

IN THE MATTER OF ARBITRATION BETWEEN

**Amalgamated Transit Union, Local 1005,
Minneapolis, St. Paul and Rochester,
Minnesota**

And

**Rochester City Lines Company Inc.,
Rochester, Minnesota**

**Opinion and Award
FMCS Case No. 100809-58957-3**

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of ATU, Local 1005

Roger A. Jensen, Esq.

Miller, O'Brien and Cummins

Minneapolis, Minnesota

On behalf of Rochester City Lines Company, Inc.

Alec Beck, Esq.

Seaton, Beck and Peters, P.A.

Minneapolis, Minnesota

JURISDICTION

In accordance with the Agreement between Amalgamated Transit Union, Local 1005 and Rochester City Lines Company, Inc., January 1, 2008 to December 31, 2010; and under the jurisdiction of the United States Federal Mediation and Conciliation Services, Washington, DC, the above grievance arbitration was submitted to Joseph L. Daly on November 17, 2010, in

Rochester, Minnesota. Post-hearing briefs were waived by the parties. The case was decided by the arbitrator on December 15, 2010.

ISSUES AT IMPASSE

The parties stipulated that the case was properly before the arbitrator and that the issue is: whether there is “proper cause.” The parties further stipulated that the term “proper cause” means “just cause.”

Potentially applicable contract provisions include: ARTICLE 5, section 1; ARTICLE 7, discharge was not for proper cause.

Potentially applicable Rochester City Lines Corrective Action Policy include:

Group II These offenses may begin with a written warning. Repeated offenses or more serious incidents may result in suspension or termination: 9. Misconduct

Group III Incidents in Group III are very serious infractions and may result a suspension or termination. 4. Immoral or indecent conduct on Rochester City Lines property.

FINDINGS OF FACT

1. On April 5, 2010, Abdirizak Jama, a Rochester City Lines bus driver, was terminated for “indecent behavior” for an alleged incident that took place on March 31, 2010, involving a 20-year old woman.

2. On April 7, 2010, Amalgamated Transit Union, Local 1005, filed a grievance on behalf of Mr. Jama against his employer Rochester City Lines. In applicable part the grievance stated:

ATU Local 1005, Rochester, MN contends that RCL’s termination of [Abdirizak Jama] was not justified and merited. RCL’s corrective action policy was not followed as it is written and ATU Local 1005 seeks to have [Mr. Jama] reinstated to his full-time driver’s position immediately and made whole for the period of time from April 5, 2010 until now, excluding the dates from April 10, 2010, through May 10, 2010, as [Mr. Jama] was on a previously approved unpaid leave of absence. [sic] [Employer exhibit #3]

3. Rochester City Lines filed a “Disciplinary Report Form” which stated in applicable part the “type of offense”:

Indecent behavior – driver Abdirizak Jama was speaking with [bus passenger] (who is a vulnerable 20 yr old rider on the bus) about a lot of small talk issues then asked if she had a boyfriend & requested [bus rider’s] phone number which she refused to give him but when he approached her destination to get off the bus, he shook hand, but would not let her off the bus by keeping the door closed until she gave him a hug, she was afraid he would not let off the bus as he was not opening the door so she walked back to the driver & gave him a hug as per his request.

4. The bus rider testified at the arbitration hearing. She stated she boarded the bus at Wal-Mart after renting a video. No other passengers were on the bus. She testified she moved to the seat directly behind the driver and behind the aisle-facing handicap seats near the front of the bus. The bus driver asked her if “she was working at Wal-Mart?” and “did she go to school?” She told him she wanted to be in surgical technology, but didn’t get in. He asked her how old she was and she replied 19, although she was 20 at the time. She testified she didn’t want to give her age away because she thought it was “a security thing.”

She testified Mr. Jama then asked her “if she likes to go to the movies.” The passenger testified she then moved forward toward the driver because it was “kind of noisy on the bus.” She testified she moved up to the disabled seats across from the driver. She said she eventually moved to stand near him. Mr. Jama, according to her testimony, asked her if she “was in the army” because she had an army T-shirt on. She stated “No, my medical background won’t allow it.” She stated Mr. Jama said “Don’t worry; you have your life ahead of you.” Mr. Jama, according to the bus rider, then asked “Do you have a boyfriend?” The bus rider testified that at that moment she was “a little suspicious, somebody asking me about a boyfriend.”

She testified that “nothing really bothered me until the very end.” “I was standing about 3 or 4 feet from the bus driver. He pulled up to stop but did not open the door. I turned around to look at him. He told me that he had the same telephone holster that I was wearing. He asked if he could have my phone number. I said no, I’m getting a new number because of weird calls I received. The door still was not opened. He put his hand out to shake my hand. I shook his hand. Then he said ‘Don’t I get a hug?’ I was afraid because the door was still not opened. I reluctantly hugged him. He held me tight. I was trying to pull away, but he was not letting go. Then he opened the door.”

