BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SCHOOL DISTRICT OF WAUSAUKEE

and

WAUSAUKEE SCHOOL DISTRICT EMPLOYEES, LOCAL 1752-D, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES, AFSCME, AFL-CIO

Case 57
No. 67161
MA-13781

(Ellen Lesniak Discharge)

Appearances:

Dennis O'Brien, Staff Representative, 5590 Lassig Road, Rhinelander, Wisconsin, appeared on behalf of the Union.

James A. Morrison, Attorney at Law, 2042 Maple Avenue, Marinette, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Wausaukee School District Employees, Local 1752-D, Wisconsin Council of County and Municipal Employees, AFSCME, herein referred to as the "Union," and School District of Wausaukee, herein referred to as the "Employer," agreed to have a member of the staff of the Wisconsin Employment Relations Commission ("WERC") serve as the impartial arbitrator to hear and decide the dispute specified below. The WERC assigned Stanley H. Michelstetter II, a member of its staff to act as the Arbitrator. I held a hearing on November 8, 2007, in Wausaukee, Wisconsin. Each party filed a post-hearing brief, the last of which was December 26, 2007.

ISSUES

The parties stipulated to the statement of the issues as follows:

1. Did the Employer discharge Ms. Lesniak for just cause?

2. If not, what is the appropriate remedy?

FACTS [1]

The Employer is a small Wisconsin school district. It operates a single K-12 school where the incidents in dispute happened. The Union is a labor organization which represents a bargaining unit of clerical, maintenance, bus drivers and other non-professional employees of the Employer. Ellen Lesniak was a school bus driver in the bargaining unit represented by the Union. She had been a school bus driver for at least seventeen years. She was discharged effective about April 24, 2007. She had no disciplinary history which relates to this matter, but her record is not without blemish. There have been repeated questions about the safety of her driving. Daniel Biernasz is the transportation supervisor for the Employer and is the immediate supervisor of all the bus drivers. There are no other supervisors of bus drivers and Mr. Biernasz reports directly to the District Administrator, who is the chief executive officer of the Employer. Mr. Robert Werley was the acting District Administrator at the time of the discharge.

The incidents primarily leading to the discharge occurred in April, 2007. As of that time, the normal assigned operation of the buses was to leave the bus facility and drive to the school in the order they park at the school. When they arrive at the school, they routinely park in the same order so that students will be able to board buses expeditiously and without error. Each bus pulls about two inches from the bus in front of it as they park in order at the curb. On some occasions, drivers have misjudged the distance and slightly touched the bus in front of them. This has not been a cause for concern.

Cheryl Whitton is another driver in the unit. She and Ms. Lesniak have not had a normal work-place relationship. Each interprets the others actions as hostile. For at least many months prior to the incidents leading to discharge, the two have been engaging in work-place harassment of the other. It is not clear the extent to which Ms. Witton participated in this, nor is it clear who is the antagonist. Mr. Biernasz never intervened to attempt to rectify their work-place relationship.

An incident occurred on about April 2, 2007, which preceded the discharge incidents. Ms. Witton normally was assigned to follow Ms. Lesniak's bus in the procession to school. Ms. Whitton complained to Mr. Biernasz that Ms. Lesniak was deliberately driving slowly on the way over to school to interfere with Ms. Whitton's performance. Mr. Biernasz investigated this. He drove Ms. Whitton's bus one day and observed Ms. Lesniak drive inordinately slowly until she realized he was driving Ms. Witton's bus. It, therefore, was his best judgment that Ms. Whitton's claim had significant merit. Mr. Biernasz switched the order of the two buses. On about April 2, 2007, he directed Ms. Lesniak to follow Ms. Whitton in the procession to from the bus yard to the front door student pick up area.

[1] More facts stated in the discussion.

Ms. Lesniak angrily complained to Mr. Whitton the next day, April 3, 2007, that she felt he was "punishing" her by switching the buses. Mr. Biernasz believed that Ms. Lesniak was angry and out of control. Ms. Lesniak acknowledged that she was quite angry. Mr. Biernasz obtained permission to suspend Ms. Lesniak. His notes showed that he acknowledged that he did not know how to deal with her and that he was concerned that she was too emotionally out of control to drive a school bus. Mr. Biernasz then told Ms. Lesniak, in essence, that she would have three days off with pay so that she could get her emotions in check. Ms. Lesniak was not otherwise disciplined for this incident. Ms. Lesniak took vacation for a period of time and it appears that she returned about April 18. The change of processional order became effective upon her return.

