IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	OPINION
	)	
AMALGAMATED TRANSIT UNION	)	AND
	)	
"LOCAL 1384" OR "THE UNION"	)	AWARD
	)	
AND	)	
	)	
KITSAP TRANSIT	)	
	)	Ygancio Espinoza
	)	Grievant
"THE COMPANY" OR "THE EMPLOYER"	)	

HEARING: October 28-29, 2008
December 16, 2008
Bremerton, WA

HEARING CLOSED: February 9, 2009

ARBITRATOR: Timothy D.W. Williams
2700 Fourth Ave., Suite 305
Seattle, WA 98121

REPRESENTING THE EMPLOYER:
Shannon Phillips, Attorney
Rob Riner, Client Representative

REPRESENTING THE UNION:
Rita C. DiIenno, President/BA ATU
Ygnacio Espinoza, Grievant

APPEARING AS WITNESSES FOR THE EMPLOYER:

Dominick Loiacano, Supervisor
Michael Brady, Chicos Towing
John Hall, Dispatcher
Jeff Dimmen, Maintenance
Elton D. Olsen, Operations Supervisor
Colby A. Swanson, Director of Maintenance
Rob Riner, education Coordinator
Jeff Cartwright, Human Resources Director

APPEARING AS WITNESSES FOR THE UNION:

Ygnacio Espinoza, Grievant
Rita C. DiIenno, President/BA ATU 1384
Ellen Gustafson, Director of ACCESS
James Nicholas, Driver Kitsap Transit
Joann Merrill, Bus Passenger
Yvonne Ward, Shop Steward
Larry Carbaugh, Driver Kitsap Transit
Mark Dawson, Driver Kitsap Transit

EXHIBITS

Joint

1. Agreement by and between Kitsap Transit and Evergreen State Division No. 1384 of the Amalgamated Transit Union AFL-CIO Routed Service) 2/16/05 – 2/15/08

Union

1. Memorandum, 12/17/92
2. Coach Accident Damage Estimate, 1/24/02
3. Letter of Determination, Larry Carbaugh, 6/20/08
4. E-mail from Cartwright to Ward, 3/20/08
5. Customer Comment Record, 5/1/07
6. Accident Report, 5/1/97
7. Phone record.
8. Notes, handwritten, dated 2/26/08
9. Memo, 2/8/02
10. Letter to Espinoza, 7/24/08
11. Radio Log, 1/17/07
12. Map of area of accident
13. E-mail Joann Merrill, 2/19/08
14. Incident Report, 7/3/08

15. Espinoza Personnel File
16. Weather Station History, 1/16/08
17. Icy Roads WS DOT
18. E-mail Jack Freer, 2/22/08
19. Transcript of Safety Committee, 7/16/08
20. Weather graph 1/14 and 1/15/08

Employer

1. Agreement by and between Kitsap Transit and Evergreen State Division No. 1384 of the Amalgamated Transit Union AFL-CIO (Routed Service,) 2/16/05 – 2/15/08
2. Kitsap Transit – Positive Performance Counseling System
3. Kitsap Transit Operator Handbook – "The Greenbook"
4. Kitsap Transit – Accident Investigation Procedures
5. A Guide to Determine Motor Vehicle Accident Preventability
6. Kitsap Transit – Safety Committee Policy & Procedures
7. National Safety Council Accident Review Returns!
8. Kitsap Transit Supervisor's Accident Report, 1/16/08
9. Coach Accident Damage Estimate, 1/16/08
10. WSTIP Kitsap Transit Event Report, 1/16/08
11. Supplemental Report, 1/16/08
12. Supervisors' Daily Report, 1/16/08
13. Dispatch Daily Log, 1/16/08
14. Email from John Chesbrough to Jeff Cartwright, 1/18/08
15. Memorandum from John Hall to Jeff Cartwright, 1/21/08
16. Memorandum from Joyce Matsumoto to Ygnacio Espinoza, 1/22/08
17. Memorandum to Ygnacio Espinoza, 1/29/08
18. Email from Ygnacio Espinoza to Joyce Matsumoto, 1/31/08
19. Memorandum - KT Safety Committee Meeting, 2/14/08
20. Memorandum KT Safety Committee Meeting, 2/21/08
21. Kitsap Transit operations Safety Report (2/14/94 – 2/6/08)
22. Memorandum from Jeff Cartwright to Ygnacio Espinoza, 2/21/08
23. Meeting Minutes of KT Safety Committee Meeting, 2/14/08
24. Handwritten Notes, 2/22/08
25. Espinoza Questions, 2/26/08
26. Form – Meeting re Espinoza's Preventable Accident, 2/26/08
27. Type-written Notes to Jeff from CS?? 3/12/08
28. Letter to Ygnacio Espinoza from Jeff Cartwright, 2/27/08
29. Email string between Jeff Cartwright and Kittie Ward, 3/14/08
30. Letter to Ygnacio Espinoza from Rob Riner, 3/19/08
31. Email from Kittie Ward to Ellen Gustafson "Espinoza Grievance of Supervision Notice Dated 2/27/08", 3/26/08
32. Letter to Kitty Ward from Ellen Gustafson, 4/8/08

33. Letter to Rita DiIenno from Richard Hayes, 5/15/08
34. PERC Request for Grievance Arbitration, 6/5/08
35. RWR Accidents
36. Safety Committee Meeting Minutes, February 8, 2007.
37. Accident Appeal Procedures
38. Employer Record of Safety Committee since 2000
39. Negotiation Minutes, 2/11/99
40. 1/1/2005 – 11/7/2008 % of Preventables
41. Accident Report, 5/1/97

BACKGROUND

Kitsap Transit (hereafter "the Company" and ATU Local 1384 (hereafter "Local 1384" or "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy Williams in Bremerton, Washington on October 28, 29 and December 16, 2008.

At the hearing the Parties had full opportunity to make opening statements, examine and cross-examine sworn witnesses, introduce documents, and make arguments in support of their positions. An official transcript of the proceedings was taken and a copy of the transcript was provided to the Arbitrator.

At the close of the hearing, the Parties were offered an opportunity to give closing oral arguments or to provide arguments in the form of post-hearing briefs. Both parties chose to submit written briefs and the briefs were timely received by the Arbitrator. The Parties also exchanged post-hearing briefs.

SUMMARY OF THE FACTS

Kitsap Transit and Evergreen State Division No. 1384 of the Amalgamated Transit Union are Parties to a collective bargaining agreement effective February 16, 2005 to February 15, 2008. The grievance in the instant case arose under that agreement.

The following is a brief summary of the events that led up to the filing of the grievance. It is based on both documentary and testimonial evidence presented during the hearing.

Grievant Ygnacio "Nacho" Espinoza has fourteen years of employment with Kitsap Transit as an Operator.

