

**MICHAEL B. HUSTON**  
LABOR ARBITRATOR  
Federal Mediation and Conciliation Service  
Voluntary Labor Panel

In the matter of arbitration between:

**KANSAS CITY AREA  
TRANSPORTATION AUTHORITY**

**and**

**AMALGAMATED TRANSIT UNION,  
Local 1287**

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**APPEARANCES**

Jeffrey M. Place, Attorney  
Spencer, Fane, Britt & Browne

Scott A Raisher, Attorney  
Jolley, Walsh, Hurley, Raisher & Aubrey

On May 8, 2009, the arbitrator conducted an arbitration hearing on the premises of the Kansas City Area Transit Authority between the above-captioned parties. All relevant and material evidence was accepted by the arbitrator. The arbitrator led a panel of three arbitrators, with one "partisan" arbitrator selected by each party. The arbitrator selected by the Union was Union Local President William Wilson; the arbitrator elected by the KCATA was KCATA's Director of Finance Michael Graham. Briefs were received in timely fashion by all three arbitrators in the second week of July. The arbitrator then allowed until the end of the month of July for the partisan arbitrators to provide their comments, both independent and in response to questions by the arbitrator. On August 1, Arbitrator Huston closed the record on this case. There was no sentiment expressed by the partisan arbitrators to see the arbitrament or to sign it before it was to be issued by the neutral arbitrator, so Arbitrator Huston considered the response he received from the partisan arbitrators and then wrote and issued the decision. The parties stipulated at the hearing that the issue was properly before the arbitrator. The Grievant's name is Leonard Frazier.

**ISSUE**

The parties agreed at the hearing that this is a just-cause for discipline case and otherwise left it

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to the arbitrator to draft the exact statement of issue. In their closing briefs they submitted their own statements of issue which differed only slightly. The arbitrator chooses to use the KCATA's statement of issue because it is slightly more focused than the ATU's. It is: "Did the Authority have just cause to discipline Grievant based on the events of August 8, 2008; and if not, what shall be the remedy?"

#### CONTRACT LANGUAGE

##### Section 1.12 (b) Management - Discipline

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 of 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 of whether he has been discharged or disciplined for just cause...

(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)

...[N]o 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...in cases of alleged misappropriation of fares or other property, and within ten (10) working days...in other cases, after notice of the alleged offense has come to the attention of management...

#### RULES

There are three rules relevant to any consideration of this case:

2. Intentional spoiling or work product or restricting output.

First offense: Suspend three (3) days.

Second offense: Discharge.

18. Sleeping on duty.

First offense: Suspend three days.

Second offense: Discharge.

31. Productivity and workmanship below standard or deliberately restricting output.

First offense: Reprimand (warning notice).

Second offense: Suspend three (3) days.

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Third offense: Suspend five (5) days.

Fourth offense: Discharge.

### FACTS

The KCATA operates a public bus service in the Kansas City metropolitan area. Its Vehicle Maintenance Department is responsible for inspecting, repairing, cleaning, and fueling the approximately three hundred busses that the Authority operates, and assigning ("marking out") busses to operators on a daily basis.

The Grievant is a member of the Amalgamated Transit Union (ATU), as are most of the hourly employees who work in the Vehicle Maintenance Department. Grievant's position is known as Farebox Prober. He is the only Prober on regular duty from 3 a.m. to 11 a.m. During the first part of his shift, he refills or replaces depleted sleeves of blank fare cards inside the electronic farebox on busses parked in the KCATA's bus barn. In order to do this, he enters the bus barn where the busses are lined up in about thirty-five rows of eight busses each. The busses are parked with their passenger doors opened in most cases, but in some cases the busses are properly parked with their doors closed. Grievant starts at one end and walks down the aisles between the busses, with a cart of filled farebox card sleeves and stacks of farebox cards. As he comes to each bus's door (whether open or not), he inspects the window in the farebox to determine whether there is a sufficiency of farebox cards in the farebox. If there is an insufficiency (under the rule at the time, that would be 50% or less of visible window), then it is Grievant's responsibility to either fill the farebox with card stock or replace the farebox sleeve of cards with a full one. In the process of this Grievant is expected to fan the farebox cards to assure that they are relatively free of the particulate paper matter that might have resulted during the manufacturer's paper cutting process. This particular part of Grievant's duties had been discussed with him several times in the months prior to the events of August 8 because there had been several farebox failures and management wanted to find the cause and its cure. Management felt that it was possible that the particulate paper might be at least a partial cause of the farebox failures to eject cards to customers properly. In order to perform his refilling/replacement, Grievant would step up onto the bus, unlock the farebox, perform the refilling or replacing, relock the farebox, and step off the bus. Then he would proceed to the next bus. This process would continue until Grievant had gone through the entire bus barn (which could hold about 280 busses, but which might hold several fewer because of busses being in the repair shop on premises). If a bus were to enter the barn while or after Grievant was performing his farecard functions and it were to be parked in a place where Grievant had already done his farecard duties, then Grievant was not responsible for going back to inspect for that bus's farecard sufficiency. Also, occasionally, a bus would be marked out without its having been in the bus barn (usually because it was returned to duty from the repair shop shortly before its being marked out).

