



following witnesses were sworn and gave testimony:

For Kansas City Area  
Transit Authority<sup>1</sup>

Michael Kuhler  
Plant Management  
Supervisor

Matt Chrisman  
Plant Management  
Supervisor

Anthony Smiley  
Transit Master  
Administrator

For Local 1287, Amalgamated  
Transit Union<sup>2</sup>

Marcus Smith, Grievant

William Wilson, President  
Local 1287

The parties pursuant to their practice audio recorded the hearing, and provided the undersigned with a CD of the recording. Neither party sought any other means of making a record, or the subpoena of any witnesses. Both parties had the opportunity to fully present testimony and evidence in support of their cases, and to cross-examine the witnesses.

As mutually agreed at the hearing, both parties filed closing briefs by mail. Upon receipt of the briefs the matter was deemed fully submitted as of October 23.

#### Background

KCATA provides mass transit service to the general public through a fleet of approximately 300 buses. ATU Local 1287 represents most of the Authority's hourly employees. The parties are signatories to a labor agreement ("agreement") executed on March 19, 2008 and expiring on December 31, 2010, submitted as Joint Exhibit 1.<sup>3</sup>

The Grievant, Mr. Marcus Smith, began working for KCATA in March 2001, as a bus operator. From the summer of 2001 until the date of his discharge (May 29, 2009) he occupied the job position of Class A Serviceworker in the Facilities Maintenance Department. Mr. Smith's job duties included

<sup>1</sup> Hereinafter "KCATA" or "Employer"

<sup>2</sup> Hereinafter "ATU" or "Union"

<sup>3</sup> The parties agreed to and submitted Joint Exhibits numbered 1 through 34.

performance of "janitorial and other routine maintenance work in the buildings and on the grounds of KCATA's main campus, in downtown Kansas City, Missouri, and also at the bus shelters, restrooms, park-and-ride lots, and bus benches KCATA maintains throughout its system."<sup>4</sup> The Class A Serviceworkers performed the off-site janitorial work on a three-month rotating basis. At the time he was discharged, the Grievant's work day was scheduled to begin at 9:30 a.m., with a staff meeting that included the Class A Serviceworkers and Mike Kuhler, a Plant Management Supervisor.<sup>5</sup>

Mr. Smith's discharge was grieved on May 29, 2009. (Jt Ex 15) The grievance was denied at Step III on June 12, 2009. (Jt Ex 18)

The parties on August 3, 2009 notified the undersigned of selection (from a list provided by the FMCS) to serve on the Arbitration Board to decide this case.

#### The Issue

The parties agreed at hearing that this matter is arbitrable, there were no procedural questions or defects, and that the issue to be decided is:

Whether, under all the facts and circumstances was the discharge of Grievant Marcus Smith for just cause; if not, what shall be the appropriate remedy.

#### Relevant Provisions of the Labor Agreement and the Discipline Code

##### Labor Agreement

##### 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 . . . . to relieve employees from duty because of lack of available work or for other legitimate reasons, . . . . 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.

(b) The Union further recognizes that the power of

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<sup>4</sup> KCATA Br. at p. 2

<sup>5</sup> Mr. Kuhler is one of 2 Plant Management Supervisors; he is primarily responsible for supervision of the Class A Serviceworkers.

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

. . .  
(c) The Union covenants that its members shall render faithful service in their respective positions and will cooperate with the management in the efficient operation of the business

Section 1.13. Grievances

Any employee to whom this Agreement is applicable and who claims to be aggrieved by any action of the Authority or its officials, whether occasioned by discharge, suspension or other discipline . . . . may proceed in accordance with the following grievance procedure . . . .

4. If the Director's decision is not satisfactory, then the dispute may be referred to arbitration by the Union delivering a notice of intent to arbitrate . . . .

The matter may be submitted to regular or expedited arbitration. Expedited arbitration must be by mutual consent.

. . . .

7. When a case is submitted to an Arbitration Board, the Authority and the employee involved (or his representative) shall jointly present a statement in writing of the specific issue or issues to be decided, based on the record . . . and the Arbitration Board shall confine its decision to the issue or issues so presented; and no such Arbitration Board shall be authorized to deal with wages, hours of service or working condition controversies of a general nature, but shall be limited to considering and acting upon individual grievances as hereinbefore provided.

