

IN THE MATTER OF AN ARBITRATION OF A DISPUTE BETWEEN

Kansas City Area Transportation Authority in Kansas City, Missouri (the Employer)	FMCS CASE NO. 090520-02734-A
-AND-	
Amalgamated Transit Union, Local 1287, Kansas City, Missouri (the Employee Representative)	ROBERT F. WAYLAND, Neutral Arbitrator

APPEARANCES

SCOTT A. RAISHER, Attorney at Law, Jolley Walsh Hurley Raisher & Aubry, P.C.,
Kansas City, MO, appearing on behalf of the Employee Representative (Union).

JEFFREY M. PLACE, Attorney at Law, Spencer Fane Britt & Browne, LLP, Overland
Park, KS, appearing on behalf of the Employer (Company).

WILLIAM L. WILSON, President, ATU Local 1287, appearing as a member of the
Arbitration Board (Union).

ROBERT J. KOHLER, Director of Transportation, KCATA, appearing as a member of the
Arbitration Board (Company)

PRELIMINARY STATEMENT

The parties are signatory to a collective bargaining agreement (the Agreement) made and entered into on March 19, 2008 and continues in effect until December 31, 2010. Article I of the Agreement provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the Federal Mediation and Conciliation Service in accordance with the collective bargaining agreement.

The hearing in the above matter was held on July 29, 2009 at the Breen Building in Kansas City, Missouri. The parties presented oral and documentary evidence at that time. The parties chose to submit post-hearing Briefs, which were to be postmarked by August 31, 2009, subject to change and extension upon mutual agreement between the parties. Briefs were received by the arbitrator the first week of September, 2009. Accordingly, the record is now closed, and I have considered all of the evidence and argument contained therein.

STATEMENT OF THE ISSUE

The parties agree that the issue is the following: Was the Kansas City Area Transportation Authority's discharge of Jewel Walker for just cause under all the facts and circumstances? If not, what shall be the appropriate remedy?

PERTINENT CONTRACT AND POLICY PROVISIONS

Following are provisions of the collective bargaining agreement (Joint exhibit #1) that are considered pertinent to this particular case:

ARTICLE I - General Provisions

Section 1.12. Management - Discipline.

(a) The Union recognizes that the management of the business, including the right to direct the working forces, to prescribe, effectuate and change service and work schedules consistent with and not contrary to any specific provisions contained in this Agreement, to plan and control corporate operations, to introduce new or improved facilities or operating methods, to relieve employees from duty because of lack of available work or for other legitimate reasons, to transfer them, to determine the minimum qualifications of experience, health and physical and mental fitness for any job covered hereby and to appraise the qualifications of any individual therefore, 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 or transferred or whose qualifications may be questioned.

The Authority shall have the right to require appropriate medical examinations from time to time by competent doctors in order to maintain adequate and safe standards of service to the public and to minimize employee accidents; provided, that any employee to whom this Agreement is applicable and who may be adversely affected in his position or earnings as a result of an adverse medical report by an Authority doctor shall have the right to present as a grievance, for action in accordance with the grievance procedure hereinafter set forth in Section 1.13, the question of his physical or mental fitness.

(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; but neither (a) the appointment, promotion, demotion, discharge or discipline by the Authority of any individual to or in any official, supervisory or other classification excluded from the collective bargaining unit of employees to which this Agreement is applicable, nor (b) the retention in service, discharge or suspension by the Authority of a probationary or temporary employee (as

defined in Section 1.5), shall present a grievance hereunder or be subject to the provisions hereof, and the Authority's action in relation thereto shall be final; nor shall any other discipline imposed upon a probationary or temporary employee present a grievance hereunder or be subject to the provisions hereof unless it is claimed that the discipline thus imposed violates any other provision of this Agreement.

(c) The Union covenants that its members shall render faithful service in their respective positions and will cooperate with the management in the efficient operation of the business and in fostering friendly relations between the Authority and the general public; that they will be courteous to passengers and to others with whom they come into official contact; that they will at all times seek to protect the property of the Authority from injury at their own hands or at the hands of others: that, in the handling of equipment and other 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; and that upon the Authority bringing to its attention any alleged fraudulent handling of funds or fares or other wrongful practices, the Union will assist the Authority in eliminating such malpractices.

(d) Suspension means a total cessation of work and pay for the calendar days specified. Suspensions shall not deprive employees of Holiday pay for which they are otherwise qualified.

(e) Warning slips may remain in an employee's file but shall not be considered after twelve (12) months for the purpose of progressive discipline, but may be considered in reviewing the employee's record only for determining whether moderation of discipline is warranted.

