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| IN THE MATTER OF THE ARBITRATION | ) | ARBITRATOR'S |
| | ) | |
| BETWEEN | ) | OPINION AND AWARD |
| | ) | |
| THE AMALGAMATED TRANSIT UNION LOCAL 382 | ) | |
| | ) | |
| "LOCAL 382" OR "THE UNION" | ) | |
| | ) | |
| AND | ) | |
| | ) | |
| THE UTAH TRANSIT AUTHORITY | ) | |
| | ) | Ross Parsell |
| "UTA" OR "THE EMPLOYER" | ) | Grievant |

HEARING:
January 22, 2010
Salt Lake City, Utah

HEARING CLOSED:
February 19, 2010

ARBITRATOR:
Timothy D.W. Williams
830 NE 39th Ave.
Portland, OR 97232

REPRESENTING THE EMPLOYER:
Zachary Wiseman, Attorney
Lisa Bohman, Attorney for UTA
Kim Ulibarri, Manager of Labor Relations
Judi Kirkham, Senior Labor Relations Specialist

REPRESENTING THE UNION:
Joseph Hatch, Attorney for UTA
Rod Dunn, President and Business Agent for Local 382
Jim Allgier, Fin/Secretary for Local 382
Ross Parsell, Grievant

APPEARING AS WITNESSES FOR THE EMPLOYER:
Janice Jarman, Bus Patron
Joyce Wall, Manager of Service Delivery
Chuck Gruver, Operations Supervisor

Lindsay Whitaker, Operations Supervisor
Laurie Dutcher, Operator/Trainer

APPEARING AS WITNESSES FOR THE UNION:
Mike Allgier, Flextrans Operator
Ross Parsell, Grievant

**EXHIBITS**

**Joint**

1. Collective Bargaining Agreement effective 9/10/06 through 12/10/09

**Union**

1. E-mail from Judith Kirkham dated 6/1/09
2. Decision of Workforce Appeals Board dated 10/8/09
3. ALJ Decision dated 7/14/09
4. UTA Paratransit Rider's Guide

**Employer**

1. Letter from Kent Carpenter dated **2/27/09**
2. UTA Claims Account Check Stub Detail dated 3/5/09
3. Letter from Charles Gruver
4. Bus Supervisor's Accident/Incident Report Form re: Incident of 2/2/09
5. Notice of Claim Form dated 2/16/09
6. Letter from Lindsay Witaker dated 2/3/09
7. Letter from Lindsay Witaker dated 2/24/09
8. Description of Accident/Incident dated 2/2/09
9. Written Statement of Grievant
10. Letter from Lindsay Witaker dated 4/9/09
11. Letter from Lindsay Witaker dated 4/22/09
12. Accident/Incident Report Form re: Incident of 4/8/09
13. Accident/Incident Report Form re: Incident of 4/8/09
14. Written Statement of Grievant
15. Customer Comment Detail number 121279
16. Letter from Lindsay Witaker dated 5/11/09
17. Letter from Grievant dated 5/14/09
18. Customer Comment Detail number 126310
19. On the Job Training Form dated 2/6/09
20. On the Job Training Form dated 4/10/09
21. LPI Evaluation of Flextrans Student dated 9/5/08

22. Flex Daily Planning Sheets & Student Observations -9 Day dated 8/28/08, 8/29/08, 9/2/08, & 9/3/08;
23. Fixed Daily Planning Sheet & Student Observations – 21 Day dated 8/1/08, 7/31/08, 7/30/08, 7/16/08, and 7/14/08
24. Employee Statistics Report from /12/08 to 5/12/09
25. Vehicle Maintenance Data
26. K-Series Major Components
27. 'Minor' and 'Major' Wheelchair & Standee Lift Inspection
28. Paratransit Operator Training Program Participant Manual
29. Paratransit Operator Training Program Instructor Guide
30. Request for Discipline Review dated 5/22/09; E-mail from Jaron Robertson; Letter from Rod Dunn dated 6/4/09; FMCS Forms
31. Letter from Kim Ulibarri dated 7/13/009
32. Acknowledgement of Receipt for Employee Handbook dated 8/23/08
33. FRCC Operating Guidelines re: Passenger Medical Emergency
34. UTA Expectations; UTA Corporate Policy No. 6.1.1
35. Standard Operating Procedure Titled "Accidents or Incidents"
36. Standard Operating Procedure Titled "Serving Customers with Disabilities"
37. Standard Operating Procedure Titled "Wheelchair Lift and Ramp Operation"
38. Standard Operating Procedure Titled "Boarding and Alighting Customers"
39. Driver Manifest dated 2/2/09
40. Passenger Manifest
41. Photograph of Lift
42. Photograph of Lift
43. Photograph of Lift
44. Photograph of Lift Operating Buttons
45. Photograph of Lift
46. Photograph of Lift
47. Statement: SP – Separation (Discharge) by Grievant
48. Letter from Laurie Dutcher dated 7/8/09

**BACKGROUND**

The Utah Transit Authority (hereafter "the Employer" or "UTA") and the Amalgamated Transit Union Local 382 (hereafter "Local 382" or "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy

Williams in Salt Lake City, Utah on January 22, 2010. 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. As a part of his notes, the Arbitrator made an audio recording of the hearing. A copy of the recording was provided to both Parties. The Employer made a transcript of the recording. 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. Thus the award, in this case, is based on the evidence and arguments presented during the hearing and on the arguments found in the written briefs.

