2-15-2007

ATU, Local 508 v Halifax (Regional Municipality)

Innis Christie

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IN THE MATTER OF AN ARBITRATION

BETWEEN:

AMALGAMATED TRANSIT UNION, LOCAL 508

(The Union)

and

HALIFAX REGIONAL MUNICIPALITY
METRO TRANSIT

(The Employer)

07 052 004

RE: Randy White – Termination Grievance

BEFORE: Innis Christie, Arbitrator

DATE OF HEARING: January 23 and 24, 2007

FOR THE UNION: Kimberly H. W. Turner, Q.C, Counsel
Dan MacDonald, President, ATU, Local 508

FOR THE EMPLOYER: Kirby Grant, Counsel
Martin C. Ward, Q.C., Counsel
Dawn Phillips, Articled Clerk
Kevin Alexander, Employee Services Supervisor, Metro Transit, HRM
Lavra Gay, Senior Human Resources Consultant
Shauna McKay, Human Resources, HRM
Kyle Wilcox, Employee Services Supervisor, Metro Transit, HRM

DATE OF AWARD: February 15, 2007

Union grievance filed November 29, 2005, alleging breach of "Article 9, clause 9.01 and any other relevant article or clause" of the Collective Agreement in that the Employer terminated the Grievor without just cause. In the Grievance the Grievor sought reinstatement with full wages and seniority and that all records of the termination be removed from his file.

At the outset of the hearing in this matter the parties agreed that I am properly seized of it and that I should remain seized after the issue of the award to deal with any matters arising from its application.

AWARD

[1] **Introduction**. The Grievor was a bus driver whose route included a stop at a private school in Halifax. A teenaged girl, who was one of his regular passengers, gave him a bag of homemade cookies as a thank-you gift because she understood he was changing routes. He prepared a quite elaborate bag of treats to give to her the next day, he says, in return for her thoughtfulness. Because she was not on the bus that day, the Grievor gave the bag of treats to a fellow student friend of hers to give to her. He wrote his name and telephone number on a spare time card, put it in the bag and asked the friend to ask the recipient to call him, so, he says, he could thank her directly. At the same time he told the friend that the recipient should only call him with her father's permission.

[2] The Employer considered this behaviour highly inappropriate, as did the school authorities, and terminated the Grievor. For the reasons that follow I have decided that the Grievor's behaviour did deserve discipline but not discharge, and I have

ordered him reinstated with back pay, subject to conditions and a one month period of suspension. The Grievor's record discloses a somewhat similar incident and there was evidence of post-discharge behaviour relevant to the discipline I have substituted.

[3] **Motion For Non-suit**. I note that at the close of the Employer's evidence counsel for the Union moved for non-suit. I responded that I would put the Grievor to his election; i.e. that if the motion for non-suit was denied I would not allow the Union to call evidence on the Grievor's behalf. Beyond noting that the response of Canadian and Nova Scotia arbitrators to motions for non-suit is mixed in this respect, counsel made no submissions. Based on my response the motion for non-suit was withdrawn.

[4] **The Facts.** When he was discharged on November 21, 2005, the Grievor had been a bus driver with the Employer since 1990. His discipline record, which is subject to a sunset clause, contains one disciplinary incident, which is not unrelated to the cause of discharge here. The Grievor is 54 years old. He is the divorced father of four young adult children who do not live with him. He has a legal obligation to make support payments. He has lived in his sister's house since his final separation from his wife in August 2005. Since November 2006 he has worked sixteen to twenty hours as week as a labourer out of a temporary employment service, at slightly above the minimum wage.

[5] On November 9, 2005 the Grievor's route included a stop near Sacred Heart School, an independent private school in Halifax. The school is co-ed at the elementary level, but for grades 7 -12 is a girls' school. That day a 14 year old girl,

who was one of the Grievor's regular passengers on his route, gave him a bag of homemade cookies as a thank-you gift, because she understood he was changing routes. That girl, referred to below as the intended recipient, chose not to testify, but her mother did. The mother testified that she was in the habit of giving cookies to people as a thank-you, and had encouraged her daughter to do so on this occasion. The Grievor testified that at the time he was lonely and suffering from some depression and was deeply moved by this thoughtful gesture. His sister testified that upon his return home at the end of the work day he broke into tears telling her about the gift.