(f) Employees shall cooperate with the Management upon call in all matters of mutual interest, but no employee to whom this Agreement is applicable shall be called before an official in connection with the investigation of a matter which may involve his discharge, suspension or other discipline unless so called within four (4) weeks (Saturdays, Sundays, and holidays excepted) in cases of alleged misappropriation of fares or other property, and within ten (10) working days, Monday through Friday, except holidays, in other cases, after notice of the alleged offense has come to the attention of management; and if the employee is discharged, suspended or otherwise disciplined as a result of such investigation and believes himself to be aggrieved thereby, he shall have the right to proceed before his Superintendent, Lead Foreman, Manager or Director when none of the others exist, under the grievance procedure set forth in Section 1.13, by presenting the matter to the appropriate official within seven (7) days (Saturdays, Sundays and holidays excepted) after such disciplinary action.

(g) If, after discussion with the employee, it is evident disciplinary action is

indicated, the employee will be told to contact a Union representative before finalization of the disciplinary action. It is understood that the employee has the right to waive Union representation if he so desires.

(h) Employees shall be called in and notified in writing of any disciplinary actions placed in the employee's record. Customer complaints that have not been investigated and verified shall not be used as a basis for disciplinary action.

(i) An employee who is suspended will not be permitted to return to work until all suspension time has been served. The days of suspension will be consecutive unless interrupted by assigned day(s) off or otherwise specified in an agreement between the Union and Management.

Following are provisions of the Manual of Instruction, Operating Rules and Discipline Code (Joint exhibit #2) that are deemed pertinent to this particular case:

MANUAL OF INSTRUCTION - OPERATING RULES AND DISCIPLINE CODE

SECTION II – POLICIES AND PROCEDURES

5. Discipline/Personal Conduct

The Authority expects its employees to be courteous and treat fellow employees and patrons with respect. Only through full cooperation and total working efforts can the Authority prosper. As employees of a public agency, each of us has the obligation to conduct ourselves in a manner befitting the public's trust. The following actions toward any of our customers, supervisors, agents or employees will not be tolerated and are subject to suspension or discharge.

- Employees who are careless with the safety of themselves or others in the performance of their duties
- Discourteousness
- Dishonesty
- Improper handling of passenger revenue
- Conduct unbecoming an employee
- Violation of rules
- Willful neglect
- Making false reports or statements
- Concealing facts concerning matters under investigation
- Failure to report an accident
- Failure to make the proper efforts to procure witnesses

SECTION VIII - ATA DISCIPLINE CODE

A discipline code has been developed to standardize types of penalties for various violations and to inform ATA employees of penalties that may be imposed for successive violations of rules and regulations. It should serve as a guide to employees and supervisors involved in disciplinary matters. The code should be regarded as indicative of the various types of violations and not enumerative of the entire range of possible violations. The code should not be considered a hard and fast limitation upon supervisory personnel in dealing with disciplinary matters. Penalties for multiple violations occurring at the time or similar time will be dealt with only after a review by the Director of Transportation. Whenever disciplinary action is contemplated, the supervisor should consider the employee's total record and work history before determining the penalty. It is most important that supervisors review the entire work record and determine whether a particular violation is an isolated instance in an otherwise good work record or is indicative of a continuing pattern of violations.

OVERVIEW OF DISCIPLINE AND EXPECTATIONS

The work rules and policies provide a framework of guidance to accomplish our primary goal of quality transit service. The myriad of rules may seem haphazard. However, these expectations all support one of seven performance areas. Therefore, for a successful and rewarding career with the Metro, an operator should strive to meet objectives in the following areas:

1. Safety
2. Courtesy and Professionalism
3. Reliability
4. Honesty
5. Observing the Law
6. Operating Procedures
7. Meeting Employment Qualifications

The following work rules identified in the Authority's Manual of Instruction - Operating Rules and Discipline Code (Joint Exhibit #2) and Policy Bulletin 43-01(Joint Exhibit #18) are also deemed pertinent to this case:

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| Rule 2.5 | Customer service reports (complaints) when investigation reveals report is valid will result in discipline. |
| Rule 4.4 | Operators will not exhibit voluntary neglect in collecting or handling the proper fares and/or transfers (i.e., failure to ask for fare; failure to inspect fare documents). |
| Rule 5.1 | Operators will not steal fares or steal from the Authority, employees or |

passengers.

- Rule 6.5 Operators will not refuse to allow a passenger to board bus at designated stop or at the end of the line while bus is taking layover or on specified loops on certain routes.
- Rule 6.8 Operators will announce major street intersections and stops as required by the Americans with Disabilities Act, as well as comply with all requirements of the Act as set forth in Policy Bulletin #58-94.

Policy Bulletin 43-01 dated August 18, 2001, in essence states; “Bus operators, who are observed using cell phones while driving, will be subject to the following disciplinary measures: First offense – one-day suspension; Second offense – three-day suspension; and Third offense – discharge.”