## SUMMARY OF THE FACTS

The grievance in this case is between the Utah Transit Authority and the Amalgamated Transit Union Local 382. At the time of the grieved action, the Parties were bound by a Collective Bargaining Agreement effective September 10, 2006 through December 10, 2009. 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 Ross Parsell began his employment with UTA as a Bus Operator on June 24, 2008. In December of 2008 he completed his probationary period with the Employer. He operated UTA's fixed-route service for approximately six weeks.

Upon his request the Grievant was transferred to a Paratransit Operator position on September 27, 2008. As a Paratransit Operator, the Grievant's responsibilities consisted of providing curb-to-curb transportation to passengers with physical or cognitive disabilities.

On February 3, 2009 an incident took place on the Grievant's bus involving passenger Ms. Williams who uses a wheelchair. During the ride, Ms. Williams' wheelchair fell over, damaging the wheelchair and causing Ms. Williams to suffer a concussion, bruises and stiffness for which she was subsequently treated at a hospital. The Grievant righted the wheelchair and Ms. Williams and then took her to her residence. He did not report the incident until after he had taken Ms. Williams home.

By letter dated February 3, 2009 Operations Supervisor Lindsay Whitaker informed the Grievant that he was investigating the incident.

By letter dated February 24, 2009 Mr. Witaker issued a performance reminder to the Grievant, listing several concerns and the steps taken to address those concerns. The letter states in pertinent part:

> All of the concerns listed above are related to safety… Future violations of safety related policies and procedures are not acceptable and will result in disciplinary action as appropriate to the situation.

On April 8, 2009 an incident took place on the Grievant's bus involving passenger Mr. Dickman. Mr. Dickman is an ambulatory individual who fell as he boarded the bus, between the second and third stair according to the Grievant, and suffered an injury (bleeding) to the side of his head.

By letter dated April 9, 2009 Operations Supervisor Lindsay Whitaker informed the Grievant that he was investigating the incident and listed some of the concerns upon which the investigation would focus.

By letter dated April 22, 2009 Mr. Whitaker informed the Grievant of his conclusions. Mr. Whitaker concluded that the incident may not have been absolutely prevented had the Grievant been available to assist the passenger but emphasized that he is expected to take a proactive approach to avoid such incidents in the future. Mr. Whitaker also concluded that the Grievant submitted factually inaccurate and misleading information when

initially reporting the incident. The letter states in pertinent part:

> If you commit future policy violations with regard to safety or dishonesty, you will receive discipline with the possibility of termination from UTA.

On May 9, 2009 an incident took place on the Grievant's bus involving passenger Ms. Jarman who uses a walker. Ms. Jarman was exiting the lift onto the bus when the lift began to shake, frightening her. Ms. Jarman reported the incident to UTA.

By letter dated May 11, 2009 Operations Supervisor Lindsay Whitaker informed the Grievant that he was investigating the incident.

On or about May 18, 2009 the Grievant was terminated from his employment with UTA.

By letter dated May 22, 2009 the Union requested a Discipline Review on behalf of the Grievant

A Grievance Resolution Committee meeting was held on June 3, 2009. The Committee upheld the Grievant's termination.

By letter dated June 4, 2009 the Union requested that the matter be moved to the next step in the grievance process.

The matter was heard by Arbitrator Timothy Williams on January 22, 2010. The Parties acknowledged that the matter was properly before the Arbitrator to be heard and decided on its merits.

## STATEMENT OF THE ISSUE

Without objection from either Party, the Arbitrator identified the issue at the outset of the hearing as the following:

1. Did the UTA have just cause to terminate the Grievant, Ross Parsell?
2. If not, what is the appropriate remedy?[1]

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.

## APPLICABLE CONTRACT LANGUAGE

COLLECTIVE BARGAINING AGREEMENT, 2006-2009

ARTICLE 3 – RECOGNITION OF MANAGEMENT

The Union recognizes that UTA shall continue to have and to exercise exclusive rights to set policy; to manage the business; to determine qualifications for employment; to select all personnel; to determine the size of the work force; to make and enforce reasonable rules and regulations governing the operation of the business and the conduct of its employees; and to otherwise exercise full control except as limited by the express terms of this Agreement.

