IN THE MATTER OF THE ARBITRATION	)	ARBITRATION BOARD'S
	)	
BETWEEN	)	OPINION
	)	
AMALGAMATED TRANSIT UNION	)	AND
	)	
"LOCAL 587" OR "THE UNION"	)	AWARD
	)	
AND	)	
	)	
KING COUNTY METRO	)	Iordan Tchernev Discharge Grievance
"THE COUNTY" OR "THE EMPLOYER"	)	

HEARING:
February 25, 26 and 27, 2009
King County Offices
Seattle, WA

HEARING CLOSED:
March 26, 2009

ARBITRATION BOARD:
Neutral Arbitrator
Timothy D.W. Williams
2700 Fourth Ave., Suite 305
Seattle, WA 98121

Arbitration Board – Union
Lance F. Norton

Arbitration Board – Employer
Steve Grissom

REPRESENTING THE EMPLOYER:
Lynne Kalina, Attorney
Bernita Walraven, Employer and Labor Relations Representative

REPRESENTING THE UNION:
Jillian Cutler, Attorney
Cliff Freed, Attorney
Iordan Tchernev, Grievant

APPEARING AS WITNESSES FOR THE EMPLOYER:

Lisa McCurdy, TIPS III
Zane Ware, Lead Mechanic
Ifo Antoni, Vehicle Maintenance Chief
John Jassmann, Vehicle Maintenance Chief
Scotty Conyne, Vehicle Maintenance Supervisor
Berneta Walraven, Employee and Labor Relations Representative
Mike Eeds, Vehicle Maintenance Supervisor
Vashita Curtis, Employee and Labor Relations Representative
Colleen Duke, Information Systems Professional
David Pesonius, Vehicle Maintenance Chief

APPEARING AS WITNESSES FOR THE UNION:

Iordan Tchernev, Grievant
Fiona Frisch, Metro Equipment Services Worker
Robert Bergman, Metro Mechanic
Kenny McCormick, ATU 587 Vice-President

EXHIBITS

Joint

1. Union/Metro CBA (expiration date 10/31/10)
2. Expectation Warning, 2/7/08
3. Tchernev Grievance, 2/21/08
4. McCurty/Conyne/Jassman/Walraven e-mails re: Jordan Tchernev 3/11/08 Incident, 3/12 – 3/13/08
5. E-mail from Jassman to Walraven re: Phone call to Lisa McCurdy, 3/11/08
6. Draft Memo from Conyne to Tchernev, 3/17/08
7. First step Decision (2/21/08 Grievance), 3/18/08
8. Draft memo from Conyne to Tchernev, 3/19/08
9. Memo from Conyne to Ethernet re: Paid Administrative Leave, 3/31/08
10. E-mail from Jassman to Walraven re: Phone call to Lisa McCurdy, 4/4/08
11. Pre-discipline letter from Conyne to Tchernev, 4/8/08
12. Termination Letter, 4/14/08
13. Tchernev Grievance, 4/18/08
14. First Step Grievance Decision, 6/19/08
15. Second Step Grievance Decision, 8/22/08
16. Tchernev Fueling Records for 3/11/08
17. Frisch Fueling Records for 3/11/08

18. Ryerson Base Fuel Bay Sheets for 3/11/08
19. List of Ryerson Base Employees on Site on 3/11/08
20. Vehicle Maintenance Phone Directory
21. Ryerson Base Map
22. Diagram of Parts Room
23. Photograph of Parts Room
24. King County Non-Discrimination and Anti-Harassment Policy and Procedures
25. Vehicle Maintenance Information Packet
26. Tchernev Performance Appraisal (2/05 – 4/06)
27. Tchernev Performance Appraisal (8/06 – 4/07)
28. Jassman/Conyne/Walraven e-mails re: Interview with Jorden, 3/25-3/26/08

Union

1. Petition in support of Tchernev, 2/19/08
2. Fiona Frisch Statement, 5/23/08
3. E-mail from Scotty Conyne, 3/24/08
4. Notes from investigative interview
5. E-mail from Scotty Conyne, 2/27/08
6. E-mail from Scotty Conyne, 3/14/08
7. E-mail from Scotty Conyne, 3/26/08
8. Colleen Duke telephone notes, 10/19/07
9. Iordan Tchernev Interview, 3/3/08
10. Vashti Curtis e-mail, 3/20/08
11. Interview of Lisa McCurdy
12. Interview of Andrew Peel, 8/21/08

Employer

1. Tchernev letter of Expectation
2. Central base Petition, 6/30/05

BACKGROUND

King County Metro (hereafter "the Company" and ATU Local 587 (hereafter "Local 587" or "the Union") agreed to submit a dispute to arbitration. A hearing was held before a tri-board consisting of Neutral Arbitrator Timothy Williams and Partisan Arbitrators Mr. Lance Norton appointed by the Union and Mr.

Steve Grissom appointed by Metro. The hearing was held in Seattle, Washington on February 24, 25 and 26, 2009.

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. The Neutral Arbitrator made an audio recording of the hearing in a digital format. A copy of the recording was sent to each Party as an attachment to an e-mail message.

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 Arbitration Board Members. The Parties also exchanged post-hearing briefs.

SUMMARY OF THE FACTS

The grievance in this case is between King County Metro Transit and Amalgamated Transit Union Local 587. The Parties are bound by a Collective Bargaining Agreement, effective November 1, 2007 through October 31, 2010, under which the present grievance arose.

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 Iordan Tchernev has worked for King County Metro Transit as an Equipment Service Worker in the Vehicle Maintenance Section since March of 2002. The primary duty of an Equipment Service Worker is to service buses. The service routine includes inspecting the outside of the bus and its tires for damage, inspecting the inside of the bus for damage and for any items potentially left by passengers, checking that headlights and turn signals are working properly, emptying the fare box, driving the bus to the fuel bay and filling it up, "blowing out" the inside of the bus to clear it of debris, monitoring for and adding oil and/or antifreeze as needed, mopping the floors, driving the bus through the "wash rack" and re-parking it in the yard.

In September of 2005 he was assigned to the South Yard at Ryerson base. The Grievant's work schedule was 5:30 pm to 2:00 am Monday through Friday. The Grievant was supervised by Vehicle Maintenance Chiefs David "Tom" Personius and John Jassman.

Technical Information Processing Specialist Lisa McCurdy has worked for King County Metro Transit since February 1985. At the time of the Grievant's hire, she was assigned to Ryerson Base. In February of 2008 Ms. McCurdy was transferred to Atlantic Base where she shares an office with Lead Mechanic Zane Ware, adjacent to the office of Vehicle Maintenance Chief Ifo

Antonio. The Parties agree that the Grievant and Ms. McCurdy had no history of conflict prior to March 11, 2008.

Chief Antonio testified that on March 11, 2008 he received a phone call from a man asking to speak with Ms. McCurdy. He testified that the incoming number included the sequence "4-26" indicating that the call was placed from Ryerson Base. Chief Antonio gave the caller Ms. McCurdy's desk number and, through the open window separating their offices, heard her phone ring directly thereafter.

Ms. McCurdy testified that when she answered the phone, she also recognized the Ryerson Base extension. The caller identified himself as Iordan Tchernev asked whether she had been outside of his home in Lynwood on February 12, 2008. Ms. McCurdy denied that she had. The caller told her that he had seen her car on his home surveillance camera. Ms. McCurdy denied having been in Lynwood for over a decade. She asked the caller if that was all. The caller replied that it was and hung up saying "Thank you." According to Ms. McCurdy, the caller did not have a threatening tone and did not threaten her.

Ms. McCurdy testified that when she hung up, she felt "pissed" that the caller accused her of something she did not do. She shared the content of the call with Mr. Ware, who was present in their shared office, and with Chief Antonio.

Chief Antonio instructed Ms. McCurdy to report the call to Chief Jassman. Ms. McCurdy left a message for Chief Jassman and the Grievant's lead, Ron Griffin.

When he returned her call, Chief Jassman instructed Ms. McCurdy to submit a written report of the call to Mr. Conyne. Chief Jassman also called Chief Antonio regarding the phone call. Chief Antonio arranged for Ms. McCurdy to be escorted to her car. Additionally, Chief Jassman e-mailed Mr. Conyne describing his conversation with Ms. McCurdy. Mr. Conyne instructed Chief Jassman to contact Metro Transit Police, but he was unable to do so.

