

VOLUNTARY LABOR ARBITRATION

FEDERAL MEDIATION AND CONCILIATION SERVICE

OPINION AND AWARD

IN THE MATTER OF ARBITRATION BETWEEN:

AMALGAMATED TRANSIT UNION	)	FMCS Case No. 110311- 01935-T
LOCAL 1287	)	Issue: Discharge
	)	Grievant: Devona Stubblefield
	)	
UNION	)	
	)	
And	)	Arbitration Board:
	)	Steven A. Zimmerman, FMCS Member
	)	Jonothan P. Walker, Sr., Union Member
KANSAS CITY AREA	)	Robert J. Kohler, Authority Member
TRANSPORTATION AUTHORITY	)	
	)	
	)	
AUTHORITY	)	

**APPEARANCES:**

For the Union:

Mr. John P. (Jack) Hurley, Attorney

Witnesses for the Union:

Ms. Devona Stubblefield, Grievant

For the Authority:

Mr. Jeffrey M. Place, Attorney

Witnesses for the Authority:

Mr. Tommie Hill, Manager, Road Supervision

Mr. Gaylord Salisbury, II, Manager, Safety and Instruction (at time of grievance)

Mr. Robert J. (Bob) Kohler, Director of Transportation

Each party appointed a member to an Arbitration Board. The two appointed members failed to agree upon a third member of the Board. Pursuant to the Agreement between the parties, upon disagreement, the third member of the Board was selected from a panel of arbitrators from the Federal Mediation and Conciliation Service.

The arbitration hearing regarding the above referenced case was held on Wednesday, July 13, 2011. The hearing was held at the Breen Building, located at 1200 East 18<sup>th</sup> Street, Kansas City, Missouri.

All witnesses testified under oath and affirmation. Each party was given full opportunity to present oral testimony and documentary evidence. The parties agreed and stipulated that the grievance was properly before the Arbitration Board. The Arbitrator selected as the third member of the Arbitration Board, received the Union's post hearing brief through the United States Postal Service on Friday, August 13, 2011 and on the same day received the Authority's brief by e-mail.

### **ISSUE**

Did the Authority have "just cause" to discharge the Grievant, Devona Stubblefield on November 24, 2010? If not, what shall be the remedy?

### **RELEVANT ARTICLES OF THE AGREEMENT BETWEEN THE PARTIES**

#### ARTICLE I – General Provisions

##### Section 1.1. Purposes of Agreement

The purposes of this agreement are: "... it being recognized by the parties hereto as a fundamental principle of public utility operation that the public interest is paramount and is not to be adversely affected by any dispute or controversy which may arise hereunder between the parties hereto; to provide procedures for the adjustment of all grievances and disputes arising hereunder, including final resort to arbitration if necessary, ..."

It is recognized by the contracting parties that the welfare of the employees depends upon the welfare of the Authority, which in turn is dependent upon the good will and patronage of the public communities served; and, since these mutual advantages can only be gained by giving the highest type of service, ..."

## Section 1. 12. Management – Discipline

(a) The Union recognizes that the management of the business, “... is vested exclusively in the Authority; subject, however, to the seniority rules and grievance procedure hereinafter set forth as concerns any employee to whom this Agreement is applicable and who may be relieved from duty ...”

(b) The Union further recognizes that the power of discipline is vested exclusively in the Authority, and it will not attempt to interfere with or limit the Authority in the discharge or discipline of its employees for just cause; subject, however, to the right of any employee to whom this Agreement is applicable and who may be discharged or disciplined, to present as a grievance, for action in accordance with the grievance procedure hereinafter in Section 1.13 set forth, the question whether he has been discharged or disciplined for just cause; ...”

(c) The Union covenants that its members shall render faithful service in their respective positions “ ... that, in the handling of equipment and property of the Authority, they will at all times comply to the best of their ability with the rules of the Authority and with the applicable Federal, State and Municipal laws, ordinances, regulations and orders, and will make every effort to prevent injury to property and person; ...”

