

FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration between

Amalgamated Transit Union,

Local 1287,

Union,

and

Kansas City Area Transportation

Authority,

Employer.

Case No. 030814-11410-7

Arbitrator's Decision

Jim Forrester, a Class "A" Mechanic, was given a three-day disciplinary suspension for violation of the KCATA's¹ Code of Conduct, "Rule # 1 - Insubordination on August 12, 2003."² On August 21, 2003, Forrester filed a grievance alleging that the "charges are unfounded and as a remedy I am asking for 3 days pay and all references to the incident be removed from my file." Ted R. Stone, Director of Maintenance, denied the grievance at Step III of the grievance procedure stating that Forrester refused a request made by his supervisor to come into the supervisor's office to resolve a dispute, lost his temper and engaged in a verbal outburst. The Union submitted the grievance to arbitration pursuant to Section 1.13 of the collective bargaining agreement between KCATA and ATU, Local 1287.³ The agreement provides for an Arbitration Board. Each party selects a member of the Board and they select a third person, who shall be impartial and disinterested. The undersigned impartial arbitrator was notified by counsel for the parties of his selection to serve on the Arbitration

¹ Kansas City Area Transportation Authority, the Employer, will hereinafter sometimes be referred to at the "KCATA", the "Authority," and the "Employer."

² See joint exhibit 4, the written warning for infraction of the rules.

³ "ATU" is the Amalgamated Transit Union and the collective bargaining agreement is joint exhibit 1.

Board and an arbitration hearing was set by agreement of all concerned for January 14, 2004, at the Breen Building, Forest and 18th Street, Kansas City, Missouri, commencing at 9:00 a.m. The Union and the Grievant were represented by Scott A. Raisher, Counsel for ATU Local 1287. The KCATA was represented by Jeffrey M. Place, Attorney for KCATA. The Arbitration Board member for the Union was Fred Ersery, Vice President of Local 1287, and the Arbitration Board member for the Employer was Fern M. Kohler, Deputy General Manager. All witnesses testified under oath. The parties stipulated that the Arbitration Board has jurisdiction to decide the case and that there were no issues concerning arbitrability of the dispute. Each party was given a full opportunity to present evidence and witnesses, to cross-examine witnesses, pose objections and make arguments. Post-hearing briefs were filed and upon receipt of the second brief on March 4, 2004, the impartial arbitrator closed the hearing. Section 1.13 (4) (b) of the collective bargaining agreement provides that the Arbitration Board shall make every reasonable effort to render its decision within thirty (30) days from the date of the completion of the hearing.⁴

The Case

The Kansas City Area Transportation Authority is an interstate agency of Missouri and Kansas and provides public transportation in a seven-county jurisdiction to approximately 50,000 passengers a day. The Amalgamated Transit Union, Local 1287, represents certain employees of the KCATA for purposes of collective bargaining. These include bus operators, facilities and vehicle maintenance employees, and office-clerical employees. KCATA and ATU, Local 1287, have a collective bargaining agreement currently in effect. The Grievant, Jim Forrester, is employed by KCATA as a Class "A" Mechanic and is covered by the collective bargaining agreement.⁵

Forrester has been a Class "A" Mechanic in the Maintenance Department for more than 24 years and has been employed by KCATA for 26 years. His record is clean with respect to discipline for the 26 years.⁶ He currently serves on the Union's Executive Board representing Maintenance Department employees. He has served in other Union positions over the years. Jim Clayton, Maintenance Department Manager, testified he had a good relationship with Forrester and would sometimes ask him to be present during difficult grievance situations because Forrester was levelheaded and had good judgment. Forrester said he considered Clayton to be a friend and had respect for him. Clayton was Forrester's immediate supervisor. Ted Stone, Director, was second in command in the department and reports to Larry Wanbaugh, Superintendent of Maintenance.

The KCATA has an incentive program for the Maintenance Department. The program is called the Maintenance Plus Program. Under Maintenance Plus, employees with no lost time

⁴ April 3, 2004.

⁵ Joint exhibit 1.

⁶ He has never been disciplined and has not even received a written warning with respect to his conduct or job performance.

accidents and perfect attendance over a specified period of time receive certain benefits including a day off with pay, a cash bonus, and KCATA logo merchandise which was a KCATA sweatshirt during 2003. Administrative Assistant Nekita Lee was responsible for administering the Maintenance Plus Program. Lee, who was hired in August of 2002, is not a management employee nor is she a member of the Local 1287 bargaining unit. She reports to Ann Warrington, Maintenance Office Manager, who reports to Ted Stone.