When Grievant had completed his fare box inspection, he was expected to go to the small office on the farebox island to await the Brinks truck, which would pick up two safes containing the proceeds from the previous day's fare collections. The farebox island is on a raised concrete pad

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located about one hundred yards from the bus barn. It stands on the bus entrance to the property. When the Brinks truck arrived (usually about 6 a.m.), it was Grievant's responsibility to load each of two safes onto the truck using a forklift. Grievant's lunch period started about 6:30 a.m.. After his lunch, he had other duties which are not relevant to this arbitration case.

Farebox failures had become a hot issue in management because they represent a significant cost to the Authority. If a farebox does not properly issue a fare card (which can be used as a transfer or as an electronic receipt containing a customer's change [since the drivers do not handle the cash]), then the Authority must give free rides to all the customers on that bus for as long as the farebox failure persists. There had been an increase in farebox failures in the months prior to August 8 and management was very concerned that appropriate steps be taken to reduce the failures.

According to Maintenance Superintendent Walt Woodward, during the weeks prior to August 8, he had heard from more than one source (whose names he could not recall at the hearing) that some of the problem with farebox failures lay with Grievant because "he wasn't doing his job." Woodward did not consult with Grievant about doing his job or sleeping on the job prior to August 8. He had spoken to Grievant about fanning and riffling the farecards before putting them in the farebox, and when he did, Grievant demonstrated how he was doing it, to Woodward's satisfaction. Woodward had also noted for the Grievant the importance of making sure that the fareboxes are locked and that the card stock is at a sufficient level.

On August 8, Woodward, who is not usually present on the premises during the entirety of Grievant's shift, arrived at the terminal at about 4:15 a.m. At least part of his reason for appearing so early was his concern to attempt to find some cause for the farebox failures, including checking up on Grievant to see if he was performing his job properly. After stopping by his office, Woodward went to the farebox island. As he approached, he saw Grievant in a comfortable position in a chair with his legs propped up on a box and with his head bent forward over his chest. He was wearing a "hoodie" which provided shadow for his eyes. Woodward could not see Grievant's eyes. After watching Grievant in this position for "five to ten minutes," Woodward called Supervisor Mark Stambaugh, who was in the main building, to come and witness the Grievant, apparently sleeping. Shortly thereafter, Stambaugh arrived and Woodward asked him whether he noticed anything unusual. Stambaugh went to the farebox island and saw Grievant in the same posture that Woodward had seen. Stambaugh's written report (constructed on the same day as the incident) was that he received the phone call about 4:15 a.m. After Stambaugh's observation of Grievant, Woodward called Union Steward Gary Wilson to come to the farebox island. When Wilson arrived, Woodward said that Grievant was asleep. Wilson did not step up to the door to look in, but stepped into a line of sight of the Grievant, about twenty feet away. Like Woodward and Stambaugh, Wilson saw Grievant with his head down and not moving. Woodward asked Wilson whether he agreed that Grievant was sleeping. Wilson said, "It don't look good. It kinda looks that way." About this time Stambaugh left to go back to other duties and Woodward asked Wilson whether he wanted to wake Grievant up. Wilson declined. So, Woodward stepped towards Grievant. Before Woodward could say anything, Grievant looked up at him. The exact order in which things were spoken at that time is in doubt as all the witnesses had slightly different recollections. The substance of what was said is not at such odds, though. Woodward said that they had seen Grievant sleeping. Grievant said that he had not been sleeping and said something about his work being done.

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Woodward then told Wilson that he would write up a report about this incident and Wilson said words to the effect that "you'll do what you have to do."

Woodward then decided to check the fareboxes of the remaining outgoing busses to see whether the card stock in them indicated that Grievant had, in fact, done his job. Woodward then kept a detailed record of the busses leaving while he was monitoring them. His log shows that he observed fifty busses depart. He logged each one according to its bus number. He noted the level of the farecards in the farebox (percentage of the window filled) for forty of the busses. He logged none of the levels as below 50%. Of the first thirty busses to leave the barn (headed for the road), he found that three of them had a farecard level of 50%. Of the last twenty of the busses, he found five of them to have farecard levels of 50% and one of them had its farebox lid unlocked. In no instance of the forty that he logged did Woodward find the farecard level full. He noted two of them at 75% and one at 70%; all the rest were at 60%.

