

IN ARBITRATION
BEFORE ROBERT W. LANDAU, ARBITRATOR

**AMALGAMATED TRANSIT UNION,
LOCAL 1700,**

Union,

and

GREYHOUND LINES, INC.,

Employer.

**ARBITRATOR'S
OPINION AND AWARD**

AAA Case No. 77 300 00376 08

Forrest Hansen Discharge

Hearing Date and Location:

June 25, 2009
Salt Lake City, Utah

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INTRODUCTION

Grievant Forrest Hansen was terminated by Greyhound Lines, Inc. ("Greyhound" or "Company") on June 24, 2008. Amalgamated Transit Union Local 1700 ("Union") filed a grievance alleging that Grievant's termination was in violation of the collective bargaining agreement between the parties effective June 1, 2007 through January 31, 2010. The grievance was heard by the arbitrator on June 25, 2009, in Salt Lake City, Utah. Both parties had the opportunity to present witness testimony and documentary evidence, and to cross-examine adverse witnesses. The hearing was recorded and transcribed by a court reporter. At the conclusion of the hearing, the parties agreed to submit their closing arguments in written post-hearing briefs.

ISSUE

Was Grievant discharged for just cause and, if not, what shall be the remedy?

FACTS

Grievant was employed by Greyhound as a bus driver. At the time of his discharge in June 2008 he had 33 years of seniority, including service as a driver for Trailways before Greyhound and Trailways merged in 1987.

Grievant drove a regular bus route between Salt Lake City and Las Vegas. The route has a scheduled rest stop at the Chevron station in Cove Fort, Utah. The owner of the Cove Fort Chevron, Jimmy Hodges, was an independent contractor

who had an agency agreement with Greyhound to provide services to the Company and its bus passengers. The Cove Fort stop was unpopular with Greyhound drivers because the agency did not “comp” them with free meals or other complimentary items.

On March 14, 2008, there was an alleged verbal dispute between Grievant and the Cove Fort agency owner after Grievant was asked to move his bus so a fuel truck could make a delivery. The matter was reported to Roy Tanner, who is the Company’s agency sales manager in Salt Lake City and is responsible for contracting with agency locations where the Company can schedule rest stops. There is no evidence that Grievant was disciplined for this incident.

Three days later on March 17, after Grievant’s bus had made a rest stop at Cove Fort, the agency owner’s wife called Tanner and reported that the bus had left behind two female passengers whose English was limited. While Tanner was still on the phone with the Cove Fort agency, he was advised that Grievant’s bus had just returned to pick up the missing passengers, so the matter appeared to have been resolved. Moments later, however, Tanner received another phone call from the Cove Fort agency. When he answered, he could hear “loud yelling and screaming” in the background by a voice he recognized as being that of Grievant, although he could not make out the words Grievant was saying. He was unable to speak to Grievant and was informed that Grievant had just left. Tanner notified Shane Hakala, the operations supervisor, and Phil Rosa, the terminal manager, of the incident. He also requested a written statement concerning the incident from

the Cove Fort agency, and received a written complaint from the agency owner's wife later the same day.

As a result of the March 17 incident, the Company issued a one-day suspension to Grievant for violation of Rules G-3 and G-4 in the Drivers Rule Book.

Rule G-3 provides:

Hostility: Hostile or aggressive actions, whether verbal, physical, by gesture, or otherwise, towards the company, its employees, patrons, or agents are cause for discipline, up to and including termination. Any complaints, criticisms or suggestions shall not be made to passengers or the public.

Rule G-4 provides:

Personal Conduct/Courtesy: It is the driver's responsibility to be pleasant and courteous in dealing with passengers, regulatory or enforcement authorities, the public, and fellow employees. To avoid an argument, where possible, dispute shall be referred to supervisor to resolve whatever problems exist.

Grievant was also required to take in-house refresher training regarding the Company's guidelines for proper conduct toward customers and co-workers.

Grievant served the one-day suspension.

Several days later, on March 23, 2008, the owner of the Cove Fort agency called Tanner and complained that Grievant was "screaming and yelling" at him in front of his customers during another rest stop. Grievant's immediate supervisor, Shane Hakala, investigated the matter and interviewed Grievant about the incident.

According to Grievant, one of his passengers was in medical distress when the bus arrived at Cove Fort. Grievant ran into the Chevron store and in an excited manner asked for an ambulance or the police department to be contacted immediately.

Shortly thereafter the Utah Highway Patrol and an ambulance arrived. At this point

the Cove Fort owner approached Grievant and a verbal argument ensued between them, apparently concerning the issue of the agency not providing complimentary meals or other items to Greyhound drivers. In his interview with Hakala, Grievant said that he “should have let bygones be bygones.”