## Section 1.13. Grievances

Any employee to whom this Agreement is applicable and who claims to be aggrieved by any action of the Authority or its officials, whether occasioned by discharge, “...may proceed in accordance with the following grievance procedure (except that when an employed has been discharged, ... he may go directly ... as in Section 1.12(f) provided).” (ex.1)

### **FINDINGS OF FACT**

Ms. Devona Stubblefield, grievant, testified that she wanted to be a bus driver. Previously, her sister had been a bus operator with the Authority. They had discussed the pay and benefits, the good and bad about being a bus driver before she applied for such position with the Authority. The greivant said she was hired as a bus operator by the Authority on May 10, 2010.

Her first seven weeks of employment involved training. She testified to having no problems during the training period. She stated training was easy and that she was the number one student in her training class.

Mr. Gaylord Salisbury, Manager of Safety and Instruction at the time, testified that it was his job to oversee bus operator training and the accident discipline policy. He stated the first three weeks of training involved the use of books, films, tests and time with a bus

to learn how to operate and drive. The second three weeks involve operating a bus with passengers under the direct supervision of a trainer who also is on the bus. Week seven is back in the classroom to reinforce what was taught and to address questions and concerns an operator may have.

During the first three weeks of training Mr. Salisbury stated the operators are given a copy of the following training material. The "Manual of Instruction, Operating Rules and Discipline Code" (ex.2), the "Revised Accident Remediation and Discipline Policy" (ex.3), the "Special Safety Rules" (ex.5), the "Student Operator Guidelines for Driving Performance During Training Period" (ex.6), and "The Bus Operator Training Manual" (ex.7). He stated these materials are covered in the training period. He also testified to the grievant's test results on two tests; "Driving Theory, Test 2" and "Questions Over Defensive Driving Film." (ex.8&33) The grievant did not dispute receiving this training material.

The grievant testified that she completed the seven week training course and became a part time bus operator because there were no full time routes available at the time. While a part time operator, she stated to being a bus operator on three (3) or four (4) different routes during the months of July, August and September, 2010. She classified some of these routes as "mellow." When asked to explain what is a mellow route she stated it is the type and number of passengers who board the bus. It is a route where business people ride the bus in the morning to go to work and again in the evening to return home. The route is a longer run than a city route.

The grievant applied for and received a full time route on October 24, 2010. The route was referred to as the "Prospect" route. Prospect is the name of a major street that runs north and south through the city. The grievant stated she was nervous about the route because she is a female, living near the street and felt it to be dangerous, with many liquor stores and people hanging out on the street. The operating hours for her route were from 4:00 pm till midnight or 1:00 am on weekdays and from 1:00 pm till 11:00 pm on weekends. She said the route was straight, flat and had few turns. She said it would be an easy route to drive in the winter because there were no curves and hills. She had express concerns to management about driving in the winter. She said driving in the downtown area with heavier traffic was not a concern because she drove downtown routes while a part time operator.

On Sunday, November 7, 2010 the grievant was operating her bus, number 2225. She testified to stopping for passengers at 10th Street and Main Street. She said she proceeded on 10th Street and turned right (south) onto Grand stopping at 11th Street and Grand to load passengers. She said her signal light was "green" at 11th and Grand so she pulled away from the bus stop, even though a passenger was still standing near her asking questions about a transfer ticket, and drove through the intersection heading south on Grand. She testified that she saw that the signal light was "yellow" at the intersection of 12th Street and Grand, but felt she could not brake easy enough without throwing the standing passenger. She stated she did not see any other potential hazard so she continued to drive into the intersection.

The grievant's bus struck another KCATA bus, number S-99, in the intersection of 12th Street and Grand. (ex.9&13) Both bus operators were injured. Passengers on both buses were injured. (ex.26) Both buses had to be towed from the scene. (ex.21) The accident occurred at approximately 1:38 p.m.

Supervisory personnel from the Authority immediately went to the scene of the accident. Supervisor Barrett Lee went to the scene of the accident and took a statement from each bus operator. (ex.12) Mr. Lee also completed a Road Supervisor's Accident Report on the date of the accident. (ex.16)

Temporary road supervisor Mr. Rodney Hollman went to the scene of the accident as well. He spoke with both bus operators. He also completed a Road Supervisor's Accident Report on the day of the accident. (ex.15)

Mr. Tommie Hill, manager of road supervision, went to the scene of the accident. At the scene, he said he was told by Mr. Hollman that both bus operators said their signal light was green when they entered the intersection. He testified to viewing the signal lights to make sure they were operating properly. When the buses were towed back to Division, Mr. Hill testified that he removed the hard drive from the video surveillance system from the grievant's bus. The other bus involved did not have a video surveillance system. After viewing the video he determined both operators to be at fault. He informed both operators, on November 7, 2010, that they would be held off from work until he completed his investigation. (ex.17)

