

In the Matter of American Arbitration
Ass'n

First Student Inc.
0001-4125

Case # 01-19-

And

Gr: [REDACTED]
Termination

United Food and Commercial Workers
Local 1459

Arbitrator: Joan M. Martin, Esq

For the Union: David Rome, Esq

For the Employer: Peter Dagostine, Esq.

Stipulated Issue

Did the Employer, First Student Inc., have just cause to terminate [REDACTED]? If not, what shall the remedy be?

Collective Bargaining Agreement

First Student, Lakeville-Freetown and
Transit Division United Food and Commercial Workers
Union, Local 1459, UFCW International Union,
July 1, 2016 – August 31, 2021

Relevant Contract Provisions

Article 10
Discipline and Discharge

Sec. 1. Employer shall not suspend, demote or discharge an Employee without just cause.

Sec. 2. The Company recognizes the concept of progressive discipline including the following steps:

- Written warning or warnings as appropriate
- Suspension without pay
- Final warning and/or suspension
- Discharge

It is understood that such steps will be applied on a case-by-case basis as determined by the Company based on the seriousness and severity of the violation. Further, violations of the most serious matters as set out in the Company Handbook such as dishonesty, fighting in the workplace or while on duty, insubordination, any violation of the Company's Drug and Alcohol Policy, failure to report an accident, incident or moving violation as required by the Company's accident and moving violation policy, harassment of any kind, and major safety infractions specifically including child left onboard unattended may be addressed by discharge on the first offense.

Just cause grounds for summary discharge shall include but not limited to ...serious violation of posted Employer safety or general work rules..inappropriate interaction with a student...or any other offense similar in seriousness to the aforementioned.

Article 17. Employer Policies

Section 1. The Employer retains the right to promulgate and to enforce written rules and regulation, not to conflict with this Agreement, as it may from time to time deem best for the purposes of maintaining order, safety, and effective operations of the Employer operations and after advance notice thereof to the Union and the Employees.

Section 2. It is recognized that the Union reserves the right in the initial grievance filed subsequent to the enforcement of any such rule or regulation to challenge its reasonableness.

Section 3. The Employer shall inform all Employees of all general work and safety rules including the School Department's current policies regarding student discipline, assault, etc.

FACTS

The grievant in this case, [REDACTED], (" [REDACTED]", " [REDACTED]", "the Grievant") is a resident of Lakeville and has been a school bus driver in the

Lakeville/Freetown school district for 22 years. Because the contract for school bus service changes occasionally, [REDACTED] has worked for Laidlaw, School Services, Durham and First Student as a bus driver. At no time have any of these employers received a complaint of mistreatment of children involving the Grievant. On the contrary, the Grievant has been recognized for his service, including saving a child's life.

In February 2019, [REDACTED] was driving for First Student, carrying elementary students to and from the Freetown Elementary school. The children were in grades kindergarten through third; there were approximately thirty-five students, a mix of boys and girls. [REDACTED] knew some of his passengers as they were the younger siblings of children that had previously been on his route. The morning routine for drop offs is that the buses wait in the circular drive in front of the school until the principal announces the "release" and the children are permitted off the bus. The wait time for the release is about 10-12 minutes. During the wait time, [REDACTED] made it a practice to get to know the students, for example helping with homework if possible or singing happy birthday to a child or just talking with them. The children who were interviewed during investigation of the incident leading to [REDACTED] termination all said essentially the same thing. [REDACTED] as the children call him, "takes good care of us" and "keeps us safe", "even if he sees a toe in the aisle, he makes us get it back

in under the seat". When asked if they felt safe on the bus, all answered yes.

In early February, the school principal received a complaint concerning tickling of the children on the school bus by [REDACTED] while waiting for release in the morning. The woman who had complained said that the tickling "did not sit well" with her and she felt compelled to report the situation. At the time of the complaint, [REDACTED] was on bereavement leave following the death of his brother. On his return to work, his manager [REDACTED] told him the school district was investigating the complaint and he was suspended with pay. The school district interviewed six third grade boys on [REDACTED] bus. They informed the parents that the interviews were occurring and explained that there would be a follow-up call to tell them what had been said.

The tickling had been limited to the third-grade boys. It seemed to have started when one boy had a birthday and the others decided it would be a good idea to punch the birthday boy in the arm for each year of his age. Then the boys began tickling each other, [REDACTED] stepped in and stopped the arm punching, which led to the children attempting to tickle him and him tickling them in return. Because it was February, all of the children had on heavy winter jackets, at no time did [REDACTED] touch the skin of any child. The tickling was under the arms, the neck or the belly. When asked how long it lasted the children who were interviewed said, "a short

time" "not long" "not very long". One boy said that he did not like to be tickled but none of the children said they felt unsafe during the incident.

At the conclusion of interviewing the children, [REDACTED] the school principal, called their parents. The reaction of the parents varied from "[REDACTED] is allowed to tickle if need be", "I am ok with it, they have a great relationship", "completely innocent ", "innocent and benign". None voiced any concerns about [REDACTED]. After the investigation, the school Superintendent decided that a thirty-day suspension with training and counselling was warranted.

First Student company did not conduct a separate investigation because they did not want to re-interview the children or their parents, asking the same questions. The general manager for the First Student Eastern Massachusetts operations, [REDACTED] testified that in the interview with [REDACTED] he was completely open. He stated that "looking in hindsight, I should have handled it differently. At the time I did not feel that I was doing anything wrong, nothing abusive, I never touched their skin, they all had winter coats on." Additionally, he has touched the students before giving high fives, fist pumps or a tap on the shoulder. The company never told him that this was unwarranted or inappropriate. [REDACTED] backed the decision to terminate stating she could not have a driver who inappropriately touches students on the bus and at least one of the students did not like tickling.