[6] The next morning the Grievor prepared a bag of treats, which was in evidence, from items he had in his room. The bag, which was the one he had received the cookies in, contained a number of chocolate bars and other candy, a dried flower and a small teddy bear about five inches high, with the flower and the teddy bear sticking out of the top of the bag. The Grievor testified that he did this out of gratitude and not to attempt to create any sort of improper relationship. He testified that at the time it did not occur to him that he was doing anything inappropriate, although by the time of the hearing he had come to realize how what he did would have looked, and apologized for his poor judgment.

[7] Shauna MacKay, who at the time was Manager of Employee Services, testified that when she smelled the teddy bear on November 14 or 15 it "reeked" of men's cologne. The Grievor denied that he had put any cologne on the teddy bear, except by accident from his hands following his morning preparations for work.

[8] I do not conclude that the Grievor was lying about his feelings as he prepared the gift bag, but in light of all of the evidence I cannot be certain of his motivations, conscious and subconscious.

[9] As it turned out, the intended recipient of the bag of treats was not on the bus on November 10, having been driven to school. The Grievor gave the bag of treats to another student whom he recognized as having often sat with the intended recipient. That student testified, very credibly, referring to notes she had made the next day, which are in evidence. She stated that as she got off the bus the Grievor called her back and asked where "the little one who usually comes with you" was. When she replied that the intended recipient had been driven to school that day he took the gift bag from a black bag beside his driver's seat and asked the witness to give it to the intended recipient.

[10] Then, according to the witness's testimony and notes, the Grievor "pulled out a piece of paper", which has turned out to be a spare time card, wrote his name and number on it and said "Oh and I need to give you my phone number to give to her too ... give her this and ask her to call me, but tell he to get her dad's permission before she does this." He added "kind of smiling", "ask her to tell you the story behind the teddy bear". The Grievor testified that he also told the witness to whom he gave the gift bag to tell the intended recipient that the reason he wanted her to call, if she was allowed to, was so he could thank her in person.

[11] By agreement, the parties put in evidence the statement of an adult witness who came forward in response to the Employer's investigation. In her statement the declarant unequivocally identifies the Grievor as the driver on the bus she was

on on the morning of November 10, 2005. She was sitting up front, next to the young witness referred to in the preceding paragraph. After recounting the driver's inquiry about the intended recipient, the declarant goes on:

> Bus driver handed student a small gift package. Appeared to be shiny material with a small stuffed bear, possibly a card and light tissue packing. He asked if student would be seeing her that day and would she please give this to her. Couldn't hear all of the ensuing conversation but did hear the words "tell her parents" – "make sure it's ok with her parents".
> Student then got off the bus. This conversation lasted ~ 2-3 minutes.
> Bus driver checked to see who was remaining on the bus and when he saw me started telling me about the "gift". He said that the girl had brought him some chocolate chip cookies. He normally doesn't like cookies but they were so good he ate them all. He said the gift was to thank her for the cookies. He also said there was a story behind the bear but he didn't have time to tell me as I got off ...

[12] I recount this evidence for three reasons. First, it demonstrates that there was nothing covert about the Grievor's giving of the gift bag. He was quite happy that both the student witness and a nearby adult were fully aware of what he was doing. Second, this statement is corroborative of the student witness's account of what the Grievor said, although her testimony required no corroboration. Third, this demonstrates the consistency of the Grievor's accounts of why he did what he did.

[13] Counsel for the Employer made something of the fact that the intended recipient had no idea of "the story behind the teddy bear". The Grievor testified that at some earlier time he had done a favour for a stranger newly moved to town, who had given him the teddy bear with instructions to pass it on to someone who someday did him an unexpected favour. He testified that his thought had been that if the intended recipient did call him, as he expected her to, with her parents'

permission, he would tell her the story behind the bear. The declarant's statement adds to the credibility of that testimony.

[14] Counsel for the Employer cross-examined the Grievor on the fact that he had put his name on the spare time card, which he put in the gift bag, as "Randy", rather than "Mr. White", or "your bus driver" or some such thing. I accept the Grievor's testimony that he never calls himself anything other than "Randy", nor is he called anything else by anyone he knows, young or old.

