

**IN THE MATTER OF ARBITRATION BETWEEN:**

**FIRST TRANSIT, INC.**

**AND**

**AMALGAMATED TRANSIT UNION,  
LOCAL 1287**

)  
)  
)  
)  
)  
)

**Discharge of Corranzo Lewis  
FMCS No. 00859-8**

Hearing held on May 14, 2009

**APPEARANCES FOR EMPLOYER:**

Lawrence K. Hoyt, Counsel  
Timothy Akright, Operations manager

**APPEARANCES FOR UNION:**

Scott Raisher, Counsel  
William Wilson, President  
Louis A. Duncan, Sr., Executive Board  
Corranzo T. Lewis, Jr., Grievant

**IN THE MATTER OF ARBITRATION BETWEEN:**

<p><b>FIRST TRANSIT, INC.</b></p>	)	
	)	
<b>AND</b>	)	<b>Discharge of Corranzo Lewis</b>
	)	<b>FMCS No. 00859-8</b>
<p><b>AMALGAMATED TRANSIT UNION, LOCAL 1287</b></p>	)	
	)	

**I. ISSUE**

The issue in this arbitration is whether the Company had cause to discharge the Grievant, Corranzo Lewis; and, if not, what remedy shall issue?

**II. APPLICABLE CONTRACT PROVISIONS**

**ARTICLE 7  
MANAGEMENT RIGHTS**

**Section 7.1 – Retention of Managerial Prerogatives.** Except as expressly modified or restricted by a specific provision of this Agreement, all statutory and inherent managerial rights, prerogatives, and functions possessed by the Company prior to the execution of this Agreement are specifically reserved to it and vest exclusively in the Company. Further, by way of example and not by way of limitation, the rights, powers and authorities of the Company shall include the right:

- a. To reprimand, suspend, discharge, or otherwise discipline employees for cause and to determine the number of employees to be employed.

\*\*\*

f. To issue, amend and revise reasonable policies, rules, regulations, and practices including rules of conduct or standards of performance; to take whatever action is either necessary or advisable to determine, manage and fulfill the mission of the Company and to direct the Company's employees, and to carry out the lawful directives of the customers to whom the Company contracts its serves if not in violation of this agreement.

The Company's failure to exercise any right, prerogative or function hereby reserved to it, or the Company's exercise of any such right, prerogative, or function in the particular way, shall not be considered a waiver of the company's right to exercise such right, prerogative, or function or preclude it from exercising the same in some other way not directly in conflict with the express provisions of this Agreement.

## **ARTICLE 12 ARBITRATION**

**Section 12.4 – Burden of Persuasion in Discharge or Discipline Matters.** In all cases involving discharge or discipline, the burden of persuasion on the issue of whether or not the grievant engaged in misconduct or wrongdoing shall rest on the Company. The burden of persuasion on the issue of whether the discipline imposed was excessive, unreasonable or an abuse of management discretion shall rest on the Union.

## **ARTICLE 17 DISCIPLINE**

**Section 17.1 – Company Rights.** The Company shall have the right to change any policies, rules and regulations governing employees without re-negotiation of this Agreement should such changes in policies, rules and regulations be required in order to comply with any governmental law or regulation or to comply with any provision of the Agreement between the Company and its Customers. The Company shall further have the absolute right to carry out all directions of its Customers notwithstanding any provision of this Agreement to the contrary.

The Company shall have the sole exclusive right to adopt reasonable rules, regulations and policies to govern its operation and employees from time to time, to change or amend such rules, regulations and policies, to the extent they do not conflict with any provisions of this Agreement.

**Section 17.2 – Disciplinary Procedures.**

\*\*\*

b. The respective Operations Manager, to whom the individual is required to, shall give a fair and impartial hearing to all employees. This shall also includes (sic) corrective

interviews through the disciplinary process.

c. Nothing in this Article 17 shall prevent the Union from appealing the decision of the respective General Manager to the District Manager prior to a possible grievance being filed.

d. All hearings which may result in a penalty shall be attended by the charged employee. A Union representative shall also attend the hearing unless declined by the employee in writing.

