

BEFORE THE
KCATA-ATU LOCAL 1287 ARBITRATION BOARD
JAMES A. O'BRIEN, NEUTRAL ARBITRATOR

IN THE MATTER OF ARBITRATION)	
)	
between)	
)	
KANSAS CITY AREA)	Linda Smith Discharge
TRANSPORTATION AUTHORITY)	Grievance No. TR-06-2007
)	FMCS No. 070417-02645-A
and)	
)	
AMALGAMATED TRANSIT UNION)	
LOCAL 1287)	

APPEARANCES

For the Union

Scott A. Raisher, Attorney
Freddy Ersery, Vice President
Robert Roach, Financial Secretary
Linda Smith, Grievant

For the Employer

Jeffrey M. Place, Attorney
Bob Kohler, Director of Transportation
Tommie Hill, Supervisor
Tom Rodman, Instructor
Tom Morgan, Superintendent of Transportation

Arbitration Board

James A. O'Brien, Neutral Arbitrator
Fern M. Kohler, Employer Member
William L. Wilson, Union Member

INTRODUCTION

The Amalgamated Transit Union, Local 1287 (hereinafter referred to as Union) and the Kansas City Area Transportation Authority (hereinafter referred to as Employer) are involved in a dispute over the termination of the employment of Linda Smith on February 14, 2007 as a result of an incident which occurred on February 3, 2007. The parties selected the undersigned through the appointment procedures of the Federal Mediation and Conciliation Service to serve as the neutral member of a three person Arbitration Panel to determine the matter in dispute. An Arbitration hearing was held on July 19, 2007, at the Breen Building, Kansas City, Missouri.

ISSUE

The issue to be considered by the Arbitrator is as follows:

Was the grievant discharged for just cause under all the facts and circumstances and if not, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

COLLECTIVE BARGAINING AGREEMENT

Section 1.2 Management-Discipline

(b) The Union further recognize that the power of discipline is vested exclusively in the Authority and it will not attempt to interfere with or limit the Authority in the discharge or discipline of its employees for just cause; subject, however, to the right of any employee to whom this Agreement is applicable and who may be discharged or disciplined, to present as a grievance, for action in accordance with the grievance procedure hereinafter in Section 1.13 set forth, the question whether he has been discharged or disciplined for just cause; ...

(c) The Union covenants that its members shall render faithful service in their respective positions and will cooperate with the management in the efficient operation of the business and in fostering friendly relations between the Authority and the general public; that they will be courteous to passengers and to others with who they come into official contact; that they will at all times seek to protect the property of the Authority from injury at their own hands or at the hands of others: that, in the handling of equipment and other property of the Authority, they will at all times comply to the best of their ability with the rules of the Authority and with the applicable Federal, State and Municipal laws, ordinances, regulations and orders, and will make every effort to prevent injury to property and person; and that upon the Authority bringing to its attention any alleged

fraudulent handling of funds or fares or other wrongful practices, the Union will assist the Authority in eliminating such malpractices.

(e) Warning slips may remain in an employee's file but shall not be considered after twelve (12) months for the purpose of progressive discipline, but may be considered in reviewing the employee's record only for determining whether moderation of discipline is warranted.

(g) If, after discussion with the employee, it is evident disciplinary action is indicated, the employee will be told to contact a Union representative before finalization of the disciplinary action. It is understood that the employee has the right to waive Union representation if he so desires.

(h) Employees shall be called in and notified in writing of any disciplinary actions placed in the employee's record. Customer complaints that have not been investigated and verified shall not be used as a basis for disciplinary action.

MANUAL OF INSTRUCTION
OPERATING RULES AND DISCIPLINE CODE
TRANSPORTATION DEPARTMENT

SECTION II – POLICIES AND PROCEDURES

5. Discipline/Personal Conduct

The Authority expects its employees to be courteous and treat fellow employees and patrons with respect. Only through full cooperation and total working efforts can the Authority prosper. As employees of a public agency, each of us has the obligation to conduct ourselves in a manner befitting the public's trust. The following actions toward any of our customers, supervisors, agents or employees will not be tolerated and are subject to suspension or discharge.

