No. 3 (attendance) will be paid to eligible employees at the end of the bonus period B. An eligible employee will receive 1 ¼% of the gross amount of the base wages he/she earned during bonus period B. To be eligible for safety bonus No. 3, an employee must have attended all three (3) safety meetings during bonus period B.

(iv) Safety bonus No. 4 (safe driving) will be paid to eligible employees at the end of the bonus period B. Each eligible employee will receive 1 ¼% of the gross amount of the base wages he/she earned during bonus period B. To be eligible for safety bonus No.4, an employee must have driven during bonus period B accident-free and have no more than one (1) preventable incident and the employee must have attended all three (3) safety meetings during bonus period B.

(v) Safety bonus No. 5 (attendance and safe driving) will be paid to eligible employees at the end of the bonus period B. Each eligible employee will receive 2% of the gross amount of the base wages he/she earned during bonus period A and B. To be eligible for safety bonus No.5, an employee must have driven accident-free and have no more than one (1) preventable incident during both bonus period A and B, and have attended all six (6) safety meetings during bonus periods A and B.

* * *

FACTS

The following facts represent my findings of fact, based upon all of the testimony at hearing and documents introduced into evidence. They are largely undisputed.

J.G. was employed by Laidlaw Transit, Inc. as a school bus driver for the Kenosha Public Schools from December 1, 1998 until September 13, 2004, when she was terminated. During these nearly six years of employment, she had no prior discipline and had been

involved in no traffic accidents or safety-related incidents of any kind.[2] She regularly received the safety bonuses available pursuant to Article 26 of the collective bargaining agreement. She had also been fully trained in company safety policies and procedures, including the Smith System, comprising the five keys to defensive driving, i.e., aim high in the steering, get the big picture, keep your eyes moving, leave yourself an out, and make sure that other motorists are aware of your intentions.

On September 13, 2004, the Company terminated J.G., stating:

> After concluding the accident investigation, it was determined that the accident was caused by the drivers failure to keep her eyes on traffic in front of her. The driver did not apply the brakes until the moment of impact, rear ending a car stopped in lane in front of her, causing severe damage. The toddlers in the back seat of the car suffered minor injuries and the car was a total loss. ... This accident was caused by a total failure to operate the bus safely as documented in the training materials and therefore is cause for termination as stated in the CBA under Section 24 A on page 7. The termination is effective 9/13/04.

(Jt. Ex. 6).

The circumstances of the incident underlying J.G.'s termination are as follows. At approximately 3:15 p.m. on September 8, 2004, a clear sunny day, J.G. was driving Vehicle No. 544, which was not her normally assigned bus. No. 544 was a 32 foot long ten-ton flat nose bus configured to transport special needs students. J.G. had driven No. 544 only once before, a few weeks earlier, when she had been assigned to drive the vehicle back to Kenosha from a repair lot in Milwaukee.[3] At the time of the incident, four special needs students were on board, two in wheelchairs. All were securely fastened and supervised on the bus by an adult monitor, Barbara Wise, who had been assigned to J.G.'s vehicle on many previous occasions and also had experience accompanying many other drivers.

---

[2] The Company advanced some limited testimony suggesting that the Grievant had once been disciplined for a late arrival, but offered no documents to support that assertion, which the grievant denied. The disciplinary notice precipitating the instant case states that it was the Grievant's "first warning." To the extent there is a factual dispute and the record is unclear, the ambiguity is resolved against the Company, which bears the burden of producing evidence in a just cause case.

[3] On that occasion, the vehicle had broken down en route to Kenosha as the brakes started on fire. The company had repaired the vehicle before returning it to service and assigning it to J. G. on September 8. Based on this occurrence and, as related in the facts, above, the fact that the vehicle's brakes adhered to the floor at the time of the September accident, the Union suggested that the brakes may not have been functioning properly at the time of the accident, which may have contributed to the accident. The Company's investigation, including a mechanic's visual inspection at the scene and further investigation at the shop, did not reveal any malfunctioning of the brakes. The obvious skid marks at the accident scene are also inconsistent with a brake failure. Accordingly, I do not find that the condition of the brakes contributed to the accident.