**Section 17.3 – Progressive Discipline.** Any violation of posted and/or written company rules, policies and/or procedures shall result in progressive disciplinary action. With the exception of a violation of a serious infraction, as listed in the handbook, attendance policy as listed in the handbook, or unsafe act policy as listed in the handbook. Each infraction of any rules, policy or procedure may result in the following disciplinary action taken by the company against the employee who violates any rules, policy or procedure:

First Violation: Verbal warning with counseling by Operations Manager.

Second Violation: Written warning notice.

Third Violation: Suspension up to, but not exceeding, five (5) days. Lesser discipline may be imposed at sole discretion of the company.

Fourth Violation: Dismissal from employment with company may be lesser discipline at sole discretion of the company.

The definition of “first,” “second,” “third” and “fourth” violation above shall mean the violation of any rule or combination of rules and shall be not construed to mean the first, second, third or fourth violation of each individual rule exclusive of the violation of any other rules. Following a non-serious infraction, if an employee goes twelve (12) months without committing the same non-serious infraction again, that infraction will be removed from the employee’s record.

## **APPLICABLE EMPLOYEE HANDBOOK PROVISIONS**

### **4.5 PROFESSIONAL CONDUCT**

As an employee of LTS, you not only represent the Company but our clients as well. All employees are expected to conduct themselves professionally while on duty. As an employee, you are expected to meet acceptable standards of conduct and performance.

Attainment of these standards not only promotes productivity and efficiency, but also helps to ensure that all employees will enjoy a pleasant and cooperative work environment.

This is not intended to be a complete list of all standards of conduct and performance but to promote an idea of what type of conduct and job performance is expected and what behavior may result in corrective action or discharge. In arriving at a decision, both the nature of the incident and the prior record of the employee will be considered.

Conduct or job performance for which an employee may be immediately dismissed includes:

\*\*\*

The Company retains the right to immediately terminate an employee for any type of misconduct, including the examples listed below, depending upon the nature and circumstances of the incident and the employee's prior performance record. However, examples of other conduct that normally will result in a warning or suspension prior to termination include the following:

\*\*\*

- Failure to operate vehicle according to assigned route/timetable.

### **III. FACTS**

First Transit, Inc. (Company) and the Amalgamated Transit Union, Local 1287 (Union) are parties to a collective bargaining agreement that is effective from November 22, 2007 through November 22, 2010 (Joint Exhibit 1). The Company provides transportation management services for the Johnson County, Kansas Transit Department. The Union represents about 90 Company bus operators. The Grievant, Corranzo Lewis, commenced his employment with the Company's predecessor company, Laidlaw, in July 1997. The Grievant acknowledged receiving a copy of the Company's employee handbook on August 21, 2006 (Joint Exhibit 6 and Company Exhibit 1).

On March 29, 2004, the Grievant received a written warning for “crossing the railroad tracks... without stopping.” (Company Exhibit 2). On May 5, 2004, the Grievant “was terminated for unauthorized use of a Company vehicle for personal business while driving his route.” Due to the Grievant’s tenure with the Company, the Company reduced the termination to a five day suspension without pay (Company Exhibit 7).

On June 30, 2006, the Grievant received a written warning for “talking on his cell phone while driving....” (Company Exhibit 3). On April 20, 2007, the Grievant was involved in a preventable rear end collision (Company Exhibit 5). On April 26, 2007, the Grievant successfully completed a “1 hour minimum” retraining evaluation (Union Exhibit 1). On May 10, 2007, the Grievant received a four day suspension for the April 20, 2007 rear end collision incident. The Company also placed the Grievant on two years’ probation regarding preventable accidents (Company Exhibit 4).

