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In the Matter of Arbitration

between

Regional Transit Service, Incorporated

and

Amalgamated Transit Unit, Local 282

Opinion

and

Award

* *

This arbitration was heard on August 10, 2015, at the Company's offices in Rochester, New York. The undersigned was appointed to arbitrate the controversy from a panel maintained by the parties. Upon submission of post-hearing briefs by both sides, the record was closed.

APPEARANCES

For the Employer:

Roy Galewski, Attorney
Janet Snyder, Labor Relations Director
Michael Capadano, Director of RTS Bus Operations
Richard Bernhart, Workforce Development Specialist
Jim Ramos, Director of RTS Transit Center
Evonda Ramos, Video Technician

For the Union:

Jules Smith, Attorney
Nolan Lafler, Attorney
Jacques Chapman, President
Dominick Zarcone, Vice President
Saphronia L. Dyson, Union Representative
[redacted] [redacted] Grievant

THE ISSUE

Did the employer have just cause to terminate the employment of the grievant, [redacted] [redacted] If not, what shall the remedy be?

BACKGROUND

The facts of this case are largely undisputed. The grievant, [redacted] was employed by the Company as a bus operator from October 2012 until his discharge in January 2015. On January 11, 2015, he was involved in an altercation with a passenger. The altercation started on the grievant's bus and continued outside the bus in the Transit Center. The altercation was captured by video cameras in the Transit Center (but not on the bus itself). The confrontation on the bus is seen at some distance through the vehicle's windshield. The events outside the bus are entirely clear visually, although there is no audio.

According to the grievant, he first encountered the passenger, Kendrick Nelomes, about 20 minutes before the altercation. As the grievant's bus approached an intersection, Nelomes tried to flag it down, but the grievant judged that it would be unsafe to stop in the intersection and proceeded to the next stop. When the bus stopped, a dark vehicle pulled in front of it, and Nelomes got out of it. He boarded the bus, swiped his fare card, and complained loudly about not being picked up earlier, calling the grievant a "nigger" and a "faggot." He then proceeded to the back of the bus, and the grievant did not call for help.

When the bus arrived at the Transit Center, the grievant instructed all passengers to get off, as per Company policy, even those who intended to continue on the same bus to their destination. The video shows all the passengers getting off. At the end, Nelomes comes to the front, has an exchange with the grievant, and runs off. According to the grievant, Nelomes was yelling at him and "got in his face." The grievant pushes him away, whereupon Nelomes makes a brief move to get off, turns, spits on the

grievant, and then runs off. The video further shows the grievant running after and catching Nelomes, striking at him, and once kicking him as he falls to the ground. Nelomes gets back up, and there is a bit of wrestling between the two men before other employees come and break it up. Nelomes and the grievant can then be seen exchanging what may be presumed are unpleasantries. Nelomes picks up his backpack (which he had dropped as he ran off) and walks into the Transit Center concourse. Although there is no more video, it appears that Nelomes then went to the Customer Service desk to file a complaint against the grievant. The police were called and summonses were issued to both Nelomes and grievant. Apparently no criminal charges were sustained against either man.

The grievant was discharged on January 20, 2015, by Janet Snyder, Labor Relations Director, for "assault and inappropriate conduct." The discharge was timely grieved and eventually moved to arbitration.

POSITION OF THE COMPANY

The Company contends that it was the grievant's decision to exit the bus, chase the customer, and attack him that led to his discharge. Bus operators receive extensive training, including instruction on how to deal with difficult customers. In that training they are instructed to avoid physical confrontations at all costs, and in the case of threats of violence to open the doors and have the person removed. They are taught not to argue with or threaten angry customers, but rather to call Radio Control for assistance. In short, the grievant received detailed training on the proper way of handling unruly customers throughout his employment.

The Company notes that in the present case it conducted an immediate and extensive investigation of the incident. The Road Supervisor at the scene interviewed both the customer and the grievant. Ms. Snyder reviewed the video footage that was available and interviewed other operators who had witnessed part of the incident. The grievant told Ms. Snyder that he had "snapped" when the customer spit on him. Ms. Snyder tried to get in touch with the customer but was unsuccessful. She ultimately decided to discharge the grievant because he chased down the customer and attacked him even though he was in no danger after the customer fled the bus, and because the grievant failed to report the incident and seek assistance to deal with the customer.

The undisputed conduct of the grievant constituted just cause for discharghe, argues the Company. His decision to leave the bus and attack a customer is, by itself, sufficient to warrant discharge. The behavior was so egregious, inappropriate, and inconsistent with the Company's mission that it mandated dismissal. It is generally recognized that the severity of a penalty should be consistent with the seriousness of the offense. Fighting falls within the class of offenses that justify summary discharge without corrective discipline. In this case, the grievant did more than merely fight; he attacked the customer after the altercation on the bus was over. No mitigating circumstances are present to warrant overturning the Company's discharge decision.