At 6:14 a.m. on January 16, 2008 the Grievant reported to the Kitsap Transit Dispatcher that the front end of his 731, a 40-foot bus, is stuck in a culvert.

Supervisor Dominick Loiacano arrived at the scene approximately 25 minutes later to begin collecting any relevant information pertaining to a possible accident. Mr. Loiacano observed that there may have been some damage to the bus and/or the property and informed Dispatch that a tow would be necessary.

The Grievant was unable to exit the bus until it was towed out of the culvert. Once the bus was removed, Mr. Loiacano accompanied the Grievant for drug and alcohol testing, the results of which were negative.

At approximately 9:15 a.m. Mr. Loiacano and the Grievant returned to Kitsap Transit's North Base where Mr. Loiacano conducted an initial interview to be submitted as part of his Supervisor's Accident Report and the Grievant completed an Event Report.

Because Mr. Loiacano believed that there may have been some damage to the bus, the bus was sent to Maintenance which completed a Coach Accident Damage Estimate. Maintenance indicated that there was damage to the Coach, including labor costs for returning the bus to its initial condition and the price of the tow.

The event was reviewed by Kitsap Transit's Accident Review Committee, made up of supervisors. After conducting an investigation, the five members of the ARC unanimously determined that the event was an accident, rather than an accident to be reclassified as an incident. The ARC also unanimously determined that the accident was preventable (E-19).

The Grievant appealed the ARC's finding to the Safety Committee, comprised of both bargaining unit members and management. Dale Olsen presented on behalf of the ARC and the Grievant presented his own case, per Safety Committee Policies and Procedures. Accident Appeal Procedures provide for a taping of the hearing: "This appeal is being taped today in the event that it is forwarded to Northwestern University, the reviewing

entity for the National Safety Council. It can only be forwarded if today's hearing is on an accident, not an incident. Either the Operator or management has the right to forward a finding from this committee." Also, "The purpose of this appeal is to review the following question: 'Did the Operator do everything he/she could do to reasonably avoid this accident?' (per the National Safety Council's Guidelines)." According to Ms. DiIenno, who made a transcript of the Safety Committee hearing tape, approximately 16 minutes are missing from the tape, including the latter portion of Mr. Olsen's presentation and the earlier portion of the follow-up questions asked him by the Committee.

At the conclusion of the hearing, the nine present members of the Safety Committee unanimously voted to uphold the finding of the ARC that the event was a preventable accident. The Grievant was notified of the finding of the Safety Committee by Mr. Freer via letter dated February 21, 2008 (E-20).

Also on February 21, 2008, Mr. Cartwright issued a Discipline Meeting Notification to the Grievant informing him there were potential disciplinary consequences for the preventable accident and his conduct in relation to it.

A meeting was held on February 26, 2008 between the Grievant, Mr. Dawson, Ms. DiIenno, Ms. Gustafson and Mr.

Cartwright. The first portion of the meeting was investigatory, followed by the *Loudermill* portion of the meeting.

On February 27, 2008, Mr. Cartwright issued a disciplinary letter to the Grievant informing him that, because the Grievant was on Decision-Making Leave at the time of his preventable accident, he would be issued a suspension without loss of pay.

On March 2, 2008 the Union filed a grievance of Mr. Espinoza's suspension. The Union also grieved the language of the disciplinary letter issued by Mr. Cartwright.

The Parties mutually agreed to bypass the steps of their Grievance Procedure, as provided for by the CBA, and submit the dispute directly to arbitration. The Grievance was brought before Arbitrator Timothy Williams to be heard and decided on its merits.

STATEMENT OF THE ISSUE

The Parties were unable to agree on the statement of issue. The Employer proposes the following statement of issue:

1. Did Kitsap Transit have cause to suspend Ygnacio Espinoza with pay for his preventable accident of January 16, 2008?

2. If not, what is the appropriate remedy.

The Union believes that the issue is more complex then that proposed by the Employer and puts forward the following statement:

1. Did the Employer have Cause to suspend Mr. Espinoza for his bus being towed from a ditch for events that occurred on January 16, 2008?

2. If the Employer had cause to suspend, did the notice of suspension include information that went beyond the cause?

3. Was Mr. Espinoza denied due process to hear and respond to the information provided to the Safety Committee that was used for them to determine if the event was preventable?

At the outset of the hearing, in the absence of an agreed upon issue statement, the Arbitrator informed the Parties that he would frame the issue as part of the award. The issue is framed as follows:

1. Did the Employer issue the disciplinary letter, dated February 27, 2008, for cause?

2. If not, what is the appropriate remedy?

The Parties stipulated that the grievance was timely and properly before the Arbitrator, and that the Arbitrator may retain jurisdiction for sixty (60) days following issuance of his Award to resolve any issues over remedy, if needed.

APPLICABLE CONTRACT LANGUAGE

ARTICLE 4 – MANAGEMENT RIGHTS

B. Without limitations, but by way of illustration, the exclusive prerogatives, functions and rights of the Employer shall include the following:

3. To establish, revise and implement standards for … safety…. It is jointly recognized that the Employer must retain broad authority to fulfill and implement its responsibilities and may do so by oral or written work rule, existing or future.

….

9. To discipline, suspend, demote, or discharge a post probationary employee with cause.

ARTICLE 7 – DISCIPLINE

Section 1 - General

A. Operators who have completed their probationary period may be suspected without pay or dismissed for cause.

ARTICLE 6 – GRIEVANCE PROCEDURE

Section 4 Arbitration

E. "The Arbitrator fees and expense shall be borne equally by both Parties." Consistent with this provision, the Arbitrator splits his fee between the two Parties.

POSITION OF THE EMPLOYER

The Employer undertakes its burden to provide a preponderance of evidence in support of its position that, due to his preventable accident of January 16, 2008, the County had just cause to suspend the Grievant for his "failure to meet safety expectations" (E pg. 13). The Employer argues that the evidence on the record establishes that the event which resulted in the Grievant's bus being situated off the road and lodged in a culvert was properly determined by management to have been an accident. Further evidence supports the finding of the ARC, upheld by the Safety Committee, that the accident was preventable. Because the Grievant was party to a Decision-Making Leave Performance Contract at the time, suspension was the appropriate level of discipline for his preventable accident.

Having set out its grounds for suspending the Grievant, the Employer proceeds to anticipate and refute allegations made by

the Union that the Grievant was treated more harshly than similarly situated employees, that he had the been denied due process rights, and that his discipline is a reflection of anti-union bias.

The issue in this case centers on the County's decision to suspend the Grievant for what it argues to have been a preventable accident. In making his ruling, the Arbitrator must evaluate whether the event in which Mr. Espinoza's bus was involved was legitimately due to the Grievant's failure to take every reasonable precaution, as required of him, to prevent his bus from going off road and getting stuck in dirt and vegetation.

