IN THE MATTER OF THE GRIEVANCE ARBITRATION BETWEEN

FIRST TRANSIT, INC.	)	
and	)	**ARBITRATION OPINION AND AWARD**
LOCAL 1287 AMALGAMATED TRANSIT UNION	)	Ruth M. Weatherly J.D., MBA Arbitrator
	)	Issued: April 6, 2011

Re: William Larson Discharge
FMCS# 111013-00160-A

Appearances

For First Transit, Inc.

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Background and Jurisdiction

First Transit, Inc. contracts with Johnson County Transit to provide public transportation in the County of Johnson, in Kansas. About 90 drivers are employed.[1] The parties are signatories to a labor agreement ("Agreement") in effect

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[1] Testimony of Mr. Wesley

from November 22, 2007 to November 22, 2010, a copy of which was submitted as Joint Exhibit 1.[2]

The hearing was held on January 19, 2011 in Olathe, Kansas. The parties agreed at hearing that this matter is arbitrable, properly before the Arbitrator, and not affected by any procedural questions.[3] As agreed by the parties, Mr. William Wilson electronically audio-recorded the hearings, and supplied the undersigned with a CD of the recording. Neither party sought establishment of a record by any other means. Neither party sought witness subpoenas, or access to witnesses other than those who appeared.

The parties agreed that witness sequestration was not required. The following witnesses were sworn and gave testimony:

For First Transit, Inc.[4]	*For Local 1287, Amalgamated Transit Union*[5]
Corey Roessel General Manager	William Larson Grievant
Doyle Wesley Road Supervisor	Jackie Brownlee Steward

Also in attendance were:

William Wilson
President, ATU Local 1287
Louis Duncan, Sr.
Member, Executive Board, ATU Local 1287

The parties had the opportunity to fully present testimony and evidence in support of their cases, and to cross-examine the witnesses.

Both parties filed closing briefs by email and hard copy. The undersigned received the briefs and the matter was deemed fully submitted on March 5, 2011.

[2] There were 7 joint exhibits, (Jt Ex _) 12 exhibits submitted by First Transit (Co Ex __) and 3 exhibits submitted by ATU (U Ex __)
[3] Three other stipulations are noted below.
[4] First Transit may be referred to herein as "the Employer"
[5] Hereinafter "ATU" or "Union"

The Issue

The parties were at odds on the issue to be decided, thus agreed that the issue should be framed by the Arbitrator. The Employer's version is:

Did the Company violate the provisions of the Collective Bargaining Agreement when it discharged the Grievant for violating the terms of his Last Chance Agreement?
If so, what is the appropriate remedy?

The Union submits the issue should be:

Was the Company's discharge of William Larson for just cause?

Stipulations

The parties agreed to the following:

1. First Transit policy is that all turns are to be at 5 miles per hour.
2. First Transit policy requires compliance with the Smith System of Defensive Driving.
3. Grievant was aware of the above two policies.

Relevant Provisions of the Agreement

Article 7 Management Rights

Section 7.1 Retention of Managerial Prerogatives. Except as expressly modified or restricted by a specific provision of this Agreement, all statutory and inherent managerial rights, prerogatives and functions possessed by the Company prior to the execution of this Agreement are specifically reserved to it and vest in the Company. Further, by way of example and not be way of limitation, the rights, powers and authorities of the Company shall include the right to:

a. To reprimand, suspend, discharge, or otherwise discipline employees for cause and to determine the number of employees to be employed.

. . .

d. To close down . . . or service; to control and regulate the use of vehicles, facilities, equipment and other property of the Company or the Customer.

. . .

f. To issue, amend, and revise reasonable policies, rules, regulations, and practices including rules of conduct or standards of performance . . .

. . .

Article 11 Grievance Procedure

Section 11.1 Definition of Grievance. A grievance is a

claim that the Company has violated a specific provision of this Agreement. . . .

. . .

Article 12 Arbitration

. . .