As part of her responsibilities for the Maintenance Plus Program, Lee went to each of the employees eligible for the benefits and asked them what size sweatshirt each would like to receive. She did this a short time before August 12, and asked Forrester what size he wanted. According to Lee, Forrester said, "This company screws me over 365 days a year, but they want to be nice to me one day a year. I don't want any part of it. Take me off the list." Lee understood Forrester to mean that he did not want to participate in any part of the program, but Forrester testified that he only meant that he did not want the sweatshirt. Forrester testified that he was called to the office and asked by Lee what size sweatshirt he wanted. Forrester testified he told her he did not want a sweatshirt and there was additional discussion back and forth about the sweatshirt. After continuing to say he didn't want the sweatshirt, he finally said "just take me off the list." Lee responded, "Fine, you're off the list" and scratched his name off the list in front of her. Forrester recalled that the only topic discussed was the sweatshirt leading him to assume she had scratched his name from the sweatshirt list.

A few days later, on August 12, 2003, Forrester was at the parts window in the Procurement Department. There was a group of mechanics there waiting to get parts. The group included Tom Bogacz, Mark Holmes, Loretta Barker, Carl Tannehill, John Cullinan, and Jim Forrester. Lee was in the process of asking the various employees who qualified for days off which day each would like to take off. She was taking their preferences in order of seniority and had reached John Cullinan on the list. She learned he was at the parts window and went to ask him to come to the office and see her about his preference for an incentive day off after he finished at the parts window. When she talked to Cullinan about his day off, Forrester overheard it and since he was senior to Cullinan wondered why Lee had not asked him which day he wanted off.

Lee told him he would not be asked which day he wanted off because he "asked me to take your name off the list." According to Lee, Forrester yelled loudly at her, "I did not." Lee testified that she reminded him of the remark about the company screwing him around for 365 days a year and wanting to be nice on one day and his asking to be removed from the list. According to Lee, Forrester denied he said this. Forrester testified that he tried to explain to Lee that they were talking about the sweatshirt and he only wanted to be removed from the sweatshirt list. Forrester testified that Lee said, "Are you calling me a liar?" He further testified that he told her, "No, this is a misunderstanding."⁷ Finally, Lee told Forrester he was not going to receive any of the Maintenance Plus benefits and she turned and left. Cullinan testified that as Lee was leaving through the double

⁷ In his report on the incident, Jim Clayton described it as "a misunderstanding and communication about the Maintenance + program." Joint exhibit 3.

doors, Forrester shouted to Lee that he would have to file a grievance. Cullinan further testified that Lee did an about face, stepped back through the doors, and shouted back, “This isn’t contractual—you can’t file a grievance.” She left again. Cullinan and Forrester left the storeroom area and headed back to their work areas.

Lee left the storeroom area and returned to the Maintenance Office where she looked for Ann Warrington so that she could tell her what had happened. Warrington, Ed Keith,⁸ and Jim Clayton were sitting in Keith’s office which is very small, approximately 10’ X 10’ with a large desk, file cabinets and chairs.

Forrester testified that he was proceeding to his work area when he heard Lee’s voice coming from Keith’s office down the hall. Forrester said she was speaking in a loud voice, seemed upset, and he heard his name mentioned and she said he “called me a liar.” Lee’s version⁹ was that Forrester followed her into the office and “before I could tell Ann about what had just happened, Jim burst into the room and began screaming and yelling about how the company was going to screw him around again.” “Jim Clayton asked Jim Forrester to come inside the office and close the door so that we could all sit down and discuss this to which Jim Forrester replied ‘You guys are trying to screw me out of this so Fuck all of you’ and then he left the office.” Jim Clayton’s version was that he saw a “heated argument...between Nekita and Jim” and it was clear that both were upset, raised their voices and made accusations. Forrester’s version was that he stood in the door because there was not room in the small office for him to enter. Lee told her version of what happened and each time he attempted to explain what happened she would interrupt him. When Clayton asked him to come into the office to resolve the matter, Forrester told him, “Not unless you can control your employee (Lee).” Clayton did not respond, but again asked¹⁰ Forrester to come into the office. According to Clayton, Forrester reflected “for a moment and then said fuck you all and then left the office.” Forrester testified that he was frustrated that he could not tell his side of the story due to Lee’s interruptions and Clayton’s not controlling her or the meeting. He believed he was becoming too emotionally and personally involved and was losing his composure, so out of frustration and exasperation he turned to leave saying “fuck it, fuck you all.” He returned to his work area.