In this regard, asserts the Company, the Union's provocation defense misses the mark. The Company exists to serve the public and is responsible for the safety of the public. Other arbitrators have found that even with serious provocation physical attacks cannot be tolerated by organizations with a public-service duty, since they cannot take the risk that the behavior will be repeated. This reasoning applies squarely to the present

case. The Company is a public authority responsible for the public's safety on its property. The grievant has shown that he is capable of physical assault, and there is no guarantee that he would not do it again with an unruly customer. Although his training showed him how to deal with difficult customer situations, in this case to call Radio Control when he was spit on, he failed to be guided by it.

There are no other mitigating circumstances here, argues the Company. The grievant was not a long-term employee. The Company's investigation was full and objective, and the facts are not in dispute. There is no disparate treatment. Indeed, in a 2012 arbitration between these parties, Arbitrator Lewandowski upheld the discharge of a driver who had himself been assaulted on a bus by a customer and who then pursued the attacker and assaulted him.

Finally, contends the Company, any discipline short of discharge could have exposed the Company to liability under a theory of negligent retention. If he were to use physical force on a customer in the future, the Company could be charged with knowing about his propensity for misconduct. Moreover, reinstatement would unnecessarily put members of the public at risk.

For all of the foregoing reasons, the Company urges that the grievance be denied in its entirety.

POSITION OF THE UNION

The Union notes that the just-cause standards places a burden on the Company to support its decision to terminate the grievant by a clear preponderance of the evidence. Specifically, it must show that the discipline was fair, reasonable, and not excessively punitive in light of any mitigating circumstances. The Company has not sustained its

burden in this case because discharge was markedly too harsh a punishment and disproportionate to the offense, given the extenuating circumstances.

The Union contends that the Company lacked just cause to terminate the grievant's employment. Provocation is a mitigating factor that is widely considered by arbitrators. In this case, the grievant was provoked by racial slurs and a physical assault beyond that which a reasonable person can be expected to handle. Racially derogatory comments foreseeably induce the use of physical violence, as previous arbitrators have found. Terminations have also been set aside where an employee is provoked by acts of confrontation or violence, or by obscene or offensive gestures. These notably include spitting in someone's face. Indeed, spitting on another person is so serious an offense that discharge is routinely upheld against employees who engage in such conduct. Spitting in someone's face is so provocative that it generates an involuntary, instinctive reflex from even the most sensible and well-adjusted employee.

In the present case, argues the Union, the grievant was spit upon and subjected to racist remarks, either of which constituted substantial provocation. He was publicly called a "nigger," a "faggot," and a "bitch." On the bus, Nelomes rushed at him in a threatening manner, backed him into a corner, screamed at him, and then spit in his face. The grievant pursued Nelomes and kicked at him once. He has since expressed remorse and understands that he made a mistake. Yet despite the provocation, the Company has refused to support him. The discharge was disproportionate under the circumstances and therefore lacked just cause.

For these reasons, the Union urges that the grievance be granted and the grievant reinstated.

FINDINGS AND OPINION

In most discharge arbitrations, the questions are whether the employer has shown that the grievant has engaged in misconduct and, if so, whether under all the circumstances termination was an appropriate penalty. The issue in this case is at bottom a narrow one. There is no dispute about the facts, and I do not believe there can be any dispute that the grievant's behavior constituted serious misconduct. The only question is whether the circumstances were such as to render the discharge disproportionate and therefore excessive.

With the advantage of the video in evidence (even without audio), there is no real fact-finding to be done. The bus pulls into the Transit Center and passengers debark. The grievant can be seen getting out of his seat and, looking back, motioning to a remaining passenger, apparently telling him that he has to get off the bus. The passenger, obviously Nelomes, comes to the front and stands very close to the grievant as they exchange words. Nelomes then turns toward the door, takes a step and turns back to face the grievant again. The video does not show the actual spitting, but the grievant starts (in the sense of making a sudden, involuntary jerk), Nelomes runs off the bus, and a split second later the grievant takes off after him. After a few running steps the grievant catches and grabs Nelomes, and the impact takes Nelomes to the ground. The grievant also falls while still holding Nelomes' clothing, and he then gets up and kicks Nelomes once. Nelomes also gets up and the two men wrestle for a few seconds until others arrive. During the scuffle no other persons can be seen in the video.

As the Company correctly observes, there is no question of self-defense here. Once Nelomes ran off the bus, the grievant was in no danger, and he had no need to

protect himself. Indeed, the Union does not offer a self-defense argument; it argues only that the extreme provocation that the grievant experienced was a sufficiently mitigating circumstance as to render discharge an excessive punishment. That provocation, says the Union, included not only the spitting but the vile epithets that Nelomes hurled at the grievant. It must be noted, however, that the name-calling (for which we have only the grievant's word, but which I find credible) actually started some time earlier, and by the grievant's own account he did not respond to it. Although it may well be that the grievant was building resentment toward Nelomes over time, it seems clear from both the video and the testimony that it was the spitting that provoked the behavior at issue.

