BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL 662

and

CITY OF APPLETON

Case 465
No. 71182
MA-15097

(Forster Suspension)

Appearances:

Attorney Kyle A. McCoy, Soldon Law Firm, LLC., 6319 29th Avenue NW, Rochester, Minnesota 55901, appearing on behalf of Teamsters Union Local 662.

Attorney Ellen Totzke, Deputy City Attorney, City of Appleton, 100 North Appleton Street, Appleton, Wisconsin 54911-4799, appearing on behalf of the City of Appleton.

ARBITRATION AWARD

The Teamsters Union Local 662, hereinafter referred to as the Union, and the City of Appleton, (Employer or City), are parties to a Collective Bargaining Agreement (Agreement) which provides for final and binding arbitration of certain disputes, which Agreement was in full force and effect at all times mentioned herein. On October 14, 2011 the Union filed a Request to Initiate Grievance Arbitration and asked the Wisconsin Employment Relations Commission to provide a panel of 5 staff arbitrators from which the parties would select one to hear and resolve the Union's grievance regarding the allegation that the City violated the Agreement when it suspended James Forster (Grievant) on July 20, 2011. The City subsequently joined in that request and the parties selected the undersigned as the Arbitrator. Hearing was held on the matter on February 16, 2012 in Appleton, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. The parties agree that this matter is properly before the Arbitrator. The hearing was transcribed and has thus become the official transcript of the proceedings. The parties filed post-hearing briefs by March 31, 2012 marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The parties stipulated to the issue to be decided by the Arbitrator as follows:

Was there just cause for issuing the Grievant a five-day suspension?

If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 7
Discipline

7.1(A). The Employer shall not suspend or discharge an employee without just cause and shall give at least one warning notice of the complaint against such employee to the employee in writing, and a copy of the same to the Union, except that no warning notice need be given in the following cases:

1. Dishonesty

BACKGROUND

The Grievant has been employed as a bus driver for the past ten (10) years. The instant disciplinary action arose from an incident involving a female passenger riding on his bus and using a "mobility device", in this case an electric scooter. He failed to provide her with a restraint device, required by City policy, and, consequently, to call into dispatch the appropriate "1099B" code , also required by City policy, which alerts the Employer to the fact that the passenger had refused his offer to provide the restraint device. The passenger fell off of her scooter during the ride and accused the Grievant of driving carelessly. The police were called and upon their arrival the passenger was arrested for unknown warrants against her. The parties agree that she was a generally disagreeable passenger who had ridden on several trips without paying. The facts of the incident are not in dispute. What is in dispute is the extent of the punishment: a five-day suspension without pay as opposed to a lesser degree of discipline.

THE PARTIES' POSITIONS

The City

The Grievant has driven for the City since 2002 and is familiar with the City's rules and regulations relating to passengers using mobility devices. He admitted that he failed to offer the passenger a lap belt or restraints and that he should have done so. He originally told City authorities that he had failed to offer the belts because there was no place to secure them on the scooter but changed his story later using the excuse that the passenger had left her scooter and

gone to the bench seat. Finally, after the review of the video tapes located in the bus, "he acknowledged that his version of events as reported. . . were incorrect."

During the hearing the Union attempted to shift the focus from the Grievant's incorrect statements to the fact that she was a "known trouble passenger." The passenger, or his failure to follow City protocol, was not the reason he was disciplined. He was disciplined because he lied to the City authorities by making false statements on his accident report. That statement speaks for itself:

> Making left turn on to Oneida St. inbound when passenger fell off 3 wheel scooter. Observed passenger sitting sideways when her weight tipped over the scooter. She grabbed on to scooter when falling pulling it down. Stopped to check on passenger. The securements where (sic) still on scooter. The passenger choose (sic) to sit on bus bench seat when she boarded, sometime during Rt she sat back on scooter. Not properly positioned in seat. This passenger has been using a walker. She has never been instructed how to board bus with, scooter, wheel chair.

Grievant did not articulate any reason for his misrepresentations leaving management to speculate as to why he would make false statements on his accident report, especially when he knew his bus had cameras. Perhaps he realized he had opened himself up for discipline and felt he needed a plausible excuse. He was a driver with nine years of experience and was well aware of City policy regarding Wheelchair Securement. His explanation that he got confused from prior experiences with this passenger seems improbable.

A dishonest employee is generally subject to discharge, which was discussed by management. Based upon his employment history he was allowed to retain his driver status and only given a five-day suspension and a second chance. Nine times out of ten if an employee lies to his or her employer, termination is the consequence. The City exercised its discretion and weighed its discipline based on the specific fact situation and totality of the circumstances. It made that decision and is willing to live with the consequences should a lawsuit be filed regarding this matter.

The Union

The City has the burden of proving just cause for imposing discipline. Here, the City is not able to meet that burden by any standard. The Grievant had no motive for lying to the City and knew that his every move and utterance was subject to extensive surveillance by video and audio recorders.

The issue here is narrow: was the Grievant purposefully dishonest or was he innocently mistaken? The totality of the evidence supports the latter. When he wrote that he remembered the passenger getting up it was "probably something that I recollected. . .from other times I have dealt with (the passenger)." Also, he was watching the road; the police were involved; and other factors clouded his memory. There is no possible motivation for his "lie." No gain would be made to him for doing so since every driver is aware of the cameras and microphones in place on the busses. The City testified that it made no determination that he had lied nor that he could not be trusted in the future. The City considers the incident to be an anomaly.

The City was not able to view the entire video because of a technical glitch in extracting it which resulted in much of the footage being lost. This results in an inference that the missing video would have shown the passenger getting up from her scooter and sitting on the bench seat just as the Grievant had said. Although its evidence was inconclusive, the City still came to the conclusion that the Grievant lied.