Mr. Hill testified that the City's Public Works Department came to the accident scene and confirmed that the traffic signal lights were functioning properly. (ex.23)

Mr. Hill testified to asking the Kansas City Police Department's Accident Investigation Unit to recreate the accident to help to determine the cause of the accident because both operators said they entered the intersection on a green light. Their report finds the grievant's bus to be traveling at a speed of 33 miles per hour. It stated she had a clear view of the signal light. When the light changed from green to yellow she was three quarters away from the intersection of 11th Street and Grand and had 3.5 seconds to stop her bus before entering the intersection of 12th and Grand. The yellow signal light stays yellow for 3.5 seconds before turning to red. They concluded, taking into consideration the speed of the bus that the grievant should have had time to stop her bus before entering the intersection. (ex.22) Mr. Hill said he later received the investigating police officer's report, who requested to view the video to assist him in his determination of who caused the accident. He found both operators entered the intersection while their signal light was red, thus causing the accident. (ex. 21)

The grievant completed the Authority's "Occurrence Report" and gave a signed statement describing what occurred to the Dispatcher on the date of the accident. She wrote that she was going through intersection with a green to yellow light and the other vehicle was crossing intersection on a red light. (ex.11) The other bus operator also

completed an "Occurrence Report" and gave a signed statement describing what occurred to the Dispatcher on the state of the accident. (ex.10)

During Mr. Salisbury's testimony, he testified that part of his job responsibilities he completed the KCATA Avoidable Accident Analysis. The analysis is used to classify an accident as minor, moderate or major. Points are given under the categories of operator conduct, injuries, and property damage. The point total determines the classification of the accident. His total represented 25 points thereby classifying this accident as "major." (ex.24) The accident classification is used in conjunction with the Revised Accident Remediation and Discipline Policy to determine the level of discipline. An employee receiving a point total of 24 or more is subject to discharge.

On November 24, 2010, Mr. Hill met with the grievant. He informed her that the Authority had determined she had the opportunity to avoid the accident but did not. He told her she violated rule number 1.5, reckless driving, which was determined according to the Avoidable Accident Analysis report to be a major avoidable accident which is cause for discharge. He told her, her employment with the Authority is terminated effective Wednesday, November 24, 2010. (ex.30)

The grievant filed a grievance on November 24, 2010 challenging her discharge to be without just cause. (ex.31) A third step grievance meeting was held on December 22, 2010. Mr. Bob Kohler answered the grievance and reaffirmed the Authority's position that it had just cause to discharge the grievant. (ex.32)

### **UNION'S ARGUMENTS**

The Union argues is the penalty of discharge appropriate under the just cause provision of the parties agreement given the peculiar circumstances that were present in the grievant's case. The grievant admitted during the Authority's investigation of the accident and afterward to the Union that the accident was probably avoidable if she had used the defensive driving skills that she learned during her training.

The Union argues that the Authority's disciplinary rules found in the "Manual of Instruction, Operating Rules and Discipline Code" and the "Revised Accident Remediation and Discipline Policy, Effective Date: August 1, 1995" expressly provide for progressive discipline to be imposed. (ex.2&3)

In the Manual of Instruction, Operating Rules and Discipline Code, it appears to emphasize the progression of discipline to be imposed for "successive" violations of rules. Supervisor's are cautioned to review an employee's entire work record to determine whether a particular violation is an isolated incident in an otherwise good work record or is indicative of a continuing pattern of violations. This argument is further supported in the Manual under Safety work rules, number 1.5, "Reckless driving in buses anywhere ..." states the first offense is a severe suspension of five days and only when there is a

second offense is discharge authorized. (ex.2)

The Revised Accident Remediation and Discipline Policy alludes to progressive discipline for a major avoidable accident if the Authority determines that there are unusual circumstances which cause other actions to be appropriate. A close reading of the progressive discipline step number five, explanation for "Subject to discharge," the use of the phrase "will occur when an operator accumulates 24 or more points in a 12-month rolling calendar year" seems to infer that the discharge penalty is implicated only when the operator has more than one accident. (ex.3)

The Union argues that the Authority gave little, if any, consideration of the imposition of progressive discipline. Although the grievant's work tenure was brief, she had a good work record and had not been involved in any accidents until now. According to the Authority's own Manual, this information should have been considered as part of her entire work record but was ignored. Thereby ignoring the grievant's right to progressive discipline. The Authority's decision to discharge appeared to be motivated more by risk management factors than concern for the remediation of the grievant.