FINDINGS OF FACT

Kansas City Area Transportation Authority (hereinafter “the Authority” or “the Employer”) is a public mass transit system operating 300 buses with approximately 400 full-time and part-time drivers. The Authority has approximately 225 buses on the streets of the Kansas City area each week day. About two-thirds of the buses are equipped with video cameras. Local 1287 of the Amalgamated Transit Union (hereinafter “the Union”) represents the Authority’s drivers. The current collective bargaining agreement, shown as Joint Exhibit #1, was executed March 19, 2008 and expires December 31, 2010.

Grievant, Jewel Walker, was hired as a trainee Bus Operator in December, 2003. She completed a six-week training course and entered service as a part-time Bus Operator on January 30, 2004. As a part-time Operator, Grievant worked approximately 25 hours per week throughout her employment. She received extensive training, during her employment, about the operation of the buses and about compliance with the Authority’s work rules and regulations, including the service requirement provisions of the Americans with Disabilities Act (ADA).

Customer Service Specialist Sharon Teague received a customer complaint on February 12, 2009 that Grievant had refused to allow a disabled passenger, who uses a motorized wheelchair, to board her bus because there were non-disabled passengers standing in the wheelchair section of the bus. The complainant alleged that Grievant did not ask the passengers standing in the wheelchair area of the bus to move, therefore, allowing him to board the bus. After reviewing the on-board video camera recordings from the bus for February 12, 2009, Ms. Teague determined that Grievant violated Rule 6.8, failing to comply with the service requirement provisions of the Americans with Disabilities Act when she did not allow a passenger using a motorized wheelchair to board her bus. Grievant ultimately received a one-day suspension to be served in the Training School at the student rate of pay. She was also charged with a first-offense violation of Rule 2.5, receiving a written warning, since Ms. Teague verified that a valid customer complaint occurred on February 12, 2009. Additionally,

in reviewing the video recordings from February 12, 2009, Ms. Teague noted that Grievant, on two separate occasions that day, violated the Authority's prohibition against using a cellular phone while driving the bus. In accordance with the Authority's Policy Bulletin 43-01, a one-day suspension was imposed upon the Grievant as disciplinary action.

The Authority received another customer complaint on March 9, 2009 that Grievant failed to assist strapping in a wheelchair passenger who boarded her bus that day resulting in a delay that caused the complaining customer to be late for work. Following up on the complaint, Customer Service Specialist Sharon Teague and Manager of Road Supervision Tommie Hill reviewed the video recordings of Ms. Walker's assigned bus for that day. They both found that Grievant remained in the driver's seat and did not go back to make certain that the straps provided on the bus in the wheelchair area were properly secured for the passenger's safety. Instead, she relied upon another passenger, not accompanying the wheelchair bound passenger, to secure the straps.

Ms. Teague and Mr. Hill concluded that the customer's complaint was valid, since Grievant had caused a delay of 3-5 minutes for the bus departure by relying upon another passenger to figure out how to secure the straps rather than going back herself and assisting the passenger. The valid customer complaint constituted an infraction of the Authority's Rule 2.5, which would have warranted a one-day suspension to be served in Training School at the student rate of pay since this was a second offense in less than a 12-month period. They also agreed that Grievant had violated the Authority's Rule 6.8, established under the Americans with Disabilities Act, when she failed to ensure the passenger's safety on the bus by not making sure that her wheelchair was secured properly. Since this was the second ADA offense in less than a 12-month period, Rule 6.8 prescribed a one-day suspension as disciplinary action. Additionally, from the video recording of March 9, 2009, Ms. Teague and Mr. Hill determined that Grievant had committed a series of other work rule violations that day; including, using a cellular telephone while operating her bus, not properly handling fares, and handing out a couple of 1-Ride passes to persons without collecting fares. Grievant's use of a cellular telephone while operating a bus, which is prohibited under the Authority's Policy Bulletin 43-01, would have carried a three-day suspension since it was the second offense during the past 12 months.

Meetings were held on March 18, 2009 and on March 19, 2009 to investigate the customer complaint and the rule violations observed upon reviewing the video camera recording on March 9, 2009. In attendance at these meetings were; Grievant Jewel Walker, ATU Local 1287 President William Wilson, Manager of Road Supervision Tommie Hill, and Manager of Safety and Instruction Gaylord Salisbury. When questioned about how she obtained the 1-Ride passes during the March 18 meeting, Grievant first stated that she purchased them from the Salvation Army. Following the March 18 meeting, Mr. Hill contacted the Salvation Army and found that they do not sell 1-Ride passes to anyone. They purchase them, as a social service agency from KCATA at a reduced price for assistance to persons in need of transportation.

During the meeting that took place on March 19, 2009, Grievant then stated that she purchased the 1-Ride passes at a "group" meeting held at the Salvation Army from a man she had

previously known when working as an abuse counselor. She said that the man had approached her and asked her for cigarette money. Grievant stated that she gave the man \$5.00 and he gave her, in exchange, a number of passes wrapped in a rubber band. She said that she had purchased the passes thinking that she would let her son use them while his car was in the shop. As it turned out, her son did not need or use them. Grievant said that she was unaware of any rules or restrictions regarding the use of the 1-Ride passes that she had obtained. She also denied knowledge of any wrongdoing regarding the other charges of improper fare handling procedures.