Ms. Whitton was the primary witness to the incidents in question. The incidents occurred on approximately Wednesday, April 18, Thursday, April 19, Friday April 20, 2007, and the following Monday. Ms. Whitton testified that on April 18, 19, and 23, 2007, Ms. Lesniak used her bus in a manner calculated to threaten Ms. Whitton. Specifically, on each of these occasions, as the buses finished boarding students, they left in the usual order. Ms. Whitton followed the normal exiting procedure which involves a procession of the buses around the perimeter of the parking lot. She left the pick-up zone and followed the buses in front of her as they circled the outside edge of the parking lot to their designated exiting driveways. She stated that Ms. Lesniak cut across the parking lot through the area where cars are normally parked but was then empty of parked cars and headed her bus toward the side of Ms. Whitton's bus at a high rate of speed and then "slammed on" her brakes stopping just short of hitting the side of Ms. Whitton's bus. (These incidents are referred to as "t-boning" for ease of reference.) Ms. Whitton testified that students on her bus reacted to this with fear. It should be noted that it is not improper for drivers to cut across the parking lot when there are no cars parked, but it is somewhat unusual because the purpose of leaving in order is to facilitate the orderly leaving of the buses. The other incident Ms. Whitton reported occurred on Friday, April 20, 2007. This occurred as the buses arrived and lined up at the pick-up area. Ms. Whitton testified that she stopped her bus about two inches from the bus in front of her (the normal practice) and set her parking brake. Ms. Lesniak, as she was now assigned to do, pulled her bus in behind Ms. Whitton's. She did not stop, but ran the front of her bus into the back of Ms. Whitton's bus with sufficient force to cause Ms. Whitton's bus with the brake set to run into the back of the bus in front her bus. There was minor damage to the bus in front of Ms. Whitton, damage to the mirrors and arm that protrude in front of Ms. Whitton's bus and similar damage to the rear of her bus and the front of Ms. Lesniak's bus. Ms. Whitton interpreted all four acts as intentional expressions of Ms. Lesniak's anger and hostility.

Ms. Whitton complained about the incidents in late April to Mr. Biernasz on or about the following Wednesday, April 24. Mr. Biernasz also received a call from a student who had been on Ms. Whitton's bus on one of the days she allegedly stopped short of hitting Ms. Whitton's bus. Mr. Biernasz talked to some other students who had been on Ms. Whitton's bus during one of the stop-short incidents and concluded that they had reacted with fear.

Mr. Biernasz obtained some independent corroboration that Ms. Lesniak's bus had struck Ms. Whitton's bus hard enough to cause it to strike the bus in front of her. He believed Ms. Whitton's statement that she had set her parking brake and he concluded that, taken with the other conduct, that the striking had been intentional. He also believed Ms. Whitton's statements about the three instances in which Ms. Lesniak allegedly intentionally drove her bus toward the side of Ms. Whitton's bus in a deliberately aggressive manner. Neither he nor anyone on behalf of the Employer ever questioned Ms. Lesniak as to what had occurred on those days in the last two weeks of April.

Mr. Biernasz then reported the matter to Acting District Administrartor Werley. He determined that discharge was appropriate. It is unclear whether Mr. Werley knew that Ms. Lesniak was undergoing a divorce at the time. He determined to recommend her discharge to the School Board. Mr. Biernasz suspended Ms. Lesniak on or about April 24, 2007, pending discharge. He wrote a letter to her to that date stating that he was recommending her discharge. He gave the following reason:

> The reasons for this discharge are reflected in your disciplinary file. For example, recently you displayed a dangerous lack of self-control in a number of situations including several occasions when you have purposely driven your bus in a highly dangerous manner.
>
> You have been progressively disciplined with no effect. You have insisted that your conduct is acceptable and that you are fit to continue to operate your school bus and to relate to employees, students, and others in this continuing dangerous and bizarre fashion.
>
> . . .
>
> You have a right to a detailed specification of all of the reasons for this recommendation. You have a right to a hearing with the school board and/or a conference with the superintendent and me before any final disciplinary action is taken. You have the right to union representation . . . .

Ms. Lesniak and/or the Union requested a meeting with Mr. Werley with respect to the "proposed termination." The meeting was held May 15, 2007. Those present included the Staff Representative Dennis O'Brien, Board Attorney James Morrison, Mr. Werley, Ms. Lesniak, Mr. Biernasz, and Union President Lee Kline. The issue of the dismissal was already on the agenda for the School Board that evening. Mr. O'Brien correctly surmised at the outset of the meeting that Mr. Werley had made the decision to recommend the discharge of Ms. Lesniak to the School Board. He declined to have further discussion.

