

DART ARBITRATION PANEL

In the Matter of Arbitration

Between

**Amalgamated Transit Union Local Division
1338**

And

Dallas Area Rapid Transit

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Grievant: Winford Sheppard

Case No.: 3039-U-ATU

Before: Kathy Fragnoli, J.D.

Appearances:

For DART: Tammy Barrow, Counsel for DART
For the Union: David Watsky, Attorney at Law

Place of Hearing: DART Headquarters

Date of Hearing: March 17, 2011

Receipt of Transcript: April 4, 2011

Date of Award: May 3, 2011

Relevant Contract Provisions: Chapter 8, Sections 2, 3, and 7 of the Employee Relations,
Hourly Employment Manual

Type of Grievance: Discharge

Award Summary

The grievance is sustained. The Grievant is to be reinstated effective immediately. In light of his rejection of DART's earlier offer a 20-day suspension without pay, this arbitrator declines to award back pay.



Kathy Fragnoli, J.D., Arbitrator

Issues

The issues to be decided in this case are: (1) whether there is just cause to discharge the Grievant and (2) whether the discharge was within the limits of the Hourly Employee Manual.

Background

Winford Sheppard ("Grievant") was hired by DART as a bus operator on July 16, 1984, giving him approximately 26 years of service. During his tenure, he was the recipient of numerous awards, including the Efficiency award and the Operator of the Year award. While the Grievant was up for discharge previously, it was not for reasons that were similar to those at issue in this grievance.

On May 11, 2010, the Grievant picked up a passenger named Paul Vinzant LeCroy and a traveling companion at the Forest Lane station. LeCroy's companion asked the Grievant whether the route took them under the Central Expressway overpass. The Grievant answered that it did. LeCroy asked the Grievant again whether the route took them under the Central Expressway overpass. The Grievant stated, "[s]ir, I'll be leaving in less than a minute but when I do leave, I'm going up under the bridge." LeCroy, feeling like the Grievant treated him rudely, called DART as he rode the bus and left a complaint on DART's service line. A short time later, LeCroy rang the bell indicating that he wished to be let off the bus. The Grievant pulled up to the bus stop and opened the door. LeCroy walked toward the door while mumbling under his breath, stopped short of the Grievant and stood over him for a period of time. According to the Grievant, he asked LeCroy why he was standing over him, to which LeCroy responded, "Because I want to."¹ The Grievant unfastened his seatbelt and indicated that LeCroy should get off the bus.

According to the Grievant, LeCroy said "fuck you, nigger" to the Grievant as he was exiting the bus.² In response, the Grievant kicked towards LeCroy as he was de-boarding the bus. Accounts differ concerning the kick. According to LeCroy's police report, the Grievant's foot made contact with LeCroy's right forearm. Apparently, LeCroy's recollection of what transpired changed during his conversation with the police officers. He first stated that the Grievant de-

¹ DART argues that these incidents are not reflected in Grievant's statement but they were implicit in his statement, which indicates that LeCroy said to him "I hope [the Grievant] has a bad day as [LeCroy] was standing over [the Grievant]," and the Grievant asked him to "get from over [the Grievant]."

² According to the police report that resulted from LeCroy's complaint, LeCroy told police that he said only "fuck you" to the Grievant.

boarded the bus and kicked him but then stated that the Grievant was on the first step of the bus when he kicked him. According to the Grievant, he remained on the bus and he did not make contact with the passenger. Winford Sheppard testified that he did not intend to make contact with LeCroy at all and his intent was only to scare LeCroy. In the statement he submitted to DART, however, he wrote that he attempted to kick at him but missed. Afterwards, LeCroy repeated, "fuck you, nigger." The Grievant testified that at that point he told LeCroy, "Since you want to fuck me, you can come back up here and fuck me." In his statement, Winford Sheppard wrote that he "tried to get him to get back on the bus and [the Grievant] was going to show him what a nigger could do to his bitch ass." Either way, this statement was a threat. LeCroy did not return to the bus and the Grievant closed the door and proceeded with his route.