The Union argues that only five points out of the twenty-five on the Avoidable Accident Analysis should be attributed to the grievant. The other bus operator's rule violation of running a red light was more serious and could be said to be the cause of the grievant's points for injuries and property damage. Regardless, the grievant had no actual control over the extent of the damage caused in the accident. Under the just cause standard, the penalty of discharge is suppose to penalize an employee for her own conduct ,assuming the conduct rises to the level of seriousness which would warrant the ultimate punishment. But in this case, it was the consequences of the grievant's conduct over which she had no real control that was the primary driving force behind the Authority's decision making process. The Union submits that the decision to discharge the grievant was based in large part on arbitrary factors unrelated to the actual conduct of the grievant.

The Union argues that the Authority made no effort to determine whether discipline short of discharge would have had the appropriate "corrective" effect upon the grievant. It was certainly not that obvious that the imposition of such progressive discipline in her case would have been futile or inappropriate in any way.

The Union is requesting the Arbitrator to overturn the discharge and reinstate the grievant to her former position of bus operator with restoration of seniority and make her whole to the extent of her lost wages and fringes after serving a five day suspension.

### **AUTHORITY'S ARGUMENTS**

The Authority argues that it clearly had just cause to discharge the grievant. Arguing that the grievant failed in her responsibilities to be attentive at all times while operating

her bus. While operating her bus on November 7, 2010 she failed to stop at a yellow light, failed to check cross traffic before entering an intersection and failed to yield to another KCATA bus that entered the same intersection. Her poor judgment caused injuries to both passengers and operators and substantial property damage. This conduct and her very short employment tenure is cause for discharge.

The Authority argues that the grievant intentionally failed to stop for a yellow light even though she could have safely stopped her bus. Missouri driving law, Authority operator training and its work rules require the grievant to stop when approaching an intersection with a visual yellow light. The grievant claimed she did not stop for the yellow light because a passenger was standing. Yet, on cross examination she admitted that she could have stopped her bus safely. The grievant's conduct to proceed through the yellow light cannot be excused by running late to the route schedule. She was not running late. Bus operators are trained not to sacrifice safety to adhere to a route schedule.

KCATA's Accident Remediation and Discipline Policy expressly states that operators who are involved in traffic accidents after violating traffic signals will be subject to discharge. (ex.3) In failing to stop for the a yellow light when she clearly could have done so safely, the grievant violated a signal light and in doing so caused her to collide with another KCATA bus; thus being properly subject to discharge.

The Authority argues that the grievant was trained to check for cross traffic at an intersection but in this case failed to do so. Since 12th Street is a one way street heading east, cross traffic can only come from this direction. She acknowledged to the police officer who responded to the scene and during the KCATA's post-accident investigation that she did not see the other bus enter the intersection. By the time she did it was too late to do anything to avoid or brake for the collision. The grievant's incautious and inattentive driving was a significant factor in causing the accident and KCATA properly considered this conduct in determining that it should discharge the grievant.

The Authority argues that the collision was properly classified as a "major avoidable accident" according to KCATA's Avoidable Accident Analysis. The accident was classified as a "major" accident because the grievant failed to stop for the yellow light and to yield for cross traffic. She was assessed five (5) accident points according to the policy. Passengers sustained visible but non-disabling injuries, three (3) accident points. The bus operators also sustained visible but non-disabling injuries, three (3) accident points. The repairs to the grievant's bus cost more than \$3,501, seven (7) points, and repair cost to the other bus sustained major damage, seven (7) points. The Authority has paid out \$24,250 to settle injury claims from two (2) passengers out of six (6) who were on the grievant's bus. Claims from eight (8) passengers from the accident remain unsettled. The fact that the other bus operator could also have avoided the accident is immaterial in determining the disciplinary consequences that apply in the grievant's case. Each KCATA bus operator is expected to show the attentiveness and defense driving skills of a professional driver.