[15] When the student witness took the Grievor's gift bag into the school she mistakenly gave it to a student other than the intended recipient. After some miscommunication the gift bag ended up being turned in to the Dean of Students, who testified at the hearing. The Head Mistress was notified. After a meeting with the students involved, the school authorities concluded that the contents of the gift bag, particularly the note with the Grievor's name and telephone number on it, were inappropriate, so the police were notified. The Dean of Students testified that her reaction was that the gift bag was "a kind gesture, but over the line", and that the inclusion of the Grievor's phone number put it "over the top".

[16] The student who had been given the gift bag by the Grievor testified that she had thought, from his comment about the teddy bear for one thing, that he knew the intended recipient, perhaps as a family friend. When she discovered that he knew her only as their bus driver she was disturbed by the gift. She was 14 at the time.

[17] The intended recipient's mother testified that her daughter, who was 13 at the time, was very scared when she learned about the gift bag, and was unwilling to use the bus for some months. She also testified that she herself was concerned that the bus be safe, and that the driver be someone to whom her daughter could turn if there was any trouble. She further stated, however, that she and her husband were surprised to learn that the Grievor had lost his job over the incident, and had surmised that "it must have happened before".

[19] No charges resulted from the police investigation, but in the course of it the police contacted the Employer later on November 10. The Employer suspended the Grievor with pay on November 11.

[20] On November 16, 2005 a disciplinary meeting was held, attended by Shauna MacKay, who at the time was Manager of Employee Services, Robert Kirby, Employee Services Supervisor, to whom Ms. MacKay had assigned the investigation of the matter, the Grievor, Robin West, Vice President of the Union, and Rick Dexter, a Shop Steward. Ms. MacKay testified at the hearing, and her notes of the meeting are in evidence. They are on sheets of printed questions prepared by Mr. Kirby prior to the meeting.

[21] One point in Ms. MacKay's testimony that I found of interest was her testimony that when Mr. Kirby asked the Grievor about "the story of the teddy bear", she testified that he said the teddy bear had no clothes, no friends and the like, until Robin West told him "don't say any more". Ms. MacKay's hand written notes made at the time are "patches on it he has no friends, no clothing, no place to stay". She testified, "I had chills. I was afraid of what I was going to hear next."

I find that this was a misunderstanding of what the Grievor was attempting to explain, which, as he testified, was that the teddy bear had been given to him by someone who had no friends, no clothes and no place to stay.

[22] When Mr. Kirby again asked the Grievor about the "the story of the teddy bear" he was instructed by Mr. West not to answer, because the question was not relevant.

[23] I have already referred to the statement of the adult passenger on the bus on November 10, which I find to lend credibility to the Grievor's testimony on this point. I do not find that teddy bear to have been some sort of ominous luring device, as suggested by the Employer.

[24] I note that at the disciplinary meeting the Grievor was asked about having given out candy on his bus on Halloween Day, 2005, and asked why he risked that after his disciplinary suspension of the year before. According to Ms. MacKay's notes he responded;

> Could have been, yes, probably. I don't know who I gave candy. I give so many out.

There is no Employer policy against the general distribution by a bus driver of candy to his passengers, the Employer has never taken objection to such behaviour and I see no parallel between doing so, particularly on Halloween, and the incident for which the Grievor was disciplined in 2004.

[25] Ms. MacKay testified that what she had hoped to see in this meeting was some recognition by the Grievor of the stress he had caused for the school girls involved and their parents, some remorse and some commitment to change his behaviour. Instead, she testified, what she saw was an attitude of "that's what I am, that's what I do". I note that it is clear from Ms. MacKay's notes that at any point where the Grievor might have expressed remorse he was cut off by Mr. West, his Union representative. That, of course, does not alter the fact that the Employer heard no such expression, until the hearing before me. On the other hand, there is nothing else in the evidence to corroborate Ms. MacKay's suggestion that the Grievor was insubordinate in his attitude.

[26] Apart from discussion of the Grievor's disciplinary record, Ms. MacKay's testimony and her notes added nothing of any significance to the facts I have already stated. I now turn to the one instance of past discipline on the Grievor's file.

