

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SCHOOL DISTRICT OF BLACK RIVER FALLS

and

BLACK RIVER FALLS EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

Case 23
No. 69369
MA-14584

Appearances:

Priscilla Ruth MacDougall, Staff Attorney, Wisconsin Education Association Council, 33 Nob Hill Road, Madison, Wisconsin 53708, appeared on behalf of the Association.

Shana R. Lewis, Lathrop & Clark, LLP, Attorneys at Law, 740 Regent Street, Madison, Wisconsin, 53701, appeared on behalf of the Employer.

ARBITRATION AWARD

Black River Falls Educational Support Personnel Association, herein referred to as the "Association," and School District of Black River Falls, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Black River Falls, Wisconsin, on March 17-19, 2010. The parties each filed a post-hearing brief and reply brief, the last of which was received August 4, 2010.

ISSUES

The parties did not agree to the statement of the issues, but agreed that I might state them. I state them as follows:

1. Did the Employer have just cause to discharge the grievant, Martha Kidrick?
2. If not, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS

ARTICLE I - PREAMBLE AND RECOGNITION

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B. RECOGNITION

The Board recognizes the Association as the exclusive bargaining representative pursuant to Sec. 111.70, Wis. Stats., for all regular full-time and regular part-time food service, aides, custodial/maintenance, secretarial personnel and bus driver employees of the School District of Black River Falls, but excluding substitute employees for included positions, limited term employees, temporary employees, students, mail delivery employees, summer cleaning employees, transportation dispatcher, professional, supervisory, managerial and confidential employees, and all other employees as certified by the Wisconsin Employment Relations Commission (Case 8 No. 44469 ME-3041 Dec. No. 26856-A).

ARTICLE II - MANAGEMENT RIGHTS

A. GENERAL

The Board on its own behalf and on behalf of the electors of the District hereby retains and reserves to itself all power, rights, authority, duties and responsibilities conferred upon and vested in it by the laws and constitutions of the State of Wisconsin and the United States.

B. BOARD RIGHTS

Without limiting the generality of the foregoing, the Board's rights shall include:

1. The management and operation of the District and the direction and arrangement of all the working forces and equipment in the system.

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4. The determination of the management, supervisory or administrative organization of each school or facility in the system and the selection of employees for promotion to supervisory, management or administrative positions.

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7. The right to establish and enforce reasonable rules, regulations, and policies.

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ARTICLE V - GRIEVANCE PROCEDURES

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C. PROCEDURES

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Step Four. If the grievance is unresolved at Step 3, the Association may within five (5) days file a request in writing for arbitration of the grievance. The request shall be made to the Wisconsin Employment Relations Commission and shall ask the Commission to submit a list of five (5) arbitrators from the Commission staff to each party to the grievance. Each party shall alternately strike two (2) names from the list submitted by the Commission, the Association having the first strike. The name remaining shall be the arbitrator. The parties shall share equally the cost and expenses of the arbitration proceeding, including any transcript fees and fees of the arbitrator. Each party shall bear its own costs for witnesses and all other expenses including possible legal fees. The function of the arbitrator shall be to determine whether or not the rights of any employee have been violated by the Board contrary to an express provision of this Agreement and award the appropriate remedy in conformance with this Agreement. The arbitrator's decision shall be in writing and shall set forth his/her findings of fact, reasoning and conclusions of the issues submitted. The arbitrator shall not entertain any issues not raised in writing in Step 1, 2, or 3 of the grievance procedure, or have any power to add to, subtract from, alter, change, or modify any of the provisions of this Agreement. The arbitrator shall have no authority to issue an arbitration award arising out of facts occurring before the effective date of or after the termination of this Agreement. The decision of the arbitrator within the scope of his/her authority shall be final and binding upon the Board, the Union and the employees except as forbidden by law.

ARTICLE VI - WORKING CONDITIONS

A. PROBATION

1. All employees shall serve a probationary period of one hundred twenty (120) individual working days following the date of the commencement of employment and upon reemployment following termination of seniority rights. In individual cases, the administration may, by mutual agreement with the Association, extend the probation period an additional sixty (60) days beyond the original probationary period. . . . During this period, an employee may be disciplined or discharged without rights of appeal under this Agreement or to the WERC alleging violation of this Agreement in any manner on the part of such employee or on his/her behalf.

2. Following the probation period, employees may be suspended without pay or discharged for just cause. Any employee being suspended without pay or discharged shall receive notice of the disciplinary action and the reasons therefore.