ARTICLE 4 – EMPLOYEE COOPERATION AND NON-DISCRIMINATION

Employees shall work to the best interests of UTA. They shall be efficient, operate and handle vehicles and equipment carefully and with utmost regard for passengers' safety, for

[1] In its brief, the Employer takes the position that it is not obligated to meet the just cause standard. The Arbitrator will address this argument in the analysis section of this Opinion and Award.

equipment, and for the public. They shall be courteous and respectful to the public and shall maintain a clean and neat appearance.

There shall be no discrimination by UTA, the Union, or any employee against any other employee as prohibited by law, because of race, color, religion, creed, sex, age, or national origin.

ARTICLE 8 – SENIORITY

…Seniority shall be lost whenever an employee quits; is discharged for just cause; retires; or fails to return to work within five work days after the end of a leave of absence or the receipt of notice of recall from a layoff.

ARTICLE 11 – NOTICE OF DISCIPLINE

Employees shall be advised of any discipline or charges within 11 calendar days after the General Manager of UTA or its designees have knowledge of any alleged violation of UTA rules or other offenses. Oral warnings may be given, or the employee shall be furnished a written statement of the offense or discipline. The written statement shall include a description of the actions or behavior in which the employee is alleged to have engaged. Such statement shall be sufficiently precise and complete so that the employee may be able to identify the actions or behavior to which reference is made…

ARTICLE 14 – ARBITRATION PROCEDURES

…The Arbitrator shall have no power to change this Agreement nor to impose any terms or conditions the arbitrator might think the parties should have agreed upon. The arbitrator's power is limited to finding the facts and to applying the terms of this Agreement to those facts. The Union and UTA shall equally share the expense and charges of the arbitrator. The decision of the arbitrator shall be final and binding upon all parties.

## POSITION OF THE EMPLOYER

The Employer opens its arguments with its view that the appropriate standard of proof in the instant case should be a preponderance of the evidence as the charges against the Grievant do not include allegations of criminal conduct. The Employer's position is that it has met its burden of proof because the evidence that the Grievant was properly discharged for a pattern of incompetence, misconduct and negligence regarding safety policies and procedures exceeds any evidence to the contrary.

The Employer's initial argument is that the Collective Bargaining Agreement does not require a showing of just cause for termination. Significantly, Article 12 "Suspension or Discharge" makes no mention of just cause. The only place in the contract where that phrase is found is in Article 8, the Seniority Clause. Thus, the concept of just cause is only applicable to issues of seniority. Although not required, the Employer's position is that it nonetheless is able to demonstrate just cause for termination based on evidence that the Grievant repeatedly failed to adhere to the Employer's rules regarding safety. The Employer reminds the Arbitrator that, as a common carrier, it owes a higher duty of care to its passengers and has developed policies and extensively trained its operators to avoid any unnecessary and foreseeable safety

risks. Termination was the only appropriate action in this case as continuing to employ an operator who has demonstrated a pattern of safety violations would have posed a risk to a very vulnerable contingent of passengers and opened the Employer to significant liability. The Employer's arguments in support of termination are as follows.

First, the Grievant was adequately trained on safety rules and received ample notice that continuous safety violations would result in discipline including termination. The Grievant was initially trained as a regular fixed-route operator. He then received additional training – one day in the classroom, four days of operational instruction, and eight days of platform instruction – when he transferred to Paratransit. He received and signed UTA's Paratransit policies and procedures.

The Grievant continued to receive further training and notice as a consequence of the safety incidents which took place in the course of his employment including retraining in wheelchair securement, defensive driving, and boarding and alighting. Following the incident involving Ms. Williams the Grievant was issued a written notice which states that "[f]uture violations of safety related policies and procedures are not acceptable and will result in disciplinary action as appropriate to the situation" (Ex. E-7). Following the incident involving Mr. Dickman the Grievant was issued a written notice which

states that "If you commit future policy violations with regard to safety or dishonesty, you will receive discipline with the possibility of termination from UTA" (Ex. E-11). The Grievant was clearly notified that incidents involving Ms. Williams and Mr. Dickman constituted safety violations and that his ability to provide safe transportation was a serious concern for UTA.

The Grievant's own statements establish that he was aware that his behavior constituted safety violations and contain numerous promises to make safety a priority, which unfortunately went unfulfilled. The Grievant continued to display disregard for safety as evidenced by customer complaints and the incident involving Ms. Jarman. It would have been irresponsible of the Employer to continue to allow the Grievant to operate a Flextrans bus.

Second, the reasonableness of UTA's rules regarding safety were not challenged by the Union. Safety violations alleged to have been committed by the Grievant include failure to properly secure a wheelchair, inappropriately moving an accident victim who may have had a spine or neck injury, failure to accurately report incidents, failure to be present and available to assist a passenger into the bus, and failure to confirm that a passenger has completely exited the lift before stowing the platform. There can be no question that all of these violations

are reasonably related to the safe transportation of vulnerable passengers.