On April 7, 2008, the Grievant received a five day suspension without pay for failing to stop at a railroad crossing. The Company advised the Grievant that this was his “...last and final warning. Should you fail to abide by all Company policies, you will be subject to further discipline, up to and including termination.” (Company Exhibit 6). On April 17, 2008, the Grievant successfully completed a four hour retraining as part of his discipline for the April 7, 2008 railroad crossing incident (Union Exhibit 2).

The Company has installed video cameras on its busses to record images inside the bus and outside the bus through the front windshield. The camera records images 10 seconds before and after a tripping event such as quick acceleration, deceleration or other strong forces. The Company reviews the video images as promptly as possible but did not view the videos of the

incidents in question in this arbitration until late August due to a backlog of videos to be reviewed by Company staff.

Based on the videos, the Company concluded that on July 18, 2008, at approximately 6:30 a.m., the Grievant was preparing to turn left into the Country Club Plaza. The Company asserts the Grievant stopped at the red light while not in the intersection and proceeded through the intersection on the red light. The Grievant insists he observed a jogger in the intersection and so he stopped the bus to give the jogger the right of way. The Grievant related that he was in the intersection at this time and after the jogger cleared the intersection, the Grievant proceeded slowly through the intersection and completed his right turn but the light had turned red.<sup>1</sup>

On July 21, 2008, the Grievant was heading south on Metcalf Boulevard toward 112<sup>th</sup> Street with three or four passengers on board. The video reflected that as the Grievant approached the intersection, the traffic signal changed from green to yellow. The Grievant decided to make the left turn on the yellow because, in his opinion, it would not have been safe to stop his bus based on his location at the time the light turned yellow. The Company charged the Grievant with “unsafe turn, pushing yellow light” (Joint Exhibit 5).

On July 31, 2008, the Grievant was working the Plaza route (Union Exhibit 4). The Company’s video showed the Grievant running 13 minutes ahead of schedule and the Company concluded the Grievant must have skipped stops. The Grievant testified that after dropping off the last of his passengers at the Sprint campus he requested and received from the Company

---

<sup>1</sup>The Company offered evidence at the arbitration hearing that the video showed the Grievant in the intersection based on the location of the pedestrian crosswalk and the Company’s post-discharge calculation that the Grievant’s bus must have been stopped at least behind the nearest white line of the pedestrian crosswalk (Company Exhibits 11 and 12).

dispatcher permission to take a “10-7,” a restroom break. The Grievant decided to deviate from his scheduled route to go to a nearby Quik-Trip located across from the Grievant’s last stop. At the September 2, 2008 Company disciplinary meeting, the Grievant admitted missing scheduled stops and told the Company that during the time he had run the route, he had never picked up anyone at the skipped stops.

On September 2, 2008, the Company held a disciplinary hearing with the Union and the Grievant concerning the July 18, 21, and 31 incidents. Prior to the meeting, the Company had discussed internally the Grievant’s alleged infractions and the Company participants, Operations Manager Akright, Project Manager Aulgur, and DDS Manager Sonsteng, agreed the Grievant should be discharged for these incidents. At the conclusion of the September 2 disciplinary meeting, the Company decided the Grievant had offered no acceptable explanations for the incidents and it discharged him. The Company gave the Grievant a discharge letter which read:

To review your prior discipline:

- April 7, 2008 – Failed to stop at railroad crossing – 5 day suspension, Last and Final
- March 29, 2004 – Failed to stop at railroad crossing – Written warning
- June 30, 2006 – Talking on cell phone while driving – Written warning
- May 10, 2007 – Preventable collision – 4 day suspension, 2 year collision probation
- October 23, 2007 – Failed to stop at railroad crossing – Written warning

The following is a summary of a DriveCam incident containing a serious offense:

- July 18, 2008 – Failure to stop at red light (54805)
- July 21, 2008 – Unsafe turn, pushing yellow light (54937)
- July 31, 2008 – Failure to properly run route, unauthorized stop (55422)

After reviewing the facts, we have determined that your behavior violates Laidlaw (dba First Transit) Employee Handbook Section 3.1, Unsafe Acts, & Section 4.5, Professional Conduct, and First Transit’s SPAD’s (Signals Passed At Danger) policy. In addition, your Last & Final Warning on April 7, 2008 included notice that, “should you fail to abide by all company policies, you will be subject to further discipline, up to and including termination.”