Clayton reported that “about 30 minutes later, Ann (Warrington) and myself met with Jim Forrester to talk out this issue, this was when it became clear that there was a misunderstanding between the two concerning the whole situation. At 1:00 p.m. I brought Jim Forrester into my office and further discussed the incident with him. I cautioned him about this display, what he had said and also cautioned him that any other display like that would likely result in disciplinary action. I then

⁸ Keith is a supervisor.

⁹ Company exhibit 1.

¹⁰ Clayton “asked” Forrester to come into the office two times. In joint exhibit 3, Clayton uses the word “asked” twice. Notably he did not say that he “ordered” or “directed” Forrester to come into the office.

requested that he speak with Nekita to try and clear the air about misunderstanding and to apologize. Mr. Forrester indicated that he would speak with Nekita and he did so later on in the afternoon.”¹¹

In the arbitration hearing, Clayton, Warrington, and Forrester testified that Clayton asked Forrester to come to his office to further discuss the matter. Forrester asked if Lee would be there; and when Clayton said she would not be there, Forrester agreed to meet. After a brief discussion, Clayton and Warrington could see that there had been a misunderstanding and agreed that Forrester would receive the bonus and the day off. Forrester commented that the other employees had already selected their day off, and for him to do so now would cause problems. So, he agreed to give up the day off. Ann Warrington was appreciative of him doing so. Clayton told Forrester he would prepare a statement, joint exhibit 3, about the incident and have Forrester sign it. Forrester signed it when it was presented to him. Clayton again asked Forrester to apologize to Lee and Forrester agreed.

Meanwhile, Lee went to Ted Stone’s office to tell him what had happened while he was away. When he returned around 10:00 a.m., they talked. Lee told Stone she was offended and upset about the way Forrester talked to her. In her statement she said, “I told Ted that I was concerned that since the initial incident occurred in front of so many people that my position had been compromised and that if he did nothing it would set a precedent that it would be okay to speak to not only me but other members of his staff that way. I also reminded Ted that he told me that I was his representative out on the floor and that he would back me up. Ted told me to ‘settle down.’ But he promised me that he would speak to Jim Forrester.”¹²

After his meeting with Clayton and Warrington, Forrester went into the office to talk to Nekita Lee. He explained that there had been a misunderstanding or miscommunication between them. Forrester testified that his apology was not well recieved and he believed that Lee was looking for an unconditional apology where he would take total responsibility for the blow-up.

Lee and Warrington left the office about 10:30 a.m. to run some errands. They were gone for approximately an hour and, according to Lee, “I assumed that Ted would speak to Jim and resolve the matter while we were out of the office. At 2:30 p.m. that afternoon, I asked Ted if he had spoken to Jim yet and he seem agitated by my question and replied ‘not yet.’ I asked him when he planned to do so because I was very upset about the way I had been treated so he called Jim Clayton and asked him to bring Jim Forrester to his office.”

So, Stone met with Clayton and Forrester as he had promised Lee he would do. He also wanted to hear Forrester’s version of the incident. Having heard both sides he told Forrester that he thought an apology would resolve the matter and asked Forrester if he would apologize to Lee. Having apologized earlier, although also offering an explanation, and seeing that Lee did not seem to be satisfied, Forrester was reluctant to do so believing it would not settle matters. Nevertheless,

¹¹ Joint exhibit 3.

¹² Company exhibit 1.

he accommodated Stone's request and tried again. Stone asked everyone else to leave the office. This time Forrester apologized for his behavior and any embarrassment it may have caused Lee. Forrester testified that she said, "Apology accepted."¹³

Lee testified that the next day Marvin Shackelford, the Local Union President, called her and asked her for a statement. She was not sure if she should give him one and Ann Warrington also was not sure. So, Lee called Cheryl Coleman, Director of Human Resources and KCATA's EEOC Officer for advice. Lee said she also called Coleman again several weeks later and told her she was concerned about the way the matter was handled in her department. She seemed to be more upset about how it was handled, or in her view not handled, than she was about the incident. She was also more upset about the exchange in front of the parts window than she was about Forrester's words and actions in Ed Keith's office. She testified that she told Clayton and Stone that they did not deal with her concerns. It is not clear what she believed would deal with her concerns, but she testified that she did not ask for Forrester's suspension.