Third, the Employer thoroughly and fairly investigated all three incidents and accurately concluded that the above-listed safety violations indeed took place before taking disciplinary action. Each incident was investigated by the Grievant's supervisor Lindsay Whitaker. Regarding the incident involving Ms. Williams, Mr. Whitaker looked into whether the Q-straints were properly applied and whether the Grievant's radio was operational. Regarding the incident involving Mr. Dickman, Mr. Whittaker looked into how the fall took place, what actions the Grievant took to assist the passenger, and the inconsistencies between the Grievant's reports. Regarding the incident involving Ms. Jarman, Mr. Whittaker interviewed the passenger and the Grievant and inspected the lift for evidence of malfunction.

In addition, Ms. Ulibarri conducted an impartial internal hearing and concluded that termination was appropriate. At all stages of the process the Grievant was afforded the opportunity to present his side of the story and to have Union representation present. There is no evidence that the Employer failed to properly investigate the incidents upon which the Grievant's discharge is based or to observe the Grievant's due process rights.

Fourth, there is no evidence that UTA fails to investigate violations wherever discovered or to impose discipline where appropriate. The Grievant was treated consistent with other operators found to be in violation of UTA's safety policies and procedures.

Fifth, the safety violations committed by the Grievant were each serious in nature and involved injury or possible injury to passengers. Taken as a whole, these incidents constitute ample grounds for termination.

When the Grievant failed to secure Ms. Williams' wheelchair, she fell, suffered a concussion and ended up needing hospital treatment. The Grievant compounded his misconduct by moving Ms. Williams once she had fallen and by failing to timely report the incident. His claim that his radio was not operational is not supported by objective evidence and, even had it been true, does not provide an excuse for failing to report the incident at first opportunity.

When the Grievant failed to assist Mr. Dickman into the bus even though he noticed that Mr. Dickman was "wobbly" as he approached the vehicle, the passenger fell and injured his head. The Grievant was required to be out of his seat and ready to assist the passenger, but failed to do so. He further compounded his misconduct by failing to be completely truthful in reporting the incident.

When the Grievant began to stow the lift before Ms. Jarman has finished entering the bus, he caused her a serious fright. Although Ms. Jarman was not injured, the Grievant's action posed a serious risk to her safety as she could easily have lost her balance and fallen.

The seriousness of these safety infractions are not mitigated by the Grievant's overall record as an operator. In less than eight months of his employment the Grievant has accumulated numerous complaints regarding safety and disrespectful treatment and displayed other, less serious, deficiencies.

For all of the reasons presented above, the Employer requests that the Arbitrator sustain the discharge.

## POSITION OF THE UNION

The Union opens its brief with its view that the appropriate standard of proof in the instant case should be clear and convincing evidence as that is the standard which has traditionally been applied to termination cases at UTA. The Union's position is that the Employer is unable to meet its burden of proof because applying the facts of the case to answer Arbitrator Daugherty's seven questions for just cause reveals the absence of evidence in support of termination. The Union's arguments regarding each of the seven questions is as follows.

First, the Union argues that the Grievant did not have forewarning that his behavior could result in discipline. While the Union recognizes that the Grievant did have notice after the February 3rd incident involving Ms. Williams that further infraction could result in discipline, there were no further infractions of a similar degree or nature. From the Union's perspective, the April 3rd and May 9th incidents involving Mr. Dickman and Ms. Jarman were extremely minor at best. Furthermore, following the incident with Ms. Williams the Grievant received mixed messages regarding when and whether it was appropriate for him to physically assist passengers. For that reason alone, there was insufficient notice that failing to assist Mr. Dickman could result in discipline.

Second, the Union is in full agreement that the rules put in place to ensure the safety of passengers are reasonable. However, as mentioned above, there was confusion regarding physically assisting passengers. The Union's position is that only the February 3rd incident involving Ms. Williams constitutes a violation of UTA rules warranting discipline.

Third and Fourth, the Union argues that UTA failed to conduct a fair and conclusive investigation sufficient to establish the validity of the misconduct allegations. The investigation of the May 9th incident was particularly problematic. It involved interviewing the passengers and the

Grievant, obtaining a written statement from the Grievant and informally inspecting his bus. UTA proceeded to terminate the Grievant without stating any grounds or findings. Evidence on the record that reveals the investigation's lack of accuracy. Specifically, an e-mail from Manager of Service Delivery Joyce Wall characterizes the May 9th incident as the continuation of a pattern of misconduct which has resulted in three injuries and which persists despite repeated coaching.

