

ARBITRATION OPINION AND AWARD

BEFORE

ROBERT B. MOBERLY, ARBITRATOR

IN THE MATTER BETWEEN

FIRST TRANSIT SERVICES, INC.  
Company

FMCS Case No. 81116-00674-8  
Duncan Discharge

and

AMALGAMATED TRANSIT UNION  
LOCAL 1287  
Union

REPRESENTATIVES

For the Company: Gerard A. McInnis, Esq., Jackson Lewis LLP

For the Union: Scott A. Raisher, Esq., Jolley, Walsh, Hurley & Raisher, P.C.

The parties requested the undersigned to serve as Arbitrator in the above dispute, after the Arbitrator who originally heard the case did not issue an arbitration award in a timely manner. Counsel submitted the arbitration record to the undersigned, including the hearing transcript, exhibits and post-hearing briefs, all of which were received on February 10, 2009.

### ISSUES

The parties stipulated that the issues are "whether the grievant was discharged for cause; if not, what shall the remedy be."

### FACTS

The Employer provides fixed route and door-to-door bus service in Johnson County, Kansas. The County owns the buses, and First Group provides the drivers out of its terminal in Olathe, Kansas. The Union represents drivers who work at that facility. First Group took over the operation from Laidlaw Transit in October 2007.

Grievant Louis Duncan was employed as a driver in December 1994. He became a Union representative and Executive Board member in 1997. Prior to his termination, he had not been disciplined during his tenure with the Company.

On September 25, 2007, Dan Hall, Company Operations Manager, sent Grievant a notice terminating his employment for the following reason:

"On September 7, 2007, drivecam was activated and when it was reviewed on September 20, 2007 it revealed inappropriate conduct between you and a passenger, which is in violation of Laidlaw's Passenger Interaction Policy.

Laidlaw's Passenger Interaction Policy states, "To preserve the safety, security and trust of our passengers and to minimize claims of harassment or the appearance of impropriety, your interactions with passengers must be free from personal relationships or conversations or conduct that could be construed as harassment, abuse or otherwise inappropriate."

As a result of your actions on September 7, 2007, your employment is terminated as of this date."

On the same day, Grievant filed a grievance stating that his discharge was not for just cause, and asking to be reinstated and made whole for any lost monies and seniority. The matter has proceeded through the grievance procedure to arbitration.

Grievant's termination arose out of events occurring on September 7, 2007. Grievant reported for duty at about 3:40 p.m. and was scheduled to work until about 7:30 p.m. He was driving on a route he had worked for a least a year. The route had several scheduled stops, and occasionally a driver may be running "hot," meaning that the driver is ahead of schedule. Duncan testified that under such circumstances drivers are allowed to pull over and stop in order to get back on schedule.

Grievant's girlfriend was riding the bus to Johnson Community College to attend a class, and was the only passenger on the bus. Grievant testified that he realized that he was "running hot" ahead of schedule; that in order to adjust his time and get back on schedule, he pulled over and stopped; that when stopping like that he would get up and check to make sure passengers left nothing on the bus; that as he got out of his seat, his girlfriend asked why they stopped; that he explained because he was "running hot;" that she then said "Come, let me tell you something - a joke - about running hot;" that he leaned down and she whispered the joke in his ear; that he then returned to his seat and said once or twice, "Oh, that was a good one;" and that his comment referred to the joke. Grievant then proceeded on his route and eventually returned to base.

These events were recorded on the bus's drive-cam video and downloaded onto the Company's computer server. One of the road supervisors viewed the video on September 20 and brought it to the attention of General Manager Donnie Aulgur. Aulgur testified that she reviewed the video, and concluded that it showed Grievant kissing his girlfriend. She testified that there is some sound with the video; that she could not understand what the girlfriend was saying; that Grievant was bent over her; that they were rocking back and forth and sideways in unison; that she could hear a soft murmur or moan, followed by a

smack, a "pop, like they have just kissed, a smacking sound;" that Grievant then said "Humm, that was good, really good;" and that she could see the passenger wiping her mouth. Aulgur concluded that Grievant's conduct was sexual in nature, a serious violation of the Passenger Interaction Policy, and sufficiently serious to warrant his termination.

**PERTINENT CONTRACT PROVISIONS**

**ARTICLE 7  
MANAGEMENT RIGHTS**

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

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

...

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

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**ARTICLE 17  
DISCIPLINE**

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

First Violation: Verbal warning with counseling by Operations Manager

- Second Violation: Written warning notice
- Third Violation: Suspension up to, but not exceeding, five (5) days. Lesser discipline may be imposed at sole discretion of the Company.
- Fourth Violation: Dismissal from employment with the Company, may be lesser discipline at sole discretion of the Company.

**PERTINENT POLICY**

**PASSENGER INTERACTION POLICY**

Laidlaw Transit Services, Inc., is committed to treating our passengers with respect, dignity and courtesy. This commitment and the nature of our business require that the relationship between Laidlaw's employees and passengers be strictly professional at all times. To preserve the safety, security and trust of our passengers and to minimize claims of harassment or the appearance of impropriety, your interactions with passengers must be free from personal relationships or conversations or conduct that could be construed as harassment, abuse or otherwise inappropriate.