Mr. Werley prepared a document dated May 15, outlining his recommendation to the School Board that she be discharged and stated the following as the reasons:

At this closed session I am recommending the termination of Ellen Lesniak for the following reasons:

1. Hostile and unnecessary comments to fellow bus drivers.
2. Purposely heading for the side of another bus at an unusual speed scaring students.
3. Keeping her bus to run personal business.
4. Hit other buses in parked position hard enough to push it into the bus ahead.
5. In two years she hit 3 buses, and broke four mirrors.
6. Other drivers report being afraid of her.
7. Personal use of district cell phone for lengthy periods while driving.
8. Out of control behavior – throwing papers at her supervisor.
9. Frequent parent complaints, documented in file.
10. Teacher complaints.
11. A letter from 2004 documenting parent complaints and three more accidents.
12. In 1998 she ran in the ditch with students.

Mrs. Lesniak has demonstrated personal behavior and driving behavior that puts the children of our school district in danger. As such, she should be dismissed.

The Union received that notice. The School Board met that evening. Neither the Union, nor Ms. Lesniak requested to be present at that closed session meeting. A number of records of incidents which allegedly occurred, including parent complaints, but which were not the subject to discipline were added to Ms. Lesniak's personnel file. Some were added before this meeting and some were added after the May 15 School Board meeting.

The Union filed a grievance over the discharge. The grievance was properly processed to arbitration.

RELEVANT AGREEMENT PROVISIONS

ARTICLE 19 – EVALUATION

In the event that the District evaluates employees, each employee (s) shall receive a cop of said written evaluation. The employee will sign said evaluation acknowledging receipt. This signature does not mean that the employee agrees with the contents. Employees may attach a written statement to such evaluations, to e included in their personnel file.

. . .

ARTICLE 22 – DISCIPLINE

No non-probationary employee shall be reprimanded, suspended, discharged, except for just cause. Any employee who is disciplined, except probationary, shall be given a written notice of the reasons for the action, and a copy of the notice shall be made a part of the employee's personal history records, and a copy shall be sent to the Union. Any employee who has been discharged may appeal by giving written notice to his/her supervisor within fourteen (14) working days after dismissal. Such appeal shall go directly to arbitration.

Section 1. The normal progression of disciplinary action will be:

A. Verbal warning(s)
B. Written reprimand(s) (similar offense)
C. Suspension(s)

a. Three (3) day suspension
b. Up to ten (10) days suspension

D. Dismissal

Any disciplinary action taken by the District shall be reduced to writing, stating the reason for the disciplinary action. The employee and the Union shall be given copies, and a copy shall be placed in the employee's personnel file.

The Employer may deviate from this discipline order when extenuating circumstances, in the Employer's discretion, warrants same.

Section 2. An employee, if he/she so requests, may have a Union representative present during any conference regarding disciplinary action. The District will advise the employee of his/her right to have a Union representative present during any conference regarding disciplinary action.

POSITIONS OF THE PARTIES

Employer

The Employer takes the position that it had just cause to discharge the Grievant based upon a series of incidents occurring in April, 2007. While her file has numerous prior incidents, the Employer acknowledges it did not discipline her for those incidents at the time of occurrence. The Employer, therefore, does not rely upon them.

The Union's argument that Ms. Lesniak was not given an opportunity to answer the charges, is not correct. First, she was given a detailed letter which set forth the Employer's concerns and referred to her employment file and, more importantly, offered to have her meet with Mr. Biernasz and the superintendent before Mr. Biernasz made any effective recommendation. The Union chose to attend the meeting, but declined to participate because the superintendent answered the Union's question that he thought the conference would not change the effect of Mr. Biernaz's recommendation. The Union had notice of the school board meeting considering the discharge, but chose not to attend. The Union will argue that it serves no purpose to have hearings when it will not change anyone's mind. That is a huge assumption on the part of the Union.

The Union claims that Mr. Biernasz had a vendetta against Ms. Lesniak. However, in a prior grievance, he wrote a letter supporting her. The Union never availed itself of the opportunity to raise this issue to management.

It is uncontradicted that Ms. Lesniak ran into another school bus Mr. Biernask saw the damage and concluded it was more serious than the ordinary. The other driver said she was on the bus which was parked with the brake set. The Union president agreed that it must have been a very hard hit if the other bus was parked and had the brake set.