The Union takes issue with every aspect of this characterization. It argues that the three incidents in which the Grievant was involved were all unique and do not constitute a pattern. The Grievant was not responsible for three injuries, but only the one involving Ms. Williams. Furthermore, he was not repeatedly coached. In fact, the Grievant received less training than normally provided to new Flextrans operators and, in consequence of the incidents, he received only two additional training sessions. The Union's position is that UTA had made up their mind to terminate the Grievant without properly investigating the facts, especially as concerns the incident of May 9th.

Fifth, UTA chose not to place on the record the findings of the preliminary hearing officer making it difficult to evaluate the facts regarding whether the "judge" obtained substantial evidence that the Grievant was guilty as charged. At the

arbitration hearing the testimony of UTA's witnesses established that the Grievant was terminated because his supervisors had lost patience with him. According to the Union, "[t]his is not the fair weighing of evidence required by the just cause standard" (U brief, pg. 12).

Sixth, the Union argues that the Grievant was treated harshly. As mentioned above, he did not receive proper training to deal with Paratransit passengers as found by a neutral Utah Workforce Services administration law judge. Also as mentioned above, the Employer incorrectly maintains that he had continual training. Other operations are not held to a perfect standard without appropriate training.

Seventh, UTA failed to follow its own policy of progressive discipline when it moved to summary termination following the May 9th incident, which was very minor in nature. There was not attempt to work with the Grievant following the incident and there is no evidence that anything other than discharge was even considered.

Because the Employer cannot provide clear and convincing evidence in support of each of the seven elements of the just cause standard discussed above, the Arbitrator should find that the Grievant was discharged without cause. The remedy requested by the Union is reinstatement with back pay and benefits with interest, less unemployment compensation and other earnings.

Should the Arbitrator find that it is not appropriate to reinstate the Grievant to his previously held position, the Union requests that he return to work for UTA as a regular operator or as a fuel island operator.

## 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. Without objection from either Party, the Arbitrator identified the issue at the outset of the hearing as whether the Grievant was discharged for just cause. The pertinent language is found in Article 8 and it states:

> Seniority shall be lost whenever the employee quits; is discharged for just cause; retires; or fails to return to work within five work days after the end of a leave of absence or the receipt of notice of recall from a layoff.

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 the issue of discharge and the burden of proof, therefore, lies with the Employer.

In the instant case, the Parties are in disagreement regarding the standard of proof requisite of the Employer to establish that discharge was the appropriate action considering the charges against the Grievant and his overall employment record. The Union holds that the Arbitrator should require clear and convincing evidence as this is the standard traditionally used by the Parties in cases involving discharge. The Employer holds that the Arbitrator should require a preponderance of the evidence as the charges against the Grievant do not include allegations of criminal conduct.

This Arbitrator views the matter of the standard of proof somewhat differently than either Party. The 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 records, the applicable standard of proof must be clear and convincing evidence. Charges requiring the higher standard of proof include such matters as dishonesty, insubordination, or sexual harassment. The reason for requiring the higher standard of proof in such cases is that, should the arbitrator sustain the disciplinary action, the employee's record would be so affected that the individual is likely to encounter substantial difficulties obtaining subsequent employment.

By contrast, the disciplinary action in the instant case is based on the allegation that the Grievant committed several serious safety violations in the course of his employment. Thus, the Arbitrator finds that the clear and convincing standard of proof does not apply. In order to prevail, the Employer must show by a preponderance of the evidence that the Grievant was guilty of conduct which violated safety-related policies and procedures. Furthermore, as the disciplinary action in this case was termination, the Employer must establish that the safety violations were sufficiently serious to warrant discharging the Grievant.

After conducting a careful review of the record including the recording of the hearing and the documentary evidence submitted by the Parties, and after thorough consideration of the Parties' written arguments as found in their post-hearing briefs, the Arbitrator has concluded that the Employer has met its burden of proof. The discharge of Grievant Ross Parsell did not violate the CBA. The Arbitrator's reasoning is contained in the following multi-point analysis.

First, the Parties are in disagreement regarding the applicability of the just cause standard. While there was no objection at the hearing to the Arbitrator's framing of the issue, the Employer argues in its post-hearing brief that the Contract does not require a showing of just cause for

disciplinary action. The Employer's position is based on the lack of just cause language in the article which addresses discipline and discharge. Because just cause language is only found in the seniority provision, the Employer argues that it is only applicable to issues of seniority and cannot be applied more broadly to the issues involved in the instant case. By contrast, the Union relies on the mention of just cause in the seniority provision to argue that the Grievant may not be discharged without cause.

In the Arbitrator's experience, the mention of the just cause standard may be found in a number of places in a collective bargaining agreement. The Arbitrator has most frequently encountered language regarding just cause in the management rights' clause, in provisions dealing with discipline and discharge, and in seniority provisions as is the case here. Though it may be expressed differently and encountered in different places, just cause language has at its core the concept that a member of the bargaining unit is protected from losing his or her employment but for cause.