LeCroy immediately filed a police report, and DART was notified. On May 13, 2010, Winford Sheppard was placed on administrative leave with pay by Assistant Division Manager Leonard Hatcher while the incident was investigated. Robert Reeves, the Senior Manager of the South Oak Cliff and East Dallas Bus Operations at the time, commenced an investigation.

On June 21, 2010, the Grievant was issued a notice of his proposed discharge. Two days later, the Grievant met with Reeves to provide his side of the story. During this meeting, the Grievant asked that consideration be given to his lengthy service for DART. In recognition of the Grievant's service, Reeves offered him a 20-day suspension without pay as long as he participated in anger management training, in lieu of discharge. The Grievant rejected this offer; Reeves thus proceeded with the discharge. After he had drafted the notice of discharge but before he signed it, the Union objected that Reeves was related to another employee at the East Dallas Bus Operation and so DART management replaced him with Wanda Schafer, who assumed the position of Acting Senior Manager at East Dallas Bus Operations. Rather than proceeding immediately with the discharge, Schafer reviewed every document associated with the file, tried to contact LeCroy and finally met with the Grievant again to make sure that discharge was appropriate. During this meeting, Schafer went over the Grievant's incident report with him to make sure it accurately reflected what had transpired. It did and on July 27, 2010, Schafer issued the Grievant the notice of discharge. This grievance timely ensued.

Provisions of the Hourly Employment Manual

8.2 Employee Conduct

Employees of DART are expected to exhibit high standards of personal conduct both on and off the job, and to avoid conflicts of interest or even the appearance of conflicts of interest. Conduct that is illegal or would reflect negatively on DART may be the basis for discharge.

8.3 Unacceptable Conduct

- M. Disturbance is exemplified, but not limited to, the following violations:
3. Intimidation including threatening injury to another employee, a citizen, or DART patron.
 5. Use of profane or abusive language. This includes use of racial and/or ethnic slurs or sexist language.
 8. Other disruption of the harmonious relations among employees or between employees and the public.
- O. Misconduct is any conduct, during or off working hours, that could have an adverse effect on DART, or on the confidence of the public in DART. Misconduct includes criminal offense(s) and convictions.

8.7A Pending Investigations

2. Before an action of discharge is taken, the employee must be given an opportunity to respond to the allegations, in writing and orally, to the person having the authority to take the disciplinary action.
3. Written notice must be given to the employee within five working days from the date the employee's immediate supervisor becomes aware of the incident.

Position of the Union

According to the Union, good cause does not exist to discharge the Grievant. First, LeCroy made several inconsistent statements concerning the events that transpired, thus undermining his credibility. Second, the Grievant kicked at LeCroy only after LeCroy called him a "nigger" making the Grievant understandably upset. Through testimony by Ricky L. Booker, the Union argues that DART's treatment of the Grievant was inconsistent with discipline given bus operators accused of similar, or even worse, actions. Bus Operator Haston Van Elder, for example, chased a passenger off a bus who threw a soda bottle at him and called him racial names. For his actions, Van Elder received only a two-week suspension and even this discipline was rescinded when grieved. Bus Operator Margaret Peggy Johnson similarly received no discipline when she shoved a passenger from the bus at a stop. According to the Union, the actions of these bus drivers were worse than those of the Grievant, supporting the Union's position that the Grievant's discharge was inconsistent, and disproportionate to his actions.

The Union also argues that the Grievant's discharge was untimely, based on Section 8.7(a) and (b) of the Hourly Employment Manual. Specifically, Section 8.7(b)(3) provides that written

notice (of discharge) must be given within five working days from the date the employee's immediate supervisor becomes aware of the incident. Since DART had the information it needed to proceed with the termination on June 23, 2010 at the latest, notice of the Grievant's discharge should have been provided five days later. Instead, the Grievant received notice of his discharge five weeks later, on July 27, 2010. In response to DART's argument that the timeline was suspended because the Grievant took vacation, the Union points out that the Grievant took vacation from June 1 through June 16, well before June 23, the day the Grievant's immediate supervisor became fully aware of the incident.

In response to DART's argument that the Grievant's discharge was necessary because he is unwilling to remediate his conduct, the Union introduced testimony of the Grievant, who testified that, faced with the same situation today, he would not engage in the same conduct.