. . .

APPLICABLE WISCONSIN ADMINISTRATIVE CODE PROVISIONS

Trans. 300.16 Driver Requirements.

- (1) Prior to the start of any trip, the driver shall check the condition of the bus, giving particular attention to brakes, tires, lights, emergency equipment, mirrors, windows, and interior cleanliness of the bus. Defects shall be reported in writing to the person in charge of bus maintenance. The driver shall be responsible for the cleanliness of the interior of the bus and shall insure that the windshield and mirrors are clear before each school bus operation and that the strobe light is actuated whenever the bus is in operation on a highway

. . .

- (11) A driver shall not leave the bus unattended with the engine running or the key in the ignition when pupils are in the bus or in the immediate area of the bus.

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- (16) Drivers shall check the entire interior of the school bus following each trip to assure that all passengers are off the bus.

...

**WISCONSIN COMMERCIAL DRIVER'S MANUAL, VOLUME 2, HAZ MAT,
SCHOOL BUS (MAY, 2008)**

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Section 10.10 Pre-Trip and Post-Trip Inspection for School Bus

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POST-TRIP INSPECTION

When your route or school activity trip is finished, you should conduct a post-trip inspection of the bus by walking through and around the bus looking for

- Articles left on the bus
- Sleeping students
- Open windows and doors
- Mechanical/operational problems with the bus with special attention to items that are unique in school busses – mirror systems, flashing warning lamps and stop signal arms
- Damage and vandalism

Any problems or special situations should be reported immediately to your supervisor or school authorities.

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**TRANSPORTATION DEPARTMENT HANDBOOK
SCHOOL DISTRICT OF BLACK RIVER FALLS**

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Pre-trip & Post-trip

It is the driver's responsibility to pre-trip their bus before each trip and complete the pre-trip log (see log in Appendix A) before leaving the Transportation Department or their house. Each driver is given fifteen minutes to pre-trip and it should be used to check the engine, interior, and exterior of your bus. Drivers who keep their buses at home are expected to do a full pre-

trip under the same guidelines as a driver who keeps their bus at the Transportation Department.

It is also the driver's responsibility to complete a thorough post-trip of their bus after each route and each driver is also given fifteen minutes for this purpose. Post-tripping your bus includes checking for sleeping children and any articles that they may have left on your bus as well as cleaning and fueling your bus. **Leaving a child on the bus after it is parked may result in dismissal.**

Drivers who keep their buses at home are expected to do a full post-trip under the same guidelines as a driver who keeps their bus at the Transportation Department.

Pre-tripping and post-tripping your bus are two of the most important duties in the bus driver's job description and neither one is more important than the other one. By conducting a thorough pre-trip and post-trip of your bus, you know that your students are safe while riding your bus and that they have safely departed your bus which means that you can get a good night's sleep.

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FACTS

The Employer is a Wisconsin public school district. The Employer operates its own school bus system. It owns its own school busses and directly employs drivers. The Association represents various non-professional support employees of the district including non-supervisory school bus drivers.

At all times material to this dispute, the Employer's Transportation Department was organized as follows. It was headed by a Transportation Director, who reported to the Employer's Director of Business Services, Jill Collins, who, in turn, reported to the Superintendent of Schools. Jeff Walker was the Transportation Director in the 2008-2009, school year. He resigned and was succeeded by Tom Tupper, who started work July 1, 2009, shortly before the incident which is the subject of this dispute. Tupper spent much of his time winding up his former job between the time he started and the time of this incident. Thus, he was still largely unfamiliar with many specific aspects of this school bus operation. The Transportation Department was staffed with one regularly assigned dispatcher and various full-time, part-time, and substitute school bus drivers. At the time of the incident in question, the regular dispatcher had resigned and other employees were temporarily acting as the dispatcher.

Mr. Walker hired Grievant Martha Kidrick effective September 2, 2008. This was the first time she had driven a commercial vehicle. She was a member of the bargaining unit represented by the Union at all relevant times thereafter. She had a number of minor vehicle accidents which prompted Mr. Walker to extend her probationary period by another sixty days.

Mr. Walker retrained her with respect to some of her driving skills during the extended probation after which she performed well. Her probationary period ended on or about June 5, 2009, near the end of the 2008-09, school year. She received a good performance review at that time and was viewed as an above average new employee as of that date.