Following the March 23 incident, the Grievant received a four-day suspension for violating Driver Rules G-3 and G-4 and was again directed to take the Company’s refresher training before returning to work. Grievant served the four-day suspension, attended the refresher training and returned to work.

On June 6, 2008, another incident occurred at Cove Fort while Grievant’s bus was stopped there. A dispute arose between a young female bus passenger and a Cove Fort agency employee regarding payment for an advertised “free” cup of ice. During the dispute, the female passenger refused to pay for the ice cup, left other items at the cash register without purchasing them, and called 911 for assistance. When Grievant learned of the situation, he felt that the Cove Fort agency staff, including the owner and his son, were intimidating and harassing his passenger. Shortly thereafter, a Utah Highway Patrol officer arrived on the scene. While the officer was present, Grievant used his cell phone to call Roy Tanner. When Tanner answered, he heard Grievant screaming loudly at someone, “You were s****ing yellow when I first started driving [this] bus.” After Grievant had calmed down, Tanner said he would meet him in Cedar City, the next scheduled stop, and discuss the situation. Tanner drove to Cedar City and met with Grievant, who was still somewhat agitated. Grievant told Tanner that he believed the Cove Fort staff had been “mean” to his young female passenger and had tried to force

her to pay for a free ice cup as advertised in the store. After this discussion, Grievant was permitted to drive the remainder of his scheduled run.

Tanner then went to Cove Fort and spoke to the Highway Patrol officer about what happened. Tanner also received a second written complaint from the Cove Fort agency, as well as a 10-second cell phone video clip allegedly taken by the owner's son during the incident while Grievant was speaking to the patrol officer. Subsequently Hakala conducted a formal investigation of the June 6 incident, including an interview with Grievant and his Union representative on June 22. During the interview Grievant reiterated that he was attempting to protect his young female passenger from being taken advantage of by the Cove Fort agency staff. Grievant denied violating Rules G-3 and G-4 of the Drivers Rule Book regarding hostility and personal conduct. However, upon being shown the cell phone video Grievant admitted he "was not in control" in the video and that his actions depicted in the video violated the Driver rules of conduct, but he maintained that he had been "set up" by the agency owner.

At the completion of its investigation of the June 6 incident, the Company terminated Grievant's employment on June 24, 2008. The Union grieved the discharge. At the third step hearing in the grievance procedure, the Company requested the Cove Fort agency owner to testify about the matter, but the owner declined to appear or otherwise participate in the Company's grievance procedure. The grievance subsequently proceeded to this arbitration.

RELEVANT CONTRACT PROVISION

ARTICLE G-7 DISCIPLINE

Employees will neither be disciplined nor will entries be made against their records without just cause. Use of the term “just cause” in lieu of “sufficient cause” herein is not intended to and will not be interpreted to raise the standard for discipline historically applied under Article G-7. Just cause includes violation of company rules, regulations and instructions not inconsistent with this agreement. * * *

Customer complaints are a serious matter and operators are expected to treat customers with courtesy so as to avoid complaints. Complaints will be discussed with operators as soon as practicable so corrective action can be taken. A complaint made in writing or in person identifying the customer, operator, date of the incident, and details of the conduct complained of may be the basis for discipline up to and including discharge. The complaining customer may appear at the third step hearing either telephonically or in person. If the complainant fails to testify at a third step hearing, the complainant is prohibited from appearing at arbitration. If the complainant appears at the third step hearing, the union agrees to allow the complainant to testify at the arbitration hearing by telephone, live, or in the form of a pre-hearing arbitration deposition. The same procedures regarding appearing at step three hearings and arbitrations will apply to complaining parties other than customers with the exception of supervisory personnel and regulatory authorities acting in their official capacity. * * *

POSITIONS OF THE PARTIES

A. Employer

The Company first argues that the cell phone video taken by the owner’s son during the June 6 incident should not be excluded under Article G-7 of the labor agreement. The “complaint” provision in Article G-7 relates only to complaining customers or other persons testifying at the third step hearing or at arbitration. A video of the Grievant is not a complaint; it is simply evidence of the Grievant’s actions, unfiltered. The only persons in the video are Grievant and the patrol

officer, not the videographer. Although the videographer makes a comment at the end of the video clip, the Company does not offer that comment as evidence and it can be excluded. Second, the video is nothing more than a visual depiction of the phone call Tanner received from Grievant during the June 6 incident. Article G-7's "complaint" provision, by its own terms, does not apply to "supervisory personnel" like Tanner. Third, the video was provided to the Union and Grievant at the investigatory meeting and was played at the third step hearing, which satisfied the requirements of Article G-7 for consideration at arbitration.