J. G. had just turned east onto 52nd Street from 39th Avenue en route to her first drop off at the end of the school day and was traveling at about 25 miles per hour. She observed a new model Nissan Sentra in the lane ahead of her but did not observe a turn signal or brake lights. About one block later, as J.G. passed the intersection with 38th Avenue, she noticed a minor accident to her right in the westbound lane of 52nd Street toward which she diverted her attention for one or two seconds, concerned that someone might enter her lane from the accident scene. She had released her accelerator when she noticed the westbound accident but had not touched the brakes. When she again looked to the front she observed that the Nissan had stopped perhaps one car length in front of her, mid-block, waiting to take a left turn into a driveway leading to the offices of the Kenosha Unified School District. Another entrance to the District offices was at the end of the block, at the intersection with 37th Street. J.G. immediately slammed on her brakes, which adhered to the floor of the bus, but was unable to stop before hitting the Nissan and pushing it forward about 30 feet. Two toddlers in car seats in the back seat of the Nissan experienced minor injuries, but neither the driver of the Nissan nor anyone on J.G.'s bus was injured. The Nissan suffered approximately $13,000 in body damage, sufficient to be deemed a total loss by the insurance company. The damage to the bus was approximately $4500 and took company mechanics about 36 hours to repair. J.G. was cited at the scene for a three-point violation of following too closely, which eventually was reduced to a two-point safety zone violation. Shortly after the accident, J. G. acknowledged to Company officials that it could have been prevented if she had kept her eyes on the traffic in front of her.

The Company investigated the accident at the scene, measured the skid marks, took several photographs, obtained statements from J.G. and its investigators, and had a mechanic evaluate the condition of the brakes. At the conclusion of its investigation, the Company terminated J.G. The Union immediately grieved the termination, which was processed in a timely fashion through all steps of the grievance procedure, denied by the Company at all preliminary steps, and submitted to arbitration on December 1, 2004.

The Company's policies provide as follows:

> Traffic accidents are serious no matter how large or small. Any employee accumulating three preventable accidents with a company vehicle in a 24-month calendar period will be TERMINATED. **A Preventable Accident is one in which the driver failed to do everything reasonable to avoid the accident.** …
>
> Generally speaking, the severity of an accident will determine the action that will be taken by the company. It is possible for a driver to have one serious preventable accident and be dismissed for it. A driver who has had a preventable accident, which does not result in dismissal from employment, will be required to participate in post-accident retraining. Content of the retraining

will be determined by the Branch Manager or DDS Supervisor. It will include a minimum of two hours of instruction with compensation and must be completed before driving duties can be resumed.

The following policy pertaining to preventable accidents with a company vehicle will serve as the basis for disciplinary action regarding accidents in a 24-month period:

FIRST PEVENTABLE:
-- Written warning and driver evaluation and retraining; and/or
-- suspension 1-5 days (optional) and retraining; or
-- termination (optional)

SECOND PREVENTABLE:
-- Written reprimand and driver evaluation and retraining; and/or
-- suspension 2-15 days and retraining; or
-- termination (optional)

THIRD PREVENTABLE:
-- Termination

(Jt. Ex. 2 at Section II – Page 3) (emphasis in original).

The Company employs 120 drivers in its Kenosha branch and operates 114 vehicles on 104 routes. The Company experiences approximately eight to 10 accidents per year, seldom involving the amount of property damage that occurred here. The Company's normal practice is to terminate a driver for three preventable accidents within 24 months. The record contains no evidence that the Company has previously terminated an employee for a first preventable accident of any kind.

In January 2000, a driver was involved in a preventable rear-end collision involving substantial damages and was not terminated. On an unspecified date, another driver was involved in a preventable rear-end collision as part of a chain reaction accident involving several vehicles, resulting in less damage than J.G.'s accident, for which the driver was not terminated.[4] In October 2003, the Company imposed a three-day suspension plus retraining

[4] The Company offered testimony but no documentary evidence that the damages in the January 2000 incident may have been in the $3200 range and in the multiple vehicle incident approximately $919. However, although the Company was aware that the Union viewed these incidents as comparable to the Grievant's incident, the Company did not provide the underlying documents to the Union upon request, nor did the Company offer those documents into evidence in this matter. Accordingly, as those documents would comprise the best evidence and presumably would be in the Company's possession, and as the Company has the burden of production, I decline to find as a fact that the damages involved in those two incidents were substantially less than those involved in J.G.'s accident.