As a result, your employment with First Transit is terminated effective immediately.

(Joint Exhibit 5).

On September 5, 2008, the Union filed a grievance on the Grievant's behalf. The Grievant stated that "I was discharged from my employment at First Transit. I do not feel I was discharged for just cause. I ask to be reinstated and made whole for all loss of monies & benefits including restoration of seniority." (Joint Exhibit 2). On September 25, 2008, the Company and Union met for the Second Step grievance meeting. The Company observed that:

This Second Step Grievance is denied, based on the following:

- Mr. Lewis has a Last & Final Warning letter dated April 7, 2008
- Mr. Lewis violated First Transit's "Seven Deadly Sins" by failing to stop at red light on July 18, 2008.
- On July 31, 2008, Mr. Lewis failed to run his route properly by deviating off route and making an unauthorized stop.

Therefore this grievance is denied at the 2<sup>nd</sup> Step because Mr. Lewis failed to abide by all company policies.

(Joint Exhibit 3).

On October 13, 2008, the Company and the Union met for the Third Step grievance meeting. At the meeting, the Grievant reiterated that he had to stop in the intersection because of a "lady jogging" (Company Exhibit 9). Following the Third Step meeting, the Company again denied the grievance and upheld its decision to terminate the Grievant (Joint Exhibit 4).

On May 14, 2009, the parties submitted this matter for final and binding arbitration. At the arbitration hearing, the parties stipulated that the matter was procedurally properly before the Arbitrator.

#### **IV. POSITION OF THE PARTIES**

##### **A. Company**

The Company contends that the Grievant was afforded due process throughout the grievance proceedings. The Company insists the clear and convincing evidence supports the Company's contention that the Grievant committed serious misconduct by running a red light. The Company also asserts that although Operations Manager Akright had made a tentative assessment of the Grievant's misconduct on September 2, 2008, Akright admitted that he could have changed his mind during the Grievant's disciplinary hearing based on evidence presented at the investigatory meeting.

Further, the Company argues the preponderance of the evidence is that the Grievant unnecessarily and inexcusably proceeded through an intersection on a red light. The Company submits that the undeniable evidence is that the Grievant's vehicle was behind the crosswalk and there was absolutely no safe reason for the Grievant to proceed through the red light. The Company maintains that the Grievant's jogger excuse is a red herring and most likely an embellishment created by the Grievant to avoid Company sanction for unsafe driving.

The Company points out that the Grievant was on a last chance agreement because of a fifth significant safety violation. The Company contends the last chance agreement should be enforced as the Grievant breached the terms of the agreement.

Finally, the Company observes that the parties' agreement provides that progressive discipline is not required for serious infractions or unsafe acts. The Company reasons that a red light violation is such an unsafe act. Moreover, the Company insists that the Grievant was

treated fairly and that is no evidence of disparate treatment.

In conclusion, the Company requests the grievance be denied.

### **B. Union**

The Union reminds the Arbitrator that an employee's discharge is a serious matter that is tantamount to economic capital punishment and thus, the Company bears the burden of proving the discharge was for just cause. The Union contends the Company must prove with clear and convincing evidence that the Grievant committed the misconduct and here, the Union insists, the Company has failed to do so. In addition, the Union believes that the Grievant testified candidly, honestly, and forthrightly and thus his testimony should be credited.

The Union also reasons that the Company has failed to prove the Grievant committed all three incidents upon which the Company based its decision to discharge the Grievant. Further, the Union maintains that the Company must prove all three alleged violations in order to sustain the discharge for cause.