*KCATA Rules and Regulations - Discipline Code<sup>6</sup>*

"This discipline code standardizes types of penalties for various violations of rules . . .

Penalties for multiple violations occurring at the same time will be dealt with at the discretion of the supervisory personnel.

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<sup>6</sup> Joint Exhibit 2, beginning at page 12

Whenever disciplinary action is contemplated, the supervisor will consider the employee's total record or other violations of Transit Division rules before determining the penalty. . . .

"General Rules of Conduct

The Rules are applicable to all Maintenance and Purchasing Department Employees . . .

. . .

2. Intentional spoiling of work product or restricting output

First offense: Suspend three (3) days

Second offense: Discharge

. . .

4. Stealing from the Authority or Transit Division

. . .

First offense: Discharge

. . .

10. Making untrue, dishonest, or misleading reports

First offense: Suspend three (3) days

Second offense: Discharge

. . .

27. Padding overtime or making dishonest time reports

First offense: Discharge

28. Taking more time than allotted for scheduled break or meal periods

First offense: Reprimand (warning notice)

. . .

Fourth offense: Discharge

. . .

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

First offense: Reprimand (warning notice)

. . .

Fourth offense: Discharge

. . .

Summary of Positions of the Parties

KCATA

The Authority submits that this case is one of theft by Mr. Smith of over 29 hours of working time, over a two month period, for which he claimed and received pay as an hourly compensated employee. The Grievant was, from mid-2001 until the time of his discharge, a Class A Serviceworker in the Employer's Facilities Maintenance Department. His daily work duties involved off-site janitorial work (after

cleaning an area on the Authority's main campus) on one of four shelter cleaning routes, which were rotated among the workers in the Class A Serviceworker position. On May 22, 2009, Mr. Kuhler (Grievant's supervisor) attempted to reach Mr. Smith, seeking people to for a voluntary overtime assignment. Mr. Kulher tried reaching Mr. Smith on his Authority-provided radio, and found through the Transit Master system (GPS) that the Grievant's truck was shown as "inactive" meaning that it had been shut off for at least 15 minutes. Subsequent attempts to reach Mr. Smith by the Authority-issued pager, and via Mr. Smith's personal cell phone were unsuccessful. At that point, the Grievant had been unreachable for 30 to 40 minutes; Mr. Kuhler "became concerned about the Grievant's safety, or the possibility that the Grievant's truck had broken down."<sup>7</sup> Through use of the Transit Master system, Mr. Kuhler determined that the Grievant's truck was in a residential area beyond the Grievant's assigned route for the day. Mr. Kuhler went to that location, and at about 1:05 p.m. found the truck parked in the driveway of a home at 4801 North 45<sup>th</sup> Terrace. Suspecting that Mr. Smith might be engaged in non-work related activities on work time, Mr. Kuhler asked that a road supervisor come to the location, to serve as a second witness. At about 1:40 p.m., Road Supervisor Bell took photos of the truck; Mr. Kuhler knocked on the door of the residence, and Mr. Smith came to the door. Mr. Smith explained that he had experienced a bout of diarrhea, and had come to this private residence to clean up and wash his clothes.<sup>8</sup>

Mr. Kuhler inquired about whether Mr. Smith was then well, and told him that they would need to return to KCATA headquarters to discuss the matter further. No Union representative was available to attend an investigatory interview on that Friday afternoon, thus the Grievant was suspended pending an investigation, and a plan to reconvene the following week.

After the suspension, Mr. Kuhler and Matthew Chrisman (Plant Management Supervisor) asked Transit Master Administrator Smiley to examine the GPS records for Mr. Smith's assigned KCATA truck to determine each location, other than KCATA headquarters, where Grievant's truck had

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<sup>7</sup> KCATA Br, at p.6

<sup>8</sup> "But for a few minor differences, both Smith's and Kuhler's recollection of what occurred at the residence are consistent." ATU Br at p. 8.

been parked for "any extended period of time"<sup>9</sup> during May 2009. After an investigatory interview with Mr. Smith on May 27, additional GPS records were produced for April 2009. The Employer determined that during 15 days between April 1, 2009 and May 22, 2009, Grievant spent more than 29 hours pursuing personal matters (not including travel time from and to his assigned work routes) in those activities.