The Grievant's account of the event conflicts with the testimony of other witnesses regarding many important details. The County argues that issues of credibility should be resolved against the Grievant for several reasons. First, unlike the other witnesses, the Grievant has an obvious incentive to be untruthful and minimize his responsibility for the situation as he was aware that any preventable safety event could result in suspension.

Second, the Grievant's theories of how the bus ended up where it did - that brake failure or ice on the road caused the event - entirely lack plausibility, as will be discussed in more detail further on.

Third, the Grievant has been inconsistent in his description of the event, initially stating that the bus "rolled" off the road and then, after the Safety Committee ruling, claiming that it "skids." The County argues that, with his 14 years of experience as a transit operator, the Grievant could not have failed to notice the difference between "rolling" and "skidding." Therefore, this inconsistency of descriptors must be seen as a change of story which the County believes was made in an effort to lend credence to the "ice" theory after the "brakes" theory proved unconvincing to the ARC and the Safety Committee.

All three of these factors undermine the Grievant's credibility and his claim that the event took place through no fault of his own.

Management correctly employed its discretion to determine that the event of January 16, 2008 was properly to be considered an accident. The handbook, or "Greenbook," received by all Routed Operators, including the Grievant, provides the following definitions:

> Accident: Injury and/or combined property damage from $101 and up. "Combined" means from all sources (all vehicles and fixed objects involved in the accident). All safety occurrences will initially be classified as accidents.[1]
>
> Damage (Kitsap Transit Vehicle): When Maintenance confirms in writing there is damage.

[1] If it is later found that the damage is between $1 and $100, the event is reclassified as an "incident". An incident reclassified as an accident still constitutes a basis for progressive discipline according to the Greenbook.

Management makes the evaluation of whether an incident is to be classified as accident in the following way. The supervisor arriving at the scene determines whether there may be $1 or more in damage and, if so, submits a Coach Accident Damage Estimate to Maintenance. Maintenance determines if there was damage and estimates the amount in accordance with the Vehicle Maintenance Form which specifies "Amount should include PARTS, TOWING & LABOR but does not include travel time, only time worked."

In the instant case, the Grievant's bus made contact with the embankment and Mr. Loiacano saw that there could potentially have been damage to the landscaping and/or the bus, so he appropriately requested a Coach Damage Estimate from Maintenance. Maintenance cleaned out the wheelchair lift, pushed it back into proper alignment and reattached a mud flap, resulting in labor costs of $70. The cost of towing the bus out of the culvert was $162.92. Total damages were estimated at $260.92. In accordance with the Greenbook definitions provided above, management properly determined that the event in which Grievant was involved reached the level of "accident."

The Employer addresses the Union's argument that towing charges should not contribute to the damage total, as Maintenance is instructed to do by the Vehicle Maintenance Form. According to the Employer (E pg. 18-19),

> It is a legitimate exercise of Kitsap Transit's management right to determine what is properly included as "damage" due to an accident, so long as it has a rational basis for doing so and it applies the standard consistently… If an accident is ultimately determined preventable, any cost impact could have been avoided… It is reasonable for Kitsap Transit to determine that it makes sense to include all costs resulting from the driver's negligence, not just some.

Kitsap Transit provides records of many instances where discipline was imposed for accidents and the damage calculation included towing charges, establishing a long-standing practice consistent with the policy spelled out on the Vehicle Maintenance Form. The Union's argument that towing alone does not constitute grounds for discipline in no way undermines the Employer's claim that it applies its policy regarding damage calculation consistently. There are situations in which a bus needs to be towed even though no contact was made with any vehicles or objects, such as when a bus sticks in mud or snow or becomes inoperable. Such situations do not constitute accidents, the costs incurred are not potentially the fault of the driver, and therefore, consistent with the logic cited above, the Employer would not impose discipline for such situations. They are simply not comparable to situations in which damage calculations are made in association with accidents.

The Union maintains that the Grievant was in no way at fault because he did what was required of him – set the maxi

brake and put the bus in neutral – when the bus rolled/skid due to either maxi brake failure or the presence of ice on the road. The Employer argues that neither of these two explanations can account for the accident as they are "contrary to the overwhelming evidence about the vehicle condition and scene" (E brief, pg. 22). The Employer undertakes to support the conclusion of the Accident Review Committee and the Safety Committee that the accident was preventable because the bus could not have ended up where it did had the bus been properly secured.

The first theory advanced by the Union and Grievant is that the maxi brake failed causing the bus to roll off the road. All evidence on the record indicates that the maxi brake was fully operational. The tow truck driver testified that he examined the brakes at the scene and determined that they worked properly. Maintenance was instructed to thoroughly examine the brakes and came to the same conclusion. Furthermore, as the Director of Vehicle and Facilities Maintenance testified, the maxi brake works by releasing air which means that had it failed, the wheels would have been unable to roll and the bus would have remained in place. The Union offers no evidence to refute the conclusion that maxi brake failure could not possibly have been the cause of the accident.

Once the "brakes" theory failed to convince the ARC, the Union began advancing the theory that ice on the road caused the bus to skid - rather than roll as was argued under the "brakes" theory - off the road. All evidence on the record goes against this theory. The Employer argues that ice could not possibly have caused a properly secured bus to slide into the culvert given the conditions present at the time.

First, substantial evidence on the record indicates that there was no ice at the location and time of the accident. The Grievant himself testified that he did not himself see ice on Kitsap Street, but only patches of ice as he drove to Kitsap Street. He did not mention ice to Mr. Loiacano, who arrived at the scene approximately 25 minutes after the accident and indicated that the road was dry and that he saw no ice. This observation is consistent with that of the tow truck driver, who also failed to notice any ice. Mr. Loiacano is trained to carefully survey the scene of the accident and, like the tow truck driver, has no motivation to be dishonest regarding the possible presence of ice. Furthermore, weather reports provided by the Union support the Employer's claim that any ice on the road at the time of the accident would still have been present when Mr. Loiacano arrived. Given the testimony of his supervisor and that of the tow truck driver, the Grievant's claim about ice is not credible.

Second, the Grievant's claim is undermined by a total lack of supporting evidence. Of the hundreds of transit operators at Kitsap Transit, the Union could not find one to testify that they saw patches of ice on the road or experienced difficulties driving or securing their buses. Only the testimony of a sympathetic homeowner is offered by the Union as support and it should not be accepted.

Third, even should the Arbitrator accept the Grievant's claim that there was ice where he parked the bus, the theory that it could have caused the accident is physically implausible. The Union advances that the weight of the bus alone caused it to slide from a standstill down a 1% to 2% grade and up the other side of the culvert through which it continued to plow for 21 feet, "despite the oppositional force of the properly set brakes and then the additional friction caused by contact between the wheels and the dirt and gravel surface once it left the road" (E brief, pg. 27). The Employer advances that this hypothesis defies the laws of momentum, especially considering that the bus did not slide when the Grievant was coming to a stop and the bus was in motion, but only after the bus was fully parked and secured. Given the weight of the bus, the claim that the maxi brakes were engaged, the relative flatness of the road, and the softness of the ground where the bus traveled and came to rest, it is simply impossible to

believe that it started moving on its own accord and at the speed necessary to end up on the other side of the culvert. The ice theory must be rejected by the Arbitrator, as it was by the Safety Committee.