[27] According to the letter of discipline on the Grievor's file, in late October, 2004 when a bus driven by the Grievor reached a stop where they were alone, he repeatedly asked a young girl passenger on the bus if he could take her photograph, to which she objected. When she disembarked five minutes later the Grievor offered her a candy. The girl lodged a complaint. The Grievor was given a one day suspension for that behaviour. The relevant passages in the letter of discipline, dated October 25, 2004, are:

> At [the disciplinary meeting] you explained that you had attempted to take the picture of this female passenger because you have a hobby of taking pictures of people that look familiar to you, "look-alikes" so to speak. You stated that this female passenger looked like a neighbour of yours and that you attempted to take

> her picture. You indicated that you didn't believe your actions were inappropriate in any way and that you couldn't understand why you actions would make this female passenger feel uncomfortable.
>
> ... Your explanation that your behaviour is a hobby, as well as your lack of understanding of the inappropriateness of this type of behaviour is completely unacceptable. This type of behaviour is very intimidating and is inappropriate in the workplace; as evidenced in this case, this young girl felt incredibly uncomfortable by your actions. Based on all of the circumstances, you are issued a one day suspension without pay ... . I must inform you that this type of serious misconduct cannot an will not be tolerated and that further discipline, up to and including termination, shall result should any further incident of inappropriate behaviour occur.

Ms. MacKay testified that this letter on the Grievor's file was very important to the decision to discharge him.

[28] In cross-examining the Grievor counsel for the Employer asked about this incident. Union counsel objected that the Employer was not free to go behind the facts set out in the discipline letter. I upheld her objection, dismissing Employer counsel's argument that his questions should be allowed because they went to credibility.

[29] The Grievor remained on suspension with pay after the discipline meeting of November 16, until he received his termination letter on November 21, 2005. The facts as I have set them out above are recounted. The other relevant passages are:

> ... we find that your conduct was completely inappropriate and cannot be tolerated. ... you behaviour has traumatized several young female students of Sacred Heart School as well as their parents. Additionally, your behaviour has damaged the reputation of Metro Transit. Given this breach of trust, as well as your record of discipline for similar behaviour (a one day suspension without pay dated October 25, 2004), we find it necessary to terminate your employment as a bus operator with Metro Transit, effective immediately.

[30] The Grievance, dated November 21, 2005, was filed November 29, 2005. It alleged breach of Article 9.01 of the Collective Agreement in that the Grievor had been terminated without just cause. The Employer denied the Grievance, and in mid-March, 2006 I was asked to serve as arbitrator. The parties were not able to agree on dates open in my calendar sooner than January 23, 2007.

[31] **Evidentiary Issues and Additional Facts.** In cross-examination of the Grievor counsel for the Employer asked how often he had approached young female passengers on one of the Employer's busses or at one of the Employer's terminals and given his name and telephone number. Counsel for the Union objected that the question lacked specificity. Counsel for the Employer offered to be more specific. I allowed the question and the Grievor replied that he had done that once, after his discharge. The Grievor then stated that in December of 2006, thirteen months after his termination, he had struck up a conversation with a young woman at the Halifax-Dartmouth bridge bus terminal, and had subsequently asked the driver of the bus he had seen her take, who was an acquaintance of his, to give her a note with his name and phone number on it. He did not know the woman's name, but described her to the driver. It became clear that this had been reported to the Employer. The Grievor asserted that this was a matter of his private life.

[32] Counsel for the Employer also questioned the Grievor about the fact that in the early winter of 2006 he had boarded the 51 bus at the Halifax-Dartmouth bridge bus terminal and ridden the whole route, which is a very short one of about twenty-five minutes. The Grievor acknowledge that he had done this but said that he had done so to stay warm while waiting for the bus to his residence, which came

with less frequency. On that occasion he had spoken to a woman who he said was his brother's ex-girlfriend.

[33] Counsel for the Employer then sought to question the Grievor about events prior to the date upon which any discipline should have been expunged from his personnel file in accordance with 8.01. Counsel for the Union objected.

[34] **The sunset clause.** Article 8.01 is a complex "sunset clause", which need not be quoted here, except for the statement in paragraph 8.01(a) that "complaints" and "policy or rule violations, which do not give rise to discipline" "will be removed from the [personnel] file" within three and six months respectively, and paragraph 8.01(d), which provides;

> (d) Any record of discipline shall not be relied upon by the employer after twenty-four (24) months from the date of occurrence and shall be removed from the file. ...

[35] In supporting her objection Counsel for the Union relied on *Sea-Van Enterprises Inc. and Teamsters, Local 31* (2002), 103 L.A.C. (4th) 327 (Coleman, arbitrator) and the cases cited there, including, at p. 331, arbitrator Paul Weiler's oft-cited statement in *Wire Rope Industries Ltd. and U.S.W.A.* (1978), 19 L.A.C. (2d) 409, at p. 413, "In, effect the parties have indicated that an employee's discipline record that is more than 12 month's old is simply not relevant." Counsel emphasized that she had not put the Grievor's record of employment in issue, beyond stating his seniority date, so the Union had not waived the effect of Article 8.01.