Busses are stored and serviced at a bus terminal facility located less than a mile from the Forrest Street School where the incident in dispute primarily happened. Some drivers store busses at their home instead of at the bus terminal because it is easier to start their routes from their home. The Employer operates what is known as a “single route” bus system. By that it is meant that only one driver is assigned to one bus for the entire run and successive runs. The Employer has up to three runs per day per bus. The first is a morning route picking up children for school. The second is called the “noon” run which picks up and delivers kindergarten students. The third run is the run which takes students home after school. The Employer also makes special runs for school activities such as sporting events, etc. Employees do not “hand off” busses from one employee to another. “Handing off” is when employees take over an active bus from another driver. All employees pick up their busses at the terminal at the start of their routes, except those who are permitted to keep a school bus at their home. The Employer has not established procedures for employees to “hand off” busses from one employee to another.

Bus drivers have several essential duties. First, it is their responsibility to drive safely. Second, they are to monitor students on their bus and otherwise ensure student safety in connection with their transport. Third, they are responsible to ensure that their vehicles are safe to drive. Drivers are all required to maintain a commercial driver’s license (herein “CDL”). Part of the CDL instruction process includes instruction on performing pre-trip and post-trip inspections, both of which are required by law.¹ Part of the post-trip inspection, but by no means the only thing, is a “walk-through” inspection. A “walk-through” inspection is when the driver physically walks from the front of the bus to the rear door inspecting for, among other things, sleeping students. The risks associated with leaving a student on an unattended, parked bus for a substantial period are very serious. The situation in dispute involves the failure to perform this critical function which resulted in a young student being left unattended on a parked bus.

Mr. Walker required that all drivers perform a walk-through when they parked their bus at the end of each run at the terminal or home as part of their post-trip inspection.² He did not preclude walk-throughs at other times, but he never trained any employee to do so. It appears that employees were also required to do a walk-through anytime they left their bus unattended.³ Some buses have mechanical interlocks which set off a signal if their ignitions

¹ The relevant portions including the pre-trip and post-trip inspection are set out above in the relevant portions of Wis. Admin. Code Sec. Trans 300.16, and the Wisconsin Commercial Driver’s Manual and will not be repeated here.

² References to the transcript of proceedings will be marked “tr. p.*.” See, for example, Walker, tr. pp. 129, 162, 166, and 169. Danielson, tr. p. 395-8.

³ Griffin, tr. p. 322, Danielson tr. p. 398, Tupper tr. 227

are turned off without opening the rear safety door within a certain number of seconds. The “small bus” which is the subject of this dispute was not equipped with that device.

As discussed more below, Mr. Tupper announced a change in the policy of doing walk-throughs on August 26, 2009, by which drivers were thereafter required to do a walk-through their bus at their last stop before heading to the bus terminal. He also announced that he had “zero tolerance” for children left on a bus.

The situation leading to Mrs. Kidrick’s discharge occurred on September 21, 2009. Arlen Danielson and his wife, Karen Danielson, are bus drivers in the bargaining unit. Arlen Danielson has over thirteen years experience as a bus driver for the Employer. Karen Danielson also has ten years of experience as a bus driver with the Employer. Karen Danielson was regularly assigned to a noon route which involved students in a rural area. It included transporting students to and from a two day care providers. The area was the equivalent of two different subdivisions. At the last minute on September 21, 2009, Karen Danielson called Mr. Tupper to say she could not take her assigned run because she needed to schedule a doctor’s appointment at that time. Mrs. Kidrick was then in the office and Mr. Tupper asked her if she would take the run. Mrs. Kidrick was unfamiliar with the route in dispute, but agreed to take it. The bus involved was bus number one which is a small school bus with five seats on each side. It was normally kept at the Danielson residence a short distance away from the bus terminal. Mrs. Danielson also used the bus after the noon run for a later student run. After Mr. Tupper arranged for Mrs. Kidrick to handle the noon route, Mr. Danielson brought the bus to the bus terminal.

When a bus driver substitutes for another, he or she is to be given a list of the stops on the route and a computer-generated route map. The bus should be equipped with a map or one should be provided. The substitute dispatcher on September 21, 2009, was not able to generate the computer-generated route map for Mrs. Kidrick. She was only able to give Mrs. Kidrick the list of stops. The vehicle did not have a map on board and none was provided to Mrs. Kidrick.