In making the ruling that the accident was preventable, the ARC and the Safety Committee are not required to determine what actually occurred, as that may not be possible. What the evidence does establish is that the accident could not have occurred had the driver properly secured the bus by placing it in neutral and securing the maxi brake. The only possible conclusion, argues the Employer, is that the bus was not properly secured. According to the NSC guidelines used by Kitsap Transit, the accident was properly ruled to be preventable because overwhelming, credible evidence establishes that the Grievant "failed to do everything that reasonably could have been done to avoid it."

The Employer proceeds to argue that suspension was the appropriate disciplinary action for the Grievant. Less than a year before the accident, the Grievant signed a Decision-Making Leave Performance Contract in consequence of a prior preventable accident for which he had received a written warning. According to that contract, "[a]ny future violations in the Safety Category will result in further discipline, including suspension or discharge." The Employer appropriately applied progressive

discipline, putting the Grievant on notice that any failure to meet the safety standard may result in suspension. The event of January 16, 2008 was clearly a safety failure on the Grievant's part, therefore suspension was reasonable. Furthermore, arbitral authority recognizes that the Arbitrator should not substitute his own judgment for that of management regarding the degree of discipline unless there is a finding of an abuse of discretion. The Employer proceeds to argue that management's action was in good faith and there was no abuse of discretion in this case.

According to the Employer, the Union has failed to meet its burden of proving that the Grievant was a victim of disparate treatment. In order to meet this burden, the Union must show both that the Grievant was treated more harshly than others and that those given more moderate penalties were similarly situated. The Union fails on both counts. The Union suggests that disparate treatment started when Mr. Loiacano sent a damage estimate request to Maintenance. Mr. Loiacano testified credibly that this is the standard process when a supervisor observes that damage was possible. It is up to Maintenance to verify if any actually took place. The Union also suggests that Mr. Olsen's thoroughness in preparing for his presentation before the Safety Committee is evidence of disparate treatment. Mr. Olsen testified credibly that he made a strong effort to prepare because it was his first time presenting and he wanted

to do a good job. The thoroughness of his investigation does not establish that the Grievant was treated more harshly. Lastly, the Union makes the argument that, unlike other drivers, the Grievant was disciplined for a "tow only" accident. The Employer has provided substantial evidence to refute this argument. This evidence consists of the record of eight other "tow only" accidents or incidents reclassified as accidents in which the drivers received discipline because the accidents/incidents were ruled preventable. As stated previously, preventable accidents such as the Grievant's are not comparable to situations where the bus needed a tow but the driver was not at fault. The evidence establishes that the Grievant was treated consistent with similarly situated employees.

The Union alleges that various aspects of the preventability review deprived the Grievant of his due process rights. The Employer's position is that none of the items cited by the Union prejudiced the Grievant in any way. Even if Kitsap Transit did not follow procedural requirements exactly, it did comply with "the spirit of the procedural requirement" such that the Grievant was not adversely affected. There is therefore no procedural basis for overturning the Employer's disciplinary action.

First, the Union contends that the Grievant was prejudiced because he was not allowed to listen to the ARC representative's presentation before the Safety Committee and was not allowed to have the Union present on his behalf. Indeed, 11 months before his presentation before hearing the Grievant's appeal, the Committee changed its procedure such that the driver and the ARC representative present their cases separately. Mr. Riner testified that the change was implemented in an effort to ensure that preventability remained the focus of the hearing. The Committee's policy since at least 1997 has been that an employee has "no right to representation on his/her behalf." In the instant case, the Grievant did have his union representative present for the appeal. Most importantly, the Grievant was not deprived of due process rights because he had vigorous union representation in all dealings with Mr. Cartwright, the person authorized to determine whether discipline was appropriate irrespective of the preventability ruling. "Following the preventability determination… Mr. Espinoza had a full opportunity to present any evidence he considered relevant to Mr. Cartwright… His union representative participated actively in the investigatory and *Loudermill* meetings" (E brief, pg. 35).

Second, the Union argues that the fact that the Employer accidentally failed to capture the entire Safety Committee presentation on tape and the fact that he did not have Mr.

Olsen's report before the presentation prejudiced the Grievant. The Employer responds that neither the ARC representative nor the driver are obligated to share beforehand the information they wish to submit to the Safety Committee. A copy of Mr. Olsen's report was provided to the Union before the Grievant's investigatory interview and *Loudermill* hearing, allowing him full opportunity to provide his defense before the decision to discipline was made. Any information missing from the tape of the Safety Committee meeting could have been obtained through conversation with Union members of the Committee. The Employer met its procedural obligation by disclosing all information relevant to the potential disciplinary action. The Grievant has not been able to provide any evidence to doubt the accuracy of the preventability determination.

Third, the Union argues that confusion about the deadline for appealing a preventability ruling to the National Safety Council deprived the Grievant of his due process rights. The fact is that the Employer is contractually obligated to issue discipline timely. In deciding the grievance, the Arbitrator must judge whether the disciplinary action was appropriate considering the information that the Employer had at the time it made the decision to discipline. "Actions by the NSC (or related activities) subsequent to the disciplinary action are irrelevant to whether Kitsap Transit had just cause to impose

discipline in February 2008, or whether Mr. Espinoza was afforded due process with respect to that decision" (E brief, pg. 36).

The Employer also addresses the Anti-Union Bias argument advanced by ATU. The Employer's position is that clear proof of any such animus is entirely lacking in this case. The fact that Mr. Cartwright raised questions about the Grievant's truthfulness in reporting the accident at a time when the Grievant had union positions does not prove such animus, especially since such questions were raised by other supervisors at other times in no connection with union positions. Most importantly, there were many people who made the preventability determination - five members of the ARC, nine members of the Safety Committee, and Mr. Cartwright – and the decision was unanimous. All Union members on the Safety Committee voted to uphold the preventability decision. The Union cannot show that all of these people were prejudiced against the Union.

Lastly, the Employer responds to the Union's contention that the Grievant's disciplinary letter should not have included Mr. Cartwright's doubts regarding the Grievant's veracity. The Employer's position is that "[d]ispleasure with an admonition included in a disciplinary letter is not a grievable action" (E brief, pg. 38).

For all of the reasons provided above, the Employer requests that the grievance be denied in full.