Position of the Employer

According to DART, the Grievant violated Sections 8.2 and 8.3 of the Hourly Employment Manual by kicking, or attempting to kick, a paying customer and by inviting the passenger back on the bus in order to "attack" the passenger. The Grievant admitted these actions. Through Reeves' testimony, DART pointed out that bus operators can expect to take some verbal abuse from customers and are given training in how to deal with difficult passengers for this reason. Bus operators are taught that they are to never take matters into their own hands and that they should instead call the transit police if problems arise. DART considers its bus operators its "ambassadors to the public" and for this reason, the Grievant's approach to LeCroy was unacceptable. DART also argues that the Grievant's story changed over time, pointing out that the allegation that LeCroy called the Grievant a "nigger" was not reflected in the police report. According to DART, the Grievant was given the opportunity to take a 20-day suspension and anger management classes but declined to do so, leading DART to discharge the Grievant based on its conclusion that the Grievant was unremorseful and unwilling to remediate his conduct.

In response to the Union's argument that the discharge was untimely, DART points out that the delay in the discharge was caused by the Grievant going on vacation during the pending investigation. DART also argues that the delay was caused by the Union's insistence that Reeves be replaced during the investigation because he was related to someone within the division that resulted in Schafer revisiting the investigation to ensure that the discharge was warranted.

With respect to the Union's argument that the Grievant's discharge was inconsistent with discipline given other bus drivers for similar conduct, DART points out that a passenger punched Johnson in the arm before Johnson pushed her off of the bus. Also, Johnson and the passenger were the only two persons on the bus and Johnson defused a volatile situation by ridding the bus of the passenger. Also, in the case of Van Elder, he denied de-boarding the bus and chasing the passenger around. In addition, while the passenger accused Van Elder of chasing him with a knife, the police found no knife when they investigated. Finally, Van Elder's discipline was reduced because of a procedural error, not because his actions were not viewed as serious.

Discussion

Issue One: Did DART have just cause to discharge the Grievant?

The Grievant operated a bus for DART for nearly 26 years. He had never before engaged in the conduct he exhibited on May 11, 2010. There is no question that he reacted rashly and disproportionately to LeCroy's use of an inflammatory racial slur and that his conduct was totally unacceptable. Under no circumstances should a bus operator kick at a passenger or challenge a passenger to a physical altercation. As civil servants, bus operators are certain to receive some verbal abuse and the Grievant is sorely in need of additional training addressing how to constructively deal with these situations. The Grievant was a diligent and skilled bus operator and the record contains no indication that he had done anything similar to this before. This arbitrator is also persuaded that other bus operators were accused of similar or worse conduct and were permitted to keep their jobs. Three disinterested witnesses apparently testified that Van Elder actually de-boarded the bus and chased a passenger. Aside from a representation attributed to LeCroy in the police report, there is no evidence in this case that the Grievant de-boarded the bus. Similarly, there was no credible evidence that the Grievant made contact with LeCroy, which was not the case with Johnson.

DART concluded that because the Grievant declined the offer of a 20-day suspension and anger management counseling, he failed to take responsibility for his actions. The Grievant testified that he felt that accepting this offer would be an admission that he actually made contact with LeCroy, an allegation that he continues to deny. The Grievant testified that if given the same circumstances today, he would opt to simply shut the door and continue with his route. This arbitrator believes that the Grievant is willing to remediate his conduct. While without jurisdiction to so order, the arbitrator would suggest though that Mr. Sheppard attend counseling for issues related to his lack of regard for authority figures, which was evident in this case.

The Grievant was given the opportunity to mitigate his damages by accepting DART's offer of a 20-day suspension. He declined the offer. Had he accepted the offer, he would have only been denied 20 days of back pay, which was fitting disciplinary measure given the circumstances. For this reason, this arbitrator declines to award the Grievant back pay.

Issue Two: Was the Grievant's discharge untimely?

The discharge was timely in this case. It could be said that management provided "more" due process rather than less by reinvestigating the matter and allowing him another chance to tell his story.

Award

The grievance is sustained. The Grievant is to be reinstated effective immediately. In light of his rejection of DART's earlier offer a 20-day suspension without pay and his admitted wrongdoing, this arbitrator declines to award back pay.