Next, the Company contends that Grievant's discharge was for just cause. Grievant clearly has an anger management problem. As demonstrated by the evidence, Grievant on several occasions engaged in verbal altercations with the Cove Fort owner and staff, including screaming, yelling and verbal abuse. In particular, the June 6 video clip graphically demonstrates Grievant's lack of self-control, raging temper, and irrational behavior. Even the Union shop steward reported that he feared for his safety in Grievant's presence. Company management reasonably believed that Grievant had shown an inability to control his temper, even after discipline and additional training, and that continuing his employment risked further escalation and presented a danger of violence.

Finally, the Company argues that there are no reasons to mitigate Grievant's discharge. Although Grievant was a long-term employee, this does not trump his repeated outbursts and wildly inappropriate displays of temper. Long service does not excuse Grievant's repeated violations of the Driver rules of conduct. Also, there is no evidence of any change in Grievant's attitude, temperament or behavior. He

was given several chances to change, yet he did not do so. For the foregoing reasons, the grievance should be denied.

B. Union

The Union argues that the written statements of the Cove Fort owner and his wife were properly excluded at the arbitration hearing. Article G-7 clearly and unambiguously prohibits evidence or testimony from complaining parties who do not appear at the third step hearing. This language has been enforced by other arbitrators in prior arbitrations between the parties. Moreover, the Company's allegation that the Cove Fort owner did not testify at the third step hearing because he was afraid of retaliation by Grievant is unfounded and unsupported by any reliable evidence. Under Article G-7, Cove Fort personnel could have testified telephonically at the third step hearing and the agency owner's alleged fear of Grievant was no excuse for their absence.

The Union asserts that a heightened standard of proof is appropriate in this case. Where a discharge is based on stigmatizing conduct that jeopardizes an employee's future employment opportunities, arbitrators have required proof by clear and convincing evidence rather than a mere preponderance of the evidence. A heightened standard of proof is also justified based on Grievant's lengthy record of 33 years of satisfactory employment.

As to the merits, the Union contends that the Company has failed to prove by reliable evidence that Grievant engaged in misconduct during any of the incidents at the Cove Fort location. The Company's case consists almost entirely of

unreliable hearsay evidence, which arbitrators have found is insufficient to sustain an employer's burden of proving just cause for discharge. There was no testimony from any witnesses who were physically present during the events on which Grievant's discharge was based. No one from the Cove Fort agency or the Utah Highway Patrol testified at the third step hearing or at arbitration. To the extent the Company relies on what Company manager Roy Tanner heard on the telephone during the incidents in question, Tanner was not present at the scene and therefore his testimony cannot be given any significant weight. As to the cell phone video allegedly taken by the Cove Fort agency owner's son on June 6, the video is hearsay evidence and no foundation was laid for the video; the owner's son did not testify at the third step hearing or at arbitration and therefore the arbitrator should not place any weight on the video. Even if the arbitrator considers the video, it does not show any conduct by Grievant that was so outrageous as to warrant discharge. Further, Hakala's handwritten notes of his investigatory interviews with Grievant are also hearsay and fail to establish that Grievant violated Rules G-3 and G-4 or engaged in any misconduct. The evidence is totally inadequate to justify Grievant's discharge under any burden of proof, and certainly not under the heightened clear and convincing evidence standard required by Grievant's long history of service with the Company.

Finally, the Union argues that Grievant's lengthy and satisfactory work history does not support a penalty of discharge. There is no evidence that Grievant's work record is anything but positive. On each date of the alleged incidents on which Grievant's discharge is based, Grievant completed his bus route

and all of his passengers arrived safely at their destinations without making any complaints. Further, there is no evidence that any of the alleged altercations took place in front of bus passengers. For the foregoing reasons, the Union contends that the grievance should be sustained and that Grievant should be reinstated to his former position with full back pay and benefits.

ANALYSIS AND OPINION

Under well-accepted arbitral standards in discipline cases, the Company has the burden of proof to demonstrate that Grievant engaged in misconduct and that discharge is an appropriate disciplinary penalty. As noted by the Union, where an employee is discharged for improper or reprehensible personal conduct that, if sustained, could detrimentally affect his future employability, most arbitrators, including this arbitrator, have held that management must prove its case by more than a mere preponderance of the evidence, namely by clear and convincing evidence. A heightened standard of proof is also justified in discipline cases where the employee has a lengthy and satisfactory record of service. Accordingly, based on the charges in this case that the Grievant engaged in improper personal conduct and hostility, and in recognition of his 33 years of satisfactory employment, it is appropriate to require the Company to prove its disciplinary charges by clear and convincing evidence.