The bus rider then testified “I do not see how he thought I was trying to initiate the hug.” “I have never had other incidents like this with other drivers. I have never flirted; never got in their personal space. I have not had any bad experiences with Mr. Jama in the past. His race is not a reason I made the complaint.”

5. Mr. Jama testified at the arbitration hearing that at approximately 3:55 p.m. on March 31, 2010, he was waiting at the Wal-Mart North, Route 18 stop when the bus rider got on his bus.

Mr Jama testified “She sat on the opposite side of me and did not sit behind me. I said ‘Hi’ which I usually do because I’m instructed to be polite. She said ‘how are you doing, it is beautiful today.’”

Mr. Jama responded “Winter is gone, it reminds me of home.”

The passenger said, “Where are you from?”

Mr. Jama replied “Somalia.”

Mr. Jama stated he then asked her “Where are you from?”

She replied “Michigan.”

Mr. Jama asked her “Have you ever been to Kalamazoo?”

She stated “Yes, I’ve been there.”

Mr. Jama stated, “The passenger then stood up from her seat and came up next to me.”

“I asked, ‘what reason brought you to Rochester?’”

She stated “Study.”

Mr. Jama asked “What study?”

She answered “Technology.”

He asked “Is it hard?”

He testified he then asked her “Where are you living-with your family, spouse, boyfriend or friends?” He said at the arbitration hearing he did this simply to be “kind and friendly.”

Mr. Jama testified he then asked “Is that a British flag on your t-shirt?”

She answered “No, Army Six.”

He asked “Have you ever been in the Army?”

She answered “I would love to, but no, because of my health.”

Mr. Jama testified he then said, “Don’t worry about it, you’re young, a beautiful woman you have plenty of time to do many things in your life.”

Mr. Jama stated he then picked up another passenger from Mayo Hospital and dropped that person off a little further. He testified that after a few more blocks the rider pointed to a movie theatre and asked him “Do you like movies?”

Mr. Jama testified he stated “Yes, I’ve got an HBO at home.”

Mr. Jama said the passenger then moved very close to him and said “Nice talking to you.” She then put out her hand for a handshake and “leaned in with both hands and hugged me.” Mr. Jama testified he did not initiate the hug, but he did hug her. “It lasted about 1 or 2 seconds.” Mr. Jama testified he had opened the door when she pointed to the door.

He testified that before she left he saw her phone cover and said “Hey, I used to have one like that, a good one.”

He testified she said, “This phone isn’t working I need to get a new number.” He testified that she said “Goodbye” and left the bus.

Mr. Jama testified he was seat belted in his seat and could not possibly have turned to give her a hug, but rather she came toward him and gave him a hug sideways.

6. The next day the passenger’s aunt, with whom the passenger lives in Rochester, Minnesota, contacted Anthony Knauer, Transit and Parking Manager for RCL, and told him the: “Driver asked [the passenger] if she had a boyfriend. She responded no-that she did not have time. When she went to leave the driver wanted her telephone number. She did not want to give it. The driver then asked for a hug as she debarked and did not open the door. She hugged the driver—and he opened the door. The passenger felt intimidated and very uncomfortable (She may be a vulnerable adult.)” [E-mail from Tony Knauer to Hugh Findry, Director of Human Resources and Safety for Rochester City Lines dated April 1, 2010].

7. The basic position of the company is that there are simply some things a bus driver does not do. When a passenger gets on a bus, a bus driver does not engage in a conversation about a boyfriend, a woman’s telephone number, or a woman’s beauty. Given the nature of this complaint, the company absolutely needed to respond in dramatic fashion. There is “proper cause/just cause” to terminate Mr. Jama.

8. The position of the union is that Mr. Jama is an honorable man. He is not lying. He was being friendly and kind. The real reason the company terminated Mr. Jama was because of its concern about litigation, both civil and criminal.

Mr. Jama was misunderstood when he was interviewed. Mr. Jama was nervous. He is not guilty of anything. Since English is not his primary language his testimony and statement does not flow smoothly. Further, the video, which ordinarily would resolve this matter, was not working on the bus that day. The union argues if there had been a video, it cannot be known who put their hand out first and who initiated the hug. Then we would know what happened. In fact, Mr. Jama suggested that Mr. Fetter “look at the video” and that would prove it.

Further, says the union, a police report initiated by the company was filed more than 6 months later. No charges have been brought against Mr. Jama.

Also, says the union, it is clear that the bus rider has boundary issues. Two credible bus drivers testified at the arbitration hearing that she had ridden their buses and that she also stood “too close” to the driver, was “overly friendly”, and seems “to be seeking friendship”.