In the Arbitrator's reading, Article 8 affirms that discharge must be for just cause. In the context of this collective bargaining agreement, the loss of seniority becomes a euphemism for discharge (when your employment is terminated obviously you lose your seniority). To limit the applicability

of the just cause standard to the seniority provision only would create an unreasonable result. According to such a reading, an employee would lose seniority when discharged for cause, but would maintain seniority in the event that he or she is discharged without cause. A more reasonable reading is that an employee looses his or her seniority when discharged for cause because the employee would be put back to work with the restoration of seniority if that employee was discharged without cause. The Arbitrator finds that nothing in the contract language to support the Employer's position that a showing of just cause is only requisite in matters of seniority excluding discharge.

Second, in order to evaluate whether the Grievant was appropriately discharged, the Arbitrator must first consider the charge(s) against him. This is because all standard tests for just cause come back to the charge: whether it was properly investigated and whether it is established by sufficient evidence.

In the instant case, the Employer provides the following statement[2] as to the charge that brought on the discharge:

[2] The Arbitrator is in agreement with the Union that the Union should not have had to request this statement from the Employer but that it should have been provided at the time the Grievant was informed of his termination. Delay creates the impression that the Employer created the reasons for discharge after the termination. The Arbitrator concludes, however, that this procedural deficiency in the Employer's case does not, in the instant case, play a significant role in the final outcome of this arbitral proceeding.

> We terminated Ross Parsell after we received information from a customer about an incident that occurred while she was on a lift operated by Ross Parsell. This incident involved the passenger being thrown forward from the lift while boarding the bus from the lift.

Basically this charge involves an allegation that the Grievant committed a safety violation. After careful consideration of all testimony and documentary evidence on the record, the Arbitrator concludes that the Employer has provided a preponderance of the evidence in support of its charge that the Grievant's actions with respect to the incident involving Ms. Jarman on May 9 constituted a safety violation.

The Employer's investigation of the incident included two telephone interviews with Ms. Jarman and, in response to the Grievant's assertion that the lift had malfunctioned, conducted an inspection and testing of the lift operated by the Grievant. The Employer concluded that the lift was fully operational and that the Grievant had pushed the button to stow the lift before Ms. Jarman had completed entry into the bus. Specifically the Employer views the fact as follows:

> When Ms. Jarman had the front wheels of her walker on the bus but had not yet gotten the back wheels of her walker into the bus, Mr. Parsell pushed the stow button, causing the lift to begin moving into the stow position … (E Br 11, 12)

The Arbitrator's assessment of the evidence results in a conclusion favoring the Employer's point of view. The Arbitrator notes that Ms. Jarman's gave three different

statements (E 18), with the third statement being her testimony at hearing. She is consistent and clear that the Grievant began to stow the lift prior to her full exit. Moreover her testimony includes a statement that when she looked at him he was looking the other way. This would certainly explain why he had prematurely started the stow process – not paying attention. It also helps to establish that this incident clearly involves a question of safety.

Moreover, the Arbitrator is in agreement with the Employer's conclusion that there is no basis to find that the lift was anything other than fully operational. The Union's objection that the Employer's inspection and testing of the lift was "informal" was not given much weight by the Arbitrator because the Union failed to specify in what way the testing was deficient. That is, the Union did not show what more needed to be done by the Employer to conclusively establish that the lift was fully operational. Thus, the Arbitrator has no basis to set aside the Employer's finding that the lift did not malfunction.

Third, to the extent that the Employer is concerned that it learned about the incident from a complaint submitted by Ms. Jarman rather than from a report submitted by the Grievant, the Arbitrator believes this is not a significant component of the Grievant's misconduct. It is conceivable to the Arbitrator that there may be a discrepancy between what is perceived by the

passenger and what is perceived by the driver. Thus, the Employer may get a complaint from a passenger which honestly mystifies the driver who may not have perceived a reason for such complaint. The incident involving Ms. Jarman may have occupied that grey area. Based on the fact that the passenger did not fall, did not sustain any injuries to her person or damage to her mobility device, and indicated that she was OK in response to the Grievant's questions, it was not unreasonable for the Grievant to conclude that the event was not sufficiently serious to constitute an incident warranting a report on his behalf.

Fourth, the Arbitrator emphasizes that the safety violation charge against the Grievant involving Ms. Jarman is, on its face, insufficient to warrant the termination of the Grievant's employment. The Employer's charges, however, go beyond the Jarman incident; the accusation is that the latest problem is an extension of a pattern of unacceptable performance. Specifically the Employer states:

> This is a continuous pattern involving the safety and well being of our passengers with Operator Parsell. A pattern that has resulted in at least three(3) injuries. He has been coached and retrained continually.