[36] I ruled that the Employer counsel could not use anything that had been expunged from the Grievor's file to fuel his cross-examination, for any purpose, including impugning the Grievor's credibility. I ruled that counsel could, however, ask a question not derived from information that should have been removed from the file, provided that he did not then use information from the file to challenge or seek elaboration on the answer given.

[37] Counsel for the Employer then asked the Grievor whether, prior to November of 2003, he had ever approached young female passengers and attempted to exchange personal information with them. The Grievor answered "yes'. Probably because of my ruling, counsel asked no further questions about this.

[38] **Rebuttal evidence.** Counsel for the Employer then sought to call rebuttal witnesses, on the basis that they would give evidence relevant to both credibility and remedy. Union counsel objected on the bases that this testimony should not be admitted because it was collateral fact evidence called to impugn the Grievor's credibility under cross-examination, because it related to post-discharge events and because the Employer was splitting its case. She stated that the fact that these witnesses were to be called had not been disclosed prior to the hearing.

[39] **Splitting the case**. I allowed Employer's counsel to call the rebuttal witnesses, subject to Union counsel's objection to admissibility, which I said I would rule on as part of this Award. With respect to "splitting the case" I ruled that, in so far as the testimony of the rebuttal witnesses was evidence that should have been introduced as part of the Employer's case in chief, I would allow Union counsel to

re-call the Grievor or call other witnesses in final rebuttal. She could have asked for an adjournment to do this, but did not.

[40] **The collateral fact rule.** The first rebuttal witness was the woman to whom the Grievor had asked his bus driver acquaintance to give his name and telephone number. Her testimony was collateral fact evidence in that she testified about the conversation she had had with the Grievor at the bridge bus terminal and about receiving his name and telephone number from the bus driver some time later. In objecting to its admissibility on the basis that it was collateral fact evidence, counsel for the Union relied on the well-known passage from Gorsky, Usprich and Brandt, *Evidence and Procedure in Canadian Labour Arbitration* (2nd ed., looseleaf) as it appears in the following quote from *Lilydale Co-operative Ltd. and U.F.C. W., Local 1518 (Crnkovic)* (2001), 96 L.A.C. (4th) 221 (Keras, arbitrator), at p. 226:

> The Union argued that the rebuttal evidence [in issue] .... concerned a collateral issue and as such should not should not have been admitted....
>
> Arbitrator Hope in *Re Greater Victoria Drug and Alcohol Rehabilitation Society and B.C.N.U. (Tataryn)* (1998), 71 L.A.C. (4th) 239 (H.A. Hope, Q.C.) at p. 260, commented as follows:
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> > Cross-examination on collateral facts is subject to what is referred to [as] the "collateral fact rule" which restricts the calling of evidence to prove collateral facts that have been denied. See Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992), pp. 870-73.
> >
> > In short, questions put in cross-examination with respect to collateral facts, generally speaking, cannot support an application to call rebuttal or reply evidence to prove facts that have been denied. See Gorsky, Usprich and Brandt, *Evidence and Procedure in Canadian Labour Arbitration* 2nd ed., looseleaf (Toronto: Carswell), at p. 10-43 where the authors wrote in part as follows:

> "Collateral Fact Rule
>
> "The rule provides that a witness's answer to a question that does not relate to the facts in issue (i.e. something that is merely "collateral" to the issues) is final. The cross-examiner cannot call evidence to contradict it. The credibility of a witness is considered to be a collateral matter. This is purely a rule of expediency designed
> to prevent the case bogging down as the hearing wanders off into side alleys to explore matters that are really not relevant to the issues. The test as to whether a matter is collateral is whether evidence to prove it would be relevant even if the witness had not been asked about it...[.] [I]n other words, if the only value of the evidence is to contradict the witness's denial, it is collateral. Although the problem does not arise often in reported awards, arbitrators have recognized the wisdom of the rule.
>
> In the instant case, [the testimony in issue] is collateral to what blameworthy conduct the grievor may have or may not have been involved in.
>
> In the result, the rebuttal evidence... will not be considered.

[41] In the case before me, while the testimony of the witness called in rebuttal is collateral to the blameworthy conduct the Grievor was discharged for, it bears directly on one of the issues before me; that is what remedy I should substitute if the Grievor is to be reinstated. It cannot be said, therefore, that its "only value ... is to contradict the [Grievor's] denial" of, or spin on, the events at the bridge bus terminal in December 2006. Quite apart from that, while I recognize the wisdom of the collateral fact rule, it does not over-rule my power under sections 43(1)(b) and 16(8) of the *Trade Union Act*, R.S.N.S. 1989, c. 475, as am. to "accept any evidence ... as in [my] discretion [I] may deem fit and proper, whether admissible in a court of law or not."

[42] **Post-discharge evidence**. With respect to Union counsel's objection the testimony of the rebuttal witness because it related to post-discharge events, I have

admitted that evidence because it is relevant to the remedy I should substitute if the Grievor is to be reinstated. In this context Counsel for the Employer referred me to *University of Manitoba and C..A.W., Local 3007(Shaw)*, (2003) 124 L.A.C. (4th) 208 (Wood, arbitrator) where the arbitrator admitted post-discharge evidence which counsel there agreed was only relevant to remedy. In the hearing I referred to *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] S.C.R. 487 in which the Supreme Court of Canada quashed the award of an arbitration board for excluding evidence relevant to remedy in a case where the board had ordered reinstatement of the grievor.

[43] In my opinion I could not properly take into account post-discharge evidence in determining whether or not the Grievor had been guilty of the misconduct alleged, or in determining whether, if some misconduct was proved, the discipline imposed by the Employer was appropriate, unless, in the words of the Supreme Court of Canada in *Cie Minière Québec Cartier v. Québec (Grievances Arbitrator)*, [1995] 2 S.C.R. 1095."it helps to shed light on the reasonableness and appropriateness of the dismissal . . . at the time it was implemented". However, once I have determined that the discipline imposed was not appropriate I can, and should, take into account post-discharge evidence that is relevant to the remedy that I should substitute, in the exercise of my power under s. 43(1)(d) of the *Trade Union Act* (*supra*), to substitute "any other penalty that to [me]... seems just and reasonable in the circumstances".

[44] The first rebuttal witness called by Counsel for the Employer was a twenty-four year old slim blonde woman. She testified that she had met the Grievor when they, and several other passengers, were standing in the bus

shelter on the Dartmouth end of the Halifax-Dartmouth bridge. The group was laughing and chatting with one another about a little girl who was catching snow on her tongue. The Grievor said something, the details of which the witness could not remember, about driving a bus for Metro Transit, and commented to the witness that she must be cold. When the witness got on the 51 bus the Grievor got on behind her, still chatting to her, another lady and the driver, but the Grievor got off the bus before it pulled away from the stop. Several days later, when the witness got on the same bus, the driver asked her if she knew "Randy White". When she said "no", the driver told her that the Grievor had given him his phone number to pass on to the witness. The driver described the events of a few days earlier in a way that made it obvious to her that the Grievor had been talking to the driver at some length about his minor encounter with her.

[45] The witness testified that she had immediately torn up the piece of paper with the Grievor's name and phone number on it. She testified that she was concerned that a man who had made this approach to her might, as a Metro Transit employee, know her bus stop and therefore approximately where she lived.

[46] At the end of his shift, the bus driver mentioned this discussion with the rebuttal witness in an incident report of the sort routinely filed. At the conclusion of the rebuttal witness's testimony that report was provided to union counsel, and the driver was not called as a witness.

[47] **The Issues.** The main issues here are those that arise in the arbitration of every grievance in which unjust discharge is alleged, as set out in the *William Scott*

award by Paul Weiler as Chair of the B.C. Labour Relations Board [1977] 1 C.L.R.B.R. :

> 1. Has the Employer established that there was cause for some discipline?
>
> 2. If so, was discharge an excessive disciplinary response?
>
> 3. If discharge was an excessive response, what discipline should the arbitrator substitute? This third question calls for consideration not only of the appropriate period of a disciplinary suspension but also of conditions of reinstatement.

[48] **Decision.** For the reasons that follow I have concluded that the Employer here had just cause for imposing some discipline on the Grievor, but that discharge was not appropriate and I have ordered the Grievor reinstated subject to a one month period of suspension and the two conditions set out below.