The route normally involved picking up about four students. Some students are transported to or from the intermediate day-care stops. All of the Employer’s busses are equipped with rear-facing video security cameras which operate at all times that the vehicle’s ignition switch is activated and for about twenty minutes after they are turned off. The events in dispute were video taped by the system aboard the bus which is the subject of this dispute. Mrs. Kidrick had severe difficulty finding the streets and stops listed. This was true because the list was wrong and because one of the streets had been renamed without correction in the Employer’s records. One student’s address was incorrectly listed by the parent. This resulted in Ms. Kidrick running about twenty minutes late on her route. In the course of operating this route, she picked up two students who were to be transported to Forrest Street School, Charles and Madison. Both were in 4 year old kindergarten. Charles is a withdrawn child.

The ordinary procedure when dropping students off is that a teacher's aide meets the bus and escorts the students into the school and to class. No one met the bus when Mrs. Kidrick arrived at Forrest Street School. Mrs. Kidrick did not do a walk-through of her bus at any time after arriving at Forrest Street School and ultimately turned the bus over to Mr. Danielson without having done so. Mrs. Kidrick turned off the bus' ignition. There is a dispute as to whether Mrs. Kidrick radioed a "10-7" call to Mr. Tupper at the bus terminal while she was at the Forrest Street School stop. A "10-7" radio call has somewhat varying meaning depending on the circumstances under which it is made, but generally means that the driver is parked, having done his or her post-trip inspection and is "out-of-service." It is clear that Mr. Tupper did return whatever call was made with a "10-4" call which is merely an acknowledgment that the driver's call was received. Mrs. Kidrick turned off the bus' ignition during that exchange. Mrs. Kidrick escorted Madison to the school door. She had forgotten that Charles was on the bus. Charles remained asleep, out of view, on one of the bus' seats until he was discovered later that afternoon.

Mrs. Kidrick then returned to the bus and started the engine and drove to the bus terminal without walking through her bus. She began the process of parking her bus when she arrived at the terminal. Mr. Danielson had been at the terminal waiting to take the bus home for his wife to use that afternoon. He was impatient because he wanted to get home for lunch. He approached the bus and instructed Ms. Kidrick to put the bus in "park" and turn it over to him. The two exchanged some brief discussion, but neither raised the issue as to who would do the post-trip inspection. Mrs. Kidrick exited the bus and Mr. Danielson drove the bus from the bus terminal to his house. Both Mr. Danielson and Mrs. Kidrick knew that no post-trip inspection had been done at the terminal. Under normal procedures, drivers are not required to do a pre-trip or post-trip inspection when no passengers are being transported. He did no post-trip inspection when he got home and Charles remained asleep on the seat undetected.

Mrs. Danielson came out of the house about two hours later. She may have done a brief exterior inspection, but did not walk through the interior of the bus. She drove to her first stop and then discovered Charles. Charles was unharmed. Ultimately Charles was turned over to the custody of his regular teacher who notified his father of the incident.

Mr. Tupper and Business Manager Jill Collins conducted the investigation which started later that same afternoon. They suspended Mrs. Kidrick pending investigation. They reviewed the security video of the incident. They jointly interviewed Mrs. Kidrick who admitted that she did not perform a post-trip inspection. She also admitted that she did not ask Mr. Danielson to perform one and did not expect that he would perform any inspection. They next interviewed Mr. Danielson who was quite upset and remorseful about the incident. They also interviewed Mrs. Danielson. Mrs. Kidrick was discharged. Mr. Danielson was not disciplined for this incident at that time. The Employer did discipline him for it in November, but the discipline was ultimately rescinded as a result of a grievance settlement. Mrs. Danielson was given a written warning for the incident on September 28, 2009.

POSITIONS OF THE PARTIES

Employer

The Employer had just cause to discharge Mrs. Kidrick because she failed to complete a post-trip inspection which resulted in a student being left unattended on a bus after a run was completed. Article VI provides that a non-probationary employee may be discharged for just cause but does not define the term. Wisconsin arbitrators have applied the generally accepted principles that an employer must establish both that the conduct of the employee engaged in conduct which reasonably reflects a disciplinary interest of the Employer and that the discipline imposed reasonably reflects that disciplinary interest. Most arbitrators have required that the Employer need only prove these elements by a preponderance of the evidence and not any higher standard. An arbitrator's role is not to second guess every disciplinary action taken by an employer. If arbitrators were to do so, unions would take every disciplinary action to arbitration.

