

ARBITRATOR'S DECISION AND AWARD

IN THE MATTER OF ARBITRATION)
BETWEEN;)

AMALGAMATED TRANSIT UNION LOCAL)
1287 and Milton Washington, Grievants)

and)
)
KANSAS CITY AREA TRANSPORTATION)
AUTHORITY)
) ISSUES-DISCHARGE,
) JUST CAUSE, REMEDY
)

Date of Hearing: June 14, 2012

Date of Closing of the Record: July 30, 2012

Date of Decision: August 3, 2012

Appearances:

Grievant: Scott Raisher

Respondent: Jeff Place

Arbitrators: Michael S. Hill

Fern Kohler

Jonothan P. Walker Sr.

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I. BACKGROUND

Kansas City Area Transit Authority operates buses in Kansas City, Missouri, employing 500 bus drivers and 30 supervisors.

Milton Washington, bus driver, was employed by the firm for 11 and 1/2 years. He was discharged by the firm after he ran a red light, made a threat when he went to a psychiatrist due to stress, and indicated in a hearing that he could only lift a pound or two after an on the job injury. He was also accused of sexual harassment and making ethnic comments while on duty. Mr. Washington was discharged on November 21, 2011.

Mr. Washington filed a grievance on November 22, 2011 and subsequently requested arbitration after his grievance was denied.

An arbitration hearing was conducted on June 14, 2012 in Kansas City at the firm's offices. The parties were represented by counsel as indicated on the cover sheet. They presented their arguments, introduced documentary evidence, examined and cross-examined witnesses, filed post hearing briefs, and presented their cases in full.

II. ISSUES

The issues presented were whether the discharge of the Grievant was for just cause and if not, what is the remedy?

III. RELEVANT DOCUMENTS

Documents entered as Exhibits include the collective bargaining agreement, the manual of instruction operating rules and discipline code, a cell phone

bulletin, a customer service report, a complaint memo, a supervisor's special report with observation or ride reports attached, an investigative interview report of the grievant, an accident report, medical reports, an investigation report after an on the job injury, a worker's compensation hearing transcript, another supervisor's special report, a customer complaint and discipline report, the discharge decision, the grievance form, the third step grievance denial, a surveillance CD, a CD of running a red light, a bulletin pertaining to red lights, a route map with a photo, and a listing of red light violations.

IV. SUMMARY POSITIONS OF THE PARTIES

A. Company

The firm states that the Grievant, Milton Washington was discharged with just cause because of multiple rule violations which include sexual harassment of a bus rider, ethnic remarks, running a red light, use of a cell phone while driving, threatening to kill a supervisor, and making false statements in a workers' compensation hearing.

B. GRIEVANTS

The Union and the Grievant agree that there was some reason for discipline, not discharge. Although Mr. Washington ran a red light, he had no intent to kill his supervisor, no intent to commit fraud, and only looked at his cell phone to determine the time.

V. SUMMARY OF THE EVIDENCE

The collective bargaining agreement, Exhibit J-1, provides that the

discharge of an employee is a management right but with just cause. Section 1.12 of the agreement contains the just cause provision.

Exhibit J-2, Manual of Instruction, Operating Rules, and Discipline Code provides rules pertaining to safety, dishonesty, and discourtesy. Included are false testimony in workers' compensation hearings, sexual harassment, threatening co-workers, and unsafe operation of a motor vehicle. The document is dated July 1, 1995.

Exhibit J-3 is a Bulletin pertaining to cell phones and personal electronic devices. Use of a cell phone while on duty is subject to progressive discipline with a third offense resulting in discharge.

Exhibit J-4 is a Customer Service Report of a bus driver running a red light, the customer complaining that he was run off the road by the bus. An attachment to the report, dated the same day of 10-27-11 lists running the red light, that Grievant, Mr. Washington, made inappropriate comments to a female passenger, that he took a cell phone out of his pocket, and that he laughed at improper language of a passenger and in the process of the conversation, he gestured by giving the finger.