[49] 1. **Cause for some discipline.** I have concluded that the Grievor's behaviour in sending a gift bag to a student at the private girls' school on November 10, 2005 gave the Employer cause to impose some discipline. Particularly in light of the letter of discipline of October 25, 2004 the Grievor should have realized that this behaviour was inappropriate in the circumstances. At a minimum he was guilty of very bad judgment, as he conceded at the hearing before me. Clearly, there was cause for some discipline.

[50] 2. **Was discharge excessive?** Depending on his intentions in sending the gift bag with his name and phone number to the intended recipient, the Grievor may have been guilty of a serious abuse of his position, and a breach of the trust the Employer had placed in him in putting him in contact with the public, including

vulnerable young women, in an unsupervised position of some perceived authority. The Employer has a clear responsibility to its customers, and an obvious right to uphold its reputation as a mode of transportation in which all passengers are safe from, among other things, molestation, and even annoyance, by its employees. On the other hand, the Grievor had been employed for fifteen years. At 54 he will have, and, as he testified, has had, real difficulty finding regular employment.

[51] As I have already said, I do not conclude that the Grievor was lying about his feelings as he prepared the gift bag, but in light of all of the evidence I cannot be certain of his motivations, conscious and subconscious. The openness with which he sent the gift bag to the intended recipient suggests a simple lack of thought and judgment, which may have been associated with his apparent depression, or at least loneliness, at the time. There is no doubt that he did send the message that the intended recipient was not to call him without a parent's permission. Counsel for the Employer suggested that this might have been a clever cover for the hope that she would call without permission. I am not satisfied that such was the case, but this message does indicate that the Grievor was not oblivious to the perceptions to which his behaviour might give rise.

[52] The Employer's position was that the picture taking incident for which the Grievor was disciplined a year earlier was similar to sending the gift bag to the intended recipient here, because in both instances the Grievor intruded on a female passenger's privacy without due regard for, or understanding of, the concern, and perhaps fear, this would cause her. Counsel for the Union submitted that the two incidents were quite different. I agree with the Employer's position. The Grievor

should have learned from the first instance that there was an element of, at least perceived, impropriety in his intrusion on the privacy of his female passengers. Progressive discipline was clearly appropriate.

[53] Indeed, the striking thing about the picture taking incident was that the discipline imposed was so minor; a one day suspension for what, on its face, would appear to have been a more serious intrusion on a passenger's privacy than was the giving of the gift bag in apparent gratitude for the cookies, which resulted in his discharge. The leap from a one day suspension for that behaviour to discharge for this does not look like progressive discipline. Such a leap can, of course, be appropriate, but Ms. MacKay, now a senior Human Resources consultant with the Employer and at the time of the Grievor's discipline its Manager of Employee Services, testified that she knew of no other case where this Employer had moved directly from a one day suspension to discharge. Ms. MacKay testified that the Employer did not act on the basis that the Grievor was, or might have been, a sexual predator, and did not consider any sort of examination to determine that.

[54] On these considerations, and based on the evidence that the Employer had legitimately before it when it discharged the Grievor, I have concluded that discharge was an excessive reaction to the Grievor's behaviour in making the kind of personal approach he made to the intended recipient of his gift bag.

[55] As I have made clear above, the Employer cannot rely on anything from the Grievor's personnel file that should have been removed in accordance with the sunset clause. Although the Grievor testified under cross-examination in the hearing before me that prior to November of 2003 he had approached a young

female passenger, or passengers, and attempted to exchange personal information, there is no evidence that the Employer knew that other than from what was on, or should have been on, and then removed from, the Grievor's personnel file. Neither the Employer nor I, as arbitrator, can take any such fact into account in determining either whether the Grievor committed the misconduct alleged or what discipline the Employer could appropriately have imposed.

[56] I must add, however, that to me, even if not to the Employer, the similarity of the behaviour under consideration here to the picture taking incident suggests the possibility that the Grievor has a psychiatric problem which the Employer could not have been expected to, nor should have, overlooked. I return to this below, in considering the conditions I have decided to impose on the Grievor's reinstatement.

[57] 3. **What discipline should I substitute?** Based on the seriousness of the Grievor's lapse of judgment, if that was what it was, in sending the gift bag to the intended recipient, and the one day suspension imposed by the Employer for the picture taking incident, I have concluded that the maximum appropriate discipline for the Employer to have imposed would have been a one month suspension without pay.