Section 12.3 Arbitrator's Jurisdiction. The jurisdiction and authority of the arbitrator and his opinion and award shall be confined exclusively to the interpretation and/or application of the provision(s)of this Agreement at issue between the Union and the Company. He shall have no authority to add to, detract from, alter, amend, or modify any provision of this Agreement; to impose on either party a limitation or obligation not explicitly provided for in this Agreement.

. . .

The written award of the arbitrator on the merits of any Grievance adjudicated within his jurisdiction and authority shall be final and binding on the aggrieved employee, the Union and the Company. The Arbitrator shall render a decision within thirty (30) calendar days from the completion of the hearing. All decisions of the Arbitrator shall be in writing, in duplicate, with originals filed with the Company and the Union.[6]

Section 12.4 Burden of Persuasion in Discharge or Discipline Matters. In all cases involving discharge or discipline, the burden of persuasion on the issue of whether or not the grievant engaged misconduct or wrongdoing shall rest on the Company. The burden of persuasion on the issue of whether the discipline imposed was excessive, unreasonable, or an abuse of management discretion shall rest on the Union.

. . .

Article 17 Discipline

Section 17.1 Company Rights. The Company shall have the right to change any policies, rules and regulations governing employees without re-negotiation of this Agreement should changes in policies, rules and regulations be required in order to comply with any provision of the Agreement between the Company and its Customers.

. . .

The Company shall have the sole exclusive right to adopt reasonable rules, regulations, and policies to govern its operations and employees from time to time, to change or amend such rules, regulations and policies, to the extent they do not conflict with any provisions of this Agreement.

Section 17.2 Disciplinary Procedures

a. All disciplinary processes will be performed by the Operations Manager, Project Manager or District

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[6] At the close of the hearing the parties and the Arbitrator agreed that "within thirty (30) calendar days of from the completion of the hearing" shall be interpreted as within 30 days from the closing of the record, that is, the date of submission of briefs.

Manager, or their designee with Union Representation unless declined by employee. . . .

b. The respective Operations Manager, to whom the individual is required to report shall give a fair and impartial hearing to all employees. This shall also include corrective interviews through the disciplinary process. . . .

Section 17.3 Progressive Discipline. Any violation of posted and/or written company rules, policies and/or procedures shall result in progressive disciplinary action. With the exception of a violation of a serious infraction, as listed in the handbook, or unsafe act policy as listed in the handbook. . . .

Brief Summary of Positions of the Parties

First Transit

The Employer discharged William Larson on July 16, 2010. The Grievant had been employed as a bus operator since December 2003. Grievant had extensive training, but nevertheless was involved in preventable accidents and had been counseled twice for road rage and dangerous driving. Due to a collision causing damage to a vehicle side mirror in October 2008, and complaints of aggressive driving, Mr. Larson was placed on administrative leave; on November 12, 2008, that leave was converted to an unpaid suspension and he received a written warning.[7] A September 14, 2009 damage incident when the grievant took a bus through a wash resulted in a three-day administrative leave. "In lieu of discharging the Grievant, the Company agreed to convert the discipline into a suspension without pay and placed the Grievant on a second Last Chance Agreement"[8] signed by the Grievant on September 17, 2009. Mr. Larson was discharged for, within nine months, violating that September 2009 Last Chance Agreement[9] through erratic driving that tripped the DriveCam™ while on his route on June 28, 2010. In that the Grievant's behavior, shown on the DriveCam™ June 28 video, was consistent with the previous discipline and counseling, the Grievant did in fact violate safety policies and engage in aggressive driving. His danger and liability to the passengers, other drivers, the general public, and the image of First Transit's customer, Johnson County Transit, justify the discharge.