When Lee contacted Coleman, Coleman in turn contacted Mark Huffer, General Manager of the KCATA. Huffer in turn contacted Clayton and told him to get written statements from all those involved in the incident. Clayton first talked to the employees who were near the storeroom, but did not take statements because none of them recalled very much.¹⁴ Clayton never asked Forrester for a statement although Forrester had signed Clayton's memo to file written on the day of the incident. Clayton had told Forrester he would put this in his file and Forrester said he understood. Forrester testified that there were some small points in Clayton's memo that he disagreed with, but he signed it anyway because it was more or less acceptable.

Huffer did not read the statements that Clayton provided to him. Of course, there was no statement among them from Forrester. Huffer did not talk to Forrester nor did he talk to anyone else who was directly involved except Clayton. Clayton testified he was first contacted by Huffer on the 13th and the next day, the 14th, Huffer came to the Maintenance Department. Normally Ted Stone would have handled any discipline, but he was out of town after the 12th. Huffer does not usually get involved in discipline, but in this case he recommended to Clayton that Forrester be given a three-day

¹³ Lee mentioned that she had never had any negative feelings about Forrester prior to this incident and "in fact, Jim came to my house last Fall to install a new heating and cooling system so our relationship had always been very cordial."

¹⁴ Actually the testimony of Lee and Forrester with some help from Cullinan's testimony has given the impartial arbitrator sufficient information to make a judgment about what happened at the parts window. Likewise, there is not much disagreement about what happened in Keith's office even though there is a great deal of disagreement about why it happened and Forrester's motives.

suspension to be consistent with the arbitration decision on the grievance of Patrick Cooks.¹⁵

On August 15, 2003, Clayton told Forrester to get a Union representative and meet with him and Ed Keith. Forrester asked John Cullinan, the Steward, to go with him to the meeting which did not last very long. Forrester was given a warning (discipline) slip stating that he was to be suspended for three days for insubordination.¹⁶ Cullinan and Forrester asked if the discipline came from higher up. Neither Clayton nor Keith replied. Huffer testified that he had made the decision that a three-day suspension for insubordination would be proper in order to be consistent with the Cooks decision.

Forrester filed his grievance on August 23, 2003, with the help of Cullinan and it was denied by Jim Clayton. The second step of the grievance procedure was bypassed. The third step was held on September 11, 2003, and denied by Ted Stone. Stone wrote:

“Mr. Forrester, as a union executive board member, should have been aware of the work rules and not refused a request made by his supervisor to ‘close the door and come into the office’ in an effort to resolve an issue between Mr. Forrester and another employee.

Mr. Forrester instead lost his temper and it was reported that he said, ‘You are trying to screw me around again; Fuck it and Fuck all of you.’ He then turned and stormed out off the office failing to comply with the request made by his supervisor.

The insubordination he demonstrated by refusing to go into the office to discuss the issue was exacerbated by his ensuing verbal outburst.”¹⁷

The Union submitted the case to arbitration pursuant to 1.13 of the agreement and the matter is now before the impartial arbitrator for decision.

The Grievance

Normally the arbitrator would set out the grievance and grievance process documents here.

¹⁵ KCATA and ATU Local 1287, FMCS 02-15577 (Arbitrator Marino, decided February 21, 2003), joint exhibit 7.

¹⁶ Joint exhibit 4 is the warning. It says, in part, “This is the # 1st warning you have received regarding the following infraction of the rules. Describe in detail: Rule # 1 - Insubordination on August 12, 2003 Ed Keith, Ann Warrington & Jim Clayton as witness. 1st offense is a 3 day suspension to be served on Aug 18, 19, & 20.”

¹⁷ Joint exhibit 6.

However, since they are set out above, it would be redundant to do so.