[58] **Conditions of reinstatement**. In the course of the hearing I raised with counsel the appropriateness of reinstating the Grievor subject to the conditions I have decided to impose. Counsel for the Union spoke to them favourably in her closing argument. Counsel for the Employer stated that his client did not consider them appropriate and rejected any discipline short of discharge as inappropriate.

[59] I take seriously the Employer's need to maintain the confidence of its customers, and I can understand how damaging it might be for the Grievor to reappear as a driver on the bus that stops at the private girl's school in question. Counsel agreed that under the Collective Agreement drivers have a right to bid for or rotate though the Employer's routes, so the Employer may not have had the power to deprive the Grievor of that right as a matter of discipline. As arbitrator, on the other hand, I do have that power. I am, therefore, making it a condition of the Grievor's reinstatement that he have no right to be assigned to the route in question.

[60] I recognize that Article 10.06 of the Collective Agreement provides:

> 10.06 The arbitrator will not be authorized to make any decision inconsistent with the provisions of the agreement, nor to alter, modify, or amend any part of the agreement.

However, in the context of discipline this provision is overridden by Section 43(1)(d) of the Nova Scotia *Trade Union Act*, to which I have already referred:

> 43 (1) An arbitrator or an arbitration board appointed pursuant to this Act or to a collective agreement ...
>
> (d) where
>
> (i) he or it determines that an employee has been discharged or disciplined by an employer for cause, and
>
> (ii) the collective agreement does not contain a specific penalty for the infraction that is the subject of the arbitration,
>
> has power to substitute for the discharge or discipline any other penalty that to the arbitrator or arbitration board seems just and reasonable in the circumstances ...

[61] Quite apart from the Employer's reputation, my uncertainty about the Grievor's motivations, conscious and subconscious, is of real concern to me here. As I said above, the Employer has a responsibility to its customers to ensure that it provides public transportation in which passengers are safe from molestation by its employees. In ordering the Employer to reinstate the Grievor I too must act responsibly. While the Employer could not have known of, or taken account of, the Grievor's behaviour after his termination, I consider the Grievor's behaviour as testified to by the rebuttal witness clearly relevant to the discipline I am empowered to impose.

[62] There was nothing illegal, or improper, about the Grievor attempting to befriend a female passenger on the Employer's bus when he was no longer an employee. It is not clear on the evidence that he pretended to be a driver. However, on the basis of this incident, considered together with the matter for which he was disciplined in 2004, the allegedly merely ill-judged gift giving for which he was discharged in November of 2005, and the Grievor's less than entirely convincing evidence before me about his motivations, I have decided to make my order to reinstate the Grievor subject to a further condition. This further condition is related to his fitness to be a bus driver for the Employer.

[63] At any time after his reinstatement the Employer may require the Grievor to be examined and assessed by a qualified psychiatrist acceptable to the Union, arranged and paid for by the Employer. The Employer's obligation to continue to employ the Grievor shall depend on that assessment, as set out in greater detail below.

[64] **Conclusion and Order.** For all of the above reasons, I hereby order the Employer to reinstate the Grievor with full back pay, benefits and seniority, retroactively effective December 22, 2005, but subject to the following conditions:

1. The Employer is not obliged under the Collective Agreement or any successor Collective Agreement to assign the Grievor to the bus route that stops opposite the Convent of the Sacred Heart School.

2. At any one time after his reinstatement the Employer may require the Grievor to be examined and assessed by a qualified psychiatrist acceptable to the Union, arranged and paid for by the Employer. If that psychiatrist's assessment, a complete copy of which is to be provided to the Union and the Grievor, is that allowing the Grievor to drive one of the Employer's buses puts female passengers on any bus he may drive at abnormal risk of being subjected to unwanted personal advances by him, the Employer may terminate his employment without notice, subject to any rights he may have under the Collective Agreement when he is terminated due to illness. The Union and the Grievor shall not unreasonably refuse to accept a psychiatrist chosen by the Employer, and the Employer shall not unreasonably interpret or apply the psychiatrist's assessment.

[65] As agreed by the parties at the outset of the hearing, I remain seized of this matter to hear and decide on any issues that may arise in the implementation of this Award, and that includes issues that may arise in the implementation of these conditions, including, if necessary, the naming of the psychiatrist.

Innis Christie, Arbitrator