POSITION OF THE UNION

In filing the Grievance, the Union alleges that management lacked just cause when it decided to issue a suspension to the Grievant for the event of January 16, 2008. The Union builds its argument on the seven tests for just cause, as established by Arbitrator Daugherty. The Union then proceeds to grieve the language in the Suspension Letter issued to the Grievant by Mr. Cartwright. Lastly, the Union makes the argument that the Grievant was denied his due process rights before the Safety Committee and at the discipline hearing because he was deprived of the information necessary to present an adequate defense on his behalf.

The following is a summary of the Union's analysis of Arbitrator Daugherty's seven tests for just cause as they should be applied to the instant case:

1. Forewarning. The Employer argues that the event of January 16, 2008 constituted an accident, defined as such because it resulted in over $100 worth of "damage." The Union's position is that there was no forewarning that the costs incurred as a result of the event – the cost of towing the bus and washing it – would be considered "damage" by the Employer. The Union has provided a statement from the property owner that

no damage to her property had taken place and there is no dispute that nobody was injured as a result of the event. "The Union argues that neither Mr. Espinoza, nor the Union had any prior knowledge that the employer was using a definition of accident that did not have property damage or injury" (U brief, pg. 1).

2. Are the employer's rules reasonable related to business efficiency? The Union's position is that "the published rules known to the employee are reasonable" (U brief, pg. 2). The Union challenges the Employer's position that it is reasonable to include towing costs and the cost of washing a bus as part of a damage estimate.

3. Was effort made before discipline to determine whether the employee was guilty as charged? The Union's position is that the decision maker, Mr. Cartwright, disregarded objective evidence which, the Union believes, in this case supports the statements made by the Grievant in his Event Report and subsequently. The Union further takes issue with Mr. Cartwright for allegedly failing to follow-up on the defenses raised by the Grievant at the *Loudermill* hearing, specifically regarding the icy conditions which may have caused the event, before making the decision to issue a suspension.

4. Was the investigation conducted fairly and objectively? The Union's position is that the investigation was flawed as

both the ARC and Mr. Cartwright failed to follow-up on the crucial question of whether icy conditions caused the event. The Union believes that the investigation began with a belief that the Grievant was at fault and evidence supporting his defense was thereafter disregarded. Again, the Union believes the objective evidence establishes that the Grievant did everything reasonable to avoid the event.

5. Did the Employer obtain substantial evidence of the employee's guilt? The Employer presented several theories of how the Grievant's bus may have ended up where it did. In the Union's view, none of these theories are supported by substantial evidence. "The Union argues that there was no objective evidence that Mr. Espinoza failed to set his maxi brake, put the bus in neutral, text or use any electronic device while driving, or even to have continued around the corner and driven into the culvert" (U brief, pg. 3). Rather, the following is evidence that the event occurred consistent with the Grievant's testimony and all other statements.

In its summary at the end of the brief, the Union also adds that it "believes Dominic Loiacano and Mr. Olsen did the best job they were able to do under their perceptions and beliefs. We do argue that their very perceptions and beliefs blocked them from see (sic) the objective evidence. Neither one identified

or addressed the discrepancy between the employee and the supervisor reports." (U brief pg 7).

6. Were the rules applied fairly and without discrimination? The Union's position is that the disciplinary investigation conducted by Mr. Cartwright was prejudiced against the Grievant because Mr. Cartwright held the unsubstantiated belief that the Grievant was dishonest or evasive and because Mr. Cartwright was influenced by an anti-Union bias.

The Union argues that Mr. Cartwright's prepared questions for the disciplinary meeting, his testimony at arbitration, statements made by him to the steward and other members of management, and the language of the Grievant's Notice of Suspension all indicate that Mr. Cartwright was primarily concerned with what he unfoundedly perceived to be the Grievant's dishonesty and improper reporting. Mr. Cartwright testified that suspension is appropriate only for a serious infraction or when the application of progressive discipline has failed to correct the employee's performance problems. "Yet, there is no evidence in this case of something Nacho 'performed' incorrectly. His prior progressive discipline for accidents is acknowledged, but in those cases there was damage to the coach. Otherwise, suspension can be used for a single serious violation, but no such violation is noted in the notice of discipline" (U brief, pg. 6).

The Union believes that the Grievant was treated more harshly than other operators whose buses slid into a ditch and needed towing. In those other cases the Employer did not claim that contact with the culvert constitutes hitting a fixed object, as they do in this case, and only the Grievant's event was therefore designated as a "code 29." Furthermore, had Mr. Loiacano not claimed that there was damage, there would have been no ARC review. As stated previously, the Union had no knowledge that the costs of towing and washing a bus could be considered "damage." The Employer has only been able to find a few cases over ten years where they were so considered and acknowledges that the Union could not have had access to that information.

7. Did the punishment fit the crime? The Grievant's testimony, consistent with all statements made by him prior to the arbitration hearing, that he did everything reasonable to stop the movement of his bus once he became aware of the problem must be credited. The Union's position is that the event of January 16, 2008 was not an accident/incident and was not preventable. The Grievant was not at fault. "For this reason the Union argues there wasn't an issue to discipline, let alone at the level of suspension" (U brief, pg. 7).

Having presented its case in support of the allegation that the Employer has violated the just cause standard by

disciplining the Grievant for the event of January 16, 2008, the Union takes up the issue of the Grievant's Disciplinary Notice. Even should the Arbitrator find that there was reason to suspend the Grievant, it argues that the Disciplinary Notice issued to him must be remedied. Specifically, the Union believes that Mr. Cartwright acted inappropriately when he wrote "I expressed to you that I still had lingering doubts as to how the accident actually happened as opposed to how you reported it. However, after reviewing this case I have determined that there was not sufficient evidence to warrant terminating your employment for either dishonesty or improper reporting of the accident." The Union argues that "[t]he notice should be restricted to the actual issue being charged in the discipline. An employee's personnel file should not have letters that imply events or behaviors that did not occur… This type of notice is highly inflammatory and damages the reputation of the operator who would have his supervisor review the same" (U brief, pg. 7).

Lastly, the Union advances the argument that the Grievant was denied due process rights at the Safety Committee and/or the discipline hearing as he had no opportunity to review the entirety of the ARC's case. Safety Committee policy has changed to exclude the Operator from the hearing during the ARC representative's presentation. Even so, the Operator should be able to access that information by reviewing the recording of

the hearing. In this case, the Employer has failed to capture a significant portion of Mr. Olsen's presentation on tape, in consequence of which the Grievant did not know how to prepare for the disciplinary meeting. "Without either of these possibilities [i.e. being present for Mr. Olsen's presentation or having a tape thereof], the employee could not present an adequate defense to the opinions, theories or beliefs presented. What he did have finally at the disciplinary meeting was the ARC package, with grainy photos, and was still able to demonstrate how the objective evidence supported his statement, and not the written claim in the report" (U brief, pg. 7).