The central issue in this case is whether the Company has presented sufficient reliable and competent evidence to support a finding that Grievant violated the Company's rules of conduct for bus drivers. The Company disciplined

Grievant for having verbal altercations with the owner and staff of the Cove Fort agency on March 17, March 23 and June 6, 2008. Most of the information relied upon by the Company was supplied by the owner of the Cove Fort agency. Significantly, however, no Cove Fort agency personnel appeared or testified either at the third step hearing or at arbitration. The same is true for the Utah Highway Patrol officer who was present during the June 6 incident leading to Grievant's discharge. Thus, the Company's case against Grievant consists primarily of hearsay evidence from witnesses who were not available to be cross-examined during the grievance and arbitration process.

Article G-7 of the labor agreement expressly provides that if a complaining customer or other complaining party fails to testify at a third step hearing, the complainant is prohibited from appearing at arbitration. This language clearly reflects the parties' contractual intent that any evidence or information from a complaining party may not be used against a charged employee in arbitration if the complaining party fails to participate at the third step hearing. Based on Article G-7, the arbitrator ruled at the arbitration hearing that the Company's proffered written statements from the Cove Fort agency owner and staff could not be used against Grievant. The arbitrator reserved his ruling as to the admissibility of the cell phone video allegedly taken by the agency owner's son during the June 6 incident and invited the parties to argue this question in their post-hearing briefs.

After considering the arguments of the parties, I conclude that the cell phone video is essentially equivalent to the written statements from the Cove Fort personnel which were previously excluded at the arbitration hearing. The video clip

is approximately ten seconds long and appears to show the Grievant standing next to the Highway Patrol officer, each talking on his cell phone, and then Grievant makes a remark apparently directed at the person using the cell phone camera (or possibly someone standing next to him). Although the Company argues that the video is not a “complaint” within the scope of Article G-7, this argument is unpersuasive. Article G-7 broadly excludes any evidence provided by a complaining party who does not appear or testify at a third step hearing. Even though the video itself was played at the third step hearing, the person who made the video B allegedly the agency owner’s son B was not made available for cross-examination and therefore the video, like the written statements, cannot be used against Grievant at arbitration. It is important to note that the video was taken not by a disinterested third party but by a close relative of the principal complainant in this case. The reliability of the video is even more questionable given the comment made at the end of the video clip by the person shooting the video which reflects bias and animosity against Grievant.

Further, I am unpersuaded by the Company’s argument that the video is merely a visual depiction of the phone call Roy Tanner received from Grievant during the June 6 incident and therefore should be allowed as evidence under the exception in Article G-7 for “supervisory personnel.” Although Grievant was allegedly speaking to Tanner when the video was taken, Grievant’s sole audible remark in the video is not the same statement Tanner testified he heard over the phone. In short, the bottom line under Article G-7 is that any evidence from a

complaining party who does not appear at the third step hearing may not subsequently be used in arbitration.

Without the testimony of Cove Fort agency personnel, the Highway Patrol officer, or anyone else who was physically present when Grievant allegedly engaged in misconduct, there is little remaining evidence against Grievant. During the March 17 incident, manager Tanner testified he heard Grievant screaming and yelling over the phone, but he could not make out what Grievant was saying. During the June 6 incident when Grievant called Tanner, Tanner heard Grievant yelling to someone, "You were s****ing yellow when I was driving [this] bus," but Tanner was not physically present at the scene and it was not clearly established to whom Grievant's statement was made or what the context of the remark was. Even though Tanner's testimony as to what he heard on the phone is admissible, this evidence is simply too limited to have much evidentiary value and is certainly not enough to prove by clear and convincing evidence that Grievant engaged in misconduct warranting discharge.

Likewise, the Grievant's purported admissions during his investigatory interview concerning the June 6 incident are insufficient reliable evidence of misconduct to support his discharge after 33 years of employment. When the cell phone video was played during his investigatory interview, Grievant apparently agreed the video showed he was not in control and violated the Driver rules of conduct. As I concluded above, however, the video is inadmissible under Article G-7 because it was made and supplied by a complaining party who did not appear or testify at the third step hearing. Notably, in the same investigatory interview

Grievant specifically denied being “completely out of control” and violating Rules G-3 and G-4 of the Driver rules in connection with the June 6 incident. Therefore, any purported admissions by Grievant relating to the video are not entitled to much weight.

For the foregoing reasons, I conclude that the Company has not presented sufficient competent and reliable evidence demonstrating that Grievant engaged in misconduct justifying his discharge.

AWARD

The grievance is sustained. The Company did not have just cause to discharge Grievant on June 24, 2008. As a remedy, the Company shall reinstate Grievant to his former position with applicable back pay and benefits, less any interim earnings. The arbitrator will retain jurisdiction in the event of any further dispute regarding the remedy or the implementation of this award.

Respectfully submitted,

Robert W. Landau
Arbitrator

October 16, 2009