

IN THE MATTER OF ARBITRATION BETWEEN

AMALGAMATED TRANSIT UNION)	
LOCAL 1005)	ARBITRATION
)	AWARD
)	
and)	
)	KIEFNER DISCHARGE
)	GRIEVANCE
)	
)	
METROPOLITAN COUNCIL)	BMS CASE NO. 09-PA-1066

Arbitrator: Stephen F. Befort

Hearing Date: September 10, 2009

Post-hearing briefs received: N/A

Date of decision: September 28, 2009

APPEARANCES

For the Union: Roger A. Jensen

For the Employer: Anthony G. Edwards

INTRODUCTION

Amalgamated Transit Union Local 1005 (Union), as exclusive representative, brings this grievance challenging the decision of the Metropolitan Council (Employer) to terminate the employment of bus driver Paul Kiefner. The Union contends that the Employer violated the parties' collective bargaining agreement by discharging Mr. Kiefner without either establishing a clear violation of the Last Chance Agreement applicable to his continued employment or establishing that his discharge was supported

by just cause. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits. The parties decided not to submit post-hearing briefs.

ISSUES

1. Did the Employer have cause to discharge the grievant pursuant to the terms of the parties' last chance agreement?
2. Alternatively, did the Employer establish that its decision to discharge the grievant was supported by just cause under all of the circumstances?
3. If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 5 GRIEVANCE PROCEDURE

Section 1. Metro Transit reserves to itself, and this Agreement shall not be construed as in any way interfering with or limiting its right to discipline its employees, but Metro Transit agrees that such discipline shall be just and merited.

RETURN-TO-WORK AND LAST CHANCE AGREEMENT LANGUAGE

On March 23, 2007, Mr. Kiefner was discharged for violation of last chance agreement dated August 19, 2004 and overall record. The Amalgamated Transit Union, on behalf of Mr. Kiefner, filed a grievance challenging the violation of paragraph three (3) of stated agreement. Mr. Kiefner wishes to remain employed with Metro Transit and Metro Transit is willing to allow Mr. Kiefner a last-chance opportunity to continue as an employee so long as he agrees to, and in fact, complies with all of the following conditions:

1. Mr. Kiefner will be reinstated to his previous employment position effective Wednesday, April 10, 2007 with no loss of seniority. The time lapse between March 23, 2007 and April 10, 2007, will be served as an unpaid suspension. This agreement supersedes and replaces the last chance agreement of August 19, 2004.

2. Mr. Kiefner agrees not to falsify any information based upon a manager's inquiry and further agrees not to falsify any information on any official Metro Transit document.
4. Mr. Kiefner cannot have a class A violation within the duration of this agreement effective from his reinstatement date.
7. This agreement and the related discipline shall remain in the employee's personnel file for 36 months from the date of this agreement.
8. Failure of Mr. Kiefner to comply with any terms of this agreement shall result in his immediate termination. Such termination will be deemed just and merited as interpreted in Article 5, Section 1 of the Labor Agreement between the parties.
9. This Agreement shall not operate to restrict Metro Transit's authority to terminate the employee for any reason not mentioned in this agreement, if that reason would have been proper reason for Employee's termination in the absence of this agreement.
11. In the event Mr. Kiefner is discharged pursuant to this agreement, he may file a grievance only to challenge whether his conduct constituted a violation of any employer rules or regulations stipulated in this agreement. Mr. Kiefner specifically agrees that he may not challenge the propriety of the discharge penalty in any stage of the grievance procedure.
12. If Mr. Kiefner's grievance is submitted to arbitration, the jurisdiction of the arbitrator is limited to determining whether Mr. Kiefner was in violation of this agreement. All parties agree that the arbitrator shall not have jurisdiction to modify the discharge penalty in the event such a violation is found.