Contract Clauses and Other Documents

The contract provisions and other documents presented by the parties and considered by the arbitrator include, but are not necessarily limited to, the following:

Article I, Section 1.5	Employees to Whom Applicable
Article I, Section 1.6	Effective Dates
Article I, Section 1.7	Duration-Termination-Change
Article I, Section 1.12	Management - Discipline
Article I, Section 1.13	Grievances

Discipline Code:

Rules of Conduct:

1. Insubordination (Example: Failure to accept and execute instruction from Leadmen, Foremen or other supervisory personnel)
First offense: Suspend three (3) days.
Second offense: Discharge

#

6. Conduct unbecoming a Transit Division employee, such as threatening, intimidating, coercing fellow employees; distracting attention of others; shouting, demonstration

First offense: Reprimand (warning notice)

Second offense: Suspend three (3) days

Third offense: Discharge¹⁸

None of the above are set out in full here, but will be set out later in the discussion as they are relevant to issues discussed.

Discussion

¹⁸ Joint exhibit 2.

The issue in this case is whether the KCATA met its burden of proof by producing evidence that there was just cause to discipline the Grievant, Jim Forrester, for insubordination for his conduct on August 12, 2003. The arbitrator holds that there was not just cause shown for the discipline. Following are the reasons for the holding.

The KCATA makes the following arguments.

1. While the KCATA admits that “as a purely technical matter Forrester did not engage in ‘classic’ insubordination, of the type encountered when an employee completely refuses to follow a direct, reasonable and work-related order, even after receiving a warning that continued refusal will result in discipline.” However, the KCATA argues, many arbitrators have noted, “in addition to failure or refusal to comply with an order, abusive behavior - from profane language to physical violence - toward management qualifies as insubordination, since such actions impinge on the employer’s ability to direct the workforce.”¹⁹ KCATA says that saying “fuck you all” to a group of managers, and then walking away when a manager is clearly attempting to have a discussion is both abusive and profoundly disrespectful.²⁰

2. The KCATA also argues that Forrester’s refusal to come into Keith’s office and discuss the matter was not mere “shop talk.” The KCATA cites a case where an arbitrator did not apply the “shop talk” defense where an employee said “fuck you” to a supervisor and walked away from him during a discussion.²¹ The arbitrator believes that the “fuck you” comment in that case must be considered with the more serious behavior of walking away from the supervisor.

3. The KCATA argues that Forrester’s behavior was unprovoked. While the arbitrator agrees that none of the management employees had taken a side and in that sense Forrester’s comment was unprovoked, but taken in the context of his attempting to speak and repeatedly being over-talked by Lee, and having asked management to control her and management having not done so, and the fact that she and three management people were in a small room with desk, chairs, and file cabinets, it is easier to see why Forrester may have elected to not throw flames on this potential blow up.

4. The KCATA argues that Huffer’s decision to discipline, or recommend discipline to

¹⁹ Sysco Food Services of St. Louis, Inc., 2000 WL 995195, *6 (Marino, 2000).

²⁰ The arbitrator agrees. However, many things, such as sexual harassment or a fist in the face may be “abusive” and “disrespectful” while not being insubordination. A long, long, long list of “abusive” and “disrespectful” behavior could be drawn up that almost all labor relations practitioners would agree are not insubordination although they may comprise other common infractions of workplace rules.

²¹ The Testor Corp., 115 LA 428 (Neigh, 2000).

subordinates, was appropriate. This is (a) because Clayton's interview and memo does not preclude discipline; (b) Huffer may delegate and share decision-making authority among management; (c) Huffer did not need to interview Forrester before deciding he should be disciplined because there is no rule that requires that the same manager who investigates be the one who decides discipline; and, (d) Huffer was correct in making Forrester's penalty consistent with the one given Cooks in the earlier case.

5. The KCATA argues that the length of the suspension is appropriate because anything less than a suspension, a mere written warning, would suggest to angry and dissatisfied employees that they are licensed to lash out at management in harsh terms without facing any serious consequence. Even if Forrester believed he should leave the area, he clearly did not have to say "Fuck you all" before leaving.

The Union made the following arguments.

1. The Union pointed out that this alleged "insubordination" does not meet the definition of insubordination.

2. The Union argues that in cases where arbitrators have gone beyond the classic definition of insubordination considering, as some arbitrators do, that profane language may be insubordination, the arbitrators take into account factors other than the words used looking at why the employee departed himself in the manner he did, what the employee intended to impart by his conduct and the effect of the conduct on others. Profanity, obscenity, and abusive language has been held by the Arbitration Board in the past to be insubordination, but when it so held, the words had to be calculated to demean and undermine a supervisor's authority.²²

3. Forrester did not totally refuse to meet with Clayton. The Union argues that he did meet with him a short time later when the circumstances were more reasonable and conducive to problem solving.