The Authority uses a DVR Video Snapshot security camera to record happenings at the farebox island. The camera is located outside the office and at a height. It does not take a streaming video, but takes periodic snapshots. (The existence of this camera is common knowledge.)

Later in the morning of August 8, Woodward approached the technician whose responsibilities included management of the recording files to provide him with snapshots of the farebox island area for the period during which Grievant was on-duty. What he received was a group of eight snapshots. The first three are taken within a period totaling seven seconds and show Grievant moving equipment into (apparently) the office at 3:08 a.m. The next one shows Grievant (apparently) leaving the farebox island at a few seconds after 3:11 a.m. The next three show Grievant returning to the office between 3:54:12 and 3:54:20. The final picture was taken at 4:29:26 and it shows Woodward facing away from the closed door to the office on the farebox island.

Woodward presented Grievant with a first warning at 11:00 a.m. on the morning of August 8. In the section headed "Describe in detail," Woodward inserted, "This warning ticket is being given to [Grievant] concerning a violation of Rules of Conduct #2-Intentional spoiling of work product or restricting output. You will be suspended 8/12, 8/13, 8/14."

Accompanying the warning was a memo to Grievant which says:

"During the week of August 4, 2008, three inspections of card stock cassettes were made as busses left KCATA during a.m. pull outs. These inspections were prompted by nine occurrences of cassettes running out of card stock while busses were in service on August 2, 2008. The inspection of cassettes made on August 8, 2008 resulted in finding several cassettes at the 50% or less level. You had been instructed as recently as August 4, 5, and 7, 2008 to be sure all cassettes are filled above the 50% level.

You have failed to perform your duties as required by intentionally restricting work output. This was exemplified by finding you asleep on August 8, 2008 at 4:20 a.m. at the fare box island. When awakened by myself, Mr. Stambaugh, and Gary Wilson at 4:50., you stated that you had completed all your work prior to 4:20 a.m.

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As a result of these findings and your conscience [sic] decision to not perform your job as instructed, has earned you a written warning for Rule 2 (intentionally restricting output). You will be given a three day suspension without pay. The suspension days will be August 12, 13, and 14, 2008. If any future inspections of card cassettes indicate your failure to perform your duties, it will result in your termination." [The arbitrator notes that the card stack insufficiencies of August 2 were not the result of Grievant's errors, since he was not present on the day in question.]

Grievant filed his grievance on the same day as the incident and his receiving his warning notice with the suspension. It says (in relevant part):

"I received a warning ticket on 8-8-08 for Rule #2 with a three day suspension. I feel the warning ticket is unjust and seek to have it removed from my file and to be made whole any lost monies (Maint Plus, suspension days, overtime, etc.)."

#### DISCUSSION AND OPINION

As the Employer presented this case, it is one of two different but connected offenses: the performance issue of Grievant's performance or non-performance of his duties in the bus barn, and the issue of sleeping on the job. The Union, fully cognizant of the Employer's efforts to show that there was a motive for Grievant to hurry through his job in the bus barn, i.e. to get to the farebox island so that he could sleep, strongly objects to any findings of guilt based on a separate charge of sleeping on the job. There is a rule against sleeping on the job, Rule No. 18. Woodward and Grievant were both aware of the existence of this rule. The rule was not cited on the warning ticket that Woodward issued to Grievant nor was it cited or mentioned in the accompanying memorandum.

Woodward's memorandum clearly suggests that the sleeping that he thought he observed was a motive for hurrying through the job. Two weeks after the incident, during the processing of the grievance, Woodward continued his insistence that he was prosecuting the case because of the performance issue in the bus barn. He wrote a memorandum to Steward Phillip Scherer in which he said:

"My decision to issue [Grievant's] warning ticket for a Rule 2 violation was made as a result of my findings during the gate check. It was obvious that [Grievant] had not completed his duties as required. Falling asleep in considered a voluntary action made by one. He didn't accidentally fall asleep. Therefore, I determined that he intentionally spoiled his work assignment."

In this, Woodward is clearly implying that if the card stocks at the gate had been satisfactory, he would not have issued the discipline. The issue of sleeping on the job only arises tangentially in Woodward's effort to justify his use of Rule 2, rather than Rule 31, i.e., Woodward was trying to present a reason for justifying a charge that Grievant was guilty of "intentional" rather than "deliberate" restricting of output, with the former being the more severe charge.