The proper penalty is a written warning notice because of the Grievant's failure to follow the City's protocol. The Arbitrator has discretion over the appropriateness of the penalty as an integral part of his decision on whether just cause is shown. The punishment should fit the crime and it is the job of the Arbitrator to make sure that happens. The Grievant's driving history and history of discipline is unblemished and he does not deserve the extent to which he was punished. The suspension should be reduced to a written warning for his failure to offer the lap belts.

DISCUSSION

At issue is whether the City had just cause to discharge the Grievant. The burden is on the City to show wrongdoing and justification for its actions by a preponderance of the evidence. The threshold question is whether the Grievant lied to his employer. If so, he should be disciplined for that offense.

As in most collective bargaining agreements, this Agreement does not contain a definition of "just cause", although Article 7 of the Agreement does require it. There is no uniform definition of what constitutes just cause and so it becomes the job of the Arbitrator to define such parameters based on the facts of each case. On the function of the Arbitrator in such cases, I have consistently agreed with Arbitrator Harry Platt. He said:

> It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge (discipline) not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its

> exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged (disciplined) employee by making reasonably sure that the causes for discharge (discipline) were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge (discipline). To be sure, no standards exist to aid an Arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what reasonable men, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the (disciplined) employee was defensible and the disciplinary penalty just. RILEY STOKER CORP., 7 LA 764, 767 (Platt, 1947).

I believe that just cause requires a finding that the employee is guilty of the conduct in which he is alleged to have engaged and that the level of discipline imposed as a result of that conduct is reasonably related to the severity of the conduct. Just cause mandates not merely that the employer's action be free of capriciousness and arbitrariness but that the employee's performance be so faulty or indefensible as to leave the employer with no alternative to impose (the) discipline. (See Platt, "Arbitral Standards In Discipline Cases", in The Law and Labor-Management Relations, 223, 234 (Univ. of Mich., 1950).

It is clear, as the Union states, that the issue is not solely whether there was cause for some discipline. Clearly there was, and the Union does not suggest otherwise. The real issue, as the Union argues, is that while the actions of the Grievant should have resulted in some measure of discipline, they should not have resulted in the measure of discipline meted out in this matter. He was disciplined for lying and he did not lie. The City, on the other hand, believes that the actions of the Grievant constituted a flagrant violation (lying) which, under the terms of the parties' Agreement, allowed the Grievant's immediate discharge. Here, though, in consideration of the Grievant's past record, the City chose not to impose such a harsh penalty but to impose a five-day suspension in its place. Further, says the City in so many words, that based upon the facts the Grievant's five-day suspension without pay was just, equitable and reasonably related to the severity of his conduct.

The Union says that the offenses set forth by the City justifying the Grievant's suspension without pay are inadequate for a number of reasons. The Union urges the undersigned to find that the Grievant's statements on the accident report do not constitute lying but, rather, mistakes. It is the Arbitrator's duty to determine the relevancy, authenticity and weight of all of the evidence. In this case, the facts are, to a large extent, determined by the weight and credibility accorded to the Grievant and, (in this case, to a lesser degree), the documentary evidence produced by the parties. The Arbitrator must consider whether conflicting statements in the witness' testimony ring true or false. The determination in this regard requires the Arbitrator to

note the demeanor of each witness and to credit or discredit each witnesses' testimony according to his impressions of their veracity. The undersigned takes into consideration whether the witnesses speak from firsthand knowledge or from hearsay and gossip. The duty of the Arbitrator is to consider all of the evidence and to accord each piece of documentary evidence and each witness the weight (if any) they are due and to determine the truth therefrom. See ANDREW WILLIAMS MEAT CO., 8 LA 518, 519 (Cheney, 1947)

The Arbitrator is mindful of the fact that the Grievant has an incentive to lie about the facts of this case in order to lessen the potential effects of discipline. This fact renders his testimony subject to the most careful scrutiny. The undersigned has considered that his perception of events may be faulty or incomplete because he had no idea that a dispute would develop later. This is tempered by the fact that he completed his accident report very shortly following the event and so his recollections are not dimmed. Also, the manner in which he communicated his version of the events, i.e. the accident report, may have failed to get across his initial impressions of the occurrence. His statement is general in nature and covers the incident in broad strokes as opposed to detail. See SOUTH PENN OIL CO., 29 LA 718, 720 (Duff, 1957)

The undersigned has also considered the fact that portions of the video were destroyed/missing and did not record the entire event. This leaves open the possibility, however small, that the passenger could have used the bench seat on the bus. I have not given this fact much weight due to the stipulation of the parties that the video "would indicate that the passenger did not move from her scooter to a bench seat when she got on the bus. ", but have considered it because, while the video does not show her taking a bench seat, the stipulation does not prove that she did not take the seat.

I have reviewed the Grievant's testimony in light of the above standards and conclude that he did not lie to the City Officials when he completed his accident report. His report was arguably inaccurate but not a lie. Consequently, the five-day suspension without pay was not justified. The Grievant did violate the City's protocol for calling in the "1099B" and the Union suggests a written warning notice for this violation. I agree with the Union and direct that the City enter a written warning notice in his file consistent with that violation.

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

AWARD

1. The City **did not** have just cause for giving the Grievant a five-day suspension without pay.

2. The City **did have** just cause to issue a written warning notice for the protocol violation of failing to call in a "1099B" and for failing to offer/provide restraints to the passenger and shall replace the suspension with such notice.

3. The City shall make the Grievant whole for all losses suffered by this action.

4. The undersigned will retain jurisdiction for a period of 60 days.

Dated at Wausau, Wisconsin, this 7th day of May, 2012.

Steve Morrison /s/
Steve Morrison, Arbitrator

SM/gjc
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