4. The incident did not occur in the shop where it would undermine management's authority. It happened in Keith's office in front of Keith and two other management persons. Only Lee was there who was not management.

²² What if an employee tells the other employees, "Don't do anything he tells you to do. He is wrong." Is this insubordination - words calculated to demean and undermine authority? Probably, but where is the profanity, obscenity, or abusiveness? It may be that we should look at the intent of what is said and its result, or probable result, rather than the precise words used.

5. Clayton did not use the word “insubordinate” in reference to Forrester’s leaving.²³ Likewise, Ted Stone never used the word “insubordinate” in his meetings with Forrester. Stone suggested he apologize to Lee, not to Clayton.

6. Forrester’s comment was not directed at Clayton or anyone else specifically and was not meant to be taken personally.

7. The Union argues that the Cooks decision is not comparable to this situation and should not be used as a measure for the penalty. Cooks was disciplined for failing to follow an order to stop using his cell phone and for his failure to follow a company bulletin prohibiting the “use of inappropriate language.” The Union points out the obvious problem with the management approach in the Cooks case which is that Cooks was charged with insubordination for failing to follow the bulletin. By that logic, the Union seems to contend, a violation of any rule could be raised to insubordination. For example, is it insubordination to arrive five minutes late. Is that a refusal to follow a company order to start work at a certain time and does it undermine management’s authority?

The impartial arbitrator does not believe that the tests of just cause have been met and proven in this case. These seven tests are set out by Arbitrator Carroll Daugherty in Enterprise Wire Co. and Enterprise Independent Union, 46 LA 359 (Daugherty, 1966). They include notice, reasonable rules and orders, investigation, fair investigation, proof, equal treatment, and appropriate penalty. The parties in this case are familiar with these and no doubt refer to them often. While these tests should not be set in stone because they must be considered in light of arbitral precedent and common sense, they are still good guidelines. For example, while notice of rule should be given to an employee before he is punished for a violation of it, certain things, like not shooting your foreman, are so egregious that a specific rule need not be written. Nevertheless, the KCATA failed to measure up on three of these tests. Most significantly, the evidence in this case does not prove that Forrester committed the offense for which he was disciplined— insubordination. There are also lesser questions about the investigation and fairness of it that should be addressed, but are not pivotal because Forrester simply was not insubordinate.

Insubordination is the failure or refusal to follow a direct legitimate work order after being given notice that such failure or refusal is insubordination and will lead to discipline including suspension or discharge. Both parties and the impartial arbitrator agree that is the definition of insubordination.

The impartial arbitrator believes that words have meanings so that we can all understand what is being said to us. To consider the violation of some other rule as insubordination is a very slippery slope. What Forrester did in this case was inappropriate. It was profane language. Forrester admitted that it was inappropriate. It could fairly be said to be a violation of Rule of Conduct # 6 -

²³ The arbitrator noted that Clayton used the word “requested” twice in his memo referring to asking Forrester to come into the office.

Conduct Unbecoming a Transit Division Employee. There was reference in the Cooks case to the KCATA issuing a bulletin prohibiting the “use of inappropriate language.” Assuming this bulletin and other Rules of Conduct (Discipline Code) are properly promulgated and notice is given, there is nothing wrong with having such a rule against inappropriate language. Almost every company has such a rule. The biggest problem with such a rule is probably that it is difficult to enforce even-handedly. Nevertheless, if that is what Forrester did, that is what he should have been disciplined for.