The Authority argues that many arbitrators apply Arbitrator Carroll Daugherty's seven



tests of just cause when considering whether a particular disciplinary penalty is appropriate. A review of these seven questions as applied to the facts in this case support the action taken by the Authority and confirms that the discipline in this case should be upheld.

### OPINION

It is clearly stated in the Agreement between the parties that “just cause” is a contractual requirement that must be met by the Authority when it imposes discipline or discharge to an employee. The standard or term “just cause” has been used for decades in the field of Labor Relations to help employees understand, when accused of violating work rules or the enforcement thereof, whether or not they are being treated fairly and consistently like other employees in like situations. Therefore, the Authority carries the burden to prove it has “just cause” to discharge the grievant. One area of proof is to prove wrong doing by the grievant, who is accused of violating safety work rule 1.5 “Reckless driving in buses anywhere ...” (ex. 2, pg. 38) and such conduct contributed to a “major” avoidable accident, a violation of the Revised Accident Remediation and Discipline Policy, Effective Date, August 1, 1995. (ex. 3) If the Authority can prove wrong doing by the grievant, then the burden of proof shifts to the Union to prove that the Authority's decision was arbitrary, capricious, or unreasonable to the extent that it would warrant the arbitrator to substitute his judgment for that of the Authority.

The Arbitrator finds, based on all the facts and evidence presented at the hearing and taking into consideration each parties position statements and arguments made in their post hearing briefs, that the Authority has met it burden of proof and had just cause to discharge the grievant.

The evidence is conclusive that on Sunday, November 7, 2010 there was a very serious accident involving two KCATA buses at the intersection of 12th Street and Grand. Passengers from both buses were injured as well as both bus operators. Everyone was taken by ambulance to area hospitals for observation and/or treatment. As of the date of this hearing, \$24,250 has been paid by the Authority to settle injury claims. Eight passengers have retained counsel regarding their injury and have yet to settle. (ex.26)

Substantial damage was done to both buses requiring that they be towed from the scene of the accident. Repair parts from out of service buses were used to off set the cost of many parts to repair both buses. Even so, total repair cost was around \$10,500. (ex.25)

The grievant was the operator of one of the buses involved in the accident. Her bus was number 2225 and was equipped with an audio/video cameras and a DVR recorder. The other bus was number S-99 and it was not equipped with any audio or video equipment.

The grievant testified that she started her route on Sunday, November 7, 2010 at 10th Street and Main Street. She proceeded east on 10th Street for two blocks and then turned

south onto Grand going south for one block where she stopped to pick up passengers at the bus stop at 11th Street and Grand. While stopped, she testified she saw the traffic signal light at 12th Street and Grand was green. She pulled away from the bus stop and proceeded south on Grand toward the intersection of 12th Street and Grand. While driving toward the intersection, a passenger was standing next to her asking questions about a transfer ticket. The Arbitrator thought this passenger may have distracted the operator causing her to lose focus on her defensive driving skills, but she testified otherwise saying she knew she had to keep the bus moving, keeping her eyes on the road, paying attention to traffic, all while the passenger just stood there.

The Arbitrator felt it was important to know if the grievant was able to see the traffic signal at 12<sup>th</sup> and Grand and what color the light was. She answered that question by testifying to the fact that she saw the traffic light turn yellow. She also said she felt like she couldn't brake easy enough without throwing the standing passenger. She stated she didn't see any other potential hazard so she proceeded into the intersection. She stated it was not her intent to stop at the intersection. She stated she was going to try to make the light. The audio/video tape from the grievant's bus clearly substantiates her testimony. (ex.13) The Arbitrator finds through this testimony that the grievant knew what she doing. She did not even think about stopping the bus. Her thought process was not what you would expect from a new bus operator who just graduated from training.

The grievant's bus struck another KCATA bus, #S-99, at a location just to the rear of the front bumper, directly into the left side of the bus where the operator is seated, in the middle of the intersection of 12th Street and Grand. The collision occurred around 1:38 or 1:39 pm.; only 38 or 39 minutes after the grievant started her route. There was no argument made that the grievant may have been upset or that something was troubling her at the start of her route. Anything that would have caused her not to focus on her driving. The Arbitrator finds that absent such evidence or argument, it should be considered the grievant was attentive and clearly focused on her defensive driving skills at the time of the accident.