And on some of the days in question, the Grievant had been paid overtime on other janitorial tasks. He had charged overtime for days that his actual pursuit of KCATA assignments was for less than the 8 hours at straight pay.

Based on his violation of Rules 2, 10, 27, and 28 of the KCATA Discipline Code, and because of Mr. Smith's numerous off-route incidents while on paid time during April and May 2009, the discharge was warranted.

*ATU Local 1287*

The facts leading to Mr. Smith's discharge are not substantially in dispute.

In view of the seriousness of the penalty of discharge, the Authority has the heavy burden of proving that Mr. Smith is guilty of the offense charged, and that he in fact intended to "steal time" or to commit "fraud". Even though Mr. Smith was "off route" or pursuing personal matters during the work day, that does not prove that he intended to "steal time." Mr. Smith was, in early 2009, enduring stress from marriage problems, including deprivation of contact with his two-year old daughter. As a result of the stress and anxiety, Mr. Smith also began suffering physical problems, and began taking medication for treatment of high blood pressure. This medication, according to evidence presented (Jt Ex 9) has possible side effects including diarrhea and stomach cramps. Mr. Smith was a dedicated and capable employee with nearly nine years of service, with no prior discipline or criticism of his work as a Class A Serviceworker. Under the circumstances, those years of service and good work record are important variables that should have been considered in imposing a penalty that was not excessive and unreasonably severe.

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<sup>9</sup> KCATA Br, at p. 6

## Findings and Discussion

Ruling on a discharge grievance arbitration is a major responsibility, never easy, not a pleasant task, and it cannot be done with less than due care and careful consideration.

The parties do not significantly dispute the facts in this case. What this matter boils down to is when the Grievant spent 29 documented hours pursuing personal matters while on KCATA paid time, did he know and/or should he have known and understood that what he was doing was wrong, or that his activities would be considered by his employer to be wrongful conduct, and whether that conduct justified the Grievant's discharge.

### *Just Cause*

"The central concept permeating discipline and discharge arbitration is 'just cause.'"<sup>10</sup> The Agreement between the parties herein prohibits the Employer from discharging employees without just cause.

While just cause is not easily or simply defined, it may be represented in "shorthand" as whether the arbitrator finds the employee was treated fairly, after consideration of all the facts.<sup>11</sup> The two principles central to just cause, applied by arbitrators, are due process and progressive discipline.<sup>12</sup>

### *The Investigation*

To satisfy due process, arbitrators typically require that an employer conduct a full, unbiased, and fair investigation into the facts of any charge that may lead to discipline.<sup>13</sup> The standard must be that an investigation determines the truth, at a standard in the realm of preponderance of the evidence.<sup>14</sup> Counsel for ATU and the Grievant appropriately questions the fact that KCATA representatives had certain investigatory results prior to the May 27 meeting that were not shared with the Union,

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<sup>10</sup> Discipline and Discharge in Arbitration, Brand, ed.; ABA Section on Labor & Employment Law, BNA Books, 1998, at 29.

<sup>11</sup> *Id.*, at p. 29

<sup>12</sup> *Id.*, at p. 29

<sup>13</sup> *Id.*, at p. 39

<sup>14</sup> How Arbitration Works, 6<sup>th</sup> ed., Elkouri & Elkouri, Ruben, ed., at pp. 949-950



and that the discharge decision was announced at the May 29 meeting before additional GPS information was shared. While there is seldom justification for playing "hide the ball" when a job is at issue, there is nothing in the evidence presented in this case and nothing argued by counsel for the parties that would suggest the investigation was flawed to such an extent as to affect the proceeding herein.