Mrs. Kidrick did not dispute that she failed to complete a post-trip inspection on September 21, 2009. As a result she left a K-4 student with special needs on her bus without supervision for nearly two hours. When Mrs. Kidrick was interviewed, she admitted that she did not conduct a post-trip inspection at the Forrest Street Elementary School, her last drop off, and did not conduct one at the end of her route. She also admitted that she did not expect Mr. Danielson to conduct a post-trip inspection when he took her bus at the end of the route. A school bus driver who leaves a child alone and unsupervised has clearly acted contrary to student safety and merits discipline.

The Employer has every right and obligation to insure that its school bus drivers use reasonable care to safeguard children. This incident is of such a nature that it warranted discharge for the first incident. Mrs. Kidrick had been trained by the Employer to conduct post-trip inspections. Wisconsin law requires bus drivers to "check the entire interior of the school bus following each trip to assure all passengers are off the bus." Leaving the student caused the parents to be understandably irate. All bus drivers had been warned in a meeting a couple of weeks before this incident that there would be "zero tolerance" for children left on the bus. The transportation handbook states in bold: "Leaving a child on the bus after it is parked may result in dismissal." Mrs. Kidrick's poor short poor work history served as a factor in warranting dismissal. Mrs. Kidrick's difficulties during the noon route do not excuse her actions. The Employer acknowledges that Mrs. Kidrick encountered a lot of chaos on her September 2, 2009, route. However, it is on the most chaotic days that a driver must use extra precautions and fully abide by all procedures. There were only two children on her bus when she arrived at the school and failed to perform her walk-through. She was questioned by a teacher's aide why there was only one student. Further, when she returned to the garage she handed the bus over to Mr. Danielson without conducting a post-trip inspection or asking Mr. Danielson to do so. The Employer asks that the grievance be denied in its entirety.

Association

The Employer lacks just cause to discharge Mrs. Kidrick. The arbitrator should apply Arbitrator Daughtery's well-established "seven tests of just cause" in interpreting the just cause provision of the parties' agreement. Three of these are that:

1. There must be reasonable notice to employees of the consequences of any particular misconduct.
2. The infraction must be serious and an employer needs to make a fair investigation and find substantial evidence of guilt
3. The Employer must not treat its employees discriminatorily

The Employer did not give clear notice to any of its bus drivers, including Grievant, of the consequences of leaving a child in the bus. The new bus director, Tom Tupper attempted to claim that he made a clear statement at an August, 2009, staff meeting that anyone leaving a child on a bus after it was parked would be terminated. Mr. Tupper did not change the Transportation Handbook to reflect the new rule. It still indicated that employee "may" result in dismissal. Mr. Tupper's other testimony about that meeting is incorrect. He testified that he introduced the concept of a "pre-post-trip" inspection. No one heard him say that. In any event, if there was such a "zero-tolerance" policy, then all three drivers involved in this situation should have been fired.

Mr. Tupper also argued that Mrs. Kidrick made a radio call "10-7" while at Forrest Street School which indicated that the driver was completely done, including completing his post-trip and having put the bus away. This is not on the video recording and did not occur.

Firing Mrs. Kidrick without treating Mr. and Mrs. Danielson the same violates the essence of the non-discriminatory treatment doctrine of just cause. Mr. Danielson interrupted the parking and post-trip of Kidrick, took the bus, but did not conduct a post-trip. Mrs. Danielson did not do a pre-trip inspection when she left her home. Former Transportation Director Walker testified that after Mrs. Kidrick corrected minor problems during her probationary period she did very well. He thought she had the makings of an outstanding bus driver. He noted that she always conducted thorough pre-trip and post-trip inspections.

Imposing discharge upon Mrs. Kidrick for this fiasco is highly disproportionate for the conduct at issue. Mr. Danielson wanted the bus immediately. Mrs. Kidrick was appropriately deferential to him because he was a long-time employee. Having employees exchange busses rather than return them to the parking area was something that had not occurred in this district. Neither Mr. Danielson, nor Mrs. Kidrick was trained as to how to pass an active bus from one driver to another. To discharge Mrs. Kidrick for letting an older colleague take over her bus was too severe.

The penalty of discharge was disproportionately more severe than discipline given other drivers. None of the other drivers who were involved in this incident were discharged. No other driver has been discharged for accidents. Small accidents are common with school busses for many reasons. Although the Association concedes that leaving a child unattended on a bus is a very serious offense, several employees who have left children on a bus past their intended stop were not discharged for the first offense. In fact, the Employer has not discharged any employee and suspensions are rare for any offense. The Association asks that Mrs. Kidrick be reinstated and made whole for all lost wages and benefits.