Specifically, the three incidents involve Ms. Williams, Mr. Dickman, and Ms. Jarman allegedly demonstrate an unacceptable pattern of disregard for safety policies and procedures. All

three incidents occurred, according to the Employer, due to the Grievant's failure to provide due consideration for his passengers' safety. Although no individual incident would have resulted in termination, the pattern of safety violations is legitimate grounds for dismissal.

The Union's position is that all three of the cited incidents are to be treated as distinct - the incident with Ms. Williams involved wheelchair securement, the incident with Mr. Dickman involved boarding procedures, and the incident with Ms. Jarman involved lift operation. The Union argues that the Grievant learned his lesson after each incident and did not repeat errors with respect to wheelchair securement or boarding procedures. He was not given a chance to demonstrate improvement regarding lift operation. Thus, the three incidents do not constitute a pattern and do not form legitimate grounds for dismissal.

The Arbitrator, having given careful consideration to this point, is in agreement with the Employer. All three incidents, as alleged, are reasonably related to the question of whether the Grievant is able to provide safe transportation to his passengers. The Parties are in agreement that safety concerns are a top priority for UTA and the operators it employs. The Employer has provided a preponderance of the evidence establishing that the Grievant's actions with respect to each of

the three incidents did constitute safety violations, thus the only reasonable conclusion is that a pattern of unsafe operation did exist.

Fifth, the Union takes the position that the Employer cannot meet its burden of proof in this case because the Grievant was discharged inconsistent with the principles of progressive discipline as required by the Employer's Corporate Policy No. 6.3.1. According to the Union,

> This is possibly the most egregious violation of the just cause standard committed by the UTA… There was no attempt by the UTA to train, to assist, or to place Ross on a corrective path after the May 9th incident. In fact, there is no evidence that the UTA considered anything other than firing Ross. This violates UTA's own progressive discipline policy.

From the Arbitrator's perspective, this is clearly one of the Union stronger arguments. The Employer could have chosen, for example, to have given the Grievant a suspension as part of the progressive discipline sequence. Yet, the Employer ignored this step of progressive discipline and moved directly to termination. Ultimately, however, the Arbitrator did not find this argument of the Union sufficient to set aside the discharge. For one thing, progressive discipline does not mandate the steps that must be followed. As a concept, progressive discipline is most concerned with remediation. The Grievant certainly had substantial prior warning and coaching (remediation) related to the first two safety violations.

The Arbitrator's disagreement with the Union's position on progressive discipline is additionally based on the following reasoning. Under the just cause standard, the Arbitrator's task is to determine whether the penalty imposed is excessive given the circumstances involved. In order to make his evaluation, the Arbitrator must weigh the degree of the discipline imposed against several factors including the seriousness of the charges, the Grievant's overall employment record and any mitigating factors that might have affected the situation. In the instant case, the Arbitrator finds that the degree of discipline is commensurate with the sum of the factors against which it is weight.

As discussed above, the Arbitrator has concluded that a preponderance of the evidence establishes that the Grievant acted without due consideration for the safety of his passengers on at least three occasions, which actions constitute a pattern of unsafe conduct. The Employer is reasonably concerned that the Grievant is unable to adhere to safety guidelines as demonstrated by this pattern of unsafe conduct. In sum, these incidents pose a serious concern. The charges as sustained by the Arbitrator are serious in nature.

Second, in his eight months of employment with UTA the Grievant has managed to accumulate a rather substandard employment record. The Union recognizes that the Grievant's

performance has been in need of improvement in several areas. In addition to the three incidents discussed by the Parties in detail, there is evidence of numerous complaints (for example E 15). It appears that the Employer made a good faith effort over the course of the Grievant's employment to help him improve his performance and operate in a manner which is consistent with safety protocols and more agreeable to the riding public. But there is nothing in the Grievant's short employment record that evidences the potential to become a completely satisfactory employee.

Last, there are no mitigating factors presented by the Union to suggest that the Grievant was the victim of circumstances which compromised his ability to perform his job safely and in line with Employer expectations.

Thus, the Arbitrator concludes that discharge was not an excessively harsh penalty given the seriousness of the charges, the poor quality of the Grievant's overall performance record, and the lack of mitigating circumstances.

Sixth, the Union contends that the Arbitrator should give some weight to the fact that the Grievant was granted unemployment compensation over the objections of the Employer (U 2 & 3). The Arbitrator disagrees with this assessment and notes that the two proceedings are *de novo* meaning that they are entirely a separate matter. The Arbitrator questions, for

example, whether Ms. Jarman testified at the unemployment compensation hearing. And, were the parties allowed an opportunity to file post-hearing briefs? Etc. The record in front of this Arbitrator is most likely substantially different then the record in front of the unemployment compensation administrative law judge. Moreover, while both proceedings focused on the term "just cause," it is this Arbitrator's conclusion that they mean substantially different things in the two venues (CBA v Unemployment Law).