Exhibit J-5 is a memo drafted by Gaylord Salisbury in which he states that he had viewed a video taken on the bus driven by the Grievant that indicated that a conversation with a female passenger boarding the bus appeared to involve suggestive remarks made by the Grievant. He also stated that a conversation with a male passenger contained crass and vulgar remarks. During the

conversation, the Grievant gestured by giving the finger. Also, on the video the Grievant indicated that shortly after the woman boarded the bus, he ran a red light.

The memo, dated 10-31-11 to 11-7-11, also describes a telephone call from Dr. Messina, a psychiatrist at the Veterans Administration, in which she informed Rodney Hollman, a Supervisor, that Mr. Washington had threatened to kill him. Although she did not know whether Mr. Washington would actually do it, she felt obligated to report it. She also indicated that she was aware that Mr. Washington had access to guns. He also told her that he hated Mr. Hollman.

Exhibit J-6 is a Supervisors Special Report by Rodney Hollman in which he describes his conversation with Dr. Messina. She indicated to him that Mr. Washington had threatened to kill him. Mr. Salisbury was brought into the call by speakerphone. The Exhibit also contains two Observation or Ride Reports in May and June conducted by Mr. Hollman of Mr. Washington, who was cited for a need to improve signalling for turns and lane changes.

Exhibit J-7 is a Memo from Gaylord Salisbury to Bob Kohler in which he describes his Investigative Interview with Milton Washington. Mr. Washington stated that he thought that Supervisor Hollman was nitpicking. He admitted that he told the psychiatrist that he hated Hollman because of his nitpicking and that he could kill him. He also told her that he had guns and knives because he is a hunter. He also told her that he was not going to kill anybody.

Mr. Washington stated in the meeting that he did run the red light. His

statements in the Workers Compensation hearing were discussed. He denied making any false statements.

Exhibit J-8 is an accident report which indicates an injury of Mr. Washington. Exhibit J-9 are doctor's reports of diagnosis and treatment for Mr. Washington.

Exhibit J-10 is an Investigative Report of video surveillance of Mr. Washington conducted by three Investigators of Intertel Inc. The surveillance occurred on May 7, 8, 14, and 15. On May 14, it was reported that Mr. Washington and a male friend lifted what appeared to be an air conditioning unit from a trailer. On the following day, Mr. Washington was observed riding an ATV. He was also observed lifting a metal box.

Exhibit J-11 is a transcript of the Workers Compensation hearing of the Grievant. He stated that he had only lifted one or two 2x4's at a time, only about one pound in weight due to his back injury since January 27, 2011. He also stated that he had not lifted over 10 pounds since that date of his vehicle accident. He also stated that he did not ride his ATV since the accident because of his back injury.

Exhibit J-12 is a Supervisors Special Report which resulted in a 3 day suspension of the Grievant, Mr. Washington, for sleeping on the job. The date of the incident is listed as 8-8-11 and the discipline notice is dated 8-10-11.

Exhibit J-13 is a Customer Service Report of 8-24-11 of Mr. Washington with a 1 day suspension for looking at his cell phone while driving. The discipline

notice is dated 8-25-11.

Exhibit J-14 is the Disciplinary Notice of November 21, 2011 which lists the discharge of the Grievant, Mr. Washington on the same date. The reasons given for the discharge are running a red light, a threat to kill Rodney Hollman in a conversation with Dr. Messina, staring at a female passenger, ethnic comments, giving the finger in gesturing, use of a cell phone, and comments about physical limitations in a deposition that were contradicted by video taken in May, 2011.

Exhibit J-15 is the Grievance Form filed by Mr. Washington on November 22, 2011.

Exhibit J-16 is a letter from Bob Kohler, Director of Transportation, to Jonathan Walker, Union President, which lists the reasons for the discharge as prior suspensions of three days for use of cell phone and sleeping on the job and current rule violations of false testimony in a deposition, threatening a supervisor, inappropriate comments to customers, an inappropriate gesture, and running a red light.