On March 12, 2008 Ms. McCurdy submitted her report to Mr. Conyne via e-mail. She wrote "The call was very unsettling to me and has left me somewhat concerned for my safety" (Joint Exhibit #4).

On March 13, 2008 Mr. Conyne corresponded via e-mail with Employee and Labor Relations Representative Berneta Walraven regarding the Grievant and Ms. McCurdy. Mr. Conyne wrote that maybe "I can get a grip on him [the Grievant]" (Joint Exhibit #4).

Also on March 13, 2008, Mr. Conyne heard a First Step grievance regarding an expectation warning memo issued to the Grievant on February 7, 2008 which alleges that the Grievant engaged "in inappropriate workplace conduct" (Joint Exhibit #2).

Mr. Conyne ruled to remove the expectation warning memo from the Grievant's file.

On March 14, 2008 Mr. Conyne e-mail Ms. Walraven regarding the grievance hearing and his decision to remove the expectation warning letter from the Grievant's file. He wrote "My though is, ok I pull this letter, as it is not discipline, and close out this grievance (save a lot of time and make him happy. Then rewrite it around the Phone call incident, which I sent you, and re-issue it" (Union Exhibit #6).

On March 17, 2008 Mr. Conyne drafted a disciplinary memo to the Grievant under the subject heading "Oral Reminder" and forwarded it to Ms. Walraven. The memo admonishes the Grievant for bringing "a civil matter" into the workplace, characterizes the phone call as "harassment" and the Grievant's alleged behavior as "inappropriate workplace conduct" (Joint Exhibit #6).

On March 19, 2008 Ms. Walraven produced a second draft under the subject heading "Workplace Violence Prevention Policy - Oral Reminder" (Joint Exhibit #8). The memo characterizes the phone call as "a threat," a "violation of the King County Workplace Prevention policy" and "a first minor infraction" (Joint Exhibit #8).

On March 20, 2008 Ms. Walraven forwarded the second draft of the disciplinary memo to Employee & Labor Relations

Representative Vashti Curtis. Ms. Curtis replied the same day advised Ms. Walraven to question the Grievant and conduct an investigation before issuing the memo to him. She also advised her to focus the memo on the allegedly threatening nature of the call, rather than the personal use of County phones.

On March 25, 2008 the Grievant was interviewed by Chief Jassman. Shop Steward Girma Stephanos was also present. The Grievant denied calling Ms. McCurdy on March 11, 2008.

On March 31, 2008 Mr. Conyne issued the Grievant a memo placing him on paid administrative leave pending further investigation. The memo states "I'm investigating incident reports that I've recently received" (Joint Exhibit #9).

On April 3, 2008 the Grievant was interviewed by Ms. Walraven. Union Representative Kenny McCormick was also present. The Grievant again denied calling Ms. McCurdy on March 11, 2008.

On April 8, 2008 Mr. Conyne issued the Grievant a memo notifying him of his proposal for a thirty day unpaid suspension with termination to follow (Joint Exhibit #11). Mr. Conyne writes:

The reasons for this proposed discipline are as follows:

- You made an inappropriate telephone call to a co-worker during business hours.
- You were dishonest about this event during an investigatory interview on March 25, 2008.

- You were again dishonest about this event during an investigatory interview on April 3, 2008. The egregiously inappropriate telephone call is considered to be gross misconduct. Dishonesty during investigative interviews is considered to be insubordination.

On April 11, 2008 a pre-disciplinary hearing was held before Mr. Conyne. The Grievant was represented by Mr. McCormick.

By letter dated April 14, 2008 Mr. Conyne notified the grievant of his decision to implement the proposed unpaid thirty day suspension with termination to follow effective May 16, 2008. Mr. Conyne writes that he finds "no new information that has not already been considered in arriving at the proposed discipline" (Joint Exhibit #12).

The Union grieved the discipline and a First Step Hearing was held before Atlantic Base Supervisor Mike Eeds on June 4, 2008.

By letter dated June 19, 2008 Mr. Eeds denied the grievance at the First Step stating that "Mr. Tchernev has a history of harassment and conflict with his coworkers" (Joint Exhibit #14).

A Second Step Hearing was held before Ms. Curtis on August 8, 2008. Ms. Curtis testified that, following the hearing, she interviewed Parts Specialist Andrew Peel who was on duty on March 11, 2008.

By letter dated August 22, 2208 Ms. Curtis denied the grievance at the Second Step stating "Metro's investigative findings determined that Mr. Tchernev made the call" (Joint Exhibit #15).

On February 25, 26 and 27, 2009 the grievance was brought before this Arbitration Board to be decided on its merits.

STATEMENT OF THE ISSUE

The Parties agreed on the following statement of issue:

1. Did Metro have just cause to terminate the employment of Iordan Tchernev?
2. If not, what is the appropriate remedy?

The issue of whether the Grievant made a particular phone call is central to the determination of just cause in this case. In that regard, the Parties further agreed to the following:

> The Parties to this arbitration hereby stipulate that telephone calls made or received within the King County voice network system on 3/11/08 cannot be tracked; therefore, no records exist for any internal calls that were placed between Ryerson and Atlantic Bases on 3/11/08.

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

APPLICABLE CONTRACT LANGUAGE

PREAMBLE

The purpose of this AGREEMENT is to provide a working understanding between METRO and the Employees represented by the Union. In order to best sere the public interest, the Parties agree to provide efficient, reliable and convenient service. In the spirit of the cooperation, METRO and the UNION agree that this can best be accomplished by maintenance of adequate facilities, staffing and equipment, and by efficient use of a qualified and responsible workforce. Employees are entitled to fair wages and working conditions as provided in this AGREEMENT, including all protections preserved by law. Further, the Parties recognize that a key element in the provision of fair working conditions include a commitment to the concept of just cause with respect to employee discipline. To that end, the Parties have set forth in Article 4, Section 3, specific major infractions which will result in discharge or, under certain circumstances, suspension.

ARTICLE 4: DISCIPLINE

SECTION 2 – TYPES OF DISCIPLINE

A. Types of discipline shall include oral reminders, written reminders, disciplinary probation, decision making leave, suspension and discharge.

SECTION 3 – TYPES OF MAJOR AND SERIOUS INFRACTIONS

A. Major infractions include:

- Gross misconduct
- Insubordination
- Gross negligence
- Theft of METRO funds or property or job related theft
- Misappropriation – the personal use of METRO funds or property
- The use of intoxicants or the odor of intoxicants
- The use or odor of narcotics or abuse of controlled substances
- Preventable accidents in accordance with the accident point system
- Late reports, absences, and unexcused absences, in accordance with Article 17, Section 11, and Article 18, Section 12

- Falsification of sick reports
- Falsification of applications or any other official METRO documents
- Willful failure to turn in lost articles
- Willful destruction or damage to METRO property/possessions
- Serious or repeated harassment based on a legally protected class (see DEFINITIONS)
- Committing a felony while on duty or conviction of a job related felony
- Serious or repeated discrimination, as prohibited under Article 2

B. Major infractions will result in discharge unless METRO determines that there are unusual circumstanced which cause a suspension to be appropriate. Infractions, other than those listed above, shall be considered minor infractions.

C. Serious Infractions – METRO may also determine that an infraction is misconduct, negligence, or a serious performance problem, which warrants discipline under the just cause standard. A suspension under this section may be issued up to, but not to exceed, five days.

D. Infractions, other than those listed above, shall be considered minor infractions.

SECTION 11 – WRONFULLY SUSPENDED OR DISCHARGED

A. If, after review of a suspension or discharge, it is mutually agreed that an Employee who was suspended or discharged was completely blameless of charged regarding the offense, he/she shall be reinstated to his/her former position without loss of seniority and will be paid wages lost as though he/she had not been suspended or discharged. No entry shall be made on the Employee's record of such suspension or discharge.

B. If, however, if after such a review, it is found that the Employee in question was not completely blameless, then the Parties may mutually agree upon a reduction of the penalty and upon what, if any, portion of the wages he/she would have earned should be restored to him/her.

ARTICLE 5: GRIEVANCE AND ARBITRATION

SECTION 2 – ARBITRATION PROCEDURE

E. The power and authority of the Arbitration Board shall be to hear and decide each grievance and shall be limited strictly to determining the meaning and interpretation of the terms of this AGREEMENT.