#### *Grievant's Knowledge of the Rules*

Arbitrators consistently agree that employers have the right to make and enforce reasonable work rules that are related to the employer's business objective.<sup>15</sup> An aspect of the reasonableness of work rules involves the determination that a rule must "clearly and unambiguously establish the scope of prohibited conduct as well as the consequences of violations . . ."<sup>16</sup> The parties presented, as Joint Exhibit 3, a copy of Mr. Smith's acknowledgment of receipt of KCATA's Maintenance and Purchasing Department Rules and Regulations and Discipline Code. Thus, while the claim is made on behalf of Mr. Smith that he did not realize that what he was doing was wrong, he did have notice that his employer prohibited his conduct.

#### *Progressive Discipline*

Even in the absence of a specified progressive discipline system in a labor contract, "arbitrators have generally asserted that an employee must be given some warning that his behavior is unacceptable, and some opportunity to conform his behavior to the employer's legitimate expectation."<sup>17</sup> The expected result of progressive discipline is that "the employee will recognize he has engaged in unacceptable conduct and will correct his future behavior."<sup>18</sup> However, it's universally understood that in instances of particularly serious actions by an employee, such as theft of company property<sup>19</sup> progressive discipline is not required. Thus, a decision must be made as to whether Mr. Smith's behavior was of such a serious nature that the corrective action of progressive discipline would not be required.

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<sup>15</sup> Discipline and Discharge in Arbitration, at pp. 72, 73

<sup>16</sup> *Id.*, at p. 79

<sup>17</sup> *Id.*, at p. 30

<sup>18</sup> *Id.*, at p. 57

<sup>19</sup> See Discipline and Discharge in Arbitration, *Id.*, at p. 68

It's clear the Grievant's pursuit of personal activities while on the clock was tantamount to theft of company property. Grievant was paid by the hour to pursue his assignments. At the pay rate of \$20.00 per hour, Grievant was paid approximately \$580.00 for the twenty-nine hours<sup>20</sup> (between April 1 and May 22) the Authority's records showed that Grievant was pursuing personal activities. This is neither minor, nor de minimis.<sup>21</sup> Had the "off route" time been limited to May 22, the day that Grievant may well have been physically indisposed, this would be a very different case. Stopping at a friend's home to clean up after experiencing diarrhea without calling in sick shows, at best, the lack of good judgment. However, shopping for a motorcycle while on paid time is not even in the realm of the mere lack of good judgment. Rather, it establishes that the Grievant deliberately used paid work time to pursue personal matters.

The fact that Mr. Smith was an hourly paid employee is significant, and runs contrary to the Union position that since he was completing his work, and received no complaints about his work, he thus did not understand that what he was doing was wrong. Mr. Smith was required to clock in and out, and he had a precise time-constrained work day, as illustrated by Joint Exhibit 5. He was eligible for overtime, and ironically, his supervisor seeking Mr. Smith for a voluntary overtime assignment precipitated finding him "off route" on May 22. It is not reasonable to conclude that Mr. Smith, an articulate person with eight years service in an hourly paid position, would have not understood the basic precept of working while on the clock.

#### *The Elements of Theft*

Among the most serious forms of employee conduct are acts of dishonesty.<sup>22</sup> In cases of alleged theft (examples include "'grazing' in retail stores, recording and seeking wages for time not worked . . ."<sup>23</sup>) arbitrators frequently use a four-part test, one aspect of which is the issue of the grievant's "intent to deprive the owner of its property

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<sup>20</sup> KCATA Brief, at p. 1

<sup>21</sup> Even when the loss to the employer is arguably de minimis, arbitrators often take the position that "theft is theft" regardless of the value of one onion, or a 58 cent can of juice, in that theft itself is inimical to employer-employee trust. (See Discipline and Discharge in Arbitration, Id., p. 227)

<sup>22</sup> Discipline and Discharge in Arbitration, Id., at p. 225

<sup>23</sup> Id., p.225-226

permanently".<sup>24</sup> A finding of knowing and willful action satisfies the requisite intent, and it can be "either express or implied and may be established through the employee's actions or words."<sup>25</sup> Clearly, the Grievant repeatedly deprived KCATA of paid time when the Grievant had, in fact, not worked. This was not accidental, or unintentional. I find that Mr. Smith knew what he was doing, and must be held to understand that repeatedly pursuing personal matters while on KCATA paid time was wrongful. As referenced in Discipline and Discharge in Arbitration, in falsification cases, "the employer generally must show that the employee intentionally engaged in the misconduct in question."<sup>26</sup> In this case, KCATA has met that burden.