Exhibit J-17 is a video of the May surveillance of Mr. Washington which was shown during the hearing. The video showed Mr. Washington and another man carrying a large box. Another part of the video showed Mr. Washington lifting a large rectangular box into a vehicle. He was also shown riding his ATV.

Exhibit J-18 is a video of Mr. Washington driving his bus and stating that he ran a red light.

Exhibit J-19 is a Bulletin pertaining to red light cameras and the Company rule against running red lights.

Exhibit J-20 is a map of E. 12th St. and Lydia Avenue, Kansas City, MO., the area where the red light violation occurred. Attached is a photograph of the area.

Exhibit J-21 is a listing of 25 other red light and stop sign violations with discipline issued of 1 day suspensions up to discharge.

Gaylord Salisbury, Superintendent of Transportation, stated that he supervises drivers, dispatchers, and 1st line supervisors. He said that Exhibit J-4 is a complaint received from an individual that a bus driver, the Grievant, ran a red light and ran him off the road. Mr. Salisbury also said that a video indicated that the Grievant said he ran the red light. He said the video showed the Grievant looking at a female passenger for several seconds and Mr. Washington remarked to the woman, "You don't like that." Mr. Washington also used profanity when he ran the red light.

Mr. Salisbury also said that the video showed Mr. Washington pulling out his cell phone and looking at it. Exhibit J-3 is the cell phone policy. He said that there are two readouts for telling the time without using a cell phone and also a wrist watch is considered part of a driver's uniform. Therefore, there is no need to look at a cell phone.

Mr. Salisbury also stated that Mr. Washington used profanity in regard to immigrants and ethnic groups and waved his middle finger.

Mr. Salisbury indicated that Exhibit J-5 includes the complaint from Dr. Messina about a threat to kill Supervisor Hollman Exhibit J-6 are ride inspection reports indicating that the Grievant did not use turn signals. Mr. Salisbury also noted a difference in a surveillance video of the Grievant and the Grievant's testimony in his deposition.

Exhibit J-8 is a report of an injury on the job suffered by the Grievant. Exhibit J-9 dated 3-2-11 is a doctor's release of Grievant to return to regular duty with no permanent impairment. Mr. Salisbury said that he received the surveillance report on the Grievant. He said that Exhibit J-11, Grievant's deposition, differed from the surveillance video he received. He said the video showed the Grievant lifting an air conditioner and furniture and riding an ATV in May, 2011.

Mr. Salisbury stated that he recommended the discharge of Mr. Washington based upon running a red light, prior cell phone usage, threatening to kill his supervisor, and false testimony in his deposition. He indicated that there was no complaint received from the female passenger.

Mr. Salisbury indicated that some employees received a 1 day suspension for running a red light. He said the bus was stopped when the Grievant pulled out his cell phone. He said that some consideration was given to obtaining an evaluation of Mr. Washington, but he decided not to do so.

Mr. Salisbury indicated that another employee, Mr. Mahan, had made a comment that he understood why some employees bring guns to work. Mr.

Mahan was sent for a fitness for duty evaluation.

Tommie Hill, Manager of Road Supervision, stated that he issues discipline for drivers and supervisors. He indicated that Exhibit J-12 describes the Grievant asleep on his bus which caused the bus to be late. For this, Mr. Washington received a 2 day suspension. Exhibit J-13 is a cell phone complaint filed against Mr. Washington dated 8-24-11 for which he received a 1 day suspension. The suspension was served in a 1 day training school.

Mr. Hill said that Mr. Washington previously had shoed away supervisors talking to him and he had said that he wanted to whip Hollman and Prater. No discipline was assessed for that. Mr. Hill said that he has 11 supervisors working under him. He said that he agreed with the discharge decision.

Mr. Hill said that literature pertaining to cell phone usage was distributed for two weeks.