1. The Arbitration Board shall not have the authority to add to, subtract from, or modify this AGREEMENT, nor to limit or impair any common law right of METRO or the Union. The Arbitration Board's decision, including upholding, modifying or setting aside any disciplinary action or the award of lost wages and benefits, shall be in accordance with federal and state laws, and shall be final and binding on all Parties.
2. The decision of the arbitration Board shall be based solely on the evidence and arguments presented by the Parties in the presence of each other.

F. The parties agree that the power and jurisdiction of any arbitrator who is chosen shall be limited to deciding whether there has been a violation of a provision of this AGREEMENT.

G. If the arbitrator upholds the grievance, METRO shall pay the cost of the Arbitrator. If the grievance is denied, the UNION shall pay the cost of the Arbitrator.

POSITION OF THE EMPLOYER

The Employer undertakes to meet its burden of showing that it had just cause to terminate the Grievant for two major infractions - gross misconduct and insubordination. The Employer's position is that Mr. Tchernev is guilty of having made an inappropriate phone call to Ms. McCurty on March 11, 2008, constituting gross misconduct. Furthermore, Mr. Tchernev was not truthful when interviewed for the investigation, constituting insubordination. Article 4.3 of the CBA provides

that such major infractions "will result in discharge unless METRO determines that there are unusual circumstances which cause a suspension to be appropriate." The Employer believes its charges against the Grievant are supported by clear evidence and no unusual circumstances exist such that METRO was fully within its contractual rights when it made the decision to terminate the Grievant.

Although no definition for the term "gross misconduct" is provided by the CBA, the applicable definition has been established as "willful conduct which is obviously wrong." The Employer believes that it was obviously wrong of the Grievant to intentionally call Ms. McCurdy and "falsely accuse her of engaging in improper behavior" (E brief, pg. 14). The Employer argues that the testimony of credible witnesses clearly establishes that Ms. McCurdy did receive an inappropriate phone call and that the Grievant was, in fact, the caller. The Grievant's testimony in his own defense, on the other hand, is not supported by the evidence on the record and should not be taken as credible.

Ms. McCurdy testified that she received a phone call on March 11, 2008 during which the caller identified himself as "Iordan Tchernev" and baselessly accused her of being outside of his home in Lynnwood on January 12, 2008. Ms. McCurdy denied the allegation to which the caller replied "I have your car,

registered to you, on my home surveillance camera." Ms. McCurdy one again denied the allegation, stating that she hadn't been in Lynnwood for about a decade. Ms. McCurdy was shaken up by the phone call and shared her dismay with Mr. Ware, who shares her office, and Chief Antonio who initially gave the caller Ms. McCurdy's direct telephone number.

She became increasingly disturbed as she talked about the call throughout the evening, as testified to by Chief Antonio and Mr. Ware. Mr. Ware, who overheard her repeat portions of the call and state that she had not been in Lynnwood, confirmed Ms. McCurdy's testimony regarding the content of the call. Because of the unsettling nature of the call, Chief Antonio instructed Ms. McCurdy to report it and arranged for her to be escorted to her car after work for the next couple of weeks. There can be no doubt that the call caused a disruption in the workplace. The Employer's position is that the call received by Ms. McCurdy was egregiously inappropriate and constituted "gross misconduct" on the part of the caller, as it is obviously wrong to falsely accuse another of such improper behavior.

The Employer argues that Ms. McCurdy's credibility on this issue is apparent and her account of the call is supported by the testimonies of Mr. Ware, Chief Antonio, and Chief Jassman. "Ms. McCurdy is a highly respected employee with no history of complaints against coworkers, including Mr. Tchernev, and no

motive to fabricate the call" (E brief, pg. 15). Both Ms. McCurdy and Chief Antonio recall that the incoming call included the number sequence "4-26(3)" indicating that it was placed from Ryerson base. Having worked with the Grievant at Ryerson, Ms. McCurdy was able to identify his distinctive Eastern European accent "with 100 percent certainty." Chief Jassman supported her testimony, stating that, of the employees working that day at Ryerson, no one else speaks with a similar accent. Mr. Ware, from his desk in their shared office, testified that he overheard Chief Antonio give out Ms. McCurdy's direct number, that the phone on Ms. McCurdy's desk rang almost immediately, and that Ms. McCurdy repeated the name "Iordan" as she spoke to the caller. Neither Mr. Ware nor Chief Antonio had any relationship with the Grievant and lack any motivation to support a false complaint against him. The Union is unable to present any evidence that calls into question the credibility of either Ms. McCurdy, Mr. Ware of Chief Antonio regarding the occurrence or the content of the phone call of March 11, 2008.

Further evidence establishes that the Grievant had the opportunity to place that call. The Grievant's testimony is that he usually arrived at Ryerson base at 5:20 pm. There are no witnesses regarding his whereabouts between that time and 5:47 pm, the time automated fueling records show that he exited the fuel bay with his first bus. The Grievant had access to the

telephone in the parts room and the testimony of Parts Room Specialist Mr. Peel establishes that it was possible for the Grievant to use the phone without Mr. Peel's knowledge. Although nobody saw the Grievant place the call, this fact is not dispositive. The only possible conclusion is that the opportunity existed for the Grievant to place that phone call.

The Grievant's testimony denying this conclusion is not credible and, to the extent that the testimony of his supporting witness, Equipment Service Worker Ms. Frisch, can be given any weight, it supports the Employer's case. The Grievant testified that he had no access to a telephone, but there are several phones in the parts room accessible to employees the number for all of which includes the sequence "4-26(3)" identified by Chief Antonio and Ms. McCurdy. The Grievant testified that he was prohibited from entering the parts room following Parts Room Specialist Ms. Brodersen's complaint, but the letter of expectation issued by Chief Personius clearly anticipates the need for ongoing work-related discussions with Ms. Brodersen.

Lastly, the Grievant testified that he was too busy working to make the call and solicited the testimony of Ms. Frisch to support this claim. Ms. Frisch was not identified by the Grievant as being a witness until after the Step Two grievance meeting. Ms. Frisch's memory of March 11, 2008 is questionable, as illustrated by her statements during her interview with Ms.

Curtis and her testimony at arbitration. What is reliable in her accounts is that she could not attest to the Grievant's whereabouts prior to the time she began fueling her first bus, which she completed at 6:17 pm. As Equipment Service Workers perform their duties individually rather than in teams, Ms. Frisch would not have been in constant eye contact with the Grievant. This fact is supported by fueling records showing that the two often used the same fueling lane, so they could not have been in the fuel building at the same time. Aside from the times that they were both in the fueling building, using separate lanes, as did occur, Ms. Frisch cannot account for the Grievant's activities.

The Employer's conclusion that the Grievant had the opportunity to place a call to Atlanta base on March 11, 2008 is supported by reliable evidence, which the Grievant cannot credibly contradict. The Employer believes that the sum of the testimony discussed clearly establishes that the Grievant did, in fact, make that inappropriate phone call to Ms. McCurdy on March 11, 2008.

Having been informed of the phone call, the Employer began an investigation including interviewing the Grievant to get his side of the story. When interviewed on two separate occasions by Chief Jassman and Ms. Walraven, the Grievant was given a clear directive to be truthful, cooperative, and to answer

questions fully. He was informed that any false statements made by him would constitute grounds for discipline, including discharge. During both interviews, the Grievant denied making the call, but at the time did not request that any other person be interviewed or could corroborate his story. Weighing his self-serving denials against the statements made by Ms. McCurdy, Mr. Ware and Chief Antonio, METRO appropriately concluded that the Grievant was not being truthful during his interviews. His failure to be truthful during the investigatory interviews as instructed constitutes insubordination and establishes additional grounds for discharge.

The Employer anticipates that the Union may argue that METRO did not conduct a thorough investigation before disciplining the Grievant and disputes this argument. The Grievant was given two opportunities to present his side of the story and he consistently denied all involvement. Although Ms. Frisch was not interviewed until after the discipline was imposed, it was not Metro's obligation to interview all employees who could potentially have had relevant information and the Grievant could have requested that she be interviewed sooner. Lastly, the Employer did not verify whether the Grievant actually had a home surveillance camera, but this fact is irrelevant because the gravity of the offense consists in the

Grievant's false accusations against Ms. McCurdy, not in possessing or lacking a surveillance camera.

The Employer concludes that the penalty of termination for the two charges supported by evidence on the record is reasonable and should be sustained. In its view, the Grievant has a history of complaints from co-workers and prior discipline regarding his failure to interact professionally with co-workers. "Mr. Tchernev has been given numerous opportunities to improve his behavior and interact appropriately with his coworkers. He has repeatedly refused to accept constructive criticism regarding his interactions with coworkers and his continued refusal to admit any wrongdoing makes him not amenable to rehabilitation through the progressive discipline process" (E brief, pg. 22). The Employer believes that no unusual circumstances have been shown to exist such that a lesser degree of discipline was to be considered.