All of the elements of misconduct must be proved. “Insubordination — A refusal to follow a direct, valid work order is only half the story. There must also be proof that the employee was given clear prior warning of the consequences.”²⁴ This means that the supervisor must say something very close to, “This is a direct order. I am ordering you to (load the truck, or whatever). If you fail or refuse to do so, I will consider it insubordination which will lead to discipline including suspension or discharge.” As a previous impartial arbitrator on the Arbitration Board said, “If an employee refuses to obey an order...that employee needs to be told by the person issuing the order that refusing to obey the instruction will be considered an act of insubordination, and such is a very serious offense. The employee then needs to be told that by refusing to obey the order, such employee will be subject to discipline...If the employee still refuses to carry out the order, the above process might well be repeated.”²⁵

Clayton did not order Forrester to come into the room. In his own memo he wrote that he “asked Jim to step into the office” and “asked Jim to close the door.” Ann Warrington wrote that “Clayton asked Forrester to come in and shut the door so we could discuss this...”²⁶ Ted Stone wrote “Mr. Forrester ... should have been aware of the work rules and not refused a request made by his supervisor ...”²⁷ When a supervisor “asks” or “requests” an employee to do something, it is not a direct order. One of the elements of insubordination is that there be a legitimate direct order. The KCATA failed to prove this element.

For purposes of argument only, assume there had been a direct order given. The KCATA also failed to prove that Forrester was advised that he had just been given a direct order and that failure and/or refusal to carry it out would be considered insubordination leading to discipline including suspension or discharge. The impartial arbitrator agrees with the KCATA that the work place is not a debating society, but it is also not a place for mind reading. Communications are necessary. Insubordination is a very serious offense and it should not be alleged unless the elements for it are present and provable. No management person told Forrester that they considered him to be

²⁴ Just Cause: The Seven Tests, Koven and Smith, BNA Books, ISBN 0-87179-708-9, p. 245.

²⁵ Coates Arbitration, (Barnard, 1998).

²⁶ Company exhibit 2.

²⁷ Joint exhibit 6.

insubordinate and it could lead to discipline.

Truth is, the evidence leads the impartial arbitrator to believe that Clayton, Stone, Keith and Warrington all believed that Forrester was guilty of use of inappropriate language, but never mentioned insubordination until Huffer suggested that they discipline for it. The evidence really shows that insubordination never occurred to Clayton or Stone until it was recommended by Huffer. This is because Clayton knew that the remark, profane as it was, was not directed at him.

This impartial arbitrator is not inclined to find insubordination in cases where other usual rule violations more accurately describe the behavior. Even so, assuming only for the purposes of argument that use of certain words, like “fuck you all,” may be insubordinate, it still seems that they must be taken in the context of the situation. For example, if a foreman says, as he should, “This is a direct order and failure to follow it will lead to discipline including suspension or discharge. Load the truck.” Then the employee walks away saying “fuck you.” It seems that it would be no less insubordination if he failed or refused to do the job he was directed to do if he said something less profane like “don’t hold your breath” or said nothing at all. Use of profane words without the elements of wilful failure or refusal to follow a direct order do not bootstrap a violation of use of profane language to insubordination.

In this particular case, taken in the context of what was happening including four people in a small room and Lee stepping on Forrester’s words as he tried to explain, and no one effectively chairing the meeting to give each a turn to state what they saw as the problem, the impartial arbitrator credits Forrester’s version that he was frustrated by this cacophony, considered the request to step inside and thought that this would solve nothing, threw up his hands and left. He said, “Fuck you all.” This is consistent with throwing up one’s hands in frustration and it was not particularly directed at anyone. This is not to say it is appropriate to say it, but it is inappropriate language and not insubordination.²⁸ Forrester admitted it was inappropriate and said he understood that Clayton’s memo would go in his file.²⁹

²⁸ Sometimes management uses a shotgun approach and charges an employee with several rule violations. Sometimes the employee is guilty of all of them, sometimes just one of them, and sometimes none of them. This arbitrator has no problem with management alleging multiple violations and unions alleging multiple offenses as long as they remember they have the burden of proving them.

²⁹ “A machine operator who shook his finger at a supervisor and said “Don’t fuck with me” was not guilty of a serious form of insubordination and should not have been discharged. What he did was more akin to using threatening language, the penalty for which was suspension, according to the employer’s rule.” Just Cause: The Seven Tests, Koven and Smith, BNA Books, ISBN: 0-87179-708-9, p. 244. In Forrester’s case, he did not really threaten supervisors. None of them felt threatened.

Up to this point, everything was going on the basis of “conduct unbecoming” which carries a penalty of a reprimand (warning notice) on the first offense. This would be especially true if an employee has a clean record of 26 years as Forrester had to mitigate the penalty. Insubordination did not enter this case until Huffer made his recommendation.

