

**In the Matter of LOCAL 1287, AMALGAMATED TRANSIT UNION, On Behalf of
ROY W. ELMORE, and KANSAS CITY AREA TRANSPORTATION AUTHORITY
(Grievance No. TR09-2009; FMCS No. 090520-02280-A)**

Date of Decision: December 11, 2009

Arbitrators: John M. Gradwohl, Neutral Arbitrator
William L. Wilson, ATU Local 1287 Arbitrator
Fern Kohler, KCATA Arbitrator

Appearances: For ATU Local 1287 and Roy Elmore:

Scott A. Raisher, Attorney
Jolley Walsh Hurley Raisher & Aubry, P.C.
Kansas City, Missouri

For KCATA:

Jeffrey M. Place, Attorney
Spencer Fane Britt & Browne LLP
Overland Park, Kansas

Issues:

The issues in this arbitration are whether Kansas City Area Transportation Authority discharged Roy Elmore for "just cause" in accordance with the collective bargaining agreement between ATU Local 1287 and KCATA and, if not, what is an appropriate remedy?

Relevant Portions of the Agreement:

The "just cause" standard for imposition of discipline or discharge of an employee by KCATA is contained in Section 1.12(b), on page 12 of the collective bargaining agreement. The arbitration authority and procedure is spelled out in Section 1.13, Grievances, on pages 14-19. The parties agreed that procedurally the grievance is properly before the Arbitration Board for decision.

Statement of Facts:

Roy Elmore was an Operator for KCATA with a total experience of just under 12 years of part-time work. His bus struck a pedestrian at 13th and Holmes Streets after 5:00 p.m. on

Monday, March 9, 2009. Initially, the accident was considered by the KCATA investigating Supervisor as “unavoidable” from Elmore’s standpoint in that the pedestrian had walked into the bus. No police citation was issued. The next day, when views from cameras on the bus were examined, the incident was formally classified by the Superintendent of Transportation as a major “avoidable” accident for which Elmore was assessed 24 points.

A copy of the applicable Accident Remediation and Discipline Policy is attached to this decision. Accidents are first determined to be either “unavoidable” or “avoidable.” For remediation and disciplinary purposes, “avoidable” accidents are further classified as “minor,” “moderate,” or “major.” That classification is performed by a Safety Officer considering “operator conduct, injuries and property damage.” The accident of March 9th was determined to be a “major accident.” Elmore was assessed 24 points under the Policy which made him “subject to discharge.”

A meeting concerning the situation was held on Thursday, March 12, 2009. At the outset of the meeting, the Manager of Safety and Instruction advised Elmore:

After going through the accident report and then the subsequent video that we pulled, and investigation of the accident report, it became clear to everyone that it was terribly unsafe, inattentive operation of the bus, resulting in a critical, severe injury to a pedestrian who had no defense against the bus. It was determined to be a major accident resulting in 24 points. Based on that 24 point determination and severity and type of accident, this is notification that your employment with KCATA is terminated. If you’d like, I could show you the video for the event as it happened. For the life of us, we couldn’t figure out how you didn’t see the pedestrian, when she was obviously there, she was walking in the crosswalk on a green light. It’s your responsibility, as a professional operator, to not put yourself in a position where you do damage to people that are walking, or you do damage at all. Do you have anything you’d like to say? I’m sorry the event happened and I know you are too, and I’m not saying you did it on purpose, but it happened and we just can’t have someone have a second chance to run into a pedestrian. One time is it.

A copy of the discharge notification issued on March 12th is attached to this decision. A grievance seeking Elmore’s make-whole reinstatement was filed the next day, March 13th. The grievance was denied by KCATA on March 25, 2009, following a third-step hearing on March 24th.

A strongly contested, full-day arbitration hearing was held on September 24, 2009. Comprehensive post-hearing Briefs were submitted by both parties on November 20. The entire record has been carefully reviewed in making the determinations and conclusions of the Arbitrators.

Position of KCATA:

The Employer assumed the burden of factual proof of the matters constituting the basis for its having discharged Elmore. It meticulously analyzed the accident on March 9, 2009. It stressed that but for a passenger's shouting "watch out," the consequences of Elmore's inattentiveness would have been tremendously more serious. It stated that KCATA's instructions and policies are necessary, reasonable, and consistently enforced in the interests of safety required of a major public transportation system. After detailing the seriousness of the accident, it argued that the KCATA Director of Transportation was entirely correct in concluding in his third-step reply that: "KCATA cannot extend a second chance under these circumstances. KCATA bus operators hold especially safety sensitive jobs, and KCATA cannot afford to employ inattentive drivers. As a public transit agency operating large city buses on busy streets, we should not wait until someone is killed before terminating a careless or inattentive driver." It noted that KCATA has applied its Accident Remediation and Discipline Policy evenhandedly. It argued, further, that there is no evidence or reason to mitigate the discharge decision; no "blind spot" could have interfered with Elmore's operation of the bus and, additionally, if there had been a "blind spot," a professional driver should have taken that into consideration in order to maintain proper vision at all times; the pedestrian's conduct does not excuse the accident or provide grounds for reinstatement; the failure of the police to issue a citation does not affect the reasonable determination based upon the clear video and other evidence relied upon by KCATA—nor does the initial determination of the KCATA investigating Supervisor; although Elmore's "overall service record is a positive one," his "recent performance record is significantly less impressive"; other arbitrators have denied grievances in similar situations; and the reinstatement of inattentive operators by other employers has sometimes led to disastrous consequences.

Position of ATU Local 1287 and Roy Elmore:

The Union advanced a two-prong position in seeking Elmore's reinstatement with back pay and a restoration of contractual benefits. (1) The Union termed the accident "unfortunate and regrettable" and stressed that Elmore stated honestly from the outset that he did not see the pedestrian crossing the street. With respect to the Accident Remediation and Discipline Policy, it argued: "The Authority has failed to prove that Elmore's accident was 'avoidable,' that the accident was 'major,' that Elmore was 'reckless,' or that Elmore violated any authority policy, safety rules or common safety practices." Additionally, it contended that Elmore was not inattentive or distracted, performed the appropriate scanning functions in executing the left turn, was possibly prevented from observing the pedestrian due to "blind spots," and did not make dishonest or misleading reports. Further, the Union cautioned against excessive reliance upon the video records because the cameras do not see what the driver sees and the driver cannot review the video records frame by frame with hindsight in a leisurely manner. (2) Even if Elmore were properly assessed 24 points under the Accident Remediation and Discipline Policy, KCATA did not have "just cause" to discharge Elmore under the collective bargaining agreement. This argument proceeded along two lines. First,

factually Elmore did everything properly in executing the left turn but, unfortunately, simply did not see the pedestrian prior to impact; factors relied upon as “aggravating factors” were unsubstantiated and incorrect; and KCATA improperly and unreasonably relied upon considerations of potential liability to the exclusion of what had actually occurred. Second, procedurally, KCATA did not properly investigate the accident and relied exclusively upon an interpretation of only its own incomplete records; the Authority did not take into consideration all of the circumstances of the accident in determining whether or not there was “just cause” to discharge Elmore; KCATA did not give the Union and Elmore an opportunity to effectively respond before making a determination to discharge Elmore; KCATA did not, and refused to, consider the level of discipline warranted as required by the “just cause” provision; and no meaningful consideration was given to information favorable to Elmore.

Discussion:

1. General Principles.

The responsibility of the Arbitration Board is to interpret and apply the Agreement between the parties on the basis of the evidence presented at the arbitration hearing. The Statement of Facts, above, does not purport to recite or summarize the entire evidentiary record, nor do the statements of the positions of the parties contain all of the forceful arguments presented at the arbitration hearing and in lengthy post-hearing Briefs and their accompanying documents. All of the evidence and arguments has been considered in arriving at the general findings and conclusions of this decision.

The primary contractual provision relevant to this arbitration states that: “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. . . .” The Revised Accident Remediation and Discipline Policy attached to this decision is applicable to Elmore’s accident on March 9, 2009.

The Accident Remediation and Discipline Policy assesses 24 points for an avoidable major accident which renders an employee “subject to discharge.” The assessment of 24 points does not automatically result in the discharge of an employee but makes the employee “subject to discharge” in accordance with the “just cause” provision of the collective bargaining agreement. The Accident Remediation and Discipline Policy does not call for “strict liability” of a bus operator for all major accidents but, rather, relies upon an additional determination whether or not there is “just cause” for discharge, taking into account all of the circumstances normally considered in making “just cause” discharge decisions.

2. Accident Remediation and Discipline Policy.

KCATA properly classified the accident as a major avoidable accident and assessed Elmore 24 points. He failed to observe a pedestrian crossing 13th Street whom he should reasonably have seen. The contemporaneous video shows the pedestrian was clearly visible at 17:40:09 stepping into the street. At that time, the bus had not begun its left turn and had not yet passed over the pedestrian crosswalk on Holmes Street. Two seconds later, at 17:40:11, the pedestrian is clearly walking across 13th Street and the bus is just beginning to turn left. Roughly four more seconds elapse before the left front of the bus struck the pedestrian. By that time, the pedestrian was more than half-way across 13th Street. Elmore has stated at all times that he did not see the pedestrian prior to impact. The evidence convincingly establishes that Elmore failed to see what he properly should have seen. The evidence does not clearly show why Elmore did not see what was plainly there for him to have seen. The evidence does convincingly show that the accident was “avoidable” and should reasonably have been avoided by Elmore on March 9th.

The accident was properly classified as a “major accident” under the Accident Remediation and Discipline Policy. The location and force of the impact coupled with the seriousness of the injury and damage to the bus reasonably constituted a “major accident” in the circumstances.

3. “Just Cause” For Discharge.

Having been assessed 24 points under the Accident Remediation and Discipline Policy, Elmore was “subject to discharge.” The essence of KCATA’s determination to discharge Elmore in this instance was that all major avoidable accidents involving a bus striking a pedestrian call for discharge of the operator. That is exactly what the Manager of Safety and Instruction said on March 12th: “. . . we just can’t have someone have a second chance to run into a pedestrian. One time is it.” The evidence clearly shows that this reasoning prompted Elmore’s discharge.

The contractual “just cause” requirement means that KCATA take into its consideration when imposing discharge all of the reasonably available information relevant to that decision. KCATA made a determination prior to the meeting on March 12th to discharge Elmore. That decision was made not on the basis of all reasonably available information but for the single reason that no bus operator should have a second chance.

Had KCATA considered the matter more thoroughly and taken into account all of the reasonably available information, there is a substantial possibility that it would have tempered the disciplinary discharge to a lesser but appropriate level. KCATA indicated at the March 12th meeting that because of the severity of the accident, there was nothing the Union or Elmore could present that would affect its decision to discharge Elmore (Joint Exhibit 11, page 2).

There is no convincing indication in the evidence why Elmore did not observe the pedestrian crossing the street. He appears to have engaged in a proper lookout and to have scanned the area from right to left and back to the right. The pedestrian was there to be seen by Elmore in sufficient time to avoid an accident, without regard to when she may have stepped into the street or whether or not she was within the crosswalk. KCATA, however, attributed reasons for Elmore's failure to observe the pedestrian which equally were not corroborated either by evidence available to it before making the decision that discharge was the only proper remedy in this situation or in its evidence presented at the arbitration hearing.

Contemporaneous statements of the pedestrian to the investigating Police Officer might have helped explain the circumstances affecting the accident and its severity. There was no attempt of KCATA to secure the police report prior to the discharge. The police report and physical circumstances of the bus striking a pedestrian might not be relevant to the obligation of a bus operator to observe a pedestrian under the Accident Remediation and Discipline Policy but it could be considered in assessing responsibility under a "just cause" for discharge requirement. So, too, might the record that Elmore was considered a "good operator" even after having had a minor accident turning a corner—and after Elmore had several years of outstanding part-time operator performance before that.

From the mass of other decisional references submitted with the post-hearing Briefs of the parties, different assessments with respect to "just cause" for discharge might have been made by various decision makers on the basis of the entire circumstances involved in the situation. The Union and Elmore were entitled under the applicable collective bargaining agreement to have that determination made from all reasonably available evidence. Instead, KCATA determined from its own initial information that it had no alternative but to end Elmore's employment by the Agency.

On the evidentiary record presented, KCATA did not comply with the contractual "just cause" standard in discharging Elmore. Although Elmore was "subject to discharge" under the Accident Remediation and Discipline Policy, the grievance should be sustained to the extent that KCATA misapplied the contractual "just cause" requirement.

4. Remedy.

It is appropriate that Roy Elmore be reinstated as an employee of KCATA with seniority but without back pay at the beginning of the next pay period following the date of this Award. This Award is final except that the Arbitration Board retains jurisdiction for the sole purpose of determining any issues which may arise with respect to the implementation of this Award.

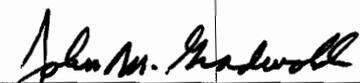
AWARD:

For the foregoing reasons, and based upon the evidence presented, the grievance is

sustained. Arbitrator Fern Kohler strongly disagrees with, and does not join in, the Award. Arbitrator William L. Wilson joins in issuance of the Award, although he disagrees with the determinations that the accident was properly classified as a "major avoidable" accident under the Accident Remediation and Discipline Policy.

KCATA is directed to reinstate Roy Elmore as an employee with seniority but without back pay at the beginning of the next pay period following the date of this Award. This Award is final except that the Arbitration Board retains jurisdiction for the sole purpose of determining any issues which may arise with respect to the implementation of this Award.

For the Arbitration Board:

By 
John M. Gradwohl, Neutral Arbitrator

Attachments:

1. Transportation Department Policy Bulletin No 1-95, Revised Accident Remediation and Discipline Policy, Effective Date: August 1, 1995 (Joint Exhibit No. 3).
2. Kansas City Area Transportation Authority Transportation Department Warning Slip, dated March 12, 2009 (Joint Exhibit 12).