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

POSITION OF THE UNION

The Union's position is that the Employer cannot meet its burden of proof to show by clear and convincing evidence that Mr. Tchernev was guilty of gross misconduct and insubordination because the Employer's case against the Grievant is built on

unsubstantiated speculation. The Union cites Arbitrator Flannagan that "Suspicion cannot carry the burden of proof." The Union argues that the Grievant did not make the phone call to Ms. McCurdy and had no opportunity to do so. It further argues that Mr. Conyne, the decision maker, was prejudiced against the Grievant and, in an effort to build a case for his discharge, disregarded all evidence in the Grievant's favor. The Grievant was deprived of due process rights by Mr. Conyne's long-standing bias and by the Employer's failure to conduct an adequate investigation prior to issuing the termination. Lastly, the Union argues that, even should the Arbitrator find that the Grievant did make the phone call, the call itself would not warrant termination, especially in light of the Grievant's performance record at Metro.

The Employer posits that on March 11, 2008 the Grievant called Ms. McCurdy from a telephone in the parts room some time between 5:00 and 7:00 pm. The absence of a more precise timing estimate is a result of the fact that witnesses do not agree on this point and some of their estimates do not even overlap. In fact, the Grievant arrived at the base between 5:20 and 5:25 pm, reported for his shift at 5:30 and seventeen minutes later had already completed servicing his first bus, which includes walking to the South Yard, inspecting, cleaning, fueling, and reparking the coach. He continued to service buses until 7:43

pm without a break. As there is no phone in the South Yard, the Grievant would have had to leave it in order to place the call. A review of the fueling records indicates that he could not have had time to leave the South Yard during the time period in question.

The Employer's speculations as to how the Grievant may have made the call do not withstand scrutiny. One theory proposed by the Employer is that the Grievant arrived at Ryerson base early in order to place the call. This is implausible for several reasons. Mr. Jassman confirmed the Grievant's testimony that he had a regular practice of arriving at the base five to ten minutes prior to the start of his shift and presenting himself to the Chief. There is no evidence to suggest that he behaved differently on March 11, 2008, as Mr. Conyne admits. Neither did Mr. Conyne inquire into whether the Grievant was at the base prior to that time before terminating him. Lastly, it "defies common sense for Mr. Tchernev to come to work early for the express purpose of calling Ms. McCurdy" (U brief, pg. 25) as he had ample opportunity to do so outside of work.

Another theory proposed by the Employer is that the Grievant may have left the South Yard unnoticed to make a phone call from the parts room without interrupting his service routine, perhaps by skipping a portion of that routine. The Grievant's performance evaluation and the testimonies of Mr.

Jassman and Mr. Conyne establish that the Grievant was a thorough and efficient worker. Any evidence that the buses for which the Grievant was responsible were not fully serviced is entirely lacking.

The next theory proposed by the Employer is that the Grievant could have placed the call between servicing buses. Mr. Conyne speculated that the Grievant should have taken less time between fueling coaches 3308 and 3605 because they required less fuel. His argument fails for two reasons. One, the time between fueling reflects the full service routine, described above, which varies depending on the condition of the bus – its outer appearance, how dirty it is inside, whether it requires oil or antifreeze. Second, it is almost certain that the meter for fuel pump #3 was almost certainly broken on March 11, 2008 because it consistently registered exceptionally low fuel numbers which were contradicted by the manual fueling records by a factor of about 10. Once again, Mr. Conyne did not seek evidence to verify his speculations regarding the time it should have taken for the Grievant to service buses 3308 and 3605.

At arbitration the Employer attempted to show that the Grievant made the call from the phone at the back of the parts room where he would not be noticed by a Parts Room Specialist. The Employer made this phone the center of its case, entering photographs of it into evidence, presenting a diagram which

marked this phone only, and thereby demonstrating that there was no direct line of vision between that particular phone and the parts room counter. Mr. Conyne even testified that it was the "most logical place" as other phones on the base, such as those in the loft or the cage, "would not be that accessible to Mr. Tchernev." The undisputed testimony of Ryerson Base Lead Mechanic Mr. Bergman is that he disabled the phone in question in late January or early February 2008 at the request of Mr. Jassman and it remained out of service on March 11, 2008. The Union is very emphatic on this point. As in previous examples, the Employer made no effort to verify this portion of its theory before terminating the Grievant's employment.

In the absence of phone records, in the absence of anyone who witnessed the Grievant make the call, and with the only two Ryerson base employees who were interviewed stating affirmatively that the did not see him do so, the Employer has no evidence to substantiate the accusation that the Grievant was guilty of calling Ms. McCurdy. "Metro's case rests solely on Ms. McCurdy's belief that Mr. Tchernev was the person who called her on March 11. Her belief is based on the fact that the caller gave Mr. Tchernev's first name and spoke with an accent. Simply put, Ms. McCurdy is mistaken" (U brief, pg. 30). Ms. McCurdy's interactions with the Grievant at Ryerson base were quite limited. After she left, they had only a few occasions to

speak on the phone and then only for short periods. She was not sufficiently familiar with the Grievant's voice to carry the Employer's burden of proof.

Additionally, the Union argues that the Grievant had no motive to make such a call. As testified by Ms. McCurdy, their work relationship was "cordial" and they had no relationship outside of work. The Grievant does not even own a home surveillance camera. The Union maintains that the Grievant did not call Ms. McCurdy as he did not have the opportunity or the motivation to do so and could not have used the telephone specified by the Employer. The Employer's array of theories to the contrary are not substantiated by the evidence and testimony on the record and are insufficient to meet its burden of proof in this case.

The Union proceeds to make the objection that the Grievant was deprived of his due process rights because the Employer failed to conduct an adequate investigation. In making this affirmative defense, the Union undertakes the burden of persuasion to show that Mr. Conyne, the decision-maker, and Metro "summarily concluded that Mr. Tchernev had made the call to Ms. McCurdy… His guilt was a foregone conclusion" (U brief, pg. 31 and 33).

The Union argues that Mr. Conyne had a long-standing bias against the Grievant, who had a history of filing incident

reports and grievances when disagreements arose. The Union presents the following evidence that Mr. Conyne was not a neutral decision-maker when it came to disciplining the Grievant. Union Exhibit #8 is a set of notes taken by Mr. Conyne on October 19, 2007 which include the following remarks "Updates on Yordin [sic] – I totally disliked – can't get meat hooks in anything – Greased pig." Union Exhibit #5 is an e-mail from Mr. Conyne to Ms. Walraven from February 27, 2008 with the subject heading "17 page Iordan Grievance." Mr. Conyne writes "I blew it on this one! Just the name, and then all the material, overwhelmed my thinking!!!! So I totally missed the subject matter, Remove the letter from his file……. The answer is…..NO" (emphasis and ellipses in the original). These exhibits clearly demonstrate that Mr. Conyne was prejudiced against the Grievant prior to March 11, 2008.

Regarding the phone call incident, the Union points to another e-mail from Mr. Conyne to Ms. Walraven from March 13, 2008 in which he writes "I am thinking maybe he has gone too far over the line, and I can get a grip on him" (Joint Exhibit #4). This e-mail was written just one day after Mr. Conyne received Ms. McCurdy's report of the phone call and on the same day that Mr. Conyne was to hear Mr. Tchernev's Step One Grievance involving the February 2008 letter of expectation. On the next day, March 14, 2008, Mr. Conyne e-mailed Ms. Walraven regarding

the previous day's hearing(Union Exhibit #6). Disturbingly, this e-mail evidences that when he agreed to remove the letter of expectation from the Grievant's file, Mr. Conyne was already planning to re-issue it around the newer issue. Mr. Conyne writes "My thought is, ok I pull this letter, as it is not discipline, and close out this grievance (save a lot of time and make him happy. Then rewrite it around the Phone call incident, which I sent you, and re-issue it." The Union emphasizes that no investigation had yet been conducted and the Grievant had not been interviewed regarding the phone call by anyone. Mr. Conyne drafted a disciplinary memo, of which Ms. Walraven produced a second draft, before either of them spoke to either the Grievant or Ms. McCurdy. Mr. Conyne even testified that prior to the Grievant's first interview on April 25 there was "no doubt in [his] mind that Mr. Tchernev made the phone call." His conclusion that the Grievant was lying when he denied the allegation was a direct product of this preconceived belief. According to the Union, the sum of these exhibits and testimony convincingly demonstrate that "Mr. Conyne was simply not going to let Mr. Tchernev slip though his fingers… [He] was convinced of Mr. Tchernev's guilt from day one and no amount of evidence to the contrary would sway him from that position." (U brief, pg. 31 and 32).