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[7] Co Ex 8; detail thereof is quoted under "Selected Additional Relevant Facts"

[8] First Transit Brief, at p. 6

[9] Co Ex 5

The parties' Agreement establishes that employees can only be discharged for cause, and that the Employer has the burden of persuasion on the issue of whether or not the employee engaged in misconduct or wrongdoing. The September 17, 2009 Last Chance Agreement does not affect those contract provisions. Thus, the Employer must show that the Grievant violated the specific policy he was charged with violating, and also that his discharge was warranted or required. The termination letter states that Mr. Larson was discharged because he had ". . . accelerated . . . so as to make a left at a speed greater than the 5 MPH . . ." While it is clear that the DriveCam™ (which does not measure or record bus speed) was triggered, triggering the DriveCam™ was not the basis for the discharge, and the Employer cannot and did not show the speed at which the intersection turn was made. While the "documented" instances for which Mr. Larson received counseling for such things as "excessive horn use," an October 2008 non-damage "incident" involving a mirror "clip" with a KCATA bus, and bus wash damage occurrence in September 2009 (which was "annulled" from Mr. Larson's record) the Employer sought at hearing to bolster its position by raising matters for the first time. Seeking to do so is contrary to the concept of just cause and inconsistent with expectations for grievance processing. The Grievant must be returned to his position with restoration of pay and benefits.

Selected Additional Relevant Facts

Grievant William Larson had been employed as a bus operator by First Transit, driving in Johnson County, since December 2003. On June 28, 2010, he was driving a "cutaway" 12-passenger vehicle on a fixed route. The vehicle is ten feet tall, twenty-three feet long, and weighs about 10,000 pounds. It is built on a pickup truck chassis. Mr. Larson's route on the day in question was one on which he had driven twice a week for over six months. Following being placed on administrative leave on June 30,[10] Mr. Larson was terminated on July 16, 2010 for driving in an

[10] Jt Ex 2

"unsafe manner . . ." having allegedly accelerated the bus "so as to make a left turn at a speed greater than the 5 MPH . . ."[11] consistent with his training and the employer's standards. Joint Exhibit 4 is a copy of the grievance challenging the discharge. By letter dated August 20, 2010, Michael Rademacher, First Transit Director of Operations, denied the third step grievance.[12] ATU Local 1287 gave notice of arbitration on the same date.[13]

The DriveCam™ System

The Number 134 vehicle driven by Mr. Larson included the DriveCam™ system.[14] The system operates via a camera attached to the vehicle windshield. The camera has two lenses, one pointed to the rear and one to the front. The driver is partially in the camera view. The camera does not "save" unless some "event" or occurrence triggers saving, that is, recording, which is for 10 seconds before and 10 seconds after the "event." Such events or occurrences are measured by "G" forces. All vehicles in the First Transit fleet, including Mr. Larson's vehicle were set at .45 "G" force trigger parameter. While the DriveCam™ parameters are customizable for each vehicle type,[15] it had not been customized for the Number 134. Mr. Doyle Wesley's daily responsibilities includes reviewing 50 to 150 of the 20-second DriveCam™ video clips which are each night downloaded to a free-standing PC. He looks at the clips in an effort to determine what "set off" the camera, including what the driver was doing. Such things as potholes on a rough road can trigger the system. If it appears to Mr. Wesley that driver counseling is required, he calls in the driver and asks for the driver's explanation after review of the DriveCam™ footage. Driver counseling or retraining (provided by management) may result.[16]

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[11] Jt Ex 3

[12] Jt Ex 5

[13] Jt Ex 6

[14] Jt Ex 7 is the DriveCam™ "User's Manual for DriveCam Video Systems' HindSight 20/20 Sotfware" – "Using the Driving Feedback System to Its Fullest Potential." The undersigned primary relied upon witness testimony in compiling the above summary.

[15] Notably, the "HindSight 20/20 User's Manual" recommends that while the "default G-force thresholds were selected to suit the needs of a generic fleet . . . you may need to adjust the settings for each of your vehicles to reflect your specific vehicle types and driving styles." The 9 vehicle types listed on page 46 include a distinction between pickup trucks and heavy trucks, for example. The "cutaway" was described at hearing as built on a pickup truck chassis, but also, after the witness noted page 46, called a "heavy truck."