Although I am not persuaded by the Union's suggestion that simply tolerating the provocation would have required superhuman self-control, I *am* persuaded that it would have required uncommon control. It is certainly true that the Company has anticipated the possibility that drivers will be provoked by passengers and has provided relevant guidance on dealing with those passengers, but we are not dealing here with a situation in which the employee will predictably pause to recall his training and weigh the pros and cons of action. On evidence that I find credible, the grievant did absorb a fair bit of abuse without immediately reacting improperly, and it was only after the abuse was magnified to a (frankly) disgusting level that he was impelled to respond, which he clearly did instinctively. Even then the response did not, in my viewing of the video, evidence a total loss of control on the grievant's part. What the grievant did was clearly wrong, but it was not premeditated, and it was not wanton thuggery.

The charges against the grievant also include a failure to contact Radio Control when faced with the disruptive passenger. To the extent that this charge refers to the

name-calling incident earlier in the day, it seems clear that drivers have to make judgment calls every day when unpleasant passengers get on their buses. In this case, the passenger got on the bus, called the driver vile names, and then went to a seat. The judgment by the grievant that there was insufficient cause to solicit help from Radio Control does not strike me as an unreasonable one, as the situation seemed to have settled. As to the failure to call Radio Control when he was spat on, that would certainly have been a preferable alternative, but we have already addressed why it might not have been foremost on the grievant's mind.

The Company acknowledges that "while some arbitrators have found that serious provocation may serve as a mitigating factor in certain circumstances," it argues that its public-safety role "makes any provocation argument inapplicable in this case." It cites certain language in a 1981 decision in *Delaware River Port Authority* that upheld the discharge of a toll collector who assaulted a customer, but in that case the arbitrator noted that the customer required medical attention for a stab wound. In his findings, the arbitrator recognized that public authorities have special responsibilities, but he also observed that "the public is not going to react with equanimity to the news that an employee who repeatedly plunged a murderous weapon into the side of a customer was reinstated to his former employment." The grievant's behavior in the present case was a long way from that.

More to the point is a recent decision by Arbitrator Michael Lewandowski in a case involving these parties. In that case, the grievant, [redacted] claimed both provocation and self-defense, although as here [redacted] pursued the customer after the customer had left the bus, thus invalidating the self-defense argument. However, the

provocation experienced by [redacted] was decidedly milder than that by the grievant, and his reaction decidedly worse. The passenger allegedly struck [redacted] with a *bus pass*, then left the bus, then came back and kicked the door of the bus, and then began to walk away. At that point [redacted] *opened the door* and went after the customer. According to the decision, the video shows the driver standing over the customer and striking him repeatedly while passengers, who had been left on the bus, reacted verbally. When the driver returned to the bus, the customer came to the door, and the driver kicked at him. The Arbitrator notes that "after the assault had ended and after the passenger left the bus, [redacted] pursued the attacker and assaulted him, not with one punch, but with several punches to the head." The decision notes that the driver "beat the customer" and threatened the safety of other passengers on the bus. In the instant case, there is nothing that I would describe as a "beating," nor was the safety of any passenger threatened. And although Arbitrator Lewandowski does not apparently give decisive weight to [redacted] prior employment record, he does note that it is "not blemish-free." In fact, in the one year prior to his discharge [redacted] had been given disciplinary suspensions three times. Here, although the grievant is not a long-term employee, his record is apparently "blemish-free."

Notwithstanding any provocation, the just-cause considerations that apply in these other cases obviously have to apply here. In general, fighting is a serious offense in any workplace, and under many circumstances it will constitute just cause for discharge even for a first offense. When an employee gets into a fight, however, provocation has to be a factor in assessing discipline, unless there is an inviolable and very public zero-tolerance rule that everyone understands and accepts. Absent such a rule, there must be

some balancing of considerations. There is nothing in the record here to show that employees at this workplace have been told if they get into a fight they will be fired, period, regardless of circumstances or provocation. I agree with the Company that some employers, because of their mission and even without zero-tolerance, may reasonably set the provocation bar very high, but the circumstances still have to be weighed and balanced. In this case, I find that the provocation was very severe, and that the grievant's reaction, while unacceptable, did not reach a level (such as beating or stabbing another person) where no risk of repetition is conceivable. It is also relevant in the latter regard that the grievant has expressed remorse and an understanding that what he did was not condonable.

To say that conduct is unacceptable, however, is to say that there must be consequences, but it is not necessarily to say that those consequences are limited to discharge. Here I find that, given the facts of the provocation and his response, the grievant's discharge was excessive under the circumstances, but the consequences of his misconduct should not include a significant amount of pay for time not worked. Accordingly, the grievant will be reinstated to his job without back pay or benefits, although he will have his seniority restored.

AWARD

The employer did not have just cause to terminate the employment of the grievant, [redacted] [redacted] Mr. [redacted] shall be reinstated to his job with no loss of seniority, but he shall not be entitled to compensation for any lost wages or benefits. The arbitrator will retain jurisdiction of this matter for the sole purpose of resolving any dispute that may arise out of the implementation of this award.

STATE OF NEW YORK} SS:
COUNTY OF ERIE }

I, Howard G. Foster, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

September 24, 2015
(dated)

Howard G Foster
(signature)