upon a driver for a first preventable accident in which the driver, while making a right turn, clipped a parked pickup truck damaging the truck's bumper and rear side panel. In the same month the Company imposed a three-day suspension plus retraining for a first preventable accident, in which the driver making a lane change side swiped a vehicle traveling in the adjacent lane. In April 2004, a driver broke off a mailbox while pulling up to a school because she had been watching the children on the sidewalk instead of her mirror; she was given a verbal warning for this first preventable accident. In May 2004, a driver struck the overhang on a building and damaged the front header panel of his bus, his first preventable for which he was given a three-day suspension and retraining. Also that month another driver had a second preventable in which he struck a parked car while attempting to turn, for which he was suspended for five days plus retraining. In August 2004 a driver was terminated for his third preventable accident, this time for turning too wide and striking a traffic sign. Also in August 2004, a driver struck a mailbox while backing into a driveway to turn around, his first preventable for which he received a three day suspension and retraining. On September 17, 2004, a driver failed to yield the right of way, striking a moving vehicle, her first preventable accident for which the Company imposed a five day suspension and retraining. In several of these accidents, the Company's driver was cited for traffic violations.

DISCUSSION

The only issue in this case is whether the Company had just cause to terminate the Grievant for the September 8 accident, in light of all the circumstances, including the seriousness of the accident and the Grievant's nearly six prior years of unblemished employment and excellent driving record.

The Company offers a concept of just cause that focuses almost exclusively on procedural fairness, i.e., notice of the rules, proper investigation, and evenhandedness. Co. Br. at 7). The Company also contends that, assuming misconduct has occurred, it is the Company's prerogative to determine the appropriate penalty, "absent an abuse of discretion." (Co. Br. at 11). While the undersigned acknowledges this line of arbitral thinking, the better weight of authority would permit the arbitrator to review both the employer's substantive conclusions about the degree of misconduct and the reasonableness of the Company's penalty. SEE GENERALLY, ELKOURI AND ELKOURI, HOW ARBITRATION WORKS (6TH ED. 2003) at 958-962.[5]

In this case, the Union does not claim any procedural defects in the Company's investigation or prior notice, but rather rests its challenge upon the substantive aspects of the

[5] I also note that Article 13.E of the collective bargaining agreement, a portion of the grievance procedure, states, "If the arbitrator rules in favor of the grieving Union member of members, he/she will determine the appropriate remedy." While the parties have not discussed this provision in connection with the instant case, and hence I am reluctant to rely upon it, it does suggest that the parties may have agreed that the arbitrator may reduce the level of discipline as a remedy for a discharge that has been found to lack just cause.

just cause standard: did the alleged misconduct occur and if it did was the discipline imposed commensurate with the degree of misconduct, in light of all the circumstances including the Grievant's previous employment record?

Substantively, the Company's contention is that J.G.'s accident was both preventable and so serious in terms of actual and potential damages (including some "minor" personal injuries) as to fall within the Company's expressly reserved prerogative to terminate at once, without progressive discipline, even though it was her first preventable accident. The Company rightly claims that a strict focus on safety and excellent driving practices is crucial to the Company's business, i.e., the safe transportation of public school children including special needs children. The Union, on the other hand, argues that the seriousness of the incident is a function of the degree of negligence, not just the degree of damages. The Union argues that termination of a long-term employee for a first accident cannot be justified absent "gross negligence." According to the Union, relying upon various statutes and published arbitration awards, "gross negligence" includes an element of willfulness or wantonness that is wholly absent here.

There is little question that the Grievant's September 8 accident was both preventable and very serious in terms of actual and potential damages. The Company's point is well taken that it cannot take chances regarding the safety of the school children it transports. J.G. averted her attention briefly but too long from the front of the vehicle and this inattention, however momentary, was preventable and caused the accident. While the Union argues that J.G. reasonably was distracted by the "fender bender" in the opposite direction, J.G. herself tacitly acknowledged that she should not have averted her eyes as long as she did. On the other hand, while the degree of property damage was both extensive and unusual, the Union aptly notes that the level of damage was primarily a function of the Nissan's recent vintage and the way it was made (the impact being absorbed by the rear end rather than the body). The bus also suffered considerable damage and took the Company's mechanics three days to repair. More meaningful than the property damage, of course, are the personal injuries that could have occurred from a collision of that nature, albeit only minor injuries actually did occur. Accordingly, the Company clearly had just cause to impose discipline upon J. G. for this accident.