[Signatures]

April 11, 2007

FACTUAL BACKGROUND

Metro Transit, as a subsidiary of the Metropolitan Council, operates the public bus transportation system in the metropolitan Minneapolis-St. Paul area. The grievant, Paul Kiefner, has been employed by Metro Transit as a bus operator for the past fifteen years. At the time of his discharge, he was assigned to drive route # 10 out of the Heywood Garage. This route traverses in a northerly direction through downtown

Minneapolis and proceeds on Central Avenue (Highway 65) to the Northtown Mall in Blaine, a northern suburb of the Twin Cities.

The Employer previously discharged Mr. Kiefner on March 23, 2007 for “violation of last chance agreement dated August 19, 2004 and for overall record.” The Union filed a grievance on Mr. Kiefner’s behalf, and the parties eventually agreed to settle the grievance by agreeing to Mr. Kiefner’s return to work under the terms of a Last Chance Agreement (LCA). The salient terms of the LCA, dated April 11, 2007, for purposes of this proceeding are as follows:

- The Employer has the right to terminate Mr. Kiefner if he falsifies any information in response to a management inquiry or if he receives one Class A violation during the 36-month period following execution of the LCA;
- Mr. Kiefner’s right to challenge such a termination is limited solely to the issue of whether his conduct constituted a violation of employer work rules as alleged; and
- The jurisdiction of the arbitrator hearing such a challenge is limited solely to a determination of whether Mr. Kiefner violated the LCA and does not include authority to modify the discharge penalty in the event such a violation is found to have occurred.

The events giving rise to the present grievance took place on March 9, 2009. At around 3:00 p.m. on that date, Mr. Kiefner was driving the # 10 bus through downtown Minneapolis in a northerly direction. As Mr. Kiefner pulled out from the bus stop at 7th Street and Nicollet Avenue, an African-American male - Mr. Howard - walked in front of the bus and, by waving his arms, signaled a desire to catch the bus. Mr. Kiefner did not stop the bus at that time, but instead proceeded to the next stop at 6th and Nicollet. At that stop, Mr. Kiefner permitted a female passenger to enter and then closed the door. Mr. Howard arrived at the stop shortly thereafter and banged on the bus door seeking

entry. After a brief hesitation, Mr. Kiefner opened the door and Mr. Howard entered. Once on the bus, Mr. Howard immediately began to berate Mr. Kiefner for failing to stop for him at the earlier stop. After Mr. Howard made a number of abusive and threatening comments, Mr. Kiefner replied that he was not going to listen to such comments, and he displayed a can of pepper spray. Mr. Howard responded that Mr. Kiefner would need more than that for protection and proceeded to a seat in the rear of the bus.

For the next 30 minutes, the bus proceeded en route without incident. At 3:32 p.m., as depicted on a videotape of the incident, Mr. Howard walked to the front of the bus and stood in near proximity behind Mr. Kiefner for the next 14 minutes. At 3:46 p.m., the bus stopped at the intersection of Central Avenue and Osborne Road in Spring Lake Park which apparently was Mr. Howard's intended point of departure. At this time, Mr. Howard initiated another verbal exchange, castigating Mr. Kiefner for how he had talked to him earlier. Mr. Kiefner responded in kind, criticizing Mr. Howard's behavior. Mr. Howard then called Mr. Kiefner a "pussy" and a "bitch." Mr. Kiefner responded by stating, "I'll take your fucking ass right now!" Mr. Kiefner also picked up an industrial size ice scraper which he held in his hands. Mr. Howard turned to the other passengers and said, "you all see how he is threatening me?" Mr. Kiefner responded by stating that he would not hesitate to use the scraper. At this point, Mr. Howard lunged at Mr. Kiefner, grabbed his glasses, poked the driver in the eye with his finger, and ran off the bus. As he left the bus, Mr. Howard tossed the eyeglasses on the dash of the bus, but Mr. Kiefner apparently did not see that maneuver.

Following Mr. Howard's departure from the bus, Mr. Kiefner almost immediately took off in pursuit with the ice scraper in hand. Approximately 50 feet from the bus, Mr.