On March 19, 2009, Director of Transportation Bob Kohler, Manager of Road Supervision Tommie Hill, and Manager of Safety and Instruction Gaylord Salisbury (all had previously been employed as bus drivers for the Authority) weighed the scope and seriousness of Grievant's March 9, 2009 misconduct. Upon considering the similar nature of her February 12, 2009 rule violations, Hill and Salisbury recommended, and Kohler approved, a decision to terminate Grievant's employment. Following the discharge notification on March 19, 2009, a grievance was filed by the Grievant appealing the discharge decision, seeking reinstatement and making whole for all lost wages and benefits. The parties agreed at the commencement of the arbitration hearing held on July 29, 2009 that the grievance is properly before the arbitration board.

POSITIONS OF THE PARTIES

The Company: The Kansas City Area Transportation Authority argues that just cause exists to discharge Grievant. The Authority discharged Grievant on March 19, 2009, after she committed second offenses of rules violations regarding the ADA compliance, customer service, and cell phone use in less than thirty days along with multiple breaches of fare handling procedures. The Authority contends that Grievant's misconduct on March 9, 2009 led to a decision to terminate her employment after considering the similar nature of her other rules violations within the previous 12-month period.

In support of this position, the Authority made the following arguments:

1. Work Rule 6.8, as amended, is derived from service requirements of the Americans with Disabilities Act and places responsibility on bus operators to accommodate passengers with disabilities by making room available for wheelchairs and by assuring the straps attached to the bus floor are properly used for securing wheelchairs. The Authority contends that Grievant violated Rule 6.8, twice within a one month period, by failing to comply with service requirement provisions of the Americans with Disabilities Act on February 12, 2009, when she did not allow a passenger using a motorized wheelchair to board her bus and, again on March 9, 2009, when she failed to get out of her chair and assist a wheelchair bound passenger to secure the safety straps attached to the bus floor.
2. Valid customer service report (complaints) under Rule 2.5 prescribes disciplinary action of a written warning for the first offense, a one-day suspension for the second offense, a three-day suspension for a third offense, and discharge for a fourth offense occurring within a twelve

month period. Following investigations, Grievant was found in violation of Rule 2.5 on February 12, 2009 and again on March 9, 2009.

3. The Authority prohibits Bus Operators from using cell phones while driving. Policy Bulletin 43-01 was issued on August 8, 2001, reminding all Operators that "cell phone usage while driving is an invitation for a disastrous occurrence." Grievant violated the Authority's prohibition against using a mobile phone while driving the bus on two separate occasions on February 12, 2009 and on one occasion on March 9, 2009. Grievant was suspended for violating this rule in December, 2007 and again in February, 2009. Nevertheless, on March 9, 2009, she yet again used her cell phone while driving one of the Authority's buses. This blatant misconduct shows Grievant's ingrained willingness to ignore important safety rules, no matter how well-acquainted with them she is.
4. On five separate occasions during just one shift on March 9, 2009, Grievant engaged in conduct that showed complete disregard for her duty to, at the very least, make a good faith effort to ensure that KCATA collects the appropriate revenue from each passenger it transports. Grievant's conduct unquestionably violated Rule 4.5, which provides that "voluntary neglect in collecting or handling the proper fares and/or transfers (i.e. failure to ask for fare; failure to inspect fare documents)" will result in a one-day suspension for a first offense, a three-day suspension for a second offense, and discharge for a third offense. Certain aspects of Grievant's conduct arguably violated Rule 5.1, which provides that stealing fares will result in discharge for a first offense.
5. Taken as a whole, Grievant's fare handling on March 9, 2009 unquestionably represented extreme neglect of her duties, in violation of Rule 4.5. Grievant's behavior in giving out free rides to a close acquaintance (or friend) and to a non-passenger sitting on a bus bench deprives the employer of the revenue it is entitled to receive.
6. The Authority sold 1-Ride Pass cards to the Salvation Army for 75 cents, with the intention and understanding that the passes would be used by indigent benefit recipients, who would not otherwise have the means to ride the bus at all. The helpful passenger who received a Pass from Grievant presumably used it to pay for his next KCATA bus ride. Grievant's action thus deprived KCATA of one-half of the revenue it should have received the next time it transported that passenger.
7. Grievant admittedly purchased "half price" tickets for her son, even though those tickets were not available to KCATA employees, their family, or members of the public, and even though her son was not entitled to ride for less than the full regular fare. Again, this conduct amounts to theft, and is no less theft because it was intended to benefit a family member than it would have been had it been intended for Grievant's direct personal use.
8. Rule 3.13 provides that "Operators who habitually show disregard for work rules and policies as evidenced by serving seven (7) suspension days in a twelve-month period" are subject to discharge. Grievant's work record in the twelve months preceding her discharge would have supported suspensions far exceeding the seven-day limit. Grievant served a one-day suspension

on February 20, 2009, for her February 12 cell phone safety violation. She was further scheduled to serve a one-day suspension "in training school" due to her February 12 ADA compliance violation. She was also suspended in April, 2008 for running six minutes ahead of schedule, though KCATA waived that suspension and replaced it with a written warning.