Ms. Lesniak effectively denies intentionally and aggressively having driven in a "T-bone" right up to and nearly striking Ms. Whitton's bus while both were loaded with students. She asserts she did so without aggressive intent once and did not come near enough the other bus to excite students' fears. She offered a witness who apparently saw the same event. However, this does not answer the three witnesses who testified to the three times Ms. Lesniak, at least two of which the Union cannot explain or contradict. Any one of these instances is totally unacceptable and warrants discharge for the first offense.

Union

The Employer did not have just cause to discharge Ms. Lesniak. The evidence does not support the conclusion that she engaged in the conduct for which she was discharged. The Union concedes that an intentional attempt to threaten to crash a bus into another bus is totally unacceptable behavior. However, this did not occur. The Employer's case rests essentially on the testimony of another driver, Ms. Witton, who admitted harbored ill feelings toward Ms. Lesniak. The Employer's profoundly inadequate investigation failed to reveal that Ms. Lesniak did not commit the act for which she was charged. The Employer violated her due process rights by not giving her a chance to tell her side of the story and the Employer failed to do a fair evaluation of the evidence against Ms. Lesniak. Instead, it accepted the accusations on their face.

Ms. Witton is not credible. There is no dispute that there was on-going strife between Ms. Witton and Ms. Lesniak. This placed Supervisor Biernasz in a difficult position. There was a dispute between Ms. Witton and Ms. Lesniak as to which place each would have in the

regular order of buses. Ms. Witton first left the garage out of the ordinary prescribed order and later went to Mr. Biernasz to secure a place in the established order of buses in front of that of Ms. Lesnak. When Mr. Biernasz changed the order, Ms. Lesniak had an angry confrontation with him which led to hard feelings on Mr. Biernasz's part. This led to a changed attitude on Mr. Biernasz's part: he, thereafter, characterized all of Ms. Lesniak's actions as "erratic."

The Employer called two witnesses to substantiate its charges with respect to the events in April, 2007, Mrs. Biernasz and Ms. Witton. However Ms. Biernasz did not actually witness the situation in which Ms. Lesniak was accused of running her bus into Ms. Witton's bus while it was parked for student loading. Thus, that allegation rests solely upon the testimony of Ms. Witton. She only witnessed the bus touching Ms. Witton's bus.

The "t-bone" incidents also rely upon the testimony of Ms. Witton. Ms. Zak testified to seeing only one of them. The Union notes that if students were that upset that they cried out, the Employer should have produced them as witnesses. The Employer's failure to do so substantially diminishes the charges. The Union notes that it was not uncommon for buses to shortcut across the parking lot during the exit maneuvers if no parked cars were present. Union witness Patti Brunette, another driver, testified that Ms. Lesniak came within a few feet, not a few inches, in the Friday situation. A few feet would not have been out of the ordinary. Ms. Witton's testimony is not credible because it is unlikely she could have seen the alleged incident in that it would have occurred more than 30 feet behind her. Ms. Burnette was in a position behind the incident and better able to see what occurred.

The evidence indicates that the argument which Ms. Lesniak had with Mr. Biernasz prejudiced his handling of this matter. Ms. Lesniak was viewed by Mr. Biernasz as a "very good employee" a year prior to the incidents in question. Despite this positive view of her, Mr. Biernasz handled this incident by accepting Ms. Witton's story without substantial corroboration. He also "packed her personnel file" with references to past incidents for which Ms. Lesniak was never discipline or even told of the incident. This directly violated Article 19. The Union believes that the Employer's actions throughout the whole matter are indicative of a truly deficient process that denied Ms. Lesniak and the Union an opportunity to defend her against these charges. The Union also notes that Ms. Lesniak was charged with running her bus into another bus on March 20. That matter was dismissed because Ms. Lesniak's time cards showed she was not at work at the time of that incident.

DISCUSSION

Just Cause Standards

Under Article 22, the Employer has agreed to discharge employees only for "just cause." The principle of "just cause" has been interpreted by parties to collective bargaining agreements, arbitrators and the courts to embody a well-established body of case law. At its core, it has come to embody the concept of industrial fairness in the employer-employee

relationship. The concept includes two basic elements, a level of procedural fairness and substantive fairness.[2] The due process procedural considerations, as stated by the National Academy of Arbitrators are:

> The just cause principle entitles employees to due process, equal protection, and individualized consideration of specific mitigating and aggravating factors. [3]
>
> Just cause requires that an employee being disciplined or discharged be given notice of the charges against him or her and a meaningful opportunity to be heard.[4]
>
> Most arbitrators require that an employer's decision to discipline or discharge an employee be based on a meaningful, more-than-perfunctory factual investigation.[5]

The essence of the procedural requirements is a responsibility of an employer to use a reasoned approach to employee discipline and to rehabilitate and support employees in complying with the employer's needs, interests, rules and procedures.