The Grievant's right to due process includes the right to have his side of the story considered by management before the disciplinary decision is made. That did not happen in this case. As outlined above, Mr. Conyne and Ms. Walraven jumped to conclusions and began drafting disciplinary letters based on unfounded assumptions. The Union describes the Grievant's March 25, 2008 interview as "entirely perfunctory" and solely the consequence of Ms. Curtis' reminder that discipline cannot be issued without first getting Mr. Tchernev's side of the story. During the interview, the Grievant was not informed that he was being investigated for gross misconduct or that there were any allegations against him. Similarly, during his April 3, 2008 interview, the Grievant was not informed of the nature of the allegations against him and was not permitted to ask questions. The Grievant's side of the story was not taken into consideration, but immediately received as "flat lying" by Mr. Conyne.

Metro's failure to conduct an adequate investigation is further demonstrated by the fact that it did not follow up on the statements that the Grievant made in support of his position that he did not call Ms. McCurdy on March 11, 2008. For example, the Grievant repeatedly stated that he had been busy servicing buses in the South Yard during the time period in question and did not have the opportunity to make a phone call.

Obtaining the fueling records to follow-up on this statement was a small task, but the Employer did not undertake to do so for over five months.

Neither did the Employer bother to interview any Ryerson Base employees to find out whether someone may have seen the Grievant place the call, as was its obligation. Ms. Frisch who works closely with the Grievant in the South Yard and Mr. Peel who works in the parts room where the telephone most accessible to the Grievant is located were obvious candidates. They were not interviewed until after the Second Step hearing, five months after the termination. The statements made by Ms. Frisch were summarily discounted, as the interviewer Ms. Curtis believed she lacked a reliable memory of March 11, 2008. This is the result of the Employer's failure to investigate promptly. Ms. Curtis wrote her decision denying the Step Two grievance on the same day as the interview. The Union's position is that "Metro's position had already become fully entrenched… By the time Metro got around to interviewing Ms. Frisch and Mr. Peel, it was more committed to justifying its decision to terminate Mr. Tchernev than conducting a fair, neutral investigation into the allegations against him" (U brief, pg. 34-5).

The Union believes that it has met the burden of persuasion in demonstrating that "Metro failed to take even the most basic and obvious steps to investigate and uncover potentially

exculpatory evidence" (pg. 36) thereby denying the Grievant the basics of his due process rights. The Union cites Arbitrator Lehleitner's decision (Grievant Sandie Olosky, 2006) to overturn a termination based on the Employer's failure to conduct a fair and reasonable investigation. Having failed to investigate properly, the Arbitration Board should find that the Employer must fail to carry the burden of clear and persuasive evidence for the discharge.

The Employer's claim that the Grievant was insubordinate because he was dishonest during investigatory interviews must fail for the same lack of evidence as its claim that the Grievant made the phone call. Metro began with the belief that the Grievant was guilty and therefore did not find him credible. The evidence does not support the conclusion that the Grievant was ever dishonest.

Additionally, the Union argues that, even had Metro carried its burden to show that Mr. Tchernev made the phone call to Ms. McCurdy on March 11, 2008, that act would not constitute "gross misconduct" warranting termination. The evidence shows that the call was initially classified as a minor infraction. Ms. Walraven testified that she and Mr. Conyne discussed re-classifying it as a serious infraction warranting an oral reminder or a suspension of up to five days on April 1, 2008. By April 8, 2008, the call was re-classified as a major

infraction. Metro has used several unpersuasive arguments to explain this escalation in the gravity of the allegation.

Mr. Conyne's first draft of a disciplinary memo claims that the call was inappropriate because the caller was bringing a civil matter into the workplace (Joint Exhibit #6). This argument was dropped by the Employer.

Ms. Walraven's second draft of the disciplinary memo claims that the call was "harassing and threatening" and that the caller intended to harm Ms. McCurdy (Joint Exhibit #8). Ms. McCurdy's testimony that the caller did not have a threatening tone and that she did not believe he intended to do her any harm directly contradicts this claim. Under Metro's Anti-Harassment Policy, "conduct must be sufficiently severe or pervasive so as to alter the terms or conditions of employment." The call, as described by Ms. McCurdy, simply does not rise to this level. "Ms. McCurdy's initial reaction to the call was not one of fear, but anger… It was only after talking to Mr. Antonio, Mr. Ware, Mr. Jassman, and Mr. Conyne that she began to feel unsettled" (U brief, pg. 39).

In denying the grievance at Step One, Mr. Eeds did not focus on the supposedly threatening nature of the call. He testified that the Grievant's "story was always the same, that [he] hadn't done anything. I heard that story once too often

and I upheld the termination." In effect, the Employer terminated the Grievant's employment solely based on conjecture.

Lastly, the Union argues that the Grievant's disciplinary history is not an exacerbating factor warranting termination. At the time of his termination, the most severe discipline in the Grievant's file was a letter of expectation regarding his interaction with Ms. Brodersen, which the Grievant and the Union believe to have been a miscommunication. Mr. Personius, who issued the letter, did not find that the Grievant intended to harass Ms. Brodersen. The letter instructed the Grievant to refrain from making non work-related comments to Ms. Brodersen, which instruction the Grievant followed to the point of avoiding Ms. Brodersen. Mr. Personius testified that the letter was meant to let the Grievant know that his comments could be misconstrued as intentionally harassing. The Union submits a petition from women who worked closely with the Grievant as evidence that he had a respectful and professional working relationship with his female co-workers.

Aside from this letter of expectation, the Grievant had a history of outstanding work performance at Metro, as evidenced by the testimony of Chief Jassman and the Grievant's 2007 performance evaluation (Joint Exhibit #27).

For all of the reasons presented above, the Union requests that the Grievant be reinstated with full back pay and benefits.

ANALYSIS

The Arbitration Board's authority to resolve a grievance is derived from the Parties' collective bargaining agreement (CBA) and the issue that is to be decided. The Preamble of the CBA provides in pertinent part that "the Parties recognize that a key element in the provision of fair working conditions include a commitment to the concept of just cause with respect to employee discipline." The CBA further provides in Article 4 for discharge of an employee who is found to have committed an act of *Gross Misconduct* and/or *Insubordination*. The Grievant was charged with Gross Misconduct and Insubordination. The Parties are in agreement that the issue in this case is whether the Company had just cause to terminate the Grievant's employment on the basis of those two charges.

This analysis begins 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 discharge and the burden of proof, therefore, lies with the Employer.

Furthermore, this Board agrees with general arbitral opinion that, where the circumstances of a discharge 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 generally include insubordination and gross misconduct when that charge involves threatening a fellow employee and questions about work place violence. In order to prevail in this case, therefore, the Employer must show by clear and convincing evidence that it had just cause to discharge the Grievant.

Specifically, the Grievant's termination letter states that the basis of his discharge is that he allegedly "made an inappropriate telephone call to a co-worker during business hours" and "were subsequently dishonest about this event during two investigative interviews" (J-11). Of the multiple ways to evaluate adherence to the just cause standard, the Parties focused on two elements – first, whether the County conducted a full and fair investigation that produced sufficient evidence to prove the charges outlined in the termination letter; and second, whether the level of discipline was commensurate with the proven charges.

In order to demonstrate just cause for discharge, therefore, the Employer must begin by showing that clear and convincing evidence supports the findings that the Grievant made an inappropriate phone call, constituting gross misconduct, and that the Grievant was dishonest during investigative interviews,

constituting insubordination. This analysis will proceed by evaluating the evidence in support of each of the charges and conclude by considering the issue of whether the proven charges were sufficient grounds for discharge.

Gross Misconduct

The fist issue before the Arbitration Board is whether the allegation that the Grievant committed gross misconduct by making an inappropriate telephone call is supported by clear and convincing evidence. After careful consideration of all the testimony and evidence on the record, the Board has concluded that the Employer was unable to meet the burden of proof in establishing the validity of this charge. This conclusion is primarily based on the determination that the investigation into the matter was deficient in significant ways.