As to the incidents on July 18 and July 21, the Union suggests that the Grievant exercised his best judgment under the circumstances while ensuring the safety of the passengers. The Union asserts that under the facts of this case the Grievant exercised reasonable judgment which should not be second guessed. Furthermore, the Union questions the Company's use of post-discharge evidence concerning measurement of the crosswalk to support its decision to discharge the Grievant. As a consequence, the Union urges the Arbitrator to disregard the Company's post-discharge analysis of the video. Moreover, the Company challenges the Company's conclusion

concerning what the video depicts. The Union asserts the video should be viewed as placing the Grievant closer to the intersection than the Company's contention.

As to the Grievant's route deviation, the Union insists the Company gave the Grievant permission to deviate. And, as the Union points out, the Company did not interview the dispatcher to confirm or deny the Grievant's contention that the dispatcher gave him permission to deviate from his route on July 31, 2008.

The Union also points out that the Grievant's final warning letter does not make discharge automatic, but rather allows for penalty less than discharge. The Union submits that because the Grievant exercised his best judgment and acted reasonably, then his conduct on July 18 and July 21, 2008 did not justify discharge. Further, even if the Grievant failed to run his route properly on July 31, such a deviation, the Union contends, did not warrant discharge.

The Union additionally challenges the Company's investigation and discipline procedures and claims the Company violated the Grievant's due process rights. The Union asserts the Company failed to make an appropriate inquiry into the facts of the case and failed to provide the Grievant with a full, fair, and meaningful opportunity to be heard. More specifically, the Union argues the Company had made its decision to discharge the Grievant prior to meeting with him on September 2, 2008.

In conclusion, the Union requests that the grievance be sustained and the Grievant be made whole. The Union also requests that the Arbitrator retain jurisdiction to address any questions that may arise regarding implementation of the award.

## V. ANALYSIS AND DECISION

The issue in this arbitration is whether the Company had cause to discharge the Grievant on September 2, 2008. Article 12 of the parties' agreement stipulates that in discharge cases, "the burden of persuasion on the issue of whether or not the grievant committed misconduct or wrongdoing shall rest on the company." As Arbitrator Neas has written:

It is axiomatic that just cause in a discipline case must be established by two general tests of reasonableness, i.e., just cause for taking any disciplinary action and just cause for the penalty imposed, if the grievant is found guilty as charged.

Texas Lime Company, 83 LA 116, 121 (1984). Further, as Arbitrator Smith has noted: "[b]y long and well recognized custom in labor arbitration, employers bear the burden of proof in disciplinary cases" and such evidence must be "clear and convincing evidence." Birmingham-Jefferson County Transit Authority, 126 LA 450, 456 (2009); see also Metropolitan Atlanta Rapid Transit Authority, 80 LA 829, 835 (Singer 1983).

In discharging the Grievant, the Company relied on three separate incidents occurring on July 18, 21 and 31. The incidents were failure to stop at a red light, unsafe turn while pushing a yellow light, and failure to properly run an assigned route.

The Company has acknowledged that the July 21 pushing a yellow light incident was included in the discharge letter to establish a pattern of unsafe driving but was not a dischargeable offense by itself. Further, the Company did not assert in its post-hearing brief that it relied on the Grievant's pushing a yellow light in deciding to discharge the Grievant.

Moreover, the Grievant candidly admits he deviated from his route on July 31, 2008, but the Grievant insisted the dispatcher authorized the 10-7 on July 31. The Company did not produce the dispatcher at the arbitration hearing nor did it interview the dispatcher during the

disciplinary investigation prior to discharging the Grievant. Finally, deviation from an assigned route, which is a violation of Company policy, is not customarily a dischargeable offense.

Thus, the Company's decision to discharge the Grievant must rise or fall on whether the Grievant failed to stop at a red light on July 18, 2008. The Grievant contends he entered the intersection prior to the light turning red but had to stop to allow a jogger to pass. Only after the jogger had exited the intersection did the Grievant complete his left turn but in doing so the traffic signal had turned red. The Grievant also expressed he exercised his best driving judgment as he was already in the intersection when he noticed the jogger and could not back up. The Company vigorously disputes the Grievant's assertion he was in the intersection. The Company argues that the Grievant proceeded through the intersection on a red light when he could have waited behind the crosswalk for the next green light.