██████████ the location manager for First Student was a participant in the decision to terminate. He stated that the Company took no notice of the Grievant's work record, his length of service or the result of the school's investigation. It was cut and dry; ██████████ had violated the Company's unwarranted touching rule as stated in the employee handbook (Er.Ex.3) and was terminated.

First Student National Employee Handbook

Section 6. Company Rules and Personal Conduct

A. Employee Misconduct.

The infractions listed below are examples of unacceptable behavior that may subject an employee to immediate termination:

...

11. Physical or verbal abuse, and/or inappropriate or unwarranted touching of a passenger or employee.

Section 7. Rules and Regulations for Operating a School Bus

A. General Rules and Regulations

Violation of any of the following requirements will result in disciplinary action, up to and including termination

...

17. Drivers or attendant shall not physically touch students unless necessary to protect themselves or another passenger, for example when a student is choking, or an assault is taking place.

POSITIONS OF THE PARTIES

The Union

██████████ should not have been terminated by First Student for several reasons. His behavior in tickling the students in no way reached the level of “inappropriate touching” as stated in the employee handbook. The Company did not follow progressive discipline as it stated it is committed to in the employee handbook. The company had no basis for exceeding the School Districts decision regarding discipline for the Grievant and its decision to terminate was not for just cause.

The Employer

The severity of the punishment should be left to management which in this case is the First Student Company, not the School District. Termination was appropriate in this case and should stand. Inappropriate touching is a violation of such a severe nature that summary discharge is warranted. The grievant’s history of good employment does not mitigate the severity of the offense. The recommendation of the District to impose a thirty-day suspension is not controlling in this case, the Employer decided that termination was necessary. Progressive discipline need not be followed when the offense is extremely serious as it is here.

OPINION

The situation here is one in which the collective bargaining rights of the Grievant comes up against the Employer's policy as stated in its handbook.

██████████ had a spotless record with all of the student transportation companies he had worked for: Laidlaw, Dunham, and First Student. He had no infractions and had received awards and recognition for good service, including that of saving a student's life. In this instance his judgment was faulty, when the students began tickling one another and then him, he should have backed away and asked them to stop. Instead, he participated in their horseplay for a brief time. The parties agreed that there was no touching of bare skin, no abuse, no sexual overtones and the whole episode lasted about thirty seconds. None of the students complained to anyone about the incident; when interviewed one boy said he did not like being tickled at all, not only or specifically by the Grievant.

The complaint about the Grievant came from one Mother (whose daughter was not tickled) who after being told of the results of the school investigation said, " In full disclosure, I was the parent who called my neighbor to ask about the tickling. I heard about it and it just did not sit with me well. So, I called my neighbor. She then called you." After questioning several times, Mrs. _____ stated she believes "it was innocent and benign. But I wasn't sure at first."

First Student Company, having to determine how to handle this situation turned to its Employee Handbook (Co.Ex.3) for guidance. [REDACTED] [REDACTED] had acknowledged receiving a copy of the handbook by signing for it in November 2017. It is clearly worded, "Drivers or attendants shall not physically touch students unless necessary to protect themselves or another passenger, for example when a student is choking, or an assault is taking place." While the Company did not interview the students themselves, it did investigate other companies and what they did in similar circumstances. Based on this information, it was decided that termination was appropriate. [REDACTED] the Area General Manager for the Company, testified "I cannot have a driver inappropriately touch a student on a bus. At least one student did not like tickling."

The contract between UFCW, Local 1459, and First Student (Jt.Ex.1) states:

Section 2. The company recognizes the concept of progressive discipline including the following steps:

- Written warning or warnings, as appropriate
- Suspensions without pay
- Final warning and/or suspension,
- Discharge

It is understood that such steps will be applied on a case-by-case basis as determined by the Company based on the seriousness and severity of the violation. Further, violations of the most serious matters as set out in the Company Handbook ...may be addressed by discharge on the first offense.

Did [REDACTED] actions rise to the level of seriousness and severity that warranted termination? I find that it did not. The school's investigation found no one who felt or stated that the tickling was other than benign and innocent. Was it a "serious violation" for [REDACTED] to tickle the students? Yes, a fact which he readily admitted, that in hindsight he should not have participated with the boys in their horseplay. But the factor that I rely on is "the severity of the violation". Severity is defined as "harshness, sternness" and "rigid exactness". (Webster's College Dictionary). Simply put, [REDACTED] inappropriate action was not severe enough to justify termination. The Company placed "rigid exactness" over just cause.

His employment record was good and perhaps outstanding, the students liked and totally trusted him to keep them safe. The parents, when told of the tickling, found no fault with it. Did it violate the employee handbook? Yes, but the Company violated its obligation to the Grievant also. The handbook states that disciplinary steps "will be applied on a case-by-case basis". [REDACTED] immediate manager, testified that the work record was not taken into account, and that "Corporate said this is how we do it in other places and how we will do it here." That is not a case-by-case basis, that is blindly following Corporate policy.

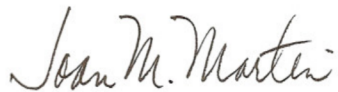
[REDACTED] exercised poor judgment in his actions, the Superintendent of the school district found that a thirty-day suspension with training and counselling was sufficient punishment. I agree.

The grievance is sustained.

In the Matter of
United Food and Commercial Workers
Local 1459
And
First Student Company

AWARD

1. The Grievant's termination is rescinded.
2. The Grievant shall be suspended without pay for thirty calendar days from the date of the incident.
3. The Grievant shall be made whole for any lost pay and benefits, including any medical expenses incurred as a result of lost benefits.



Joan M. Martin, Esq.
2020
Arbitrator

Feb. 27,
Arlington, Mass