Howard turned and confronted the driver. After Mr. Kiefner raised the scraper in the air, Mr. Howard tackled Mr. Kiefner, delivered several punches, and then ran off. It is undisputed that Mr. Kiefner did not strike Mr. Howard with the scraper.

While the parties are in general agreement concerning the facts as stated above, there are a few particulars in which the testimony diverged. First, Mr. Kiefner testified that he did not stop the bus for Mr. Howard at 7th and Nicollet because the bus already was in progress and a stop would have blocked the intersection. In contrast, Sam Jacobs, Metro Transit's Director of Bus Transportation, testified that Mr. Kiefner could have stopped and let Mr. Howard board without blocking the intersection. Second, Mr. Kiefner testified that he pursued Mr. Howard after he left the bus at Central and Osborne for the purpose of retrieving his eyeglasses. Both Mr. Jacobs and Assistant Transportation Manager Jay Kluge expressed the opinion that Mr. Kiefner's conduct appeared more consistent with an attempt to retaliate against Mr. Howard than to retrieve a pair of glasses. Finally, Mr. Kiefner testified that he only raised the ice scraper while outside the bus as a defensive gesture to ward off a possible attack from Mr. Howard. After reviewing a videotape of the incident, Mr. Jacobs and Mr. Kluge both testified to the belief that Mr. Kiefner swung the scraper toward Mr. Howard in an aggressive manner.

Following an investigative hearing, the Employer discharged Mr. Kiefner on March 20, 2009. The Notice of Discharge listed the following grounds for the termination action:

- Violation of Last Chance Agreement dated 4/11/2007
- Using a deadly weapon in an attempted assault of a customer
- Violation of Metropolitan Council Policy – Employee Conduct
- Leaving bus operator's seat

-Overall record

The Employer introduced a number of documents during the hearing in support of this decision. These included the following:

- Bus Operator's Rule Book and Guide, Rule 497 which makes the following employee conduct grounds for disciplinary action:
 - b. Falsification of any statement or record.
 - c. Threatening a citizen . . . with bodily harm or causing a physical altercation on . . . a Metro Transit vehicle.
 - h. Use of abusive or obscene language or gestures on the job . . .
- Bus Operator Bulletin # 12, which provides that Metro Transit bus drivers should:
 - . . . refrain from leaving the operator's seat to settle disputes unless it is necessary to do so to defend yourself or customers from physical attacks.
- A number of customer feedback complaints expressing dissatisfaction with Mr. Kiefner's bus driving performance. These complaints did not result in any disciplinary action, but led to an optional referral of Mr. Kiefner for anger management counseling.

The parties, at the hearing, also elicited testimony concerning past discipline imposed for similar incidents. The relevant testimony revealed the following disciplinary events involving Metro Transit bus drivers:

- 1) **Mahmoud:** Discharge upheld for driver who used a scraper to inflict an eight-stitch wound on a passenger;
- 2) **DeBill:** Driver reinstated after chasing passenger with a scraper, no LCA at issue;
- 3) **Ruiz:** Driver reinstated after chasing passenger for six blocks, no LCA at issue;
- 4) **Larson:** Driver reinstated after tackling a passenger during an altercation, no LCA at issue.

POSITIONS OF THE PARTIES

Employer Position:

The Employer contends that its decision to discharge Mr. Kiefner is justified under either of two alternate theories. The Employer first argues that Mr. Kiefner's conduct violated the terms of the LCA which authorizes termination upon a finding that the grievant falsified any information provided to a Metro Transit manager. The Employer maintains that Mr. Kiefner violated this prohibition by falsely claiming that he 1) left the bus to retrieve his glasses, and 2) that he used the scraper only in a defensive manner. The Employer alternatively asserts that, even if the LCA was not violated, discharge nonetheless is warranted based on the totality of Mr. Kiefner's misconduct. This misconduct includes threatening a passenger with harm, using obscene language, and leaving the operator's seat for a retaliatory purpose.