#### *Grievant's Treatment Compared to Treatment of other Employees*

"It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner . . ."<sup>27</sup> However, where "a reasonable basis for variations in penalties does exist, variations will be permitted notwithstanding the charge of disparate treatment."<sup>28</sup> In this case, the evidence and the brief on behalf of the Employer clearly demonstrate the differentiation in facts and circumstances between this case and others to which references were made.

#### *Grievant's Length of Service and Work Record*

Quite uniformly, arbitrators weigh the long service record of an employee in his or her favor when considering the appropriateness of a discharge. Arbitrators may assess the mitigation of long service depending upon the type of misconduct at issue. "It is well established that except for certain egregious misconduct, such as dishonesty, or other violations involving moral turpitude . . . length of service is a proper consideration when assessing the appropriateness of the penalty of discharge."<sup>29</sup> The

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<sup>24</sup> Id., p. 226; the facts herein meet the requirements of the other three factors

<sup>25</sup> Id., p. 226

<sup>26</sup> Id., p. 233

<sup>27</sup> How Arbitration Works, 6<sup>th</sup> ed., Elkouri & Elkouri, Ruben, ed., at p. 995

<sup>28</sup> Id. p. 996

<sup>29</sup> Prazich, 112 LA 700, at 704, as quoted in How Arbitration Works, 6<sup>th</sup> ed. Elkouri & Elkouri, Ruben, ed. at p. 989 (emphasis mine)

necessity for well-placed trust is particularly acute when the employer has employees in outside, unsupervised work positions, like the one held by the Grievant. Further, an employer, like KCATA, that relies upon funding from tax-supported sources has a duty to the taxpayers to be certain that the fair day's work for a fair day's pay exchange takes place.

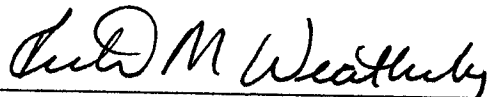
Summary and Conclusion

If I could support a logical, plausible way to allow Mr. Smith to return as an employee of KCATA that would still be fair to the employer, I would. In this case, a humanitarian argument could be made against the enforcement of what has been called "industrial capital punishment", particularly at a time when the economy makes finding other employment difficult. However, the employer is entitled to an employee's honest day's work in exchange for a day's pay. Thus, the discharge must be upheld.

Decision and Award

The grievance regarding the discharge of Mr. Marcus Smith is denied, and the discharge is upheld.

Respectfully submitted,



Ruth M. Weatherly J.D., MBA  
Neutral Member of the  
Arbitration Board

dated: 11/23/09

Concur:

Dissent:

\_\_\_\_\_

\_\_\_\_\_

dated: \_\_\_\_\_

dated: \_\_\_\_\_

(attached : Certification of Mailing)

CERTIFICATION OF MAILING

I hereby certify that on the 23rd day of November, 2009, I served a copy of the foregoing Opinion and Award on the following parties, by mailing to each, by USPS mail with appropriate postage prepaid.

*RW*

\_\_\_\_\_  
Ruth M. Weatherly

Jeffrey M. Place, Atty.  
Spencer Fane Britt &  
Browne  
Suite 700 40 Corp. Woods  
9401 Indian Creek Pkwy  
Overland Park, Kansas 66210

Scott A. Raisher, Atty.  
Jolley Walsh Hurley Raisher &  
Aubrey  
204 W. Linwood Blvd.  
Kansas City, Missouri 64111

Fern Kohler  
Deputy General Manager  
KCATA  
1350 E. 17<sup>th</sup> St.  
Kansas City, Missouri 64108

William Wilson  
President  
ATU Local 1287  
6320 Manchester Ave.  
Suite 46  
Kansas City, Missouri 64133