The deficiencies, in the Board's view, stem from the initial assumption made by the Employer that the principal fact of the telephone call was not in dispute. Evidence of this assumption is found in the testimony of Scotty Conyne and in the fact that the County began to formulate disciplinary actions prior to conducting an investigation (J-6 and J-8). In fact, Mr. Conyne made it clear that he had "overwhelming" evidence of the Grievant's guilt before conducting an investigation, based

solely on e-mail messages from Ms. McCurdy (J-4 and U-3) and one from Mr. Jassmann (J-5).

In other words, the County preceded based on an assumption that the fact of the phone call was established and what remained to be resolved was to determine the seriousness of the infraction and the appropriate level of discipline to be administered. Fourteen days after the incident (March 25, 2008), the County finally interviewed the Grievant, only to discover that he repeatedly denied ever making the telephone call. This development totally changed the direction the County was taking in conducting the investigation, as it now became a matter of "flat lying" (U-7) and of the need to establish the truth of the charge that it was, in fact, the Grievant who made the call.

The Board concludes that, as a consequence of this mistaken assumption, the Employer initially proceeded with the investigation in a manner which significantly compromised its ability to gather clear and convincing evidence in support of the charge that the Grievant actually 1) made a telephone call that was 2) inappropriate to Ms. McCurdy. Specifically, the Employer's investigation was deficient in the following two ways. First, the Employer delayed the investigatory step of interviewing pertinent witnesses until such a time that it became difficult to collect precise and accurate information

regarding the circumstances of the telephone call. Second, the Employer failed to conduct an investigation sufficiently thorough to uncover pertinent and easily ascertainable facts regarding the incident. This analysis proceeds to discuss each of these matters in more detail.

The Employer's position is that "credible evidence… establishes that Mr. Tchernev had the opportunity to make the call…[T]he majority of the evidence places the call between 5:15 pm and 6:00 pm" (E brief, pg. 16). Before evaluating this position, the Board would like to note that, depending on the circumstances, some investigations of wrongdoing may be extremely time-sensitive. Immediacy is of paramount importance in cases where the investigation is centered on witnesses' specific recollections. This is especially true when the details of those recollections become central to the conclusion of the investigation, as details are more likely to get lost the longer an investigation is delayed.

In many respects, this was an instance where timing was crucial to the success of the investigation. In order for the investigation to be successful, it was necessary for the Employer to ascertain details regarding the timing of the phone call and the Grievant's whereabouts during that time. In other words, it is the Employer's responsibility to gather the "credible evidence" in support of its position stated in the

previous paragraph. The evidence as a whole clearly establishes that Tuesday, March 11, 2008 was an ordinary day for most of the witnesses interviewed by the Employer and who testified at hearing. Therefore, the witnesses' recollections of the minute events of that day, gathered weeks or months afterwards, were understandably imprecise. The Employer's failure to carry out a timely investigation compromised its case in the following ways.

First, in the Boards' opinion, the Employer has failed to firmly establish the time of the phone call, which is extremely relevant to evaluating the merit of the charge of gross insubordination. A review of the testimonies of the three most relevant witnesses who were questioned on this point indicates significant discrepancies and internal incongruities which render the Employer's position that the Grievant had the opportunity to make the call problematic. Chief Antonio, who initially spoke to the caller and gave him Ms. McCurdy's direct phone number, testified that Ms. McCurdy received the call at 5:30 or 5:35 pm. Ms. McCurdy's officemate, Mr. Ware, testified that the call took place between 5:30 and 7:00 pm, and provided his best estimation as being between 5:45 and 6:00 pm. These discrepancies are attributable, in the Arbitrators' view, to the fact that the witnesses were not interviewed until long after the event, making it difficult for them to provide precise recollections.

Ms. McCurdy herself testified at the hearing that the call came in between 5:00 and 7:30 pm. This testimony is not in accord with statements made by Ms. McCurdy earlier in the process. In her e-mail to Mr. Conyne on March 24, 2008 (U-3) Ms. McCurdy places the call between 6:30 and 7:30 pm. During her initial interview with Ms. Walraven on April 1, she reaffirmed her belief that this was the correct time window, stating "Ifo and I differ – I believe it was between 6:30 and 7:30 PM. Ifo thought it was between 5:30 and 6:30 PM" (U-11). The Board places great weight on Ms. McCurdy's initial statements and accordingly less weight to her testimony at the hearing. The estimation of 6:30 to 7:30 pm was made much closer to the time of the incident and was repeated two weeks later. The manner in which it was reaffirmed indicated that the possibility that the call took place prior to 6:30 had been discussed with Mr. Antonio and rejected by Ms. McCurdy before she was interviewed by Ms. Walraven.

Additionally there is the testimony during the hearing of John Jassmann that he talked with Ms. McCurdy between 5:45 and 6:00 and Ms. McCurdy's testimony that she talked to Jassmann about 15 minutes after receiving the call. But, the Employer did not have this information at the time of discharge. Moreover, according to the record, Mr. Jassmann was first ask for the time of Ms. McCurdy's call at the hearing and there is

the obvious question about the accuracy of his recall 11 months after the incident and the additional fact that he sent an e-mail message to Mr. Conyne about the call at 8:43 pm. Thus Miss McCurdy's call could have come to him much later than indicated in his testimony.

In summary, all of the information that the Employer had collected at the time that it charged the Grievant with gross misconduct indicated that the call did not take place before 5:30 pm. However, at the hearing Ms. McCurdy stated that the call may have come in as early as 5:00 pm., thereby widening the window of time in consideration. From the Board's perspective, there is a sense that Ms. McCurdy's testimony was being adapted to the charges alleged by the Employer.

Taken together, the testimonies of relevant witnesses provide inconclusive evidence as to the timing of the call. The inconclusiveness of the evidence on this point impedes the Employer's ability to demonstrate the validity of the gross misconduct charge. The span of time attested to by its witnesses and the discrepancies between their recollections and other evidence on the record are sufficiently substantial as to preclude a finding that the level of proof has been met.

Specifically, there are two windows of time during which it was arguably possible for the Grievant to have made the phone call. The first possibility is that he arrived at work early

and called Ms. McCurdy before the beginning of his shift – between 5:15 and 5:30 pm. The second possibility is that he made the phone call during his shift, either while he was fueling buses or in between servicing buses – between 5:30 and 7:30 pm. Both of these possibilities are problematic and fail to convince the Board.

The first possibility is problematic because Mr. Ware, Mr. Antonio and the more weighty statements of Ms. McCurdy place the phone call at or after the time that the Grievant began work. Only one witness, Ms. McCurdy, testified that it could have occurred prior to 5:30 pm. and that testimony was not given much weight, as previously discussed. In total, the Employer's own evidence does not support the conclusion that the phone call occurred before the Grievant started work – it actually rather undermines such a conclusion.

The second possibility, that the Grievant made the call during his shift, is problematic because electronic fueling records provide a complete chronology of the Grievant's activity from the time he started work. From this chronology, it appears unlikely that the Grievant had the time to get to a telephone and back to the South Yard while continuing to service buses. The testimony of the Grievant's direct supervisor, Mr. Jassmann, that the Grievant has established a history of being a thorough and conscientious worker casts further doubt on the possibility

that he made the phone call during his shift, for example by skipping a portion of the servicing routine[1].

Mr. Jassmann also testified that the Grievant consistently checks in with him at 5:30 pm. before proceeding to service buses in the South Yard. Evidence on the record indicates that this is most likely what happened on March 11, 2008. In an e-mail to Mr. Conyne dated March 25, 2008 (U-7), Mr. Jassmann summarizes his interview with the Grievant. He writes, in pertinent part, "He [the Grievant] mentioned that he checked in with me every day at 5:30PM (he does) and then goes to work." The Board believes that had Mr. Jassmann had a reason to doubt that the Grievant had checked in at 5:30 on March 11, he would have noted that fact in this e-mail message since the content of the message was specifically about the Grievant's dishonesty over his actions on March 11.

Lastly, had the Grievant made the phone call after 5:30 pm he would likely have been seen by Parts Room Specialist Mr. Peel[2]. However, the Employer's delay in interviewing Mr. Peel made this point unverifiable. The Board specifically wonders how much Mr. Peel could remember about what would have been a very routine night at work on March 11 when he was interviewed

[1] That the Grievant could have made the phone call while fueling buses is also unlikely, as will later be discussed in more detail.
[2] It is likely that he would have been seen since the phone in the Parts Room which is not in Mr. Peel's field of vision was disconnected at the time of the alleged phone call, as established by the testimony of Lead Mechanic Mr. Bergman. This testimony will later be discussed in more detail.

on August 21, 2008 (U-12) some five plus months after the incident.