The Employer further contends that discharge is the appropriate penalty under these circumstances. Pursuant to the LCA, discharge is the automatic consequence of a violation of that agreement. Even in the absence of a LCA violation, however, the Employer argues that discharge is appropriate given the grievant's serious misconduct and poor overall work record.

Union Position:

The Union maintains that discharge is not appropriate under either of the theories urged by the Employer. First, the Union points out that the LCA's automatic termination provision is triggered only by conduct that constitutes a falsification, but not by conduct that violates an Employer policy short of a class A violation. In this regard, the Union

contends that Mr. Kiefner's statements with respect to his reason for leaving the bus and his use of the scraper are not intentional falsehoods, but statements made in a good faith belief of their veracity.

In terms of the Employer's alternative theory, the Union acknowledges that Mr. Kiefner used language that could be considered threatening and obscene under Employer policy # 497. The Union asserts, however, that this conduct does not warrant the ultimate sanction of discharge for two reasons. First, Mr. Kiefner's conduct was provoked by the abusive and threatening behavior of Mr. Howard. Second, the Employer has not discharged a number of other employees who engaged in similar types of behavior.

DISCUSSION AND OPINION

In a usual discipline and discharge case, an arbitral determination of just cause involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See Elkouri & Elkouri, HOW ARBITRATION WORKS 948 (6th ed. 2003).*

In this case, the Employer asserts two alternative grounds in support of its discharge decision. First, the Employer maintains that Mr. Kiefner's conduct violated the terms of the parties' LCA. Alternatively, the Employer argues that, even if the LCA was not violated, discharge nonetheless is warranted based on the totality of Mr. Kiefner's misconduct. Both of these contentions are examined below.

A. The Last Chance Agreement

The terms of the LCA executed by the parties limits the scope of arbitral jurisdiction in this matter. Paragraph 12 of the LCA states:

If Mr. Kiefner's grievance is submitted to arbitration, the jurisdiction of the arbitrator is limited to determining whether Mr. Kiefner was in violation of this agreement. All parties agree that the arbitrator shall not have jurisdiction to modify the discharge penalty in the event such a violation is found.

This language, accordingly, removes the typical second step remedial issue from arbitral jurisdiction under the LCA.

By its substantive terms, the LCA provides that "Mr. Kiefner agrees not to falsify any information based upon a manager's inquiry and further agrees not to falsify any information on any official Metro Transit document." Thus, the only issue presented under the LCA is whether Mr. Kiefner falsified any information provided to Metro Transit management.

The Employer maintains that Mr. Kiefner violated this prohibition by falsely telling Metro Transit management during the investigation into this matter that he left the bus to retrieve his glasses and that he used the scraper only in a defensive manner. In support of this claim, the Employer relies on the testimony of Mr. Jacobs and Mr. Kluge to the effect that Mr. Kiefner's rapid departure from the bus was more likely an attempt to retaliate against Mr. Howard than to recover his glasses. Similarly, Mr. Jacobs and Mr. Kluge, after reviewing the videotape of the incident, both testified that they believe that the tape shows Mr. Kiefner swinging the scraper in the direction of Mr. Howard in an aggressive manner.

The Employer's reliance on statements uttered during an investigation to prove the existence of a falsehood is problematic in some respects. Such statements often are

not subject to the same objective proof as may be available to establish the existence of an extrinsic lie or a forged document. Statements uttered in the wake of an incendiary incident reflect the subjective perception of the participant. Regardless of objective accuracy, the individual uttering the statement nonetheless may have a good faith belief in the truth of the statement being offered. Under these circumstances, such statements should not be treated as falsified unless they are shown to be knowing and intentional untruths.

In this instance, the evidence offered by the Employer falls short of this mark. The record shows that Mr. Howard grabbed the grievant's glasses and ran from the bus. It is clear from the tape that Mr. Kiefner did not know that Mr. Howard had tossed the glasses on the dash of the bus before departing. While it is true that Mr. Kiefner immediately left the bus to pursue Mr. Howard, it is not clear that retrieving eyeglasses that he needed to drive the bus was not a motivating objective for Mr. Kiefner's conduct.