These concepts are implicitly and expressly recognized in Article 22. Article 22, assumes that the Employer will make a reasoned decision to discipline based upon an investigation of both the specific facts and of all of the potential mitigating factors. This is the assumption underlying the provision requiring the Employer to give a notice of the "reasons" for its actions. It is also assumed in the just cause provision. By requiring a notice of the reasons for a decision to discipline and an opportunity to be heard in discharge cases, Article 22 also requires that the employee be a given a meaningful opportunity to be heard. A meaningful opportunity to be heard is a core principle of the just cause doctrine. While Article 22 does not specifically require the Employer to give an employee an opportunity to provide factual information before the decision to discipline is made, it may only be possible for the employee to have a meaningful opportunity to be heard in some cases if the employee is given a prompt opportunity during any investigation of alleged misconduct to respond to the allegations and to have the Union conduct its own investigation. The opportunity to present his or her side of the story may be the only way the Employer may be able to investigate whether or not there are mitigating circumstances in a disciplinary situation. The meaningful opportunity to be heard may carry with it other implicit obligations to allow the Union to promptly understand the real reasons for the Employer's actions and to investigate both facts and mitigating circumstances.

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[2] NAA, *The Common Law of The Workplace*, (BNA, 2d. Ed.), Sec.'s 6.2, 6.7, 6.12-20. Some of these concepts are incorporated into statutes dealing with the discipline of public employees. See, for example, Sections 118.23 and 62.13, Stats.
[3] Section 6.2
[4] Section 6.13
[5] Section 6.14

The Employer has also agreed in Article 22 to attempt to rehabilitate recalcitrant employees by the use of progressive discipline. It agreed that it will deviate from progressive discipline only when "extenuating circumstances" exist. The assumption underlying the progressive discipline provision is that the Employer will also investigate the possibility of circumstances militating against skipping to a higher level of discipline and make a reasoned decision as to whether "extenuating" circumstances exist to warrant the discipline. This did not occur.

Major Procedural Violations and "Extenuating Circumstances"

As noted the "just cause" principle as incorporated into Article 22 includes an obligation on the part of the Employer to conduct a fair and impartial investigation and, additionally, to make a reasoned judgment both as to the decision to impose discipline and as to the level of discipline imposed, based upon all of the relevant factors.[6] This did not occur in this case. Specifically, when Mr. Biernasz learned of the allegations, he never asked Ms. Lesniak about them. Further, Mr. Biernasz was painfully aware that Ms. Lesniak was undergoing a divorce at this time. He testified that her behavior had become more erratic at this time. She was also involved in a personal feud with Ms. Witton and exhibited behavior which might have warranted professional evaluation. Mr. Biernasz was well aware from prior incidents that Ms. Lesniak does not take responsibility for her actions. Her testimony indicates that she may have been in psychological "denial" in this incident. Under the specific facts of this case, the failure to question her did violate the due process considerations of the just cause provisions. His choice to not do so had the effect, intended or not, of concealing the fact that he failed to intervene in the on-going interpersonal dispute from the Board. Under the circumstances of this case, the failure to make a reasonably prompt inquiry of her did violate Article 22.

Secondly, the Employer's representatives obfuscated the real reason for its decision to seek Ms. Lesniak's dismissal by "packing" her file with incidents which were never the subject of discipline, treating this situation as if it were the "last straw" in a bad employment record rather than a single, very serious incident, and by providing a notice of discipline which did not comply with Article 22's requirement to list the "reasons for the action."[7] The "packing" appears to be a practice of the Employer, but in this specific circumstance it had the effect of re-characterizing the nature of the situation and continuing to obfuscate the fact that Mr. Biernasz had contributed to this situation by not forcefully intervening. The failure to provide an adequate notice of the real reasons for its actions and the "packing" of Ms. Lesniak's file violated Article 22.[8]

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[6] See, ENTERPRISE WIRE CO., 46 LA 359 (Daugherty, 1966); compare, Dunsford, "Arbitral Discretion: The Tests of Just Cause,: 42 NAA 23 (1990)

[7] The notice, instead, listed many irrelevant incidents and vaguely referred to the real reason for discharge

[8] Mr. Biernasz's notice dated April 24, 2007, offered to give Ms. Lesniak a "detailed specification of all of the reasons for this recommendation." There is no evidence she or the Union sought that specification. It is the Employer's policy to send a notice to an employee when it places items of complaint in an employee's personnel file. At the time of the April 24 notice, the Employer had been repeatedly sending Ms. Lesniak notices of irrelevant and misleading material being placed in her file. This had the foreseeable effect of misleading Ms. Lesniak away

Third, the procedure followed by the Employer had two interrelated effects. First, it effectively denied the Union to have a meaningful opportunity to respond to the charges. Second, the Employer's actions demonstrate that it could not have made a considered judgment as to whether this situation was an "extenuating circumstance" warranting discharge without resort to progressive discipline. The Union is correct that the specific decision to discharge Ms. Lesniak was effectively made by the Employer prior to the "meeting" with the Acting Superintendent. He admitted that he would rely upon Mr. Biernasz's judgment. He scheduled the matter for a discharge hearing before the Board before the scheduled meeting with the Union. He also allowed Ms. Lesniak's file to be "packed" with non-disciplinary incidents. As noted above, the Union was never notified of the real reasons for the proposed discharge and never had an adequate opportunity to investigate the facts. Neither the Board nor the Acting Superintendent could possibly have made a reasoned decision to as to the existence of "extenuating circumstances." First, the issue presented to the deciders was one of a culmination of negligent performance rather than a single incident[9] of aggressive conduct. Second, they could not have learned about Mr. Biernasz's failure to intervene in Ms. Lesniak's earlier behavior because Mr. Biernasz was not forthcoming about that situation and the Employer had precluded the Union from having a meaningful opportunity to present it with relevant information.[10] Similarly, it did not consider Ms. Lesniak's record of service without significant discipline because her personnel file was "packed." It also could not have considered her divorce, metal state, or the possibility of other extenuating circumstances. Accordingly, the Employer violated Article 22 by not giving the Union a meaningful opportunity to respond to the charges and the Employer did not make a decision as to whether there were "extenuating circumstances" which warranted immediate dismissal without progressive discipline.

Cause for Discipline

There are four disputed incidents leading to the discharge. The prelude to those incidents was the fact that Mr. Biernasz switched Ms. Lesniak's order in the school bus procession from the garage to the school. Mr. Biernasz made this change because he concluded that Ms. Lesniak had been deliberately driving slowly in the regular procession of buses to school in order to intimidate or harass Ms. Witton in the following bus. He rearranged the two buses in the regular procession so that Ms. Lesniak followed Ms. Witton, rather than leading her. Ms. Lesniak acknowledged that this upset her and she had a loud argument with Mr. Biernasz because she felt that he was "punishing" her by making this change. The rearrangement commenced Wednesday, April 18, 2006.

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from the fact that this discharge was based on the series of events in late April. Under other circumstances, the failure to request a specification might affect the due process considerations discussed herein. However, the fact that the Employer misled her as the real reason for her discharge excuses the failure of the Union to request a specification of the charges.

[9] The word "incident" collectively refers to the incidents of late April.

[10] Mr. Biernasz did attempt to get Ms. Lesniak to recognize that her emotions were interfering with her work in the three day suspension after her heated outburst with him. This is discussed with regard to the remedy.

Ms. Witton testified to the events which occurred. Ms. Lesniak returned from vacation shortly before the discharge incidents. On that Wednesday, the first day of changed processional order, Ms. Lesniak had the first of three 't-bone" incidents. The second occurred the following day. The next day, Ms. Lesniak drove her bus into the back of Ms. Witton's bus as she was parked with sufficient force to cause it to move forward several inches and strike the bus in front of it. Ms. Leniak again "t-boned" Ms. Witton's bus the following Monday.

There is sufficient evidence in this record to conclude that Ms. Lesniak did strike the rear of Ms. Witton's bus. There is substantial evidence in the record that Ms. Witton's bus was pushed forward. While this type of incident occurs occasionally because employees are required to park their buses within inches of the rear of the preceding bus for student safety reasons, the evidence supports the conclusion that the amount of damage and movement was so much out of the ordinary that this incident cannot be treated as a one of those ordinary incidents.[11]