- Employees who are careless with the safety of themselves or other in the performance of their duties
- Discourteousness
- Dishonesty
- Improper handling of passenger revenue
- Conduct unbecoming an employee
- Violation of rules
- Willful neglect
- Making false reports or statements
- Concealing facts concerning matters under investigation
- Failure to report an accident
- Failure to make the proper efforts to procure witnesses

a. Language and Conduct

Each employee should remember that his or her conduct reflects on every other employee of the Authority. Therefore, employees should conduct themselves in a respectful and civil manner. By law, we are obligated to keep the workplace free of religious bias. Therefore, employees on duty will not make comments to passengers or co-workers supporting or rejecting any religious belief.

Boisterous actions or profane language is not permitted or tolerated.

b. Gambling, Horseplay, Fighting and Firearms

Gambling (including bets, unauthorized lotteries and raffles), horseplay (throwing missiles, tripping, etc.), loud profanity and fighting while on duty or on Authority property are prohibited at all times. Possession of a firearm is prohibited while on duty or on Authority property and is cause for discharge.

SECTION V-PASSENGER SERVICE

1. Courtesy to Passengers

Relations and communications with passengers can be classified into four types:

a. Respectful Communications

Most contacts with passengers fall into this category. Treating people in a courteous manner as we would like to be treated is the trait of respectful communications. A friendly greeting as a customer boards, or even just a nod and a smile welcomes such person to our service. Problems with passengers handled in a respectful professional manner show that the operator is in control, rather than the passenger. Most problems arise from misunderstanding, so it is important to inform rather than criticize a customer.

b. Let it Go

For minor infractions or random comments by customers, it sometimes makes sense to say and do nothing, rather than to enter into an argument. No one ever really wins an argument with a customer. This technique cannot be used in every situation.

c. Give Orders

Orders should only be given to passengers in accident or emergency situations when the customers look to the bus operator for direction.

d. Act Without Discussion

Only in cases of passenger safety is it appropriate to act without discussion.

Good customer relations retains riders and encourages new customers. Good customer relations improves the image of our service and makes each operator's job a little easier.

SECTION VIII – ATA DISCIPLINE CODE

A discipline code has been developed to standardize types of penalties for various violations and to inform ATA employees of penalties that may be imposed for successive violations of rules and regulations. It should serve as a guide to employees and supervisors involved in disciplinary matters. The code should be regarded as indicative of the various types of violations and not enumerative of the entire range of possible violations. The code should not be considered a hard and fast limitation upon supervisory personnel in dealing with disciplinary matters. Penalties for multiple violations occurring at the time or similar time will be dealt with only after a review by the Director of Transportation. Whenever disciplinary action is contemplated, the supervisor should consider the employee's total record and work history before determining the penalty. It is most important that supervisors review the entire work record and determine whether a particular violation is an isolated instance in an otherwise good work record or is indicative of a continuing pattern of violations.

2. COURTESY AND PROFESSIONALISM

2.2 Operators will not fight on Authority property or while on duty.

First Offense: Suspend pending investigation; subject to discharge.

2.3 Conduct unbecoming an Authority employee, such as threatening, intimidating, coercing fellow employees and passengers, distracting attention of others, shouting, use of profanity will not be tolerated. (This list is not all-inclusive.)

First Offense: Suspend one (1) day to three (3) days, depending upon severity.

Second Offense: Discharge

6.5 Operators will not refuse to allow a passenger to board bus at designated stop or at the end of the line while bus is taking layover or on specified loops on certain routes.

First Offense:	Written warning
Second Offense	Suspend three (3) days
Third Offense	Discharge

BACKGROUND

Prior to the termination of her employment, Linda Smith was a full-time bus operator employed by the Employer in Kansas City, Missouri. On February 3, 2007, during her work shift, the Grievant was involved in an incident with a passenger. As a result of the incident, the Grievant's employment was terminated. While there are differing opinions on how to categorize the incident, there is no dispute that the incident occurred. At issue is what type of discipline should be imposed for the incident and whether any of the Grievant's rights were violated in the course of the discipline process.

HEARING AND STIPULATIONS

An arbitration hearing was held at the KCATA Breen Building, Kansas City at 10:30 a.m. on July 19, 2007 by agreement of the parties. The parties stipulated that all contractual procedures necessary to bring this matter before the Arbitration Board had been observed and that the Arbitration Board had jurisdiction of the issue.