Employer Reply

The Employer disagrees with the Union's assertion that it should have disciplined the Danielsons to the same degree it disciplined Mrs. Kidrick. The three had different conduct and different degrees of culpability. Contrary to the Union's assertion, no other driver at Black River Falls has ever left a student on a bus.

Association Reply

The Employer has misrepresented Mrs. Kidrick's work record and incorrectly implied that she had a poor relationship with former Transportation Director Walker. Mr. Walker emphasized that she was an excellent driver. Another driver who followed her on an out-of-town trip testified that Mrs. Kidrick was an excellent driver. The situation in dispute is not covered by the rule which states: "Leaving a child on the bus after it is parked may result in dismissal." Mrs. Kidrick did not actually leave a child on the bus after it was parked. She turned the bus over to Mr. Danielson. Mr. Danielson did not have the right to interrupt Mrs. Kidrick's work. Mr. Walker noted that Mr. Danielson is sometimes difficult to work with. Mr. Danielson should have done a post-trip when he got the bus home.

The Employer is incorrect in its assertion that Mrs. Kidrick called a "10-7" from Forrest Street School. The Union attached a report to its brief that the term "10-7" did not appear on the video in evidence. Ms. Kidrick testified that she did not call a "10-7" from Forrest Street School and that she only does so after she parks her bus at the end of her run and has done her post-trip.

The Employer's argument that all of the drivers at the August 26 meeting heard Mr. Tupper say that any driver who left a student on the bus would be fired is not true. Mr. Tupper said he used the term "zero tolerance." However, he did not explain what was meant by that term other than he would not tolerate a student being left on the bus. It appears that most of the drivers do a walk-through at their last stop. However, the Employer has not proven that such a change was made in the operating handbook. It was reasonable for Mrs. Kidrick to decide to do a walk-through at the terminal and not at Forrest Street School. She could not have imagined that a senior bus driver could take the bus away from her before she did her post-trip inspection.

DISCUSSION

1. Statement of the Issues

The parties disagreed as to the statement of the issue. The disagreement was over how many factual allegations are to be included in the statement of the issue. Those allegations were extraneous. I have limited the statement of the issue accordingly.

2. Standards Governing Determination of this Dispute

Drivers have no higher duty than protecting the safety of others, particularly the students they serve. Leaving a student unattended on a bus is a rare event, but it has serious, even potentially disastrous, consequences. For many years the Employer's policies have stressed that: **"Leaving a child on the bus after it is parked may result in dismissal."** Neither party has denied that leaving a child on a bus after it has been parked is a very serious offense for a bus driver. They just disagree as to whether it should have resulted in Mrs. Kidrick's discharge under the specific circumstances of this case.

It is important to address one of their disagreements as to the application of the just cause doctrine to an employee who has just recently passed her probation period. Under Article VI, the parties have mutually recognized that it is everyone's interest if the Employer has broad authority to evaluate new employees without significant restriction. Because Mrs. Kidrick had recently completed an extended probationary period, the Employer seeks broad deference to its judgment to discharge for this conduct. The issue in this case involves the performance of a fundamental safety task. I conclude that the discharge should be sustained irrespective of other potentially proper considerations, if the evidence establishes a reasonable inference that the employee is not likely to successfully perform bus driver duties. I conclude in the discussion below that the Employer has not met even that relaxed standard.⁴

3. Just Cause for Discipline

On August 26, 2009, shortly after he was hired by the Employer, Mr. Tupper announced a change to this policy and a "change" to the related disciplinary policy. At this meeting, he essentially instructed drivers to do a walk-through of their bus at their last stop.⁵ The better view of the record is that he stated at that meeting that the reason for this was that it would save stress on students and parents if the walk-through were done earlier. It also saved the need to drive a student back to where he or she should be.⁶ He also used page 5 of the transportation handbook cited above to describe his "zero tolerance" policy for drivers who

⁴ Because the standard of review applied is different for a new employee than for experienced employees, it is inappropriate to compare the discipline imposed on experienced employees with that imposed here under allegedly similar circumstances.

⁵ He did not instruct them to do their complete post-trip inspection at the last stop.

⁶ Tr. pp. 222-224, 240-42,

leave a student unattended on their bus.⁷ Mrs. Kidrick and both Danielsons were at that meeting and all understood that Mr. Tupper wanted them to do a “walk through” at their last stop. They may not have recognized what a “zero tolerance” policy was, but did recognize that Mr. Tupper indicated that he would not put up with students left on the bus.