Seventh, the Union also raises the issue of that the Grievant was a victim of inadequate training. While appropriate training is obviously essential for paratransit bus drivers, the Arbitrator does not find this argument by the Union persuasive as it applies to the instant case. For one thing, there is evidence that the Grievant did receive substantial training and retraining (E 48). More important, the Union does not link a specific deficiency on the part of the Grievant to missing training. For example, neither the Union nor the Grievant claim that the Grievant did not have adequate training on stowing the lift. Bottom line, only if the evidenced established a causal relationship, which it does not, between a performance deficiency and the lack of training would the Arbitrator have found this argument compelling.

Eighth, the Union requests that, should the Arbitrator find that some form of discipline is warranted, he should order that the Grievant be reinstated in a position other than Paratransit Operator. The Arbitrator is unwilling to order reinstatement to a different position because, in his opinion, such a remedy would amount to substituting his own judgment for that of management. Lacking evidence that the Employer violated the just cause provision or acted in an arbitrary, capricious, or discriminatory manner when it decided to terminate the Grievant, it is beyond the Arbitrator's authority to order reinstatement.

In the instant case, the proven charges are sufficiently serious to support management's decision. The option to transfer the Grievant to a different position as a consequence of his misconduct was apparent to the Employer at the time it made its decision. The Employer chose not to do so. However, the Grievant's scant eight months of employment and the numerous issues that surfaced during that time gave management a reasonable basis to conclude that he should not be transferred to some other position. Nothing in the record indicates that the Employer's decision that termination is the appropriate response was arbitrary, capricious or discriminatory. Thus, the Arbitrator has no basis to overturn management's decision.

Finally, in this Arbitrator's experience, cases are often decided on a very narrow margin; both parties having provided

strong arguments. Clearly the instant case follows this pattern as the Union did provide strong arguments on a number of points, particularly the point about progressive discipline. Ultimately the Arbitrator's analysis resulted in a decision that the Employer provided sufficient evidence to establish just cause for the discharge. Two factors were critical in swaying the decision.

For one thing, in each of the three critical incidents the Grievant's initial response was to take a position that in part shielded him from responsibility. In the first case, his radio did not work. In the second case, the patron fell before he started to mount the stairs instead of falling after he had gotten to the second step. In the third case, the lift malfunctioned. It is the Arbitrator's conclusion that a necessary step to performance improvement is the honest acknowledgement of error, which he finds is absent in this case.

The other factor, one that has already been in part discussed, is the Grievant's short tenure with the Employer. If, for example, the Grievant had five years of tenure, with most of that time having a record clean of any incidents, then one could legitimately argue that he had earned the right to all of the steps of progressive discipline; more opportunities to correct his deficiencies. In this Arbitrator's view, eight

months of driving tenure with numerous incidents hardly creates an obligation for patience on the part of the Employer.

## CONCLUSION

The Arbitrator has determined that the Employer is obligated under the terms and conditions of the collective bargaining agreement to establish just cause for discipline. The Arbitrator's review of all the evidence and arguments on the record has led him to conclude that while the Grievant's actions considered individually would not result in discharge, that as a whole they did constitute a pattern of failing to operate with due consideration for the safety of his passengers. Because safety is a paramount consideration for UTA, the Employer has met its burden of proving by a preponderance of the evidence that discharge was the appropriate disciplinary action given the seriousness of the Grievant's misconduct and the lack of a favorable overall employment record or mitigating circumstances.

An award is entered consistent with these findings and conclusions.

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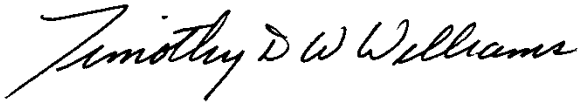
| IN THE MATTER OF THE ARBITRATION | ) | ARBITRATOR'S |
| | ) | |
| BETWEEN | ) | AWARD |
| | ) | |
| THE AMALGAMATED TRANSIT UNION LOCAL 382 | ) | |
| | ) | |
| "LOCAL 382" OR "THE UNION" | ) | |
| | ) | |
| AND | ) | |
| | ) | |
| THE UTAH TRANSIT AUTHORITY | ) | |
| | ) | Ross Parsell |
| "UTA" OR "THE EMPLOYER" | ) | Grievant |

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. UTA did have just cause to terminate the Grievant, Ross Parsell.
2. The grievance is denied.
3. Article 14 provides that "The Union and UTA shall equally share the expense and charges of the arbitrator". Accordingly, the Arbitrator assigns his fees 50% to the Union and 50% to the Employer.

Respectfully submitted on this, the 30th day of April, 2010, by



Timothy D.W. Williams
Arbitrator