The grievant testified that she thought she was operating the bus according to the training she received when approaching an intersection with a passenger standing. She stated she was trained to avoid stepping on the brake and to proceed through the intersection on a yellow light. When no passenger is standing, she stated she was trained to prepare to brake when approaching an intersection with a yellow light. On cross examination, the grievant said the video showed she was following policy when she entered the intersection on a yellow light. In the video one could see the standing passenger just starting to walk to a seat at the time of the collision. The Arbitrator finds her understanding of how to operate a bus with a standing passenger when approaching an intersection not as creditable as Mr. Salisbury.

According to Mr. Salisbury's testimony on this point, he stated on cross examination that the operating rule is for operators to stop at all yellow lights, if they safely can and to only proceed through a yellow light if they are in the intersection or no more than one bus length from the intersection when the light turns yellow. The Arbitrator finds Mr.

Salisbury testimony to be more creditable on this issue.

Both Mr. Hill and Mr. Salisbury testified the grievant could have safely stopped her bus before entering the intersection even with the standing passenger, because the signal light turned yellow three and a half seconds before she arrived at the intersection. On cross examination the grievant testified, that given her speed of 30 miles per hour at the time she was approaching the intersection, she could smoothly stop her bus in three and a half seconds. The Arbitrator finds this statement to be the key piece of evidence when searching to find if the grievant could have avoided the accident.

The Arbitrator finds, in fact, the grievant testified that she could have smoothly, without throwing the standing passenger, stopped her bus before entering the intersection. Thus, avoiding the accident. To the Arbitrator, it makes no difference that the other bus entered the intersection on a red light. The grievant testified that she could have safely stopped her bus before entering the intersection. Proof of wrong doing by the grievant is established.

The Arbitrator finds that the Authority's investigation of the accident was thorough and complete. It used other professional services to assist in its own investigation to confirm their findings before taking disciplinary action. The grievant was given complete and fair due process before the Authority informed of her discharge.

The Union argues that the decision to discharge the grievant is too harsh and that progressive discipline, in the form of a five day suspension, is what the Authority's disciplinary policy calls for. (ex.3) The Arbitrator agrees that discharge is a harsh penalty. A decision that should not be taken lightly.

The evidence in this case does not persuade the Arbitrator to overturn the decision of discharge and consider progressive discipline.

The Arbitrator listened to the grievant's testimony of her desire to work for the Authority. She stated she wanted to be a bus driver. She said the training period to become a driver was easy and that she was first in her class. While a part time bus operator, she testified to driving three or four different bus routes which included driving in the downtown area. This testimony tells the Arbitrator she had experience driving through downtown intersections. Thus, she knew the required defensive driving skills to use. The accident was not caused by her inexperience in driving through downtown intersections.

Her testimony about being a bus driver after her avoidable accident is a concern for the Arbitrator as well as the Authority. She viewed her training as easy and was first in her class, admitting to driving downtown routes through intersections while a part-time operator. However, in good weather, on a bright, clear day, on dry roads, no hills or curves, light traffic, both vehicular and pedestrian and no pressure from meeting the scheduled bus stops, she violates the most basic, the most known driving rule for any type of driver. She drove through an intersection when she knowing she had the time to

safely stop. Driving through an intersection controlled by traffic signals is one the most dangerous driving rules that anyone can violate.

The grievant completely ignored what she learned about defensive driving skills at intersections and traffic signal lights in her seven weeks of bus operating training in just four (4) and a half months. Additional bus operator training this soon to overcome this basic, well known defensive driving skill is not reasonable. The Authority, as well as its bus operators, has a major responsibility to protect the public by safely operating its buses. The Authority tells its bus operators that the safe operation of our coaches is its highest priority. Employing bus operators who violate traffic signals does not accomplish this responsibility. The Arbitrator cannot find reason or evidence to overturn the Authority's decision and change the decision to a suspension.

### **AWARD**

The Arbitrator finds that the Authority's met the burden of proof to prove it had just cause to discharge the grievant for violation of rule 1.5, reckless driving, which lead to a major avoidable accident. The grievance is denied in its entirety.

Also, there is a majority of the Arbitration Board that finds this grievance should be denied.

Entered into this 9th day of September, 2011.

Steven A. Zimmerman, Arbitrator