In sum, the Employer's inability to provide a firm and specific time frame for the phone call raises substantial questions regarding the Grievant's opportunity to place the call. Because the investigation did not proceed in a timely manner, it failed to provide persuasive evidence as to when the event took place. In the Arbitrators' view, the lack of this particular piece of information is a substantial flaw in the Employer's case.

Second, further evidence that the Employer's delay in conducting an investigation had a negative impact on its ability to establish the validity of the allegations against the Grievant is provided by the conclusions reached by Ms. Curtis when she interviewed the Grievant's co-worker, Ms. Frisch. To begin, this interview did not take place until after the Second Step Hearing of this grievance – that is, approximately five months after the event on which the Grievant's discipline was based. Ms. Curtis made two conclusions. First, she concluded that Ms. Frisch was not present during the pertinent time and therefore could not have been able to ascertain the Grievant's whereabouts. Her second conclusion was that Ms. Frisch was unable to provide pertinent information because she lacked a clear, independent memory of that particular day.

In the Board's opinion, both of these conclusions stem directly from the delay with which the witness was interviewed. The first conclusion is problematic due to the fact that the Employer was never able to determine the actual timing of the phone call – as mentioned previously, two witnesses from the Atlanta base place the call at a time when Ms. Frisch would have been present in the South Yard. The second conclusion is problematic due to the fact that the witness was not interviewed until so long after the event. Had the interview taken place directly after the event, it is possible that Ms. Frisch, like Mr. Peel, would have been able to provide clear and precise information regarding the circumstances of the phone call. The delay with which Ms. Frisch was interviewed[3], not her irrelevance as a witness, caused her statements to be discounted by the Employer.

The Board takes specific notice of Ms. Curtis' second level grievance response found in joint exhibit 15 when she states that:

[3] The County also contends that Ms. Frisch's statement would not have been helpful because she would not have been in direct contact with the Grievant during all the time in question. The Board did not find this a persuasive argument because she might have been in a position to have actually seen him walking off to make the phone call. Also, she was the one directly working with the Grievant and would have been aware of the normal rhythm of their work and whether that rhythm had been interrupted. In any regard, interviewing her some five months later substantially diminishes any potential value that might have been present if the interview had been conducted within a short period of time from the actual event. It is one thing to ask a person to recount something that happened five months ago, quite another to ask about something that happened two or three nights earlier.

> If Mr. Tchernev and the Union felt that persuasive, key information had not been considered that would prove Mr. Tchernev had not made the call, and furthermore, that he was truthful in the investigation, it was incumbent on them to provide that information at the pre-disciplinary Loudermill meeting, which according to Ms. Frisch's account was around the time Mr. Tchernev initially called her. However, Metro did not learn of Ms. Frisch's Incident Report until substantially after she wrote it, after the Loudermill meeting and after Mr. Tchernev's termination on 5/16/08.

The Board notes that there were three people who could have had contact with the Grievant during the time in question, on the evening in question: Ms. Frisch, Mr. Peel and supervisor Jassmann. Since in an employment termination case it is up to the Employer to provide clear and convincing evidence, it seems to the Board that the failure to interview Ms. Frisch and Mr. Peel early on was an investigatory error of the Employer not a deficiency on the part of the Union.

The Board must question the conclusions of an investigation that is so untimely as to render the statements of relevant witnesses unreliable, both regarding the timing of the call and regarding the Grievant's whereabouts during the time period in question. The lack of precise and accurate information on these two points, resultant from the delay with which the investigation was conducted, constitute the first significant flaw of the Employer's investigation.

The second flaw which renders the Employer's investigation deficient is the apparent lack of thoroughness with which it was

conducted. Certain facts which were easily ascertainable to the Employer were not uncovered, even though they were relevant to the claims made during arbitration in support of the allegations upon which the Grievant's discharge was based.

The first of these claims is that the Grievant most probably made the phone call from the telephone in the back of the Parts Room, where he would not have been seen by the Parts Room Specialist Mr. Peel. However, as conclusively demonstrated by the testimony of Lead Mechanic Mr. Bergman, that telephone was not in operation on March 11. Mr. Bergman testified that he himself had internally disabled the telephone, as instructed, due to an independent problem with another employee and that he himself had verified in late February that the phone was out of order. The Employer's belief that the Grievant was able to use that particular telephone made it falsely appear that it was easy for him to place the call during his shift without being seen. Having failed to verify the condition of the telephone[4] in the back of the Parts Room, the Employer lacked evidence to doubt its position that the phone call took place in the way it alleged.

The second claim made by the Employer, relevant to the charge of gross misconduct, but not supported by easily ascertainable evidence is the claim that the Grievant could have

[4] Multiple pictures of this phone are found in joint exhibit # 23.

made the call between fueling buses because certain of his buses took very little fuel, giving him extra time to travel to and from the Parts Room. However, as convincingly demonstrated by the Union, the fuel meter in lane 3 which the Grievant used several times that day was malfunctioning on March 11, as it consistently gave readings which were severely discrepant with hand-kept logs contemporaneously kept by Equipment Service Workers. The Employer's failure to ascertain the condition of the fuel meter made it falsely appear that the Grievant had more free time on that day than he actually could have. Having failed to discover the malfunction, the Employer lacked evidence to doubt its position that the phone call could have been made during the Grievant's shift.

In sum, the Employer's investigation was not sufficiently thorough, as demonstrated by the fact that it overlooked relevant and potentially exculpatory evidence such as the inoperative condition of the telephone in the back of the Parts Room and the malfunction of the fuel meter in Lane 3. Due to the lack of thoroughness and the substantial delay with which the investigation was conducted, the Board has concluded that the investigation was not sufficient to provide clear and convincing evidence that the Grievant was, in fact, guilty of making the telephone call.

An additional concern, from the point of view of the Board, does not involve a problem with the evidence but rather what appears to be a shifting sense of seriousness with regard to the content of the telephone call. Initially, Mr. Conyne was considering issuing the Grievant and oral reminder regarding the inappropriateness of the call (J-6). Regardless of who made the initial call, there is no dispute that following the March 11 call the Grievant had no contact whatsoever with Ms. McCurdy; nor was there any other incident or evidence that could change the original assessment of the seriousness of the call. Ms. McCurdy testified that the caller was not threatening and politely ended the call with a "thank you." For unexplained reasons, what had started out to be an oral reminder morphed into being a charge of gross misconduct, a charge that under the terms of the CBA can result in discharge.

What is particularly troubling to the Board is the fact that the Employer had internal discussions about calling the police, escorting Ms. McCurdy to her car for safety reasons and other concerns over possible workplace violence (U-11). Yet, while the Grievant's immediate supervisor, Mr. Jassmann, was informed of the telephone call within fifteen minutes of the call (Ms. McCurdy's testimony) and while Mr. Jassmann was at the Ryerson base when he was notified and could have simply gone out to the bus yard and questioned the Grievant to determine whether

there was a problem, no one talked to the Grievant until fourteen days later.

It is perplexing to the Board why Mr. Jassmann didn't walk out into the yard and ask the Grievant something like, "Did you just call Lisa McCurdy?" The Employer would have received two positive benefits from this immediate, direct contact: 1) Mr. Jassmann could have made an assessment as to whether the Grievant appeared to be in an agitated state and a likely threat to his fellow employees and 2) there is a strong likelihood that the problem over determining the time of the telephone call would have been resolved because the Employer would have known immediately whether the Grievant was denying or admitting the call. Also, if the Employer truly believed that there was the possibility the Grievant would physically harm Ms. McCurdy, why not put him on paid administrative leave to make sure that he was no longer present in the workplace? However you look at the matter, it appears to be such that it needed to be immediately addressed, not two weeks later.

Ultimately, the Board found that regardless of who made the inappropriate telephone call, there appears to be no basis in fact as to why it resulted in a charge of gross misconduct. That charge seems entirely out of place given the actual content of the call and the Employer's actions after the call. If it truly was gross misconduct, why was the Grievant allowed to

continue to work for fourteen days after the incident without any notice from the Employer?

As a result of the conclusions drawn in the above analysis, the Board dismisses the charge of gross misconduct.