9. While the Discipline Code sets out a standard progressive disciplinary schedule for repeated violations of the same rule, it also recognizes that it may be appropriate for Management to depart from the standard progression, depending upon the circumstances of each case. For example, an Operator who violates many different rules one time each obviously presents a more serious problem for KCATA than does an Operator who commits his or her first violation of a single rule. Similarly, an Operator who violates many different rules at the same time, or on the same day, presents a greater problem than does an Operator who commits a single violation of a rule that does not call for immediate discharge. It is both reasonable and appropriate for KCATA to penalize compound and multiple violations more severely than simple first-time violations.

In summary, the Authority argues that it did have just cause to terminate Grievant's employment. The Authority believes that Grievant has received lengthy and detailed instructions about how she is expected to perform her job; yet, she continually fails to perform satisfactorily. The Authority respectfully requests that the Union's grievance in this matter be denied.

The Union: The Union argues that just or sufficient cause does not exist to terminate the Grievant. It is the maximum and most severe penalty that an employer can impose upon an employee in that the employee's job, seniority, contractual benefits and reputation are often at stake. The foreseeable consequences and adverse impact upon the employee are so drastic that numerous arbitrators have characterized discharge as being "tantamount to economic capital punishment." Arbitrators have uniformly held that the employer bears the burden of justifying such a serious action by proving that the discharge was for "just cause." This requires the Authority to prove, at the very least, that Ms. Walker (1) is guilty of the alleged misconduct charged and upon which her discharge is based, and, equally important, that (2) in light of any proven misconduct, her discharge - instead of some lesser penalty - was warranted or required.

In support of this position the Union made the following arguments:

1. Since Grievant acknowledged use of a cell phone while operating her bus and failure to secure the wheelchair, the Union focuses on the other incidents that occurred on March 9, 2009 and upon which the Authority relied in discharging her. The Union believes the Authority has failed to prove by "clear and convincing" evidence the charges it has leveled against Grievant. The Union believes that a cautionary note regarding our reliance upon the video is in order. There is no question that the video is a valuable tool in letting us see and hear what occurred on the bus. But what we may "see" or "hear" may not be as clear, complete or as definitive as we would like; questions still remain.
2. Considering Grievant's acknowledged misconduct and that reasonably proven - even when considered together - does not warrant or justify her discharge. Counseling would have been

more than sufficient to address the Authority's concerns regarding the manner in which she handled her fares and transfers; a suspension not to exceed seven (7) days would have been consistent with the Authority's progressive discipline policy.

3. There was nothing for Grievant to personally gain by her actions - other than possibly the good will and appreciation of her passengers - an appreciation that would certainly inure to the benefit of the KCATA. She is clearly not a thief and did not knowingly and intentionally violate the rules. The Union suggests that the Authority's attempt to so characterize her cannot be justified and can only be described as shameful.
4. Grievant testified that she never gave a passenger - as a "courtesy" - a regular (2-hour) transfer. The only fare document that she has ever given to passengers as a "courtesy," as seen on the video - is what is known as a "courtesy (1-hour) transfer." In addition, Grievant acknowledged that, on March 9, 2009 as seen on the video, she did give to two regular passengers a 1-ride pass - one to the passenger who she believed had helped secure the wheelchair and the other to the man who was sitting and "stuck" on the bench. She did not think she was doing anything inappropriate or in violation of the rules with respect to her fare and transfer handling procedures depicted in the video; she certainly did not think that her actions constituted a violation of the rules or stealing.
5. Grievant testified that her March 18, 2009 meeting with Mr. Hill was the very first time that she had ever been told that what she was doing was inappropriate. Prior to this meeting, Grievant simply did not understand that she was doing anything wrong. No one had ever told her otherwise. Because she believed what she was doing was proper and really had no questions, she had no reason to speak with supervisors regarding her "protocol" or the procedures.
6. Grievant testified that no one had ever talked with her previously about passengers going through the trash, or what to do if and when passengers did so. Hill acknowledged that, if a passenger inadvertently threw a transfer away, there would be nothing inappropriate about the passenger recovering the transfer from the trash. There is no rule prohibiting passengers from looking through the trash. Neither was there anything inappropriate with Grievant giving the female passenger the benefit of the doubt when she indicated that she was looking for her transfer. Mr. Hill testified that, in his opinion, Grievant did not handle the matter "properly;" that he would have done things differently, that he probably would not have allowed the passenger to go through the trash until after all of the passengers had boarded. Grievant testified that, prior to the March 18, 2009 meeting, no one had ever talked with her about passengers going through the trash, or what to do if and when passengers did so or what the "proper" procedures were; she did not have the benefit of Mr. Hill or any other supervisor explaining to her how they would have handled the matter.
7. The Authority argues that Grievant's conduct was improper because she permitted the female passenger to take two fare documents from the trash - the one she allegedly threw away and a second document. In this regard, the video is most revealing - it does show the female passenger

taking two documents from the trash, although it cannot be said with any certainty what either document was or whether either document was still "valid."