The union contends that the facts are not inconsistent. The union notes that Mr. Jama did not ask her if “she had a boyfriend”; rather he asked her “where are you living-with your family, spouse, boyfriend, or friends?” This question must be taken in the context of the overall conversation contends the union.

Ultimately the union contends that the arbitrator cannot conclude by a fair preponderance of the evidence that Mr. Jama did anything but engage in kind and friendly conversation. He did not initiate a hug. He was belted into his seat. He simply was paying attention to the bus rider and talking kindly with her.

Obviously, when she talked to her aunt, red flags were raised in the mind of the aunt. She was not held hostage on the bus. There is simply no evidence of that. There is no independent evidence, no video and the discussion with the employer’s investigator does not prove anything. The union argues the company has not sustained its burden of proof in this matter and has not shown “proper cause” to uphold a termination. The union requests that Mr. Jama be reinstated with back pay and benefits; and that reference to this matter be removed from his record.

DECISION AND RATIONALE

This is a “she said”/“he said” situation. No independent, disinterested witnesses testified at the arbitration hearing as to exactly what occurred on the bus.

Here is what was shown.

The bus rider informed Mr. Jama that she was 19, although, in fact, she was 20. She testified that she didn’t want to give her age away because it is “a security thing.”

She testified she “moved up toward him to the wheelchair seats” and then she “moved up to stand near him.” She informed him that she was not in the Army because of her “medical background.” She testified he then said “don’t worry you have your life ahead of you.” She testified that she did shake his hand when he put his hand out. She further said that she reluctantly gave him a hug when he said “Don’t I get a hug?” Mr. Jama’s testimony is similar, but different as to who initiated what.

There is no question that both Mr. Jama and the passenger engaged in some personal conversation. The passenger viewed discussions about a “boyfriend”, “telephone,” and the fact that the door did not open as “suspicious.” Mr. Jama viewed the entire discussion as “kind and friendly.” Mr. Jama testified he did open the door when they arrived at the stop.

Mr. Jama testified he did ask the passenger if she lived with her family, spouse, boyfriend, or friends. The union contends, that in context, even this specific conversation was not improper.

Mr. Jama also admitted that he talked to her about the movies and the fact that she had changed her telephone number. He further admitted that he did shake her hand [although he says she initiated the handshake] and that he did hug her [although he says she initiated the hug].

The ultimate question to be answered is: Has the company proven by a fair preponderance of the evidence “proper/just cause” to uphold the termination of Mr. Jama?

The bus company was properly concerned about the complaint made by the bus rider’s aunt; and responded quickly to protect its passenger, other passengers, the company’s reputation and its contract with the city of Rochester, Minnesota. The company had to do so.

But there are problems. The first problem is that the video in the bus was not working. If the video had been working it is likely it could have been determined who initiated the handshake, the hug, and whether the door was closed or open. This is still in question at the end

of the arbitration proceeding. I cannot determine by a fair preponderance of the evidence answers to these questions.

A second problem is that only Mr. Jama and the bus rider were there and each has differing takes on what happened. I conclude that both the bus rider and Mr. Jama told the truth as they saw it. Therefore, this case cannot be determined on credibility since both witnesses are credible even though their views of exactly what happened differ.

On the other hand, I can conclude that Mr. Jama, by his own admission, asked the bus rider if she lived with her family, a spouse, a boyfriend, or friends. What purpose does such a question serve coming from a bus driver to a bus rider? Mr. Jama says he was simply being “friendly.” But a bus driver asking such a question could and did raise the suspicion of the bus rider and her aunt. The aunt justifiably informed the bus company officials.

Mr. Jama is not a social worker, counselor or psychologist. He is a bus driver. His job is to safely drive the bus and safely deliver the passengers to their destination. His admitted continued conversation with the passenger-even if done so to be kind and friendly- is a distraction to his driving. His job is not to be a friend, conversationalist, counselor or questioner into the personal lives of riders. His task is to safely drive the bus.

By his own admission, Mr. Jama shook the rider’s hand and engaged in a hug, no matter who initiated the hug and how it was delivered.

While company policy is for its bus drivers to be “friendly”, the word “friendly” cannot be interpreted to be asking drivers to become friends, conversationalists, counselors or questioners about the private lives of bus riders.

By a fair preponderance of the evidence, the Rochester City Lines has proven “proper/just cause” for a long-term suspension of Mr. Jama. It is held that Mr. Jama is suspended without pay from April 5, 2010 to January 1, 2011, when he will be reinstated as a bus driver with the same pay, benefits and seniority.

December 15, 2010
Date

Joseph L. Daly
Arbitrator