The Grievant's explanation that he saw and waited for a jogger is not very convincing based on the layout of the intersection, the evidence produced at the arbitration hearing, and that the Grievant did not initially mention the jogger at the first disciplinary hearing. However, the Grievant's explanation is plausible.

The Company's evidence at the disciplinary hearing was from the video clips. Based on the Company's interpretation of the video images, the Company concluded that the Grievant had stopped behind the crosswalk and that the Grievant should have waited for a green traffic signal before proceeding through the intersection. The Company only calculated the distance from the video images in relationship to the crosswalk the day prior to the arbitration hearing and bolstered its discharge decision with its pre-arbitration measurements of the Grievant's alleged bus location in relationship to the intersection.

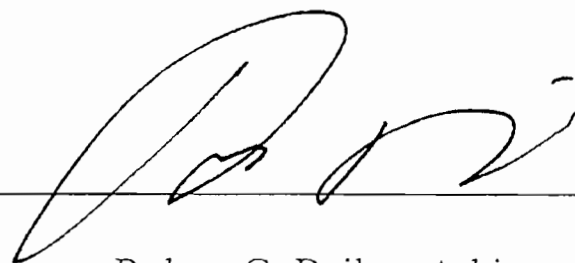
The Company's evidence from the video clips including its day before the arbitration hearing measurements did not establish clearly and convincingly that the Grievant's bus was not in the intersection July 18, 2008. The video images of the location of the Grievant's bus in relationship to the crosswalk was not dispositive as the crosswalk line in the video runs at a sharp angle and the video displayed different color patterns at the crosswalk suggesting that the Grievant's bus may have been located in the crosswalk. The evidence presented at the arbitration hearing raises enough doubt in the Arbitrator's mind that the Grievant may have been in the intersection prior to proceeding through the red light that the Company's burden of persuasion falls short of clearly and convincingly proving the Grievant committed a dischargeable offense by completing his left turn through a red traffic signal on July 18, 2008. As the Union pointed out, the Grievant proceeded through the red light at a slow speed, less than 5 miles per hour, and his left turn did not cause any disruption of traffic, further supporting the Grievant's position.

The Company has not met its burden of persuasion that the Grievant committed dischargeable misconduct on July 18, 21, and 31. However, the evidence was clear and convincing that the Grievant had a very poor driving record. This discharge was the Grievant's second discharge in a relatively short time. Furthermore, the Grievant had committed five safety violations in the fairly recent past. And, although the Grievant's last and final warning letter dated April 7, 2008 failed to specifically provide for immediate discharge but rather provided that should the Grievant "fail to abide by all company policies," he could "be subject to discipline, up to and including discharge," the Grievant should have known that his driving should have been exemplary and faultless. Nonetheless, within a two week period in July 2008, the Grievant went through a yellow and red light and deviated from his route. This is not the

driving behavior of a driver who values his job or exercises the most careful and prudent driving. Accordingly, although the Arbitrator concludes that the Company has failed to meet its burden of persuasion that it had cause to discharge the Grievant, the Arbitrator holds the Company had cause to discipline the Grievant. As a consequence, the Grievant shall be reinstated without back pay, the Grievant shall be a two year probation, and if the Grievant commits any Company policy violations within the two year probationary period, the Grievant shall be subject to immediate discharge.

#### **VI. AWARD**

The grievance is sustained in part. The Grievant shall be reinstated without back pay. The Grievant shall be on two year probation. If at any time during the Grievant's probationary period the Grievant commits any Company policy violations, the Grievant shall be subject to immediate discharge.

A handwritten signature in black ink, appearing to read 'R. G. Bailey', is written over a horizontal line.

Robert G. Bailey, Arbitrator

August 18, 2009