The parties stipulated that the collective bargaining agreement offered to the Arbitration Board as Joint Exhibit 1 (Agreement) is the collective bargaining agreement currently in effect between the parties.

The parties agreed that the Employer would proceed first with its case to be followed by the Union's case, with both parties being given the opportunity to cross-examine all witnesses. All witnesses who appeared before the Arbitration Board were sworn.

The parties agreed to extend the thirty day timeline for the Arbitration Board to render its decision if that proved necessary and further agreed that the neutral arbitrator need not submit the decision to the other Arbitration Board members prior to rendering the decision.

Both parties were given full opportunity to present evidence. All exhibits were received. The parties requested the opportunity to submit post-hearing briefs. It was agreed that the parties would have until the close of business on August 29, 2007 to

submit simultaneous briefs, if they chose to do so. Both parties submitted briefs. All testimony, exhibits and written arguments received full consideration in rendering this decision.

WITNESSES

UNION

Linda Smith

EMPLOYER

Tommie Hill
Tom Rodman
Tom Morgan
Bob Kohler

EXHIBITS

Joint Exhibits

Joint Exhibit 1 – 24

EMPLOYER'S POSITION

The Employer believes that after an argumentative discussion with a bus passenger, the Grievant initiated a physical contact with the passenger that constituted "fighting" for the purposes of the KCATA Discipline Code (Joint Exhibit 2).

As a result of the physical contact and argument, the passenger called the police and the Grievant called her dispatcher. Ultimately the police were advised that neither party wished to file charges against the other. After an investigation by the Employer, it was determined that the physical contact between the Grievant and the passenger was a result of the actions of the Grievant and constituted "fighting" which under the Discipline Code made the Grievant subject to discharge for a first offense.

The Grievant's prior record, which was clouded by a previous verbal customer service incidents, did not warrant any mitigation of the discharge penalty.

UNION'S POSITION

The Union believes that the discharge of the Grievant is unjustified. The Union acknowledges that the conduct of the Grievant on February 3, 2007 was inappropriate and may warrant some level of discipline short of discharge. The Union concedes that the Employer may rely on other disciplinary action taken against the Grievant in the previous twelve months for the purpose of imposing discipline, but any warnings outside

of the twelve month period may be utilized by the Employer only for the purpose of determining whether there should be mitigation of otherwise appropriate discipline.

The Union further asserts that the physical contact between the Grievant and the passenger on February 3, 2007 did not constitute a "fight" which warrants summary discharge. Anything short of a "fight" is subject to progressive discipline. Even if the conduct were found to be "fighting", discharge is not required and the conduct should be analyzed under "just cause" analysis. Because the Grievant's conduct does not constitute a "fight", the other sections of the discipline code do not authorize discharge because the other incidents within the previous twelve month period do not take the Grievant up to the level of discharge.

The Union also argues that the failure of the employer to refer the Grievant to the Employee Assistance Program for a recognized problem should be considered in mitigation of the penalty for actions that may have been avoided through the intervention of the EAP Program.

Finally, the Union argues that the Grievant did not receive sufficient training in dealing with situations such as that posed by the February 3rd incident and that her time off due to an injury made any training she previously received fade during the course of her leave.

FINDINGS OF FACT

The Grievant has been employed by the Employer since 1999. The Grievant has been involved in the following incidents since the commencement of her employment with Employer:

1. On November 2, 2003 the Grievant was observed being "off route" and not going to the end of the line to begin her bus run. When confronted, she refused to give her badge number to the supervisor. She was not charged with insubordination or conduct unbecoming. As a result of the incident, she received two days off without pay.
2. On June 8, 2005 the Grievant was involved in a confrontation with a passenger. It was a verbal confrontation accompanied by the Grievant picking up a short metal bar and displaying it to the passenger. Grievant was given a "warning" in her file and a one day suspension to be served in training at a student rate of pay for the day. There was no mention of a violation of Section 2.3 of the Discipline Code.
3. On February 17, 2006 Grievant was given a written warning regarding attendance for six attendance failures during the period September 15, 2005 through February 16, 2006. No discipline was imposed.

4. On April 21, 2006 the Grievant received a written warning for tardiness. She was one minute thirty nine seconds late on that occasion. No discipline was imposed.