Mrs. Kidrick did not do a walk-through of her bus on the day in dispute at any time after arriving at Forrest Street School even though she knew that under the new policy she was generally expected to do so at her last stop. It is unclear if she made a deliberate decision to not do one at Forrest Street School.⁸ Mr. Tupper testified that Mrs. Kidrick would not have been discharged had she done a walk-through before turning her bus over to Mr. Danielson.⁹ Accordingly, the Employer must show it had just cause to discipline Mrs. Kidrick both for having not performed a walk-through at Forrest Street School and for not having done one at the bus terminal before turning the bus over to Mr. Danielson.

The Union is correct in its assertion that Mrs. Kidrick was under time-pressure and somewhat “flustered” because of the difficulty she had in performing the disputed route. One need only review the events of that day to conclude that it was at least a “bad day.” She was not given clear directions on how to do this substitute route. She got lost while on the route and was repeatedly misdirected. As she drove through the route, Mr. Tupper repeatedly called her to find out how late she would be in getting to Forrest Street School. The video shows that she was under some time pressure when she arrived at Forrest Street School, but that she was not so “flustered” as to have completely lost track of her responsibilities. When she arrived she was forced to make a choice as to how to get Madison into the school because the teacher’s aide who normally met the bus and escorted the students in was not there. Mrs. Kidrick turned off the bus’s ignition and escorted Madison into school without doing a walk-through. None of these factors fully explain why she did not do a walk-through. One would expect that she would do a walk-through when she turned off the ignition, but she may have chosen not to because of the time pressure. However, she also had the opportunity to do a walk-through when she returned to the bus. This is much less justified by the time pressure. I conclude that the Employer had just cause to impose some discipline for failing to do a walk-through at Forrest Street School.

As noted above, Mrs. Kidrick did not do a post-trip inspection including a walk-through when she returned to the terminal after leaving Forrest Street School. Instead, she just turned the bus over to Mr. Danielson. The Employer excused Mr. Danielson from significant discipline in taking the bus without Mrs. Kidrick doing a post-trip because it was not his responsibility to do the post-trip inspection, but, rather, it was Mrs. Kidrick’s. It relied upon Mrs. Kidrick’s statement in the investigation that she had not expected that Mr. Danielson was going to perform the post-trip inspection, apparently for the proposition that she did not intend to do one at all. It also did not significantly discipline Mr. Danielson for this incident because

⁷ See, for example, tr. pp 253-4.

⁸ Kidrick, tr. p. 538

⁹Tupper, tr. p232 Hand off tr. pp. 289

he was a senior driver, he had been quite contrite, and because, in the Employer's view, he could reasonably have believed that she would have done it at Forrest Street School.

The heavy weight of the evidence indicates that Mrs. Kidrick was in the habit or routine of regularly performing detailed post-trip inspections and cleaning her bus at the end of every run.¹⁰ The video recording indicates that when she came into the terminal, she was preparing to park her bus in accordance with her normal practice. The investigation failed to discover her habit in this regard and her statements in the investigation do not negate her habit or practice. I am satisfied that Mrs. Kidrick would have discovered Charles in the bus had she been permitted to finish her routine.

The believable testimony in this case indicates that Mr. Danielson was anxious to get home with the bus when Mrs. Kidrick arrived. Mr. Danielson approached the bus before Mrs. Kidrick was able to park it and he is heard essentially directing her to apply the parking brake and let him take over. The two chatted very briefly about Mrs. Kidrick's "adventure" that day. It is not believable that Mr. Danielson ever gave any thought as to whether Mrs. Kidrick had done a walk-through at Forrest Street School. In any event, Mrs. Kidrick and every driver is required to do a complete post-trip, including inspecting the interior and the mechanics of the bus, when they complete their run.¹¹ Mr. Danielson knew that Mrs. Kidrick did not perform a complete post-trip inspection even though she was required to do one. It is not believable that he would have thought that she did a complete post-trip inspection at Forrest Street School. The video also shows that Mr. Danielson did not do a post-trip when he returned home. It is he, and not Mrs. Kidrick, that made the decision that no complete post-trip would be done after the noon run. The better view of the evidence is that Mr. Danielson wanted to avoid waiting for Mrs. Kidrick to take the normal fifteen minutes for her post-trip inspection.