[16] Testimony of Mr. Wesley

The Final Warning and the Last Chance Agreement

Company Exhibit 8 is a November 12, 2008 letter from the First Transit Operations Manager addressed to William Larson. It refers to the Grievant's "collision with a Metro bus on October 30, 2008 and numerous complaints and DriveCams showing aggressive driving and road rage." That letter, in the body thereof, is identified as "this Last and Final Warning." The final paragraph reads:

> "This letter will also serve as your last and final warning. Should you fail to abide by all company policies, you will be subject to further discipline up to and including termination. This includes but is not limited to, any further complaints, videos, or observations of aggressive driving or road rage, to be handled on a case-by-case basis."

Company Exhibit 5, dated September 17, 2009, titled "Last Chance Agreement" identifies as its parties the signatories; the Employer, the Union, and Mr. Larson. It recounts a damage-causing accident in the company's automatic bus wash, the fact that Mr. Larson's work history was reviewed, and that an administrative leave would be converted to a disciplinary suspension without pay. A final point reads:

> "Larson and the Union understand and agree that in the event Larson causes any further accidents of any nature or severity or violates any First Transit policy, his employment will be immediately terminated. If the Company should determine that Larson has violated the provisions of this paragraph, The Union reserves the right to challenge that determination , but will not dispute that immediate termination is the appropriate penalty if the determination is upheld in the grievance procedure."[17]

The Issue for Decision

As noted above, the parties did not agree on the issue for decision. This is a discharge matter; the parties' labor agreement specifies that the Company has the right to discharge employees for cause.[18] The standard for "cause"

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[17]Logically, we must assume the parties intended that "grievance procedure" includes its final part, arbitration.

[18] Article 7

is presumed to be equivalent to "just cause."[19] "Cause" is required for a discharge, even if that discharge is preceded by a last chance agreement, thus affecting the context for application of "cause." Full consideration of the facts presented by both sides leads to a single conclusion regardless of whether the issue is as stated by the Employer or by the Union. Thus, the simplest issue statement is appropriate and it is:

> Was the discharge of William Larson for just cause?
> If not, what is the appropriate remedy?

Analysis and Findings

In a discharge grievance arbitration, the question of whether just cause exists requires a two-step analysis. The burden is on the employer to establish the employee's misconduct. The second step, determining whether the discipline was appropriate, follows only if the employer meets its burden of showing that the employee committed the alleged misconduct.[20]

Consistent with and inherently a part of this two-step analysis are due process and progressive discipline. These two core principles are central to just cause, and must be applied in discharge cases.[21]

1) The "just cause" requirement

The Agreement between the parties states that the Employer may discipline employees "for cause."[22] As noted above, there is "no significant difference" between "cause" and "just cause." "Just cause" is a central concept "permeating discipline and discharge arbitration", even in the absence of specific contract language.[23] While just cause is not an easily defined concept, one measurement is "what an arbitrator thinks is fair."[24] It is incumbent upon an arbitrator to determine whether the employee involved is

[19] *How Arbitration Works*, 6th ed., Elkouri & Elkouri, Ruben, ed., p. 932

[20] This is not inconsistent with what the parties apparently intended to accomplish through one of the provisions in their 9/17/09 Last Chance Agreement. "Larson and the Union understand and agree . . .If the Company should determine that Larson has violated the provisions of this paragraph, the Union reserves the right to challenge that determination but will not dispute that immediate termination is the appropriate penalty if the determination is upheld . . ."

[21] *Discipline and Discharge in Arbitration*, Brand, ed. BNA Books, p. 29

[22] Jt Ex 1, Article 7

[23] *Discipline and Discharge in Arbitration*, Brand, ed. BNA Books, p. 29

[24] *Discipline and Discharge in Arbitration*, Brand, ed. BNA Books, p. 29, p. 31

guilty of the claimed wrongdoing, and also to make certain the interests of the employee are protected by making "reasonably sure" the "causes for the discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge."[25] Arbitrator Platt's language leads directly to the issue of due process. And, according to Black's Law Dictionary, "just cause" requires that it must be "based on reasonable grounds, and there must be a fair and honest cause or reason, regulated by good faith."[26] In this case, the question must be applied while taking into consideration the existence, and the specific language, of the September 2009 Last Chance Agreement. Thus, was there cause to discharge Mr. Larson when he was under notice of termination should he "cause any further accidents . . . or violate(s) any First Transit policy . . .?" I find there was not.