In a similar vein, it is impossible from review of the videotape to tell whether Mr. Kiefner swung the scraper at Mr. Howard. Management witnesses claim to see such a movement. Mr. Kiefner, in contrast, claims that he raised the scraper only as a defensive gesture to keep Mr. Howard at bay. This type of unverified "he said, she said" testimony does not establish that the grievant knowingly and intentionally lied in providing his version of events.

Given the state of the record, it is as likely as not that Mr. Kiefner subjectively believed the truth of the statements he provided during the Employer's investigation. Under these circumstances, the Employer has not carried its burden to show that those statements constituted a violation of the LCA.

B. The Totality of Inappropriate Conduct

While the LCA limits the automatic termination remedy to conduct that conveys false information, the agreement expressly preserves the Employer's right to impose discipline for reasons not governed by the terms of the LCA. In this regard, paragraph 9 of the LCA provides:

This Agreement shall not operate to restrict Metro Transit's authority to terminate the employee for any reason not mentioned in this agreement, if that reason would have been proper reason for Employee's termination in the absence of this agreement.

The Employer contends that Mr. Kiefner's conduct during the March 9 incident warrants discipline by virtue of violating the following three Employer policies:

- 1) Threatening a citizen or customer with bodily harm (Operator Policy 497);
- 2) Using abusive or obscene language while on the job (Operaor Policy 497);
- 3) Leaving the operator's seat to settle a dispute when not necessary for self defense (Operator's Bulletin # 12).

The evidence submitted at the hearing supports each of these assertions. Indeed, the Union does not quarrel with this conclusion.

At the arbitration hearing, Mr. Kiefner testified that he took a firm stance in response to Mr. Howard's belligerent behavior in an attempt to deter any further aggression. While Mr. Kiefner may have believed that such an approach was appropriate at the time, this conduct runs counter to the policies (and training) of the Employer which direct employees to attempt to defuse potential altercations by not engaging in retributive behavior. The wisdom of the Employer's policies is underscored in this case by the escalation in hostility that resulted from the grievant's "toe to toe" approach. In the end,

the Employer has the right to expect that its drivers will abide by company policy, and Mr. Kiefner's failure to do so warrants a disciplinary response.

C. The Appropriate Remedy

The Employer claims that discharge is an appropriate sanction in light of Mr. Kiefner's policy violations when coupled with his overall poor work record. In terms of the latter, the Employer points to a number of customer feedback complaints and the fact that Mr. Kiefner was subject to the terms of a LCA.

The Union, in contrast, argues that discharge would constitute disparate treatment when compared to the discipline imposed on other drivers for similar incidents. The Union submitted testimony to the effect that three drivers who engaged in conduct that was at least as aggressive toward passengers as that engaged in by Mr. Kiefner resulted in outcomes resulting in reinstatement. The only comparative instance in which a driver's discharge was upheld involved an incident in which a driver actually stuck a passenger with a scraper and inflicted serious injury. The Employer attempts to distinguish the former cases by arguing that none of those drivers were subject to a LCA at the time of their respective incidents. That factor, however, is of little relevance in this matter since the LCA applicable to Mr. Kiefner only implicates the making of false statements and not other rule violations.

Based on these comparative circumstances, the appropriate remedy in this case is a significant suspension rather than the ultimate sanction of discharge. In addition, since Mr. Kiefner was subject to a LCA at the time of his discharge, his reinstatement also should be subject to the terms of a LCA.

AWARD

The grievance is sustained in part and denied in part. The Employer had just cause to discipline the grievant, but the sanction is reduced to an unpaid suspension of ten days. The Employer is directed to reinstate the grievant to his former position, but such reinstatement is conditioned on the terms of a last chance agreement. The parties are directed to negotiate and establish the terms of such an agreement. Jurisdiction is retained for a period of sixty (60) days from the date of this award to address any unsettled remedial issues as may be necessary.

Dated: September 28, 2009

Stephen F. Befort
Arbitrator