Since discipline was warranted, the question is whether termination was the appropriate degree of discipline under all the circumstances. The Company's standard practice of discharging a driver who experiences three preventable accidents in 24 months recognizes that even a driver with good training in defensive driving practices can experience a lapse in judgment or focus and cause or contribute to an accident. On the other hand, the practice also sensibly reflects that three such occurrences in a 24-month period signify a propensity for negligence that cannot be tolerated in a school bus driver. Being "accident prone," even if unwittingly so and if few damages result, is a strong indication that a driver cannot be trusted to continue in the Company's employ. The policy also serves to deter other drivers from unsafe driving practices, since they can observe that the Company has a strictly limited toleration for accidents.

As far as this record reflects, the Company has not discharged a driver for a first preventable accident, even in situations marked by driver culpability (though perhaps not damages, see footnote 2, above) similar to J.G.'s in this case. Nonetheless, the contract permits (but does not require) termination for a first preventable accident, "depending on the circumstances, including the seriousness of the accident." It is this exception that requires interpretation in the present situation. The Company's position depends largely upon its view that "seriousness" of an accident can sometimes be the sole ground for discharge, and that "seriousness" can depend almost exclusively upon the amount of actual/potential damages or injuries. I find both propositions too rigid to comport with a just cause standard.

First, the syntax of the contractual language itself indicates that seriousness is but one of the circumstances to consider in determining whether a first preventable accident warrants termination. Seriousness, however it is defined, is to be weighed against other circumstances, including a driver's previous employment record and mitigating conditions surrounding the accident.

Second, as this case shows, even a relatively minor lapse in judgment or focus by a generally trustworthy driver can result in major damages. While extent of damages may correlate highly with degree of negligence, the correlation is not so strong that the amount of damages is a proxy for driver culpability. Hence, the extent of damages standing alone is a somewhat arbitrary basis for determining that an accident is serious enough to justify discharge.

Instead the just cause standard requires that "seriousness" be conceived as a function of several factors, including extent of damages, extent of injuries, degree of driver culpability, and the driver's employment record. In this case, nothing about J.G.'s accident, except the amount of actual damages, suggests that she is a driver the Company can no longer trust with its vehicles or passengers. She was not speeding, she would not have been following too closely but for the Nissan having stopped to make a lawful mid-block left turn, her attention was momentarily distracted by an incident in an adjoining stretch of road that could have distracted another reasonably attentive driver, and she was not under the influence of alcohol or other substances. Since neither she nor monitor Barbara Wise recall seeing the Nissan signaling a left turn (although Ms. Wise may not have been watching the road at the time), it is possible that the Nissan failed to operate its signal in a timely fashion. These factors do not relieve J.G. of responsibility for causing the accident. As the Company notes, she neglected to follow the Company's five-point defensive driving program in several ways. But these factors do militate against a conclusion from this single preventable accident that J.G. could no longer be trusted with the Company's equipment and passengers. Such a conclusion might nonetheless be appropriate for a driver of brief employment with the Company. But when these the circumstances are viewed in light of J.G.'s compelling employment record, comprising nearly six years of unblemished driving for the Company and a safety consciousness reflected in her regular receipt of the contractual safety bonuses, the accident does not meet the level of seriousness that justifies her immediate termination.

Accordingly, I conclude that, while the Company had just cause to discipline J.G. for the September 8 accident, the Company did not have just cause to terminate her employment. The accident did carry a level of seriousness that would warrant a relatively substantial suspension. Hence, I conclude that the appropriate penalty is a thirty calendar day suspension without pay, plus retraining at the Company's discretion.

AWARD

The grievance is upheld. The discharge shall be reduced to a thirty calendar day suspension without pay. The Company shall reinstate the Grievant with back pay, minus the wages attributable to thirty calendar days (during the work year), shall otherwise make the Grievant whole for lost pay, benefits, and seniority. The Company may impose retraining requirements upon the Grievance that are appropriate in its judgment and are consistent with its normal practices.

I will retain jurisdiction for sixty days to resolve any remedial issues the parties may encounter in implementing this award.

Dated at Madison, Wisconsin, this 22nd day of June, 2005.

Judith Neumann /s/
Judith Neumann, Arbitrator

rb
6844