In order to prove that this incident was part of a course of conduct designed to intimidate or harass Ms. Witton, the Employer must demonstrate evidence by at least a preponderance of the evidence that Ms. Lesniak engaged in an intentional aggressive act by running her bus into the back of Ms. Witton's. The evidence is insufficient to conclude that this was anything other than an unintentional act. The Employer assumed that this was part of a chain of intentional acts because it occurred about the time of the change of processional order and in conjunction with the "t-bone" incidents. It also concluded that the amount of damage made this an intentional act because Ms. Lesniak also had to know that she had struck the bus in front of her. Ms. Witton testified that she concluded it was intentional because Ms. Lesniak did not apologize for the incident, look at the damage, or otherwise acknowledge that it had occurred. Ms. Witton testified that Ms. Lesniak just went into the school. Mr. Biernasz never asked Ms. Lesniak about this incident. Ms. Lesniak was undergoing a divorce at this time and I am satisfied that she was very self-preoccupied during this period. Ms. Lesniak had substantial difficulty dealing with her emotions as a witness during the arbitration hearing and was exceedingly self-concerned during her testimony. Under the circumstances, the evidence is insufficient to establish that this was anything other than an accident. It is just as likely that Ms. Lesniak was just highly pre-occupied when she drove into the back of Ms. Witton's bus and oblivious to the fact of how hard she struck the other bus. Ms. Lesnaik and Ms. Witton were not on good terms. It is understandable that she might not apologize or engage Ms. Witton over the incident, if she ever did realize what had occurred. Thus, I conclude that this incident was negligent, but unintentional.

It is necessary to articulate my understanding what this employer rightly expects of those it entrusts with the operation of its school buses. The Employer and parents expect that

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[11] Ms. Witton testified that she set her parking brake when she was parked before Ms. Lesniak's bus arrived. This is consistent with normal practice. However, it is also possible that Ms. Witton failed to set her brake or did so imperfectly. No one examined her brake. It would be self-serving for her to testify that she had set her brake correctly. This might also explain the damage. I have assumed for the purpose of decision that the brake was properly set because it does not affect the result.

any person entrusted with the operation of the school bus will hold the safety of students as paramount. Each driver is expected to take every precaution to protect the safety of students entrusted to their care. Parents and the district expect that drivers put their concerns aside while entrusted with the student' care and, in extreme circumstances, may reasonably expect that drivers may put their own safety aside to insure the safety of students. School buses, themselves, are large vehicles capable of inflicting substantial damage on other vehicles. The Employer has liability for accidents caused by its drivers. Because school bus drivers are professional drivers, it is their responsibility to operate their assigned buses as safely and professionally as possible. They expect that professional drivers will also exercise care for the safety of other drivers, even those other drivers who are operating erratically on the road. It stands to reason that professional school bus drivers will not engage in inattentive actions which are tolerated from drivers of ordinary vehicles, such as the use of cell phones while driving. It also goes without mentioning that horseplay or other use of a vehicle which people might engage in with their personal vehicle is simply outside the realm of professional driving. The Union has conceded the obvious, that the "t-bone" incidents, if proven, were incidents which ordinarily warrant serious discipline.

I find that Ms. Witton's testimony concerning the "t-bone" incidents is credible. Ms. Zack's testimony corroborates the essence of Ms. Witton's testimony. Ms. Witton's testimony that students reacted with surprise and fear during those incidents is sufficiently corroborated by Mr. Biernasz's investigation. I do not find Ms. Patty Brunette's testimony concerning the "t-bone" incident as affecting my conclusion. While she was honest in her testimony, she was unable to identify with positive assurance that what she saw was in the week of the incidents. The "t-bone" incidents are sufficiently close to normal deviations in the parking lot, that it is entirely possible that what she saw was merely a normal deviation. She testified that the incident she observed was not significantly remarkable. I don't believe she would have remembered the incident if it did not seem unusual to her. She was first asked about the incident well after it occurred. Her recollection could easily be influenced by other factors.

Ms. Lesniak said she "t-boned" only one time. Ms. Lesniak's explanation of the "t-bone" incidents was that she believed she was being taunted by Ms. Witton in the way Ms. Witton went around. Ms. Lesniak drove at Ms. Witton's bus only to take the shortcut and not at a high rate of speed. She pulled close, but not unreasonably so, in order that other buses could pass behind her. She said that she could see the children in Ms. Witton's bus and none of them reacted. This testimony is false. Her testimony about looking into Ms. Witton's bus is clearly overstated. Her statement that this occurred once is contradicted by her other testimony. Ms. Lesniak's testimony demonstrates that she has difficulty taking responsibility for her actions. Mr. Biernasz's testimony is believable that he has seen Ms. Lesniak use her bus aggressively to attempt to block Ms. Witton. It is obvious from Ms. Lesniak's testimony that she perceives Ms. Witton's actions to be aggressive. It is also obvious that Ms. Lesniak's perceptions are often mistaken. In any event, she acknowledges maintaining a hostile attitude toward Ms. Witton. Ms. Lesniak admitted that she was angry with Mr. Biernasz for having

"punished" her by putting Ms. Witton first in the order of procession of the buses and that she blamed Ms. Witton for precipitating this.