8. Grievant testified that she did recall, as the video reflects, her taking a transfer from a male passenger as he approached the farebox, throwing it in the trash and giving him another. As she explained, if a transfer, pass or other "fare document" is damaged it may jam the farebox. If the farebox becomes jammed, operators are unable to collect fares and are then expected to let passengers ride for free. Rather than take the chance of that happening, Grievant would take the transfer, throw it in the trash and give the passenger another.
9. The Union argues that with respect to Rule 4.4, there are no written guidelines setting out what are the proper procedures to be followed or what constitutes "voluntary neglect" and a violation of the rule. In the absence of some "notice," how is an employee to know? The problem is further complicated by the fact that the undisputed evidence reflects that operators are allowed to use their discretion - their best judgment - in deciding, for example, when to give out a courtesy transfer or let a regular passenger ride for free. Again, as Mr. Salisbury testified, an operator is expected to use his or her "best judgment" and acknowledged that there are no written guidelines given to operators on how to exercise their discretion.

In summary, the Union acknowledges Grievant's misconduct in violating certain rules and submits that some discipline may be warranted. The Union, however, denies any wrong doing on the part of Grievant regarding fare handling procedures and argues that the penalty of discharge is too severe under all the facts and circumstances. The Union respectfully requests, as an appropriate remedy; that its grievance be sustained, that Grievant's discharge be set aside, that she be awarded full back pay and that all benefits and seniority lost as a result of the discharge be restored.

DISCUSSION AND ANALYSIS

Both parties presented superb arguments during the hearing and are to be commended for their respectful conduct. Likewise, the parties submitted very thorough, well-prepared post-hearing briefs in support of their respective positions in this case. The Arbitrator has carefully reviewed the entire record, including testimony and evidence, the parties' arguments in post-hearing briefs, and the cited arbitration awards. Also, the Arbitrator has carefully considered the input from both of the Management and Union members of the arbitration board. The Authority presented a credible case supported by documentation and testimony which addressed the factors for consideration of just cause identified in the parties' Agreement, and the employer's Manual of Instruction - Operating Rules and Discipline Code. All the same, the Union raised several valid points which have been carefully considered in arriving at a decision.

A decision in this case must be made only upon carefully considering and weighing all factors that are material to a determination. There are well-established standards in arbitration of discipline and discharge disputes in which the ultimate question focuses on the clear, demonstration of just cause for the Employer's decision. The current collective bargaining

agreement between the parties in this case provides for “just cause” in suspension and discharge. Elkouri and Elkouri outline the more prominent factors relevant in the review or evaluation of penalties assessed by management for employee misconduct. Some of the factors relevant to this case are: *nature of the offense, grievant’s past record, length of service with the company, knowledge of the rules, and warnings.*¹

Arbitrator Carroll Daugherty, first articulated a test for “just cause” in a 1964 case (*Grief Bros. Cooperage*, 42 LA 555), and later in his opinion and award for a 1966 case (*Enterprise Wire Co.*, 46 LA 359). Daugherty’s test established a “common law” definition of just cause which is widely used by arbitrators in discipline and discharge cases. His definition consists of the following set of seven questions to be applied to the facts of a case. A “no” answer to one or more of the questions means that “just cause” either was not satisfied or was seriously weakened in that some arbitrary, capricious, or discriminatory element was present.

1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?
2. Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business?
3. Did the Employer, before administering discipline, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the Employer's investigation conducted fairly and objectively?
5. At the investigation, did the “judge” (the Employer) obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the Employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?
7. Was the degree of discipline administered by the Employer in a particular case, reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer?