For all of the foregoing reasons, this case would have the same result regardless of Huffer’s investigation. However, there should be some discussion of it.

The impartial arbitrator agrees with the KCATA that management may use whoever it wishes to issue discipline so long as due process and just cause standards are met. Likewise, it is appropriate for Huffer, or anyone else, to delegate the necessary investigation. What is not appropriate, however, is not getting Forrester’s side of the issue. Huffer admitted he did not read the statements submitted to him except for Clayton’s memo. He could not have gotten Forrester’s version.

“Is talking to the grievant an essential ingredient of an acceptable investigation? Technically, no— at least, not unless he contract requires it. But in practice, from a good investigatory stance (and from the stance of providing due process, as discussed in the next section), the answer is yes.”³⁰ In this case, without learning the reasons why Forrester was upset, the situation in the small room, and that he did talk to Clayton and Stone later, that he apologized twice, and so on, Huffer was not in a position to make a decision based on a fair investigation. For that reason, just cause was not met. No matter. This decision would still be the same because the actions of Forrester were not insubordination.

Huffer gave three days to Forrester to make the penalty consistent with the one given in the Cooks case. Of course, the KCATA should give equal treatment to employees who commit the same or similar offenses. However, Cooks case is not at all similar to Forrester’s case. Cooks was violating a legitimate order to Cooks not to use the cell phone and he was doing it on the job in the shop. Forrester never received an order, but rather received a request to enter the room where Clayton and the others were. Forrester did not continue to refuse, but as soon as Clayton and Warrington approached him and asked him to come up and discuss the matter in a more controlled and rational setting, he readily agreed. Cooks directed his comment toward the supervisor while Forrester directed his to “all” and in the context of frustration rather than insubordination. Finally, even if all other things were the same, Forrester should still receive some consideration for having a long, long clean record to mitigate the penalty.

Remembering that discipline should have the goal of correcting improper behavior rather than to simply punish employees, it is clear that Forrester quickly recognized the impropriety of his comments, apologized twice to Lee for them, and said he understood that Clayton should and would put the memo about the incident in his file. It seems likely from this behavior that he is not likely to repeat this behavior, and if he does, the memo is still on the file to consider when giving discipline in the future consistent with the contract restrictions.

³⁰ Just Cause: The Seven Tests, supra, p. 162.

For all of the foregoing reasons, the grievance should be upheld and sustained, and Forrester should be made whole for all economic losses resulting from the discipline that was administered without just cause, including back pay for the three days off on suspension. Since the action of placing Clayton's memo in the file was appropriate for what Forrester himself admits was inappropriate language, the memo may remain on his file subject to provisions regarding this type of material in the file under the collective bargaining agreement. All references in the file to insubordination should be removed.

Award

The impartial arbitrator, having heard the testimony and considered the evidence and credibility of witnesses, the arguments and briefs of the representatives, and being otherwise duly advised, now

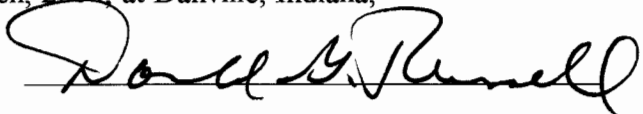
FINDS that there was not just cause for the three-day disciplinary suspension the KCATA gave to Jim Forrester for insubordination; and further

FINDS that the evidence did not support a finding that Jim Forrester was insubordinate; and, further

FINDS that for all of the reasons stated in this decision, the grievance should be, and hereby is, GRANTED and SUSTAINED; and, further

ORDERS the KCATA to make the Grievant, Jim Forrester, whole for all losses resulting from the three-day disciplinary suspension for insubordination administered without just cause, and specifically ORDERS the KCATA to pay three days of back pay to Forrester.

Respectfully submitted this 25th day of March, 2004, at Danville, Indiana,

By: 

Donald G. Russell, Impartial Arbitrator

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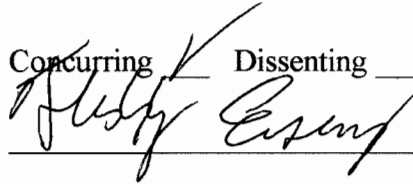
Concurring ___ Dissenting ___

By: _____
Fern M. Kohler, Arbitration Board Member

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Concurring Dissenting

By:



Freddy Ersery, Arbitration Board Member