Bob Kohler, Director of Transportation, said that the firm has about 500 bus drivers and 35 support staff. He said that safety, courtesy, and honesty are important. He said that workplace violence is very serious, dishonesty is also serious. He said that other rule violations of Mr. Washington were considered. He said that looking at a cell phone while driving is bad for the company image. A second cell phone violation is bad enough; the Grievant should not have had four cell phone violations. He indicated that the firm does have an EAP program.

Milton Washington, Bus Operator, worked as an extra board substitute for 11-1/2 years for the firm. He stated that he knew the lady who boarded the bus

as shown in the video. He said that he did not say or do anything inappropriate. He said that the traffic light turned red as he entered the intersection. He said that he looked at his cell phone to ascertain the time. He said that he does not wear a watch. He said the top transit clock was not working. He said that the bottom transit clock required pushing a button to reflect the time.

Mr. Washington said that he felt that Mr. Hollman was nitpicking him. He said that he cut him off. He said that he hated Mr. Hollman. He did say that he could kill him. He said that when he fell asleep on duty that it was due to taking naproxin. He said that he had his workers compensation hearing in April, 2012.

Mr. Washington stated that he was doing work for a girl friend in May, 2011. He said that he carried a box full of styrofoam packing to trash. The box that he and a friend carried held only a coil, not an air conditioner. He also loaded a shell of a furnace in a box.

Mr. Washington indicated that he had sensitivity training after a Bin Laden comment. He knew the cell phone policy. He went to the VA because of stress on the job.

Freddy Ersery, Vice President of the Union and extra board member, said that he was present at the 3rd level grievance meeting. He said that Mr. Washington did apologize to Mr. Hollman in the meeting. He said that Mr. Hollman is not personable, is arrogant in talking to employees. He was not present when Mahan made his statement.

VI. DISCUSSION AND DECISION

In viewing the video, it is not evident to the Arbitrator that the Grievant, Mr. Washington, sexually harassed a female passenger. Just looking at her for a few seconds is not considered to be sexual harassment. The video does not provide any remarks of the Grievant that can be considered as sexual. Therefore, this is not a valid reason for termination. Also, there is no identification or witness statement of the passenger.

Also, in viewing the video, the Arbitrator was not able to discern any derogatory ethnic or immigrant comments made by the Grievant. It was evident that he made an obscene fingering gesture.

The evidence is clear and convincing that Mr. Washington did run a red light. Discipline for this was with just cause, but the safety violation was not sufficient for discharge.

The cell phone violations of Mr. Washington indicate a flagrant violation of the cell phone rules in that Mr. Washington had multiple cell phone violations. The Company had just cause to consider his cell phone use record in its discharge decision.

The threat to kill his supervisor is considered by the Arbitrator to be just cause for discharge. Use of profanity toward a supervisor in the form of name calling is considered to be insubordination because it shows disrespect for management. A threat to physically harm a supervisor is considered by the Arbitrator to be much worse than insubordination.

Intent is considered by the Arbitrator as an element that is difficult if not

impossible to prove. Proof of intent is not required. The Arbitrator does not believe that even a professional such as a psychiatrist can determine what any person might do. Therefore, the Arbitrator finds just cause for the discharge of the Grievant for the threat that he made.

In addition, Mr. Washington stated in his deposition that he had lifted only a pound or two (a 2x4) after his on the job injury. He also said that he did not ride his ATV. The evidence is clear and convincing to the Arbitrator that Mr. Washington lifted considerably more than a pound or two and more than the 10 pounds that he was restricted to. He also rode his ATV, which is also clearly evident in the surveillance video. It is evident to the Arbitrator that the Grievant had something to gain by exaggerating his disability from his injury. Therefore, the Arbitrator finds just cause for the discharge of the Grievant for his false statements in his deposition.

VII. AWARD

For the foregoing reasons, the grievance is denied. Any reference to sexual, racial, or ethnic harassment should be removed from personnel records of the Grievant.