2) <u>Quantum of proof</u>

It's a given that the employer has the burden to prove the Grievant's misconduct. However, "the quantum of proof required to support a decision to discipline or discharge an employee is unsettled."[27] Of the three standards primarily used by arbitrators (preponderance of the evidence, clear and convincing evidence, and evidence beyond a reasonable doubt) most arbitrators apply the "preponderance" measure to "ordinary discipline discharge cases" as distinguished from those involving "criminal conduct or stigmatizing behavior."[28] Counsel for ATU argues that "clear and convincing" must be the required standard in the instant matter.[29] In view of the fact that this case involves discharge (as opposed to lesser discipline) and considering the potential future employment effects on a bus driver of a discharge for a driving issue, the higher standard of "clear and convincing" is appropriate to this case. Assuming for the sake of their burden of proof that First Transit *only* needed to show that the driving incident in question constituted operating the vehicle in "an unsafe manner"[30] there is neither direct nor substantial evidence

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[25] Riley Stoker Corp., 7 LA 764, (Platt, 1947) as quoted in *Discipline and Discharge in Arbitration*, Brand, ed., p. 31

[26] 4th edition, West Publishing Company, p. 1001

[27] *How Arbitration Works*, 6th ed., Elkouri & Elkouri, Ruben, ed., p. 949

[28] *How Arbitration Works*, 6th ed., Elkouri & Elkouri, Ruben, ed., pp. 949-951

[29] ATU Brief, p. 20

[30] Line 1 of the termination letter, Jt Ex 3. However, the letter refers to operating in "an unsafe manner" the letter clearly and directly states the discharge was because "*specifically* you accelerated your vehicle so as to make a left turn at a speed greater than the 5 MPH you were trained to perform." (emphasis mine)

that such was the case. However, in that the stated basis for the discharge was making ". . . a left turn at a speed greater than the 5 MPH . . ." that is the operative point on which this case must turn.

Mr. Wesley gave testimony for First Transit to the effect that while he could not say *for certain* what speed Mr. Larson's vehicle was traveling, he "estimated," by watching the DriveCam™ video, based on his experience and observations, the vehicle speed at an estimated 20 miles per hour. While there is no reason to doubt Mr. Wesley's veracity, an estimate is simply not a sufficient primary underpinning for the discharge decision. Mr. Wesley's opinion and estimate were countered by Ms. Brownlee. Her four year driver background (including driving the "cutaway" vehicle like the Number 134 involved) allows her to credibly testify that Mr. Larson's vehicle speed could not have reached 15 miles per hour, from a stop, in the distance in question. Thus, testimony and evidence at hearing did not provide clear and convincing proof that Mr. Larson accelerated his vehicle so as to take the left hand intersection turn at greater than 5 miles per hour.

3) The necessity for due process

"Due process is an integral part of just cause, requiring employers to treat employees fairly during the disciplinary process."[31] Industrial due process requires that the employer conduct a reasonable inquiry or investigation regarding the actions for which an employee is to be disciplined. "Procedural fairness" requires a full and fair investigation of the circumstances of an employee's alleged conduct.[32] The evidence and testimony presented at hearing does not reveal such an investigation aimed at or *proving* that Mr. Larson accelerated his vehicle to a speed greater than 5 miles per hour in the left turn. Mr. Wesley and Mr. Roessel testified they reviewed the DriveCam™ clip frame-by-frame. As pointed out in their testimony, they observed several of Mr. Larson's actions. Some of those actions were criticized during their hearing testimony. However, those actions were not the stated basis for Mr. Larson's discharge.

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[31] *Discipline and Discharge in Arbitration*, Brand, ed. BNA Books, p. 35
[32] *How Arbitration Works*, 6th ed., Elkouri & Elkouri, Ruben, ed., p. 969

Due process also requires, among other factors, "a precise statement of the charges."[33] By logical extension, where the discharge is connected to a last chance agreement, it is also necessary, if the discharge is to be upheld, that the discharge was for reasons consistent with the language of the last chance agreement. That thread is not present in the documents supporting the Grievant's discharge.

A last chance agreement should be strictly construed and enforced.[34] Of concern with respect to this requirement for strict construction, and connected to the due process ramifications of notice to the Grievant is the status or the perceived status of the final warning letter and the last chance agreement. There was testimony to the effect that "one last chance agreement 'morphed' into another last chance agreement."[35] However, it does not appear that there *was* a *first* last chance agreement. The body of the November 12, 2008 letter[36] identifies it as a "Last and Final Warning." It also includes a reminder that ". . . safety policies are strictly enforced, and you must abide by all company rules." It cautions Mr. Larson that if he fails to abide by all company policies he will be subject to "further discipline up to and including dismissal," and concludes with a list of example infractions, " . . . to be handled on a case-by-case basis." This letter did not put Mr. Larson on notice that he would be discharged for any particular act. The letter falls short of a "last chance" document. Its language is similar to general contract statements and descriptions of progressive discipline.

I cannot and do not disagree with a general concept consistent with First Transit's expectation that there is or should be a limit to the Company's tolerance for blatant disregard for safety rules and safe driving.[37] However, in order for the instant discharge to be upheld, it would have been necessary to prove that the Grievant did in fact commit the act that was the stated basis for the discharge.

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[33] *Discipline and Discharge in Arbitration*, Brand, ed. BNA Books, p. 37
[34] *How Arbitration Works*, 6th ed., Elkouri & Elkouri, Ruben, ed., p. 969
[35] Testimony of Mr. Roessel
[36] Co Ex 8
[37] Co Brief p. 20

4) Consideration of Grievant's Seniority

Counsel for ATU Local 1287 argues that the "company's failure to consider Larson's seniority when determining whether or not to discharge him" necessitates returning him to work, and that it would serve "an additional purpose – to impress upon the Company the importance of observing . . . due process and . . . the just cause standard."[38] This opinion is based upon the facts and the analysis as explained above. It is neither necessary nor appropriate, considering the Arbitrator's jurisdiction under Article 12.3, to apply this opinion for any purpose beyond the direct question involved with Mr. Larson's discharge

Summary and Conclusions

Based on due consideration of all the evidence and testimony presented at hearing, and the arguments of the parties, I find there was not cause for the discharge of Grievant Mr. William Larson. Due process was lacking in that the stated reasons for his discharge were not consistent with the notice given him via the 2009 Last Chance Agreement, and there was not clear and convincing proof that he in fact committed the driving violation that was the stated basis for his discharge.

Decision and Award

There was not cause for the discharge of Mr. William Larson. The grievance is upheld, and Mr. Larson is to be returned to his position with restoration of pay and benefits from the date of his discharge, less the amounts of any pay or compensation Mr. Larson has received from other employment during the period in question, and less the amounts of unemployment compensation he has received, unless such compensation must be repaid to the state as a result of this award.

The parties' Agreement applicable to this matter provided, at Section 17.3, language including:

> "Following a non-serious infraction, if an employee goes twelve (12) months without committing the same non-serious infraction again, that infraction will be removed from the employee's record."

[38] Union Brief, at p. 38-39

Assuming that the parties' current Agreement includes the above or similar language, the twelve months for purposes of its possible application to Mr. Larson shall be counted without including the period from July 16, 2010 until Mr. Larson's return to work pursuant to this opinion.
For application of any future potential progressive discipline affecting Mr. Larson, incidents prior to the opinion should only be counted if they were documented and properly covered with Mr. Larson.

The undersigned retains jurisdiction for the purposes of implementation of this award, for sixty days or until the parties are agreed that satisfactory implementation has been achieved.

Respectfully submitted,

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Ruth M. Weatherly J.D., MBA
Arbitrator

dated: ____________________

CERTIFICATION of MAILING

I hereby certify that on the ____ day of April 2011, I served a copy of the foregoing Opinion and Award on the following parties, by mailing to each, by USPS mail with appropriate postage prepaid.

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