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At the hearing, the Employer's representative said off-handedly that the Employer attempts to keep the listed charges to a minimum to avoid Union complaints that the Employer is "piling the charges on" when it lists multiple offenses. Nonetheless, the Employer has the obligation to communicate the nature of its dissatisfaction to employees whom it disciplines.

In its brief, the Employer contends that it was perfectly obvious that sleeping on the job was an integral part of the charges against Grievant; that sleeping on the job was a lesser, included offense. However, the Rules of Conduct do not suggest that it is a lesser offense; the penalties for both Rule 2 and Rule 18 are a three-day suspension for the first offense and discharge for the second. Sleeping on the job can be an included offense (included within the meaning of Rule 2), but as this case clearly demonstrates, that is not necessarily so. If Woodward's inspection of the fareboxes at the gate had revealed the Grievant had satisfactorily performed his bus barn duties, Grievant would not have been guilty of a Rule 2 violation regardless of his state of somnolence or wakefulness later. Nonetheless, if he had been caught sleeping in the farebox island office, he would have been guilty of a Rule 18 violation. For these reasons, the arbitrator finds this line of reasoning unpersuasive.

The Company's Rules of Conduct provide penalties (in many cases progressive) for each offense. If an employee has a first offense on his record for a violation of one rule, it certainly appears that said penalty advances the penalty to the second step for any subsequent violation of that rule, but not of any other. This makes it especially important that the Employer notify an employee of which rule(s) he has infringed, so that the employee will know what repeated behavior will yield a further progression in the penalty. It makes no sense to have a progressive disciplinary scheme if the employees remain uninformed of where they are in the progression.

In this case, Grievant was notified that he had violated Rule 2. There was no mention of a violation of Rule 18. This makes Grievant aware that a repeat violation of Rule 2 will result in progression under that rule (discharge, in this case). It does not put him on notice that a violation of Rule 18 in the future will also yield a progression on the disciplinary chart for that violation. Without that notice, the discipline which was meted out does not include any violation Rule 18.

So far, this analysis has been constrained to the nature of the message sent to the Grievant in meting out to him discipline for what happened on August 8. However, the arbitrator believes that the evidence presented to him strongly suggests that Woodward did not intend to charge Grievant with a sleeping-on-the-job infraction. The testimony of the witnesses indicates that when Woodward concluded his brief talk to Grievant at the farebox island on August 8, he said that discipline would ensue. He did not specify the charge or the penalty, but it seems very likely that he intended at that moment to discipline Grievant for sleeping on the job. However, it appears that after his inspection of the fareboxes at the exit gate, he changed his mind and decided to charge Grievant with the Rule 2 violation (though he might also have been considering a Rule 31 violation). Woodward is an intelligent man and he certainly had not forgotten about having spent a half hour of his work time that morning "catching" Grievant asleep on the job. However, judging from what Woodward wrote that morning and two weeks later, he decided to forgive the sleeping offense in favor of prosecuting what he had perceived as the Rule 2 violation. Simply put, if Woodward's view of falling asleep in that it is voluntary and, hence, intentional, then certainly his own standard would say that not listing Rule 18 as an offense was voluntary and intentional. It is not clear why Woodward did this. It could be that

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Woodward thought that catching Grievant asleep was trivial compared to catching him having done a poor job stocking the farecards and having mistakenly not noticed that a farebox lid was unlocked. The Rule 2 violation occurred (as much as it did) in the bus barn before the "sleeping incident". Whatever Woodward's reason for not listing the Rule 18 violation, it appears to have been his intent to do so. At the hearing, Woodward was insistent that Grievant was suspended for sleeping on the job (a statement to which he, under cross examination, appended a qualification that he meant "in addition to intentionally restricting his work output". So, apparently, he had again changed his mind about what was disciplinarily important in Grievant's behavior on August 8.

In any case, the evidence strongly suggests that Woodward's intention was not to charge Grievant with a Rule 18 violation, and the evidence is utterly clear that he did not, i.e. that he gave Grievant due notice of the charge and of the repercussions for a further violation of Rule 18.

Since Grievant was not charged with a Rule 18 offense, it is not important to sift through the evidence about Grievant's state of consciousness between 4:20 and 4:50 a.m. on August 8. That Grievant was observed in a relaxed and unmoving position is sufficient for the purposes of the rest of this analysis.