The Employer lacks just cause to discipline Mrs. Kidrick for failing to perform a post-trip inspection when she returned to the terminal even though she was technically responsible to do so. Employees do not routinely hand-off active busses to another employee at this employer. The Employer has no policy as to how that should be conducted and, therefore, none of the employees have been trained in the subject.¹² Mrs. Kidrick reasonably relied upon a direction from a senior employee in a circumstance for which she was not trained and which was unusual. I find her statements in the investigation that she did not expect him to do a post-trip unpersuasive to demonstrate that she was not relying upon his leadership. The expectation that she should have resisted his lead is simply unrealistic.

The next issue is what was the appropriate level of discipline? Discharge is not the appropriate discipline in this matter. The Employer has failed to show that Mrs. Kidrick's

¹⁰ Griffin tr. pp. 311-12, Walker, tr. pp. 135, German tr. p. 190

¹¹ The public policies of the state as to pre-trip and post-trip inspections are stated in Wis. Admin. Code, Sec. Trans. 300.16 and require a post-trip at the end of the "trip." Drivers are trained to do this in their commercial license training.

¹² See, for example, Tupper, tr. p. 283, 287.

serious lapse of judgment at Forrest Street School supports a reasonable inference that Mrs. Kidrick is not likely to be a successful employee. The new policy added to the work load of bus drivers at the time when their work load is heavy with students exiting the bus. Mr. Tupper's testimony establishes that as of the date of this incident there was considerable ambiguity in his new walk-through policy. One of the ambiguities was whether in some circumstances an employee could choose not to do the walk-through prescribed in his new policy at the last stop. As of the date in question, Mrs. Kidrick could reasonably have interpreted the policy to permit her to delay the walk-through until she got to the bus terminal because the terminal was relatively close to the school and because she was under unusual time pressure. Most importantly, she was faced with the prospect of further delaying Madison from entering the school when she was already late for school. She had the choice of waiting for an aide to meet the bus, letting Madison walk in alone, or walking with her. Although Mr. Tupper has testified after the fact that he did not believe that choice was justified, under the circumstances any choice she made in postponing the prescribed walk-through was isolated to the factual circumstances and not indicative of her abilities to comply with safety regulations.

Similarly, Mrs. Kidrick made a choice to turn off the bus without doing a walk-through or leave it unattended and running in a school zone.¹³ The available evidence indicates that she was in compliance with Wis. Admin. Code, Sec. 300.16(11). While a walk-through was desirable, she was absent from the bus for a very short period. In this case, her conduct in not also doing a walk-through may not have been the best judgment, but it was in the interest of safety. This circumstance was also isolated to the factual circumstances and not be indicative of her abilities to comply with safety regulation.

As noted, it may be that Mrs. Kidrick did not do a walk-through at Forrest Street School merely because she was still in the habit of waiting to do so as part of her post-trip inspection. Mr. Tupper's testimony indicates that he recognized that the habits of employees might be hard to change. He was in the process of developing "empty signs" which employees would be required to walk through their bus and put in the back window before they came into the bus terminal.¹⁴ The purpose of the signs was to re-train drivers to comply with the new policy. This procedure had not as yet been implemented for the circumstances of this case. Thus, the failure to do a walk-through for this reason would not be indicative of an inability to comply with safety regulations in the future.

Accordingly, the Employer had just cause to impose discipline on Mrs. Kidrick for not performing a walk-through at Forrest Street School, but not for failing to perform a walk-through at the bus terminal. The Employer would not have discharged her for the failure at Forrest Street School. The circumstances do not warrant discharge. The Employer does have just cause to impose some discipline. No one in this proceeding doubts how serious the circumstances were or how tragic they might have become. However, there were many other

¹³ While she was unaware that Daniel was asleep on the bus, the potential risks had she left the bus running are obvious.

¹⁴ Tupper, tr. 248-9

factors other than this employee's conduct which contributed to this situation. Discipline short of a suspension would not have impressed on every driver how important "walk throughs" and post-trips are. The remedy which I conclude is appropriate for this violation is to reinstate the employee to her former position and make her whole for all lost wages and benefits less that amount equivalent to a sixty (60) calendar day suspension.

AWARD

The Employer did not have just cause to discharge Grievant Martha Kidrick. It shall reinstate her to her former position and make her whole for all lost wages and benefits less that amount equivalent to a sixty (60) calendar day suspension. I reserve jurisdiction over the specification of remedy if either party requests that I exercise that jurisdiction in writing with a copy to opposing party within sixty (60) days of the date of this award.

Dated at Madison, Wisconsin, this 17th day of November, 2010.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator