

American Arbitration Association
Case No. 74-3000 L 00980 08

C. ALLEN POOL, Arbitrator
Arbitrator's Case No. 12-09-08

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

MV TRANSPORTATION, INC.)
)
 and)
)
 Amalgamated Transit Union Local 1225)
)
 Discharge: Rosalio Torres-Mora)
 _____)

ARBITRATOR'S
OPINION AND AWARD

This Arbitration arose pursuant to Agreement between the Amalgamated Transit Union Local 1225, hereinafter referred to as the “Union”, and MV Transportation, Inc., hereinafter referred to as the “Company”, under which C. ALLEN POOL was selected by the parties through procedures of the American Arbitration Association to serve as the Arbitrator. The Parties stipulated that the matter was properly before the Arbitrator and that his decision shall be final and binding.

The hearing was held in Oakland, California on December 9, 2008 at which time the parties were afforded the opportunity, of which they availed themselves, to examine and cross-examine witnesses and to introduce relevant evidence, exhibits, and argument. The witnesses were duly sworn and a written transcript was made of the hearing. Written closing arguments were timely exchanged between the parties and submitted to and received by the Arbitrator on January 16, 2009 at which time the record was closed.

Appearances:

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STIPULATED ISSUE

Was the termination of Rosalio Torres-Mora for just cause? If not, what shall be the appropriate remedy?

BACKGROUND

The Grievant was a seven-year employee of the Company, a bus driver. During the time of his employment he had no prior disciplines of any kind. On July 14, 2008 he was appointed Interim Shop Steward. As a shop steward his duties changed. He no longer drove a bus route as his primary duty. As a shop steward, the Company provided him with an office where he could meet with other drivers as needed. The office made available to the Grievant was a cubicle in a trailer.

On his first day at work as shop steward, the Grievant met with the General Manager, Tim Dumandan. Mr. Dumandan and he discussed his new role and duties. The Grievant was reminded that, as a shop steward and according to an agreement with the Union, he was not eligible for overtime pay. His daily rate of pay was limited to eight hours of straight time payable by the Company. If the Grievant were to be away from the job site on Union business, he would be paid for that time by the Union.

In keeping with the agreement with the Union, the Grievant, as shop steward, was required to provide the General Manager with a written schedule of his daily duties. In addition to giving the schedule to the Mr. Dumandan, the schedule was posted in a conspicuous place so

that other drivers would be aware of the Grievant's availability on a daily basis. Any changes in the Grievant's daily schedule as shop steward were to be submitted to the General Manager before becoming effective.

Each bus driver was assigned to a specific route, a "Run". A driver would stay on the assigned Run until assigned to another Run. Assignment to a different Run usually occurred every three or four months. A Run is scheduled, planned to take no more than eight hours. The Grievant's assignment was Run No. 625A. With his new duties as shop steward, Run No. 625A was assigned to two other drivers, hold-down drivers: Glen Turner and Winifred Cooper.

The daily routine of a bus driver was to arrive at the Yard a few minutes before departing on a Run. The Pre-Trip preparation included a physical inspection of the bus to be sure it was in proper condition for the day's run. The duration of the Pre-Trip inspection was expected to take no more than 15 minutes. Before leaving the Yard to commence a Run, a driver would manually activate the bus' Global Positioning System (GPS).

A GPS is installed on each bus. The GPS allows the Company to track each bus from the time it leaves the yard to the time the bus returns to the Yard. The GPS also records the arrival times of a bus at each scheduled bus stop on its Run. The information provided by the GPS allows the Company to have a record of each time a bus is late in arriving at a scheduled bus stop on that Run and or late in returning to the Yard at the end of the Run.

At the end of a scheduled Run and upon entering the Yard and before turning in his/her time sheet, a driver is expected to conduct a Post-trip inspection of the bus. The Post-trip inspection includes both the inside and outside of the bus. If the inspection reveals any damage to the bus or the finding of any items left on board by passengers, the driver prepares a written report. The time allotted to perform the Post-trip inspection is five minutes. Also, upon return to

the Yard, the driver manually deactivates the GPS. This is usually done before the inspection but sometimes it is done after the Post-trip inspection.

Following the Post-trip inspection, the driver reports to the Dispatcher turns in his/her timesheet. If a time difference is noted showing a difference between the time stamped on the timesheet by the Dispatcher and the eight hours a run is expected to take, the driver is “late” and the driver makes a note at the bottom of the time sheet explaining the difference. The General Manager testified that drivers, due to traffic, road construction, etc., are sometimes late. Mr. Dumandan testified, on direct examination, that when drivers come to the dispatch window to turn in a timesheet, the Dispatcher stamps the time on the timesheet. If the arrival time and the clock in the dispatch office are the same or close to the same, the Dispatcher signs off on the time sheet (Tr. p. 52). Drivers are paid overtime for all time, usually a few minutes, spent driving a Run over the scheduled eight hours.

The events that led to the Grievant’s discharge began with his July 31, 2008 time sheet. On August 1st, the payroll office notified General Manager Tim Dumandan that the Grievant’s July 31st time sheet included four hours of overtime. The Grievant had entered his arrival time at work that day as 8:00 a. m. and his sign out-time as 8:31p.m. Mr. Dumandan called the Grievant in and asked for an explanation. The Grievant told him that it was an error that he had actually arrived that day at noon. The Grievant apologized and characterized the error as “my bad”, my mistake.

Nothing further was done at the time. However, Mr. Dumandan testified that he felt the Grievant had not taken the matter seriously enough and decided to pull the Grievant’s time sheets for the two previous pay periods, June 24 through July 23, to see if there might be some kind of pattern of falsifying timesheets (Tr. p. 103, 104-105). Mr. Dumandan found time

differences on some of the days. He prepared a spreadsheet showing the time differences for those days (C-1).¹

On August 6th, Mr. Dumandan met with the Grievant and placed him on “Out of Service” status and told the Grievant he would let him know about the investigation when completed (Tr. p. 106). The Grievant called Union President William “Bob” Parks. On August 7th, the three men met and the Grievant was given a copy of the spreadsheet prepared by Mr. Dumandan (C-1) and told to write in an explanation on the spreadsheet explaining the time differences for each day listed on the spreadsheet (Tr. p. 6). The Grievant, without the aid of Mr. Parks, wrote in, as instructed, explanations for the time differences.

Meanwhile, Mr. Dumandan prepared a second spreadsheet showing days where there were time differences for June 24th through July 9th. (C-2) He gave this second spreadsheet to the Grievant and instructed him to explain the time differences on the spreadsheet. After reviewing the Grievant’s explanations on the two spreadsheets, Mr. Dumandan came to the conclusion that the Grievant’s explanations “did not make sense” (Tr. p. 55). Soon after, Mr. Dumandan made a recommendation to the Company’s corporate Human Resource Office to terminate the Grievant. It should be noted that the recommendation to terminate was made without discussing the investigation with the Grievant as Mr. Dumandan told him he would (Tr. p. 58, 108). The Cooperate Human Relations Office approved the recommendation and the discharge was issued on August 19, 2008. A grievance was filed on August 21 and was processed to this Arbitration.

POSITION OF THE COMPANY

The Company had just cause to discharge the Grievant. He violated the CBA and

¹ Joint Exhibits are referred to as Jt-1, Jt-2, etc. Company Exhibits are referred to as C-1, C-2, etc. Union Exhibits are referred to as U-1, U-2, etc.

Company policy. He was dishonest with his July 31, 2008 time sheet and with his timesheets on previous occasions. The grievance should be denied.

POSITION OF THE UNION

The Company did not have just cause to discharge the Grievant. There was no proof of dishonesty. The entry on the July 31, 2008 timesheet was an error, a mistake as he explained. The timesheets for the previous two pay periods showed no proof of dishonesty. The grievance should be sustained.

DISCUSSION

The just cause standard is essentially a system of fairness and it is well established that the standard requires that a discharge be supported with adequate proof of misconduct. Without proof of misconduct, there can be no just cause for a discharge. The Company alleged that the Grievant intentionally falsified time sheets. As proof, the Company cited the Grievant's July 31, 2008 timesheet (Jt-5) and the explanations he provided explaining the time differences on the two spreadsheets prepared by Mr. Dumandan (C-1 and C-2).

The Grievant was a seven-year employee, a driver with a spotless record. He had no prior disciplines of any kind. When he was appointed to the role of Interim Shop Steward, he accepted the appointment with the awareness and knowledge that, without the expressed authorization of the Company, he was not entitled to any overtime pay (Emphasis added). The prohibition was discussed with the Union President and also discussed with the Company's General Manager, Tim Dumandan the first day the Grievant reported to work as the new Shop Steward (Tr. p. 19, 23). The prohibition was also known to other employees including those in the Payroll Office (Tr. p. 24). This feature was pivotal to the question of whether there was any intent by the Grievant to falsify timesheets.

The Company's allegations were not supported by the evidence record. With respect to the July 31st timesheet, there was no proof of any intent to defraud the Company. The Company's contention that his explanation for the four hours at issue consisted of "shifting explanations" (Company Brief p. 5) was not supported by the evidence record. When Mr. Dumandan asked him for an explanation for the entries on the July 31st timesheet, the Grievant was not "shifting" with his explanation. He was upfront and forthright with his explanation that the entry was a mistake, that he had, on that day, arrived for work, not at 8:00 a.m. but at noon. He admitted his mistake, explained it, and apologized (Tr. p. 26, 101-102).

Mr. Dumandan testified that he felt the Grievant had not taken the matter seriously enough and that his apology was lacking. His testimony, on cross examination, was that the Grievant's demeanor didn't offer anything else, that it was not enough of an apology. I expected him to say "I'm really sorry, I made a mistake, or something like that" (Tr. pp. 102-103). The evidence record did not support the Company's allegation that the July 31, 2009 timesheet was proof of the Grievant's intent to falsify the timesheet.

However, based on Mr. Dumandan's belief that the grievant had not taken the matter seriously enough, he decided to conduct an investigation and look at the Grievant's timesheet for the two prior pay periods for a pattern of false entries on his timesheets. Mr. Dumandan looked at the Grievant's timesheets and found that there were some time differences between his arrival time in the yard and his reporting time to the Dispatcher. The time differences ranged from six minutes to 25 minutes.

Another element of the just cause standard is the requirement that the Company make a full, fair and objective investigation to determine if the charged individual is in fact guilty of the offense or breach. When discharge is penalty, the Company bears the responsibility of having

considered any and all facts, from whatever source, that could have an influence on the decision to discharge. The Company, however, failed to meet that responsibility because the investigation was flawed.

Mr. Dumandan constructed two spreadsheets (C-1 and C-2) and instructed the Grievant to provide explanations for each day explaining the time differences on each day between his arrival time in the yard and the time he reported to the Dispatcher. After reviewing the Grievant's explanations on the spreadsheets, *he concluded that the explanations for the discrepancies did not make sense* and that the Grievant was being dishonest (Tr. p. 55). (Emphasis added). Shortly after his review of the spreadsheets, Mr. Dumandan made a recommendation to Corporate Human Relations to terminate the Grievant (Tr. p. 58). Again, Mr. Dumandan's recommendation to terminate was made without discussing the explanations on the spreadsheets with the Grievant (Tr. p. 109-110).

The timesheets for the previous pay periods did not provide proof that the Grievant falsified any of his timesheets. The "investigation" conducted by the Company was not a fair investigation. The spreadsheets used by the Company were not reliable investigative instruments. On spreadsheet C-1, Mr. Dumandan made five corrections after the fact. More importantly, the explanations provided the Grievant on the spreadsheets was not evidence of intent to falsify. The explanations were based on stale information of events that occurred many days prior. For each timesheet showing a difference in the arrival time at the yard and time the Grievant reported to the Dispatcher, an explanation showing the reason the time differences was written on the bottom of the timesheets. Those explanations were not stale and were accepted by the Dispatcher at the time. Also, the timesheets for the two hold-down drivers, Glen Turner and Winifred Cooper, showed the same or similar time differences as the Grievant's timesheets for

the same Run (U-1; Tr. p.148).

The investigation itself was flawed. The spreadsheets did not constitute a reliable investigative instrument. Mr. Dumandan used the Grievant's explanations on the spreadsheets to make his determination to recommendation to terminate the Grievant. Mr. Dumandan, on direct examination, testified that the explanations, the discrepancies "did not make sense" (Tr. p. 55). Not making sense is not adequate proof that can support a decision to terminate.

The Company also alleged that the Grievant took too much time beyond the five minutes scheduled for post-trip inspections. However, nothing was placed into the evidence record to show that difference in the times after his arrival in the yard and the times the Grievant reported to the Dispatcher were an attempt to falsify timesheets. Where the Dispatcher found the expected time of arrival and the clock in the Dispatcher's office to be the same or close to the same, the Dispatcher signed off on the timesheet (Tr. p 52).

Therefore, for the reasons discussed in the foregoing, the Arbitrator's conclusion is that there was no proof of any intent by the Grievant to falsify timesheets and that the Company did not have just cause terminate him from his employment.

AWARD

The Company did not have just cause to terminate Rosalio Torres-Mora.

REMEDY

The Company is directed to reinstate the Grievant to his previous position, to make him whole for all lost income (less other income earned) with interest and to make him whole for all lost benefits.

The Arbitrator retains jurisdiction over any dispute that may arise over the interpretation or implementation of the remedy.



C. ALLEN POOL, Arbitrator

Date: January 26, 2009