Let’s consider the first and second questions of Arbitrator Daugherty’s tests for the existence of just cause. The Arbitrator in the instant case finds that the Authority has clearly satisfied these requirements to answer these questions affirmatively. Grievant had been given training regarding the Authority’s policies and rules, she was forewarned of possible disciplinary action or discharge for violation of the rules, and the rules are reasonably related to her employment. Likewise, the Arbitrator finds that the Authority satisfactorily met the third, fourth,

¹ *Elkouri and Elkouri: How Arbitration Works*, 6th ed., A.M. Ruben, Editor-in-Chief (BNA Books, 2003), pp. 964-1002.

fifth and sixth questions of Arbitrator Daugherty's test for just cause. The Authority reviewed the video recordings for both instances upon receiving customer complaints, met with Grievant and her union representative immediately following their discovery to allow her to respond to the charges, and administered first-offense disciplinary action following the first series of infractions occurring on February 12, 2009 to send a message that she must improve her performance. In fact, part of Grievant's discipline included a one-day suspension to be served in the Training School at the student rate of pay in an effort to provide ADA refresher training. Upon reviewing the entire record, the Arbitrator does not find any convincing evidence to show that the Authority has not applied its rules, orders and penalties even-handedly and without discrimination.

Now we get to the final question of Arbitrator Daugherty's seven tests for the existence of just cause: Was the degree of discipline administered by the Employer in a particular case, reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer? In analyzing discharge cases, arbitrators generally try to ascertain the answers to six questions found in *Discipline and Discharge in Arbitration*, ABA Section of Labor and Employment Law, Norman Brand, Editor-in-Chief (BNA Books, 1998). The following two are relevant to the instant case:

5. Whether the employee was apprised of the consequences of actions in failing to perform, obey or continuing to engage in defiant behavior?
6. Whether the employee was given the opportunity to correct the action or conduct?

At the center of the Authority's case, is the highest concern for customer care and the adverse impact Grievant's conduct could possibly have on the Authority's operations. This is the critical issue in the instant case that must be addressed. It is not enough and no excuse to say no harm has been done. Grievant holds a position of great responsibility and importance. There can be little question that she is charged with the need to be alert and responsive to requests for her services.

Arbitrators expect to see that progressive discipline is used in an effort to correct behavior of employees who do not follow the rules or continually fail to meet performance expectations. The Authority has established a formal system of progressive discipline to correct unacceptable work behavior as shown in the Manual of Instruction - Operating Rules and Discipline Code. (Joint exhibit #2) Arbitrators also prefer to see evidence of precise warnings that continued refusals to follow rules and procedures will result in discipline or discharge. The Arbitrator finds that Grievant was given prior notice that disciplinary action and possibly, discharge, was forthcoming for failing to properly follow the employer's work rules with the penalties imposed following the February 12, 2009 infractions. (See Joint exhibit #9)

Acknowledging Grievant's use of her cell phone while operating her bus and her failure to secure the wheelchair on March 9, 2009, the Union focuses their arguments on the other charges of rule violations upon which the Authority relied in discharging her, specifically, the fare handling violations. The Union

argues there was nothing for Grievant to personally gain by her actions regarding the manner in which she handled her fares and transfers other than possibly good will and appreciation of her passengers. However, as the Authority responds, she is also expected to ensure that her employer does not lose needed revenue. The Authority argues that work rules are derived to also safeguard expected revenues.

It is quite clear that Grievant, Jewel Walker, violated some of the employer's operating rules on at least two occasions during a one-month period. Although the Union recognizes Grievant's mistakes and argues that discharge is too severe under all the facts and circumstances in the case, these repeated mistakes are very serious in nature. Grievant has shown by her repeated behavior to disregard serious work rules such as the prohibition of cell phone use while operating a bus and the service requirement compliance of the Americans with Disabilities Act. Therefore, how can the Authority ever trust that further disciplinary action will effectively correct her behavior regarding compliance with the established work rules? This appears to be the heart of the issue argued in this case.

Review of the arbitral decisions cited by the Union does support much of their arguments in the matters of the Authority's charges of fare handling violations. However, the Arbitrator notes that the Authority's decision was based upon Grievant's overall performance record that reflects a pattern of unwillingness to conform to critical work rules that serve to ensure the safe operation of her bus. Even after counseling and discipline regarding rule violations in failing to comply with the service requirement provisions of the Americans with Disabilities Act and cell phone use while operating driving a bus on February 12, 2009, she committed second infractions of both rules again on March 9, 2009. The Authority has clearly demonstrated that Grievant's conduct in the workplace reflects that she refuses to follow directions and to respond positively to counseling and lesser discipline.

Although the Arbitrator agrees with the Union that there is no definitive proof that Grievant is a thief or that she defrauded her employer, the issue of the 1-Ride passes that she obtained and handed out is still a little murky. She testified that she was unaware of any rules regarding the use of 1-Ride passes by operators. During the first meeting that took place on March 18, 2009, Grievant stated that she purchased them from the Salvation Army. However, at the second investigatory meeting held on March 19, 2009, she presented a different explanation of how she obtained the passes. Upon learning that Mr. Tommie Hill had contacted the Salvation Army personnel and found they do not sell 1-Ride passes to anyone, she stated that she bought the passes at a "group" meeting at the Salvation Army location from a man she had met while working there as an abuse counselor. She testified at the hearing and the Union argues in the post-hearing brief, that she was not aware of any rules or restrictions regarding their use by operators.