Accordingly, I conclude that on the three occasions, Ms. Lesniak drove her bus which was loaded with students toward the midsection of Ms. Witton's bus, then loaded with students, at a high rate of speed. She then applied her brakes forcefully on each occasion to just stop short of striking the midsection of the bus. I also conclude that she did so willfully to intimidate or scare Ms. Witton in order to vent her anger toward Ms. Witton. These actions were repeated and, therefore, are unmistakably intentional. Further, the fact that they were repeated after an interval in which Ms. Lesniak should have reflected on her actions, demonstrates that they were a wanton disregard of the safety of students and of appropriate workplace relationships.

Appropriate Discipline and Appropriate Remedy

The Union has sought to vacate the discharge penalty because the Employer committed the due process violations discussed above and failed to make an appropriate decision as to whether extenuating circumstances warranting immediate dismissal exist. It also argues that mitigating factors listed above warrant reduction of the penalty. The Employer has sought to have the discharges sustained solely upon the conduct. It is not necessary to expound on those theories. Under the circumstances of this case, discharge is the only appropriate remedy.

The Union has outlined rather persvasive due process violations which ordinarily would result in a reduction of the penalty.[12] However, the history of this case and the testimony of Ms. Lesniak convinces me that under the circumstances of this case there is no practical way to order her reinstatement. First, both parties agree that the conduct which I conclude Ms. Lesniak engaged in warrants severe discipline, usually discharge, under most circumstances. It is unclear why Ms. Lesniak chose to let her temper get the best of her, but her own testimony shows that the circumstances which contributed heavily to creating this situation still exist. Ms. Lesniak still blames Ms. Witton for Ms. Lesniak's problems. She still is not taking responsibility for her actions. She is under great emotional stress and her judgment is clouded. She cannot be trusted at this point to not repeat similar conduct. Accordingly, it is not appropriate to unconditionally reinstate her.

Reinstatement with conditions precedent is not appropriate either.[13] The evidence is insufficient to show that there are any pre-conditions which would positively insure safety. Ms. Lesnaik would, at a minimum, have to first accept responsibility for her own conduct. That is something that is unlikely to occur. The driving position requires that Ms. Lesniak operate her bus for long periods without direct supervision. The Employer is a small employer and is undergoing significant turmoil in its management levels. When Mr. Biernasz did intervene and correctly suspended her from driving, neither he nor management were able to

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[12] See, *Common Law*, *supra.*, Sec. 6.19

[13] For example, psychological evaluation, anger management and safety retraining might be appropriate conditions. Last chance type restrictions might be appropriate conditions subsequent.

take steps which might have structured her return. The Employer lacks the supervisory depth and ability to monitor her progress as to the conditions precedent and to insure that she does not regress to a dangerous position. The conduct in this case is a repeated, wanton disregard of safety. There is no indication in this record that Ms. Lesniak is ever likely to be in full control of her temper. Finally, the conduct in this case is highly provocative, if not threatening. The tenor of the testimony demonstrates that Ms. Lesniak has been a disruptive force among her fellow employees. Mr. Biernasz rightly exhibited some fear in working with her. The testimony of her fellow employees demonstrates that that they are afraid of her. It would be very difficult in this small bargaining unit to re-establish appropriate relationships. Employees have to trust each other. For example, the formation maneuvers required here require a high level of trust. Accordingly, reinstatement, even with conditions precedent, is inappropriate. Therefore, the discharge must be sustained.

It is appropriate, however, to order that the Employer comply in the future with the procedures of Article 22, most particularly, by insuring that the Union be given a meaningful opportunity to respond to discipline. Although this was not phrased as a separate issue in this dispute, the compliance with disciplinary procedures is customarily a sub-issue of any just cause discharge.

AWARD

1. That the Employer has just cause for the termination of Ms. Lesniak and the discharge is hereby sustained.

2. The Employer shall cease and desist from violating Article 22 of the parties' agreement.

Dated at Madison, Wisconsin, this 26th of February, 2008.

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Arbitrator

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