The performance issue in this case is another matter. The DVR Video Snapshots clearly indicate that Grievant was at the farebox island until 3:11 and returned by 3:54. Grievant does not dispute the accuracy of that representation. That means that Grievant was away from the farebox island for about forty-three minutes. The undisputed evidence is that Grievant walked to the bus barn, performed at least some of his duties, and walked back to the farebox island during that time. Woodward, who has not performed the job himself, testified that in his opinion, the job could not be done satisfactorily in forty-five to fifty minutes. Later Woodward testified that a person who does that job in forty-five to fifty minutes "is moving" if he is doing a complete job. Grievant, whose job it is, said that he does complete the job in about that amount of time. Tom Hernandez, who has performed the job occasionally said that he has done the job in fifty-five minutes and that he expects that someone who performs it regularly could do it faster. The arbitrator thinks that the evidence shows that Grievant performed his job swiftly, but not necessarily poorly or too swiftly, based on these observations.

The condition of the farebox card sleeves and the unlocked farebox lid is the heart of this case. Woodward performed his inspection of the last fifty busses alone. There is no question of his competence to do so, though one might wonder whether his perception of the stock levels might have been colored a little by his unhappiness with Grievant for his presumed sleeping earlier that morning. Nonetheless, taking Woodward's word at face value, there were eight busses of the final fifty with their card stacks at the 50% level and one farebox unlocked. None of the busses had a card level below 50% and none had full card sleeves (if we assume that none of the ten which did not have their card levels noted were full). The 50% level is the cusp of insufficiency. Grievant's instructions were to refill or replace the card sleeve if the level is at 50% or less. Woodward admitted that reasonable minds might disagree about whether a card level is at 50% by merely looking at the window in the farebox.

There are three problems with basing discipline on Woodward's observation. First, his estimation that the card stock was at 50% is a "judgment call" and Grievant's judgment might



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vary from his by only a very small amount in order to justify his not filling or replacing the card sleeve. Second, in order to find Grievant guilty of the offense of intentionally restricting his work output, it is necessary to find that Grievant was responsible for the busses that Woodward inspected. In order to find that Grievant bore the total responsibility, Woodward would need to know that each of the busses that he inspected was available to be checked by Grievant in the bus barn. Woodward could not vouch for each of the busses being housed in the barn that night. Some of them may have been in the maintenance shop and some of them may have spent only a portion of the night in the bus barn, having been put there after Grievant had inspected the aisle on which the bus ultimately parked. If Woodward had determined whether any of the busses he inspected which had card stock at the 50% level, were in maintenance at some time during the evening, then their condition at the point of inspection would have been better evidence that they were available for Grievant's duties in the bus barn. The third problem deals with how representative the sampling of the busses was. Using a representative sampling to conclude that Grievant's whole job was unsatisfactory depends on the sampling being truly representative, unless the number of errors in the sampling would be too many errors for the entire group (for which there was no evidence). The fact that the error rate became worse (three of the first thirty busses and five of the last twenty) indicates that there might be some explanation for these errors which has nothing to do with the Grievant.

In spite of these problems with Woodward's observations, the arbitrator believes there is sufficient evidence to justify disciplinary communication to the Grievant that Woodward has observed a performance deficiency in Grievant's work product. However, it is hardly sufficient evidence to justify a charge under a rarely used rule prohibiting intentional restriction of output, the most serious charge of its kind. Instead, the arbitrator determines that it justifies a first step warning under Rule 31, "productivity and workmanship below standard or deliberately restricting output." This rule is a lesser and included rule in Rule 2. The first offense for a violation of Rule 31 is "Reprimand (warning notice)." Hence, the arbitrator reduces the discipline to a reprimand for a Rule 31 offense. Hence, the Grievant is to be made whole for his loss of work for the three days he was suspended. This make whole remedy is not to include payment for any overtime that the Grievant have worked while on his suspension.

The arbitrator retains jurisdiction for the sole purpose of assisting the parties in their determination of what the proper computation of the remedy. The arbitrator retains this jurisdiction for a period of six weeks from the date of this arbitration decision.

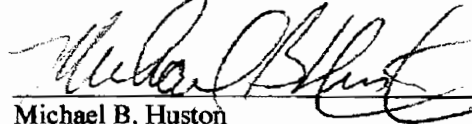
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## AWARD

The arbitrator sustains discipline at the first offense level for a violation of Rule 31. This is a reprimand (written warning). This reduces the discipline from a three-day suspension. The arbitrator orders the KCATA to make Grievant whole for regular time wages and fringe benefits that Grievant lost for his being suspended. The arbitrator retains jurisdiction for a period of six weeks from the date of this decision for the purpose of assisting the parties to calculate the back award, if they should need such assistance.

September 20, 2009



Michael B. Huston

Labor Arbitrator, and Chairman of panel of  
three Arbitrators, including company-appointed  
Michael Graham and union-appointed William  
Wilson