Insubordination

Insubordination is a grave charge which, according to Article 4 Section 3 Parts A and B, constitutes a major infraction and "will result in discharge" at the discretion of the Employer. In the instant case, the charges of gross misconduct and insubordination are closely linked. The charge of insubordination is based on the fact that, prior to being interviewed in the course of the investigation, the Grievant was instructed to be fully truthful in his responses to the interviewer and he was informed that any dishonesty may result in "disciplinary action, up to and including discharge for this [dishonesty] alone" (U-9).

Because the Employer concluded that the Grievant was guilty of making the phone call to Ms. McCurdy on March 11, his denial of said action during the interviews was considered dishonesty. The charge of insubordination was therefore added to the charge of gross misconduct, based on the Employer's belief that the allegation of gross misconduct was true.

The Arbitration Board has come to the conclusion that the Employer failed to meet its burden of proof in support of the claim that the Grievant made the phone call. Although the possibility of his guilt remains, it has not been established by clear and convincing evidence. The lack of such evidence precludes the finding that the Grievant was dishonest when he denied making the phone call.

In the Board's opinion, it seems that the Employer never seriously considered the possibility that the Grievant was being truthful in his denials. The Employer argues that the issue of dishonesty centers around the credibility of Ms. McCurdy on the one hand and the lack of the Grievant's credibility on the other. However, the Employer entirely failed to investigate the possibility that Ms. McCurdy may have been mistaken when she identified the Grievant as the caller[5]. The Board does find that there is no basis to doubt Ms. McCurdy's credibility. The Board finds persuasive the testimony of witnesses attesting to her integrity.

However, the possibility that she made a mistake remains. Therefore, it was incumbent upon the Employer to investigate this possibility, but in the Board's view it failed to

[5] In an e-mail of March 26, 2008 to Ms. Walraven, Mr. Conyne writes "only bummer would be, if she has a 'hurt' boy friend, that might sound like Iordan" (U-7). This statement by Mr. Conyne indicates that he did recognize the possibility that she could have been mistaken, but the Board finds no evidence that this possibility was ever pursued in the investigation.

adequately do so on the basis of its initial assumption that the Grievant was guilty of making the phone call. As previously discussed, the investigation that was conducted was too little, too late.

In assessing the matter of the Grievant's honesty further and in consideration of the possibility that Ms. McCurdy may have mistakenly identified him as the caller, the Board took the following evidence into account.

Evidence that Ms. McCurdy correctly identified the Grievant as the caller includes:

1. She knew the Grievant personally when she worked with him at Ryerson base and she had previously spoken to him on the telephone.

2. She testified that the caller identified himself as "Iordan" when she first answered the phone. She therefore reasonably believed that it was, in fact, the Grievant.

3. The Grievant speaks with a distinctive accent. She testified that she recognized his accent.

Evidence that the Ms. McCurdy may have mistakenly identified the Grievant as the caller includes:

1. Mr. Antonio, who initially took the call and gave the caller Ms. McCurdy's direct line, also knew the Grievant and was familiar with his accent. Mr. Antonio has not ever indicated that he recognized the Grievant as the caller.

2. The phone call was of short duration. Having started out with the belief that the Grievant was the caller, Ms. McCurdy may not have had time to correct a potential misperception.

3. The phone is not a high-fidelity instrument. It does not transmit a true reproduction of sound and can therefore be deceiving.

4. By Ms. McCurdy's testimony, she had had no contact with the Grievant since leaving the Ryerson base approximately three months prior to the phone call. As memory does fade over time, Ms. McCurdy's recollection of the Grievant's voice and manner of speaking may have been inaccurate.

The above considerations were never explored by the Employer. In the Board's opinion, this failure proceeded directly from Metro's initial assumption that the Grievant was guilty of wrongdoing. The Board agrees with the Union's argument that at the time of his interview, the Employer was already convinced of the Grievant's guilt and believed that the interview would confirm this conviction, as evidenced by an early draft of his disciplinary letter (J-8). Once the Grievant denied making the call, the Employer summarily concluded that the denial was false and charged the Grievant with insubordination. The Employer simply failed to conduct an investigation into the matter of the Grievant's honesty.

In sum, the Board recognizes that, due to all of the considerations enumerated above, Ms. McCurdy may have been mistaken when she identified the Grievant as the caller. The existence and lack of investigation of this possibility, evaluated in the context of the Employer's failure to provide clear and convincing evidence regarding when the Grievant may

have had the opportunity to make the call, significantly undermines the Employer's case for insubordination. The Arbitration Board concludes that the Employer has not met the burden of proving by clear and convincing evidence that the Grievant was dishonest when, in the course of investigatory interviews, he denied having called Ms. McCurdy. The charge of insubordination is therefore dismissed.

Level of Discipline Imposed

The just cause standard requires that any discipline imposed be based on proven charges against the employee. Where the charges against the employee have not been adequately proven, the just cause standard prohibits any discipline from being imposed. In the instant case, the Board has arrived at the finding that the Employer has failed to carry the burden of proving the charges of gross misconduct and insubordination upon which the Grievant's employment was terminated and both charges have therefore been dismissed. In accordance with the just cause standard, the Board will overturn the discipline that was imposed.

Having determined that there is no cause to discipline the Grievant, the Arbitration Board nevertheless wishes to address two points strongly emphasized by the Parties at the hearing and in their briefs. Both points concern the appropriate level of

discipline as evaluated in the context of the Grievant's overall employment record.

On the one hand, the Parties are in agreement that the Grievant is an exceptionally strong worker in terms of his fulfillment of the tasks and duties of his job. The Grievant's performance evaluations (J-26 and J-27) stress his proficiency. The testimony of his supervisor, Mr. Jassmann, was likewise expressly clear regarding his diligence in performing the work. It therefore would have been appropriate to consider this work performance history as a mitigating factor when evaluating the appropriate level of discipline had the charges been proven.

On the other hand, the Grievant does have a history of friction in his personal relationships with some of his fellow employees. The Employer has persuasively demonstrated that there have been repeated incidents which evidence that the Grievant has contributed to this friction. The Board does not want to downplay the Employer's concerns on this issue and nothing in this opinion should be interpreted as a dismissal of those concerns. Rather, the Board is in agreement with the Employer's point that it is the Grievant's responsibility to be diligent in working towards creating positive and constructive relationships with his co-workers. To the extent that he is unable to do so, it is appropriate for the County to consider a continuation of this history of interpersonal friction to be an

exacerbating factor when evaluating the appropriate level of discipline for any future infraction.

Conclusion

The Grievant, Iordan Tchernev, was discharged for gross misconduct and insubordination. The Arbitration Board found that the Employer failed to provide clear and convincing evidence of these two charges. Moreover, the Board further found that the failure to provide sufficient evidence was a reflection of an inadequate investigation -- it was untimely and failed to examine all possibilities. Based on the above conclusions, the Board is sustaining the grievance and directs the County to reinstate the Grievant's employment, making him whole for any losses. An award is entered consistent with these findings.

IN THE MATTER OF THE ARBITRATION	)	ARBITRATION BOARD'S
	)	
BETWEEN	)	AWARD
	)	
AMALGAMATED TRANSIT UNION	)	
	)	
"LOCAL 587" OR "THE UNION"	)	
	)	
AND	)	
	)	
KING COUNTY METRO	)	Iordan Tchernev Discharge
	)	Grievance
"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 Company did not have just cause to terminate the Grievant's employment on April 14, 2008.

2. The grievance is sustained and the Employer is found to have violated both the Preamble and Article 4 of the collective bargaining agreement (CBA).

3. As a remedy for the violation of the CBA, the Arbitration Board directs the Employer to reinstate the Grievant's employment and to make him whole for lost wages and benefits.

4. Per the Parties' stipulation, the Arbitration Board reserves jurisdiction for a period of 60 days from the date of the award to resolve any dispute over the remedy.

5. Article 5 Section 2 Part G provides that "If the arbitrator upholds the grievance, METRO shall pay the cost of the arbitrator. If the grievance is denied, the UNION shall pay the cost of the arbitrator." As the grievance has been upheld, the Neutral Arbitrator assigns his fees to METRO.

This arbitration award is respectfully submitted on this, the 30th of April, 2009, by

Timothy D.W. Williams
Neutral Arbitrator

I, the undersigned, ☐ concur with this opinion and award.
☐ dissent with this opinion and award.

Lance Norton
Arbitration Board - Union

I, the undersigned, ☐ concur with this opinion and award.
☐ dissent with this opinion and award.

Steve Grissom
Arbitration Board - Employer