For all of the reasons provided above, the Union requests that the grievance be sustained and the following remedy be issued "The suspension be removed and benefits lost be restored (sic). The Union asks further that the employer be directed to not include inflammatory language into its (sic) notice of discipline, where there is no evidence of a problem. Lastly, the Union requests that due process be restored to the safety committee process so that an employee risking discipline based on the decision of the committee know what is being presented about them and their alleged actions" (U brief, pg. 8).

ANALYSIS

The Arbitrator's authority to resolve a grievance is derived from the Parties' collective bargaining agreement (CBA) and the issue that is presented to him. The pertinent language is found in Article 4, Section B, Subsection 9 and it states:

> B. Without limitations, but by way of illustration, the exclusive prerogatives, functions and rights of the Employer shall include the following:
>
> ….
>
> 9. To discipline, suspend, demote, or discharge a post probationary employee with cause.

The Parties are in agreement that the grievant was a post probationary employee at the time of his suspension. The issue before the Arbitrator, therefore, is primarily whether the Employer had cause to suspend the Grievant. As the Union also alleges that the Employer included language in the disciplinary letter "that went beyond the cause (Union's Statement of the Issue)." The secondary issue before the Arbitrator is whether the wording of the letter, by itself, constitutes a for cause deficiency.

The Arbitrator begins his analysis by noting that in a grievance arbitration proceeding, the employer is generally assigned the burden of proof in any matter involving the discipline or discharge of an employee. In all other matters, the union is assigned the burden of proof. The instant

grievance does involve an issue of discipline and the burden of proof, therefore, lies with the Employer.

Furthermore, this Arbitrator agrees with general arbitral opinion that, where the circumstances of a disciplinary action involve charges sufficiently serious to cause a permanent stain on the Grievant's employment record, the applicable standard of proof must be clear and convincing evidence. Charges requiring the higher standard of proof include dishonesty, which is mentioned in the Grievant's disciplinary letter and is therefore potentially at issue in the instant case.

In order to prevail, therefore, the Employer must show by clear and convincing evidence that it had cause to issue the letter of suspension dated February 27, 2008 to the Grievant. Specifically, as the Grievant's disciplinary letter states that the basis of his suspension is the finding that the Grievant was involved in a preventable accident on January 16, 2008, the Employer must show that clear and convincing evidence supports its decision to issue a suspension for that event.

Additionally, the Union contends that serious due process deficiencies related to the discipline violated the for cause standard of the CBA. Finally, the Union claims that even if the Arbitrator found that the suspension was for cause, the wording of the letter raises a separate issue related to the

appropriateness of the discipline. This analysis will proceed to address each of these three aspects of the grievance in turn.

Preventable Accident

In making his ruling, the Arbitrator must first determine whether the event of January 16, 2008 legitimately constituted a preventable accident. The Arbitrator begins his analysis of this question by noting that, where the employer and the union have a functioning process in place for making determinations as to the status of an event (accident/incident/neither) and its preventability, the workings of that process must be respected by the arbitrator.

In the present case, the Union and the Employer have a history of resolving questions of event status and preventability through a process which includes a determination by the Accident Review Committee and an appeal hearing before the Safety Committee[2]. In the Grievant's case, all five members of the Accident Review Committee found the January 16, 2008 incident to be a preventable accident (E 19-2). By a nine to zero vote the Safety Committee also found the accident preventable. In the Arbitrator's view, the fact that the Parties have a working process for making these determinations creates a strong presumption that the findings of the committees

[2] The Accident Appeal Procedures additionally provide for a further appeal to the National Safety Council at Northwestern University, not at issue here.

are legitimate, and, therefore, the Arbitrator's role is not to conduct a new proceeding on the question of preventability but rather to review for possible error.

In the Grievant's case, both committees concurred by unanimous vote that the event of January 16, 2008 constituted a preventable accident. In grieving the matter, the Union is challenging that determination and asking the Arbitrator to set aside the finding that the Grievant was involved in a preventable accident. Because the Union is challenging the committees' determination, it has the burden of persuasion on the issue of event status and preventability. In order to convince the Arbitrator to set aside the strong presumption created by the committees' conclusion, the Union must provide compelling evidence that the committees erroneously determined that the event of January 16, 2008 constituted an accident that was preventable. This analysis continues by looking first at whether the two committees errored in determining that the event was an accident. Then, if no deficiencies are found in the determinations that the event constituted an accident, the analysis continues by determining whether there was error in the finding of preventability.

Accident or Incident

The Arbitrator begins by addressing the argument advanced by the Union that there should not have been a hearing before

the ARC in the first place because the event of January 16, 2008 was not an accident, but was rather more comparable to situations where the bus becomes stuck in mud or snow in the normal course of operation. In other words, the preventability determination should not have been made and was only made because the event was initially classified as an accident by Operations Supervisor Dominick Loiacano, which was not appropriate. The result, argues the Union, is that the Grievant has been inappropriately disciplined for a "tow-only" event.

Ultimately, the Arbitrator rejects this argument primarily because he is convinced by Employer arguments that an event is classified as an incident or an accident if it meets two defining characteristics: there must be a collision[3] (impact, contact) that results in damage (Er Br 17, 18).

The Arbitrator recognizes that Kitsap Transit operators frequently drive in rural areas and in inclement weather conditions, so situations arise, as shown by evidence on the record, where a bus needs a tow though no accident has taken place – the bus got stuck. In those situations, it is clear that there had been no accident because there had been no impact - the bus did not make contact with other objects of any sort.

The Arbitrator's review of the photographs and the testimony of witnesses who examined the scene has led him to

[3] Other, of course, than the tires on the road or in soft dirt, snow, etc.

conclude that, in the Grievant's situation, there was impact with the bank on the off-road side of a small ditch that runs parallel to the road (E 19-14-19). The contact between the Grievant's bus and the bank was significant enough that the door was pinned shut and he was unable to exit the vehicle until after it was towed. This was not a "tow-only" situation. In the Arbitrator's view, the Grievant's situation was not comparable to that of other operators whose buses required towing even though no accident had taken place.

The Employer and the Union agree that investigation into the status of an event (incident/accident/neither) and its preventability begins when the Operations Supervisor files an Accident Report and sends a Coach Accident Damage Estimate form to Maintenance. Had Mr. Loiacano not initially deemed the situation to be an accident or incident, there would have been no investigation. One question before the Arbitrator is therefore whether Mr. Loiacano's actions in sending out an Accident Report and Coach Accident Damage Estimate form were appropriate. Based on the conclusion arrived above, that there was impact with the ditch bank, the Arbitrator's view is that Mr. Loiacano did act appropriately when he deemed the Grievant's situation to be potentially an accident and started the series of events that lead up to an ARC hearing. The fact that Maintenance confirmed that there was damage to the Grievant's

coach further supports the appropriateness of Mr. Loiacano's actions. The Arbitrator upholds the initial classification of the event of January 16, 2008 as an accident. The Union has failed to provide persuasive evidence to demonstrate that the matter should not have been heard by the ARC.

Next the Arbitrator considers the Union's argument that the ARC, made up of members of management, was incorrect when it determined that the accident in which the Grievant was involved would not be reclassified as an incident.

The Parties agree that the determination of whether an accident is to be reclassified as an incident is based upon the cost of the damages. The Union advances the argument that the Employer inappropriately classified the event as an accident by including the cost of towing the Grievant's bus in the damage estimate. In support of its position, the Union provides a Memorandum dated December 17, 1992 (U Exhibit #1) which states that tow bills are not to be considered damages.

The Arbitrator carefully reviewed the Coach Accident Damage Estimate form and the relevant testimony on the record in order to evaluate the significance of the 1992 memo. Contrary to the 1992 memo, the Coach Accident Damage Estimate form (E Exhibit #9) specifically asks Maintenance to include "PARTS, TOWING & LABOR" in the estimate. There is no argument from the Union that it was unaware of the fact that the Employer used the Coach

Accident Damage Estimate form as the basis for determining whether an event was an incident or an accident.

Moreover, testimony of current management and maintenance personnel clearly established that they were not even aware of the 1992 memo and that the practice presently followed is to include tow bills in accident damage estimates, as requested on the Coach Accident Damage Estimate form; a practice that has gone on for sixteen years (Tr 136).

Also, the Greenbook clearly provides that an incident becomes an accident if the total cost of damages "from all sources" exceeds $100. The sum of this evidence has led the Arbitrator to conclude that the 1992 Memo is no longer in effect, but is superseded by current practice, the Coach Accident Damage Estimate form and the Greenbook, a copy of which is given to all drivers.

Once again, based on the conclusion arrived at above that there was impact with the ditch bank, the Arbitrator's view is that it was appropriate for management to consider the cost of towing when making the decision of whether the Grievant's accident is to be reclassified as an incident.

Once Maintenance indicated that there was damage to the coach, which E Exhibit #9 shows that they did, it was appropriate for them to include the cost of towing in that damage estimate. Once Maintenance completed the damage estimate

as having surpassed the $100 threshold, it was appropriate for the ARC to make the determination that the accident would not be reclassified as an incident, in accordance with the definition of accident and incident included in the Greenbook.

Aside from the 1992 memo, the Union has failed to provide any persuasive evidence to support its argument that the cost of towing is not to be included in an accident damage estimate. On the other hand, the Employer's defense on this point is persuasive. The Union has not been able to demonstrate by compelling evidence that the determination reached by the ARC and sustained by the Safety Committee - that the event of January 16, 2008 was an accident – was erroneous.

Preventability

The Arbitrator now turns to the question of Preventability. The heart of the Union's case is that the two committees errored in determining that the accident was preventable. Having carefully studied all of the evidence related to the accident and thoroughly investigating the Union's arguments, the Arbitrator does not find a compelling case that the committees errored in their determinations. This conclusion is based on the following multi-point analysis.

First, the Union is unable to provide a compelling account of how the event occurred. That is, the Grievant is unable to provide an actual recollection to account for the fact that the

bus operated by him went off the road and became stuck in a ditch bank, as it indisputably did. The Grievant's position is that he does not know what actually caused the event, but he is certain that it was in no way the consequence of his own conduct. The Grievant's testimony before the Safety Committee, consistent with his testimony at the arbitration hearing, is "Well, all I know is, I did everything you're supposed to do to your coach" (E 8). The argument put forth by the Grievant - that he did everything correctly and therefore some indeterminate other cause had to have brought the event about – is not persuasive to the Arbitrator. Without an account of what actually took place to create the situation in which the Grievant found himself on January 16, 2008, the Union lacks evidence sufficiently compelling to set aside the determination of the ARC and the Safety Committee.

Second, lacking a recollection of how precisely the Grievant's bus ended up requiring a tow-out off the bank, the Union advanced the theory that maxi-brake failure was likely responsible for the situation. Although this theory was not advanced at arbitration, it was the primary basis for the arguments made before the ARC and the Safety Committee and at the Grievant's *Loudermill* hearing. Because this portion of the Arbitrator's analysis concerns the Union's burden of persuasion regarding a possible overturn of the committees' determination,

the Arbitrator must address the possibility that maxi-brake failure caused the event.

A careful review of the evidence of the record has led the Arbitrator to conclude that the maxi brake did not fail and could not possibly have caused the event of January 16, 2008. The Union presents no compelling evidence that maxi brake failure occurred. On the other hand, the Employer presents compelling evidence that maxi brake failure did not occur. The Employer's compelling evidence consists of the concurring testimony of both the tow truck driver, Michael Brady, and Kitsap Transit's Maintenance Manager, Jeff Dimmen, that they specifically examined the maxi brake and found it fully functional. The fact that the bus operated by the Grievant has been in continuous service since the accident with no events or concerns regarding the maxi brake provides evidence that further supports the conclusion reached by the committees that the maxi brake did not fail.

In addition, the Employer provides compelling evidence that, in the event of maxi brake failure, a bus would not be set in motion from a parked position. The Employer's compelling evidence in this regard consists of the testimony of the Director of Vehicle and Facilities Maintenance, Colby Swanson, that the maxi brake is called a "fail-safe system" precisely because brake "failure" causes a bus to remain stationary (Tr

234-236). The Union provided no evidence to counter the compelling case presented by the Employer. It is the Arbitrator's conclusion that the ARC and the Safety Committee correctly determined that maxi brake failure did not cause the Grievant's bus to travel off road.

Third, the Arbitrator likewise is not persuaded to accept the theory advanced by the Union at arbitration that ice on the road caused the event of January 16, 2008. For one thing, the Grievant never actually claims that the bus slid on ice. In fact, he specifically testified that he does not know what happened (Tr 711). Moreover, the Grievant had an opportunity to verbally tell Mr. Loiacano about ice being a problem immediately following the accident. The evidence clearly establishes that he made no such verbal comment. So, while the Grievant when he filled out the accident report indicated that conditions were icy, does not now or at the time of the accident state with certainty that the bus slid on ice.

More importantly, it is the Arbitrator's conclusion that the evidence very clearly establishes that ice was not the cause of the accident. This conclusion is based on the following discussion points.

- For the bus to have slid on ice, it would have had to be a sheet of ice not a patch of ice. The sheet would have to have been of sufficient size to cover the entire bus. The bus would not have slid if one or two wheels were resting on a patch of ice. The other wheels resting on dry ground would hold.

- The Grievant testified that the bus was at rest when he got out of his seat. The road had almost no slope (E 19, photographs 10, 11, 16, 17). If the bus was at rest on a sheet of ice on a road that has almost no slope, the Arbitrator can see no way in which the bus slides on the ice to its ultimate point of rest.

- The Arbitrator does not find the testimony of Ms. Merrill persuasive. Ms. Merrill lives at the residence where the bus had the accident and came out to talk to the driver. She testified that the road was icy and that the bus slid (Tr 624, 625). She also testified that she did not see the bus slide. The Arbitrator did not find anything in her testimony to suggest that she went behind the bus to inspect the road to determine if there was a sheet of ice on which the bus could have slid. The Arbitrator concludes that Ms. Merrill's testimony is simply her assumptions as to what happened not statements about the fact of what happened.

- Most important, Mr. Loiacano was the first to arrive on the scene followed by the tow truck driver. Neither reported that the road was icy. In fact, Mr. Brady, the tow truck operator, testified to dry conditions (Tr 47). Since he operated the tow truck from the spot on the road where the bus would have started its slide, it is reasonable to conclude that he would be the person that would have been the most aware if there had been a large sheet of ice.

- The Union appears to argue that conditions could have changed in the approximately one hour between the accident at 6:15 a.m. and the arrival of the tow truck at 7:15 a.m. (Tr 46). Weather conditions as provided in Union exhibit 16 clearly indicate that there were no changes in the temperature sufficient to have completely melted a sheet of ice, leaving the road dry, in the time it took that tow truck driver to arrive on the scene. In fact, that document indicates a change in temperature from 31.6 degrees F to 31.8 degrees F. Since both temperatures are below freezing, where did the ice go if it was present at all?

To summarize for all of the reasons provided above, the Arbitrator has reached the conclusion that, in attempting to make the case that the findings of the ARC and Safety Committee

should be overturned, the Union has failed to meet its burden of persuasion. Lacking compelling evidence that the committees erroneously arrived at the determination that the Grievant was involved in a preventable accident, the Arbitrator's decision is to uphold that determination.

Due Process

The Union contends that the Grievant was denied due process in that he was not allowed to be present when management made its presentation to the Safety Committee. The Arbitrator looked carefully at the question of due process and ultimately determines that the Union has failed to make a compelling case on this point.

The rationale behind this conclusion begins by drawing a distinction between an ideal situation and due process sufficient to meet the for cause standard of the CBA. The Arbitrator is in agreement with the Union that the Grievant's concerns would have been better served had he been allowed to hear what the Employer told the members of the Safety Committee. Being barred from this presentation quite naturally creates a sense of suspicion and foul play. Moreover, the Arbitrator is at a lost as to how the Employer is benefited by closing the session to the driver whose interests are at stake.

Having stated all of the above, the fact remains that the Grievant received substantial due process considerations. He

had Union representation when he made his presentation to the Safety Committee and he was clearly allowed the opportunity to present his case for why he believed that the accident was not preventable. He was also given full due process rights during a pre disciplinary hearing.

Thus, while the Arbitrator would agree that the Grievant was not given ideal due process, he was certainly given sufficient due process to meet the requirements of the CBA.

Excessive Language

The notice of suspension issued to the Grievant on February 27, 2008, contains the following paragraph at the top of page 2:

> As mentioned in our meeting, this notice carries with it a caution, in the strongest terms possible, to always report, both orally and in writing, all events at Kitsap Transit in a full and accurate manner with no attempt to evade or "shade" any aspect of that event. This caution applies to all events, safety or otherwise, preventable or not. Any supportable charge of dishonesty and/or failure to report or properly report any event will also result in the termination of your employment.

The Union strongly objects to this paragraph as it contends that it goes way beyond the suspension for a preventable accident. The Employer argues that the wording of the notice of suspension should be left to the Employer's discretion so long as the suspension itself is for cause.

Having carefully reviewed the arguments and the evidence, the Arbitrator concurs with the Union's position on this matter. Specifically, the wording in the above paragraph constitutes a

written warning related to an instance of dishonesty; the Grievant is warned in writing that he must be honest or his employment will be terminated. A written warning is an act of discipline subject to the for cause requirements of the CBA. However, the notice of suspension on the first page indicates that "there was not sufficient evidence to warrant terminating your employment for either dishonesty or improper reporting of the accident." The Arbitrator emphasizes that if there is insufficient evidence to prove the charge of dishonesty, this fact would not allow the issuing of a lesser penalty as the alternative for termination. If there is insufficient evidence, then no discipline can be imposed under the for cause requirement of the CBA.

In reaching this conclusion, the Arbitrator is mindful of the Employer's argument that it should be granted latitude in how it chooses to write the notice of suspension. In general the Arbitrator agrees but he finds that the latitude stops when the wording of the notice of suspension constitutes a second act of discipline for an unproven charge.

In summary, the first paragraph on the second page of the notice of suspension is in violation of Article 7 of the CBA. To remedy this violation, the award will require the Employer to re-issue the notice of suspension and remove the pertinent paragraph.

Conclusion

On February 27, 2008 the Grievant received a written notice that he was being suspended, without losing pay, because he had a preventable accident while driving a bus. The Union grieved this discipline on behalf of the Grievant claiming a violation of the for cause requirement of the CBA. More specifically, the Union contended that the accident was not preventable, that the Grievant had not been afforded full due process and that the letter imposing suspension went beyond the matter in question -- casting dispersions on the Grievant's character.

The Arbitrator determined, for reasons extensively discussed in the above analysis, that the suspension was for cause but that the paragraph on the Grievant's honesty in the notice of suspension constituted a second act of discipline that was not for cause. The Arbitrator further concluded that this paragraph violated the terms of the CBA and thus should be removed from the notice of suspension.

An award will be entered consistent with these findings and conclusions.

IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	AWARD
	)	
AMALGAMATED TRANSIT UNION	)	
	)	
"LOCAL 1384" OR "THE UNION"	)	
	)	
AND	)	
	)	
KITSAP TRANSIT	)	Ygnacio Espinoza
	)	Grievant
"THE COMPANY" OR "THE EMPLOYER"	)	

After careful consideration of all arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. The Employer had sufficient cause to issue the disciplinary letter imposing a suspension on the Grievant, dated February 27, 2008.
2. The portion of the disciplinary letter that constitutes a written warning for dishonesty is not for cause and therefore violates the requirements of the collective bargaining agreement.
3. The grievance is sustained in part and denied in part.
4. As a remedy for the violation of the collective bargaining agreement, the Arbitrator directs the Employer to re-issue the letter of discipline removing the top paragraph on page 2 dealing with the question of dishonesty. Additionally, the word "also" should be removed from the first line of the second paragraph found on page 2.
5. Section 4E of the Agreement provides in part "The Arbitrator's fees and expense shall be borne equally by both Parties." Consistent with this provision, the Arbitrator splits his fee between the two Parties.

Respectfully submitted on this, the 31st day of March, 2009, by

Timothy D.W. Williams
Arbitrator