5. At some unspecified date, the Grievant was involved in an incident in the hallway of the Employers' offices, where use of inappropriate language was alleged, but for which there is no written record and no discipline was imposed.

6. On February 3, 2007 the Grievant was involved in the incident which is the subject of this arbitration. This incident involved an extended verbal confrontation with a passenger, ultimately leading to physical contact. After investigation by the Employer which involved questioning of the Grievant and review of a video tape taken by an on board camera, the decision was made to terminate the employment of the Grievant. The decision to terminate was based on this incident only and no other factors were involved. The Employer was unable to question the other party to the incident because the person did not leave his name or other contact information and could not be located. At the time of the same incident another potential passenger was barred from the bus by the Grievant.

During the period from May, 2006 through November, 2006, the Grievant was off work due to a work injury which required surgery.

During the course of her employment, Grievant received customer service training on multiple occasions, all of which made it clear to operators that all confrontations with passengers were to be avoided.

The Grievant acknowledges that her conduct on February 3, 2007 was inappropriate.

CONCLUSIONS OF LAW

Incidents 1 and 2 above cannot be used (and apparently were not used) by the Employer to enhance the penalty for the incident in this case. Incidents 3 and 4, as written warnings for conduct unrelated to this incident do not serve as the basis for enhancing the penalty for the conduct in this incident. The "hallway" incident (5) for which there is no documentation or date and for which the facts are in dispute, cannot be used to enhance the penalty for the conduct in this incident. Incident 1 cannot be used to negate any possible mitigation of the penalty for this incident because it is unrelated to the alleged violations in this incident. Incident 2 could be relied upon to negate mitigation of the penalty in this incident, but that impact would be limited due to the minimal nature of the penalty imposed. Incidents 3 and 4, once again, have no relation to the incident before the Arbitration Board.

It should also be noted that while the introductory paragraph of Section VIII of the Discipline Code seems to permit the Employer to consider an employee's entire work

record in imposing discipline, the Agreement supercedes this language for members of Union and limits the look back to warnings within the previous 12 months.

As a result of the above, the Arbitration Board finds that the February 3, 2007 incident essentially stands on its own. As argued by the Employer, the incident consists of three violations; "fighting", "conduct unbecoming" and "refusing to allow a passenger to board the bus". The penalties for these offenses are specified in the Discipline Code as follows:

A. Fighting. Suspend pending investigation; subject to discharge for first offense.

B. Conduct unbecoming. First Offense: One to three days suspension depending on severity; Second Offense: Discharge.

C. Refusing to allow a passenger to board: First Offense: Written Warning; Second Offense: three days suspension; Third Offense: Discharge.

Because both the "conduct unbecoming" element and the "not allowing a passenger to board" element are first offenses by definition (no other "warning slips" of the same type within 12 months), they do not constitute a basis for discharge. Therefore, the penalty imposed must rely on the "fighting" element to be upheld.

On the issue of "fighting", it is significant that the Discipline Code uses the words "subject to discharge" rather than simply the word Discharge as is used for "Second Offense, conduct unbecoming" and in other places. This supports the Union's argument that discharge is not necessarily automatic for "fighting" and is subject to a typical "just cause" analysis.

FINDINGS OF FACTS

It is unnecessary to reach the "just cause" analysis. In order for summary discharge to be available under Subsection 2.2 of Section VIII of the Discipline Code the Grievant must be involved in a "fight on Authority property or while on duty". There is no dispute that the incident occurred both on Authority property and while the Grievant was on duty. The issue then becomes whether there was a "fight". The Agreement does not define "fight" and neither party offered a definition or clarification of the term in the course of the arbitration hearing or in the briefs.

The Union's brief referenced and enclosed copies of decisions in other arbitrations involving the Employer and the Union. Two of these decisions involved a single incident which occurred on February 3, 1994 between a Mr. Harvey and a Mr. Wilson where a classic fight involving fisticuffs and serious injury occurred. Both individuals were discharged and both grieved their discharge. In decisions by separate

arbitrators, one discharge was upheld and the other discharge was overturned with the grievant reinstated and made whole for all earnings lost.

In the case before the Arbitration Board, the conduct does not involve a classic fight with fisticuffs. At most the incident before the Arbitration Board involved a bump and a push back and nothing more in terms of physical contact.