Examples of prohibited conduct which will result in disciplinary action, up to and including immediate termination, include:

- Sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature;
- Threats, abuse, coercion, or intimidation towards a passenger or customer;
- Use of profane, abusive or insulting language.

The reasons listed for discipline and discharge above are examples only and are not meant to, and do not include, all reasons for which an employee may be disciplined or discharged.

**POSITION OF THE COMPANY**

The Company contends that Grievant engaged in serious misconduct and the decision to terminate his employment was entirely reasonable; that Grievant violated the Passenger Interaction Policy; that the policy reasonably prohibits all sexual conduct with passengers, without exceptions; that Grievant did, in fact, kiss a passenger; that contrary to

Grievant's denial, the video demonstrates that he kissed a passenger while he was on duty on his bus; that Grievant's failure to offer an explanation until the arbitration indicates it is fabricated; that Grievant's explanation is not supported by the video; that the fact that the passenger was Grievant's girlfriend provides no excuse, since the policy does not make exceptions for personal relationships; that the fact that no one else was present and that no one complained is no excuse; and that the decision to discharge Grievant was appropriate and not excessive, unreasonable or an abuse of management discretion. In conclusion, the Company contends that Grievant violated the Passenger Interaction Policy by kissing his girlfriend while on duty and in a Company bus parked in a public area; that Grievant was properly discharged for his misconduct; and that therefore the grievance should be denied.

#### **POSITION OF THE UNION**

The Union argues that the Company failed to prove Grievant and his girlfriend were kissing, since the videotape does not actually show them kissing and both denied they were kissing; that even assuming they kissed, a single kiss did not violate the Passenger Interaction Policy, since it was not conduct that was offensive, harassment, abusive, or otherwise inappropriate; that no one else was present at the time; that the Company never advised employees that such conduct would result in discharge; that the Company's failure to follow progressive discipline requires that the discharge be set aside; that even assuming Grievant violated policy, the discipline under Section 17.3 of the CBA should have been a verbal warning rather than a summary discharge; that given Grievant's length of service and work record, discharge was excessive and unreasonably severe; that Ms. Aulgur choose not to consider Grievant's long service and good work record because she believed them to be irrelevant; that the Company violated Grievant's "Due Process" rights;

and that Grievant's discharge was inconsistent with how the Company has treated other employees for more serious offenses.

#### DISCUSSION

The parties have stipulated that the issues are "whether the Grievant was discharged for cause, and if not, what shall the remedy be." The initial disagreement is on the question of whether or not Grievant kissed his girlfriend on the Company bus on working time. The Company relies primarily on videotape of the incident, which was introduced into the record.

The Arbitrator has reviewed the videotape of the incident several times. It is not exactly crystal clear. The entire incident, according to the timing on the videotape, was about 20 seconds. It begins with Grievant leaning toward his girlfriend, with his rear toward the camera and no clear view of either of their faces. There is a smacking sound that could be construed as a kiss, but it is hardly conclusive. Grievant then starts back to his driver's seat and states "that's a good one" two or three times. This statement could be construed as meaning, as Ms. Aulgur contends, that it was a good kiss; on the other hand, it could be construed as meaning, as Grievant contends, that the girlfriend told a good story. There are some other sounds, but it would be overstating the case to say, as contended by Ms. Aulgur, that they might be "moans." She also stated that the sounds might be murmurs. Even this could not be stated with certainty by the Arbitrator, and even if it could, murmurs might just as well be construed as a part of a story rather than part of a kissing scenario. It also overstates the case to say that the individuals were rocking back and forth in unison, as also contended by Aulgur. Near the end of the videotape, the girlfriend is stretching her hands forward (not toward Grievant) as Grievant has approached his driver's seat. Such

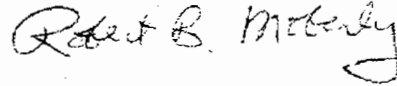
stretching also could not be construed as meaning they had kissed. At the end of the videotape, the girlfriend's hand is on her mouth and the Grievant is back at his seat, but it cannot be said with any degree of certainty that she was "wiping" her mouth, or even if she was wiping her mouth that it was related to a kiss.

In short, in the opinion of the Arbitrator, the videotape does not prove, by a preponderance of the evidence, that Grievant and his girlfriend kissed on the bus. Since the Company had the burden of proving by such evidence that a kiss actually occurred, and it did not do so, the grievance must be sustained. Since the kiss was given as the reason for the discharge, and it was not proven, the Arbitrator finds that the Company did not have just cause for the discharge of Grievant. Accordingly, the Company shall reinstate Grievant and make him whole, including back pay, lost benefits and seniority, less any unemployment compensation received or earnings from other employment since his discharge. The Arbitrator shall retain jurisdiction to decide any disputes concerning the interpretation or application of this Award.



**AWARD**

The Company violated Section 7.1 of the collective bargaining agreement by discharging Grievant Louis Duncan without cause. Accordingly, the Company shall reinstate Grievant and make him whole, including back pay, lost benefits and seniority, less any unemployment compensation received or earnings from other employment since his discharge. The Arbitrator shall retain jurisdiction to decide any disputes concerning the interpretation or application of this Award.



Robert B. Moberly, Arbitrator  
March 22, 2009