Though the Authority was unable to show that she used the 1-Ride passes for her personal gain, it is clear that she did not obtain the passes from a legitimate source. The Authority argues that she is expected to do what is best for her employer to ensure that revenue is not lost. Even if her intentions may have been good, she should have consulted her employer about how the passes were obtained before she decided to start handing them out to her passengers; particularly when she should have been mindful of the disciplinary action for

performance problems that she had received in the previous month.

The Arbitrator wishes to address another matter raised by the Union during the hearing. The Authority made clear through testimony of witnesses during the hearing, as well as the opening statement and post-hearing brief, that Grievant's prior disciplinary record was considered in determining mitigation of the decision to discharge. During the hearing, the Arbitrator noted the Union's objection to submitting Joint exhibits #12 and #13 showing the Grievant's previous disciplinary history. The parties' Agreement in Section 1.12, Management – Discipline, paragraph (e) states: "Warning slips may remain in an employee's file but shall not be considered after twelve (12) months for the purpose of progressive discipline, but may be considered in reviewing the employee's record only for determining whether moderation of discipline is warranted." Additionally, the Authority's Manual of Instruction - Operating Rules and Discipline Code, Section 5, Discipline/Personal Conduct emphasizes the consideration of an employee's work history in determining penalties. That provision reads as follows:

The code should not be considered a hard and fast limitation upon supervisory personnel in dealing with disciplinary matters. Penalties for multiple violations occurring at the time or similar time will be dealt with only after a review by the Director of Transportation. Whenever disciplinary action is contemplated, the supervisor should consider the employee's total record and work history before determining the penalty. It is most important that supervisors review the entire work record and determine whether a particular violation is an isolated instance in an otherwise good work record or is indicative of a continuing pattern of violations. (Underlining mine.)

The Arbitrator cannot find that the Authority acted improperly by considering Grievant's disciplinary history for the purpose of progressive discipline. In accordance with paragraph (e), it is appropriate for the Authority to consider Grievant's work record to determine mitigation or modification of the penalty determination once the decision has been made to discharge. In this case, as the Authority has presented, Grievant's "spotty" work record demonstrates a pattern of resistance to employer's rules and policies. Certainly, it would be proper, if the Union would attempt to show that Grievant had a good work record, if that were the case, to persuade the Arbitrator to mitigate a discharge. Thus, the Authority should be able to use a poor record to demonstrate that the penalty it chose was warranted.

Grievant's previous disciplinary history also supports the Authority's claim that it has utilized progressive discipline in an effort to correct her work performance problems. She was placed on notice, specifically in the disciplinary actions taken for the incidents occurring on February 12, 2009. In fact, Grievant was forewarned in the Warning Slip dated February 19, 2009, imposing a suspension for violation of Rule 6.8 and Rule 2.5 and a suspension for the cell phone violation of Policy Bulletin 43-01, that; "Further violations may result in suspension or discharge." (Joint exhibit #9) Yet, in less than one month, Grievant committed the same infractions that occurred during her shift on February 12, 2009. The Arbitrator fails to understand how the infractions committed by the Grievant on February 12, 2009 and again on March 9, 2009

are attributable to lack of skill, training or knowledge. Rather they appear to be attributable to carelessness or neglect. Nevertheless, despite the Authority's attempt to use discipline to correct her behavior on February 19, 2009, the Grievant showed no improvement or learning regarding safe operation of the bus and compliance with the ADA service provisions.

In summary, Grievant has not demonstrated that previously administered disciplinary action has effectively changed her behavior toward her employer's work rules; particularly those rules regarding the safe operation of her assigned bus. Arbitrators are expected to weigh mitigating factors when viewing whether an employee is guilty of serious wrongdoing and whether the penalty is too severe. I find no mitigating factors in this case to prove that the Authority did not have just cause to discharge the Grievant. In discipline and discharge cases, arbitrators have generally acknowledged that they should not substitute their judgment for that of management as to the appropriate penalty unless they can find that the penalty imposed was arbitrary, capricious, or discriminatory. Arbitrator Whitley P. McCoy succinctly established this limitation in reducing disciplinary action in his often cited vintage case, *Stockham Pipe Fittings Co.*, 1 LA 160 (McCoy, 1945). Thus, an arbitrator may set aside employee disciplinary action when just cause does not prevail. In the instant case, I find no reason to set aside the Authority's discharge decision.

DECISION AND AWARD

After full and deliberate consideration of the evidence and arguments presented by the parties, I find that just cause does prevail in this case. The Authority (Employer) has presented persuasive evidence that would clearly demonstrate just cause to terminate the grievant, Jewel Walker. These conclusions are based upon standards outlined above and stated in the accompanying discussion and analysis of the facts and circumstances in this case. I, therefore, make the following award:

The grievance is denied.



Robert F. Wayland
Labor Arbitrator

November 3, 2009