The first or principal definition of the word "fight" in all of the dictionaries consulted by the neutral Arbitrator specify, in one form or another, "battle or combat" (dictionary.com unabridged); "to attempt to harm or gain power over an adversary by blows or with weapons" (American Heritage Dictionary); "combat or battle, as hostile encounter or engagement between opposing forces, suggesting primarily the notion of a brawl or unpremeditated encounter, or that of a pugilistic combat" (Black's Law Dictionary). The subordinate definitions tend to refer to verbal or other nonphysical efforts to reach a goal.

The conduct of the Grievant, as shown by the evidence, does not rise to the level of a "fight" of the type dealt with in the arbitration decisions referred to above and does not rise to the level of the definition of a "fight" in the classic sense. To call the conduct of the Grievant in this case a "fight" would be to stretch the definition beyond any meaningful understanding of the word to average persons. In summary, the physical contact between the Grievant and the passenger in this incident did not constitute a "fight" under the terms of the Discipline Code and cannot serve as the basis for discharge.

This does not dispose of the matter because the Employer argues that the conduct of the Grievant in this incident taken as a whole, warrants discharge because of the concept of compounding all of the violations which occurred during the incident. However, taking the entire incident as a whole results in the Grievant being guilty of violating Subsection 2.3 and 6.5 of Section VIII of the Discipline Code. Because the Grievant had had no other events of violating 6.5 her conduct in this incident would only warrant a written warning under 6.5. Likewise, the Grievant has engaged in no previous violation of 2.3 in the previous 12 months and thus her conduct would constitute a first offense justifying a suspension of one to three days depending on the severity of the offense.

Thus, while the Employer has proven and the Union has in effect acknowledged that the Grievant committed a very serious violation of Subsection 2.3 of Section VIII of the Discipline Code, the Arbitrator is constrained by the documents governing the relationship between Employer and Union in this case.

It is significant that Subsection 1.5 of Section VIII of the Discipline Code provides that a first offense for reckless driving warrants a "severe suspension" which is later defined as five days or more. Clearly the Employer did not consider a first offense violation of Subsection 2.3 to be as serious as a first offense violation of Subsection 1.5.

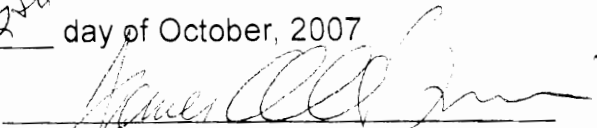
While the Employer argues that the duration and highly inappropriate nature of the Grievant's conduct during incident justifies a penalty in excess of the 1 to 3 day suspension specified in subsection 2.3 of Section VIII of the Discipline Code, no authority for this departure is cited. The introductory paragraph of Section VIII of the Discipline Code makes reference to "penalties for multiple violations occurring at the same or similar time" but only in the context of requiring review by the Director of Transportation. No departure from the progressive discipline scheme set out later and incorporated in the Agreement is justified.

AWARD

The Grievance is sustained for the reasons set forth above. The Employer's termination of the employment of Linda Smith on February 14, 2007, is not authorized by the Agreement or Employer's Discipline Code. Linda Smith did, on February 3, 2007, commit a very serious violation of subsection 2.3 of Section VIII of the Discipline Code and a violation of subsection 6.5 of Section VIII of the Discipline Code. The violation of subsection 6.5 of Section VIII warrants a written warning in her employee file and the severity of the violation of subsection 2.3 warrants the maximum suspension of 3 days. As a result, the Arbitration Panel determines as follows:

1. The Grievant is to be reinstated with full benefits, seniority and back pay, less any monies earned during the period of termination and less any monies which would have been earned during a suspension period of three days. This suspension should be noted in the Grievant's employee file as a violation of subsection 2.3 of Section VIII of the Discipline Code.
2. The Grievant's employee file should also reflect a written warning resulting from the same incident for a violation of subsection 6.5 of Section VIII of the Discipline Code.
3. For the purposes of Section 1.12 (e) of the Agreement, the discipline specified herein shall be deemed to have been imposed on the day the Grievant returns to work.
4. The Arbitration Panel retains jurisdiction of this case to the extent necessary to resolve any disputes over implementation of the remedy provided.

Dated at Dubuque, Iowa, this 12th day of October, 2007



JAMES A. O'BRIEN, Neutral Arbitrator