VOLUNTARY ARBITRATION TRIBUNAL

In the matter of Arbitration between:
Amalgamated Transit Union, Local 1287

and

Kansas City Area Transit Authority
FMCS Case No. 06-04278 /

Hearing Date: October 19, 2006

Award Date: December 18, 2006

Arbitration Panel: Richard H. Potter, Chairperson
Fern Kohler, Authority Representative
Robert Roach, Union Representative

Issue: Was the Grievant, Terry Herbst, discharged for cause?

Appearances:

For the Union:

Scott Raisher	Counsel for the Union
Terry Herbst	Grievant
William Wilson	President, Local 1287

For the Authority:

Jeffery Place	Counsel for the Employer
Walter Woodward	Maintenance Superintendent
Tom Morgan	Superintendent of Transportation
Tommie Hill	Senior Supervisor of Transit Operations
Gaylord Salisbury	Large Bus Driver
Jeffery Borland	Large Bus Driver
Mark Huffer	General Manager
Robert Kohler	Director of Transportation

Relevant Contract and Rule Language:

Manual of Instructions, Operating Rules and Discipline Code
Section VIII – Discipline Code
5. Observing the Law
5.2 Non-Accidental damage to Authority property, tools and equipment or property of employees will not be tolerated.
First Offense Discharge

Background:

The Kansas City Area Transit Authority (Authority) provides mass transit services to the Kansas City Metropolitan Area. In providing this service, it employs approximately 500 full- and part-time operators, represented by Amalgamated Transit Union Local 1287 and operates approximately 300 busses.

The Grievant in this case is Terry Herbst, an Extra Board driver, or one who drives the routes of drivers who are absent for any reason. Such drivers often work considerable overtime. Herbst began work for the Authority in 1975, and with over 30 years of service, has the highest seniority among Extra Board drivers.

The Grievant has had long standing complaints about the driver seats on Authority busses. Specifically, according to the Grievant, the seats tend to break down on the right side as the drivers put their weight on and twist on that side as they enter and exit the seat. As a result, the seats sag toward the right side. According to testimony, the Grievant first complained about the seats in March 1998 to Dick Davis, who was then General Manager. Davis asked the Grievant to write a memo about his complaints, which he did. Davis forwarded the memo and ultimately, in 1999, the Authority replaced all the seats, in part because it could no longer obtain replacement parts for the older seats.

The Grievant continued to have problems with the seats and on at least two occasions met with the Maintenance Superintendent, Walter Woodward, to discuss the matter and to talk about changes that could be made to the seats. Although the new seats had a thicker foam pad than the older ones, the Grievant said the new ones stuck up in the middle and it was like "sitting on a basketball." After a while, they too began to break down on the right side. On at least one occasion, Woodward offered to make the Grievant a custom cushion that the Grievant could carry and use on whatever bus he was driving. According to testimony from several witnesses, it is common for drivers to carry cushions or pads to sit on. The Grievant testified that because of his concern for all drivers and

because he didn't want the inconvenience of carrying a cushion, he rejected the idea of a custom designed pad.

About this same time, he began using a folded towel which he would place on the right side of the seat and a stack of schedules which he place between the foam seat cushion and the right rear frame of the seat or under the seat cover to "level" the seat.

Robert Kohler, Director of Transportation, testified that sometime in 2002, Tommie Hill, Senior Supervisor of Transit Operations, reported to him that the Grievant had ripped open a side panel of the seat cushion and stuffed schedules in the seat. Kohler said he spoke to the Grievant and told him to stop doing that immediately and the Grievant indicated he would. Kohler said he told the Grievant that if he did not, he would be subject to discharge. The Grievant remembered the conversation differently, testifying that the admonishment was much milder and didn't contain a warning about losing his job.

In late 2004, the Grievant wrote to the Kansas City Regional Office of OSHA about the seats, but was told by that office that it didn't have jurisdiction to get involved in the matter. He subsequently contacted Kohler, who set up a meeting with the Grievant and Mark Huffer, the Authority General Manager, to discuss the seat situation. The three of them walked to the bus barn and the Grievant testified he explained how he stuffed schedules in the seat to make it level. Huffer, however, testified the Grievant demonstrated how he placed the schedules on the seat and covered them with his towel.

Following the meeting, a survey was put together and distributed to all drivers. Although fewer than 20% of the drivers responded, there were concerns expressed and the Maintenance Department found that the foam pads were deteriorating within a year of use. A Seat Committee was formed and a search was begun for alternative seats. At some point several seats were obtained from the three largest seat manufacturers for drivers to try out in their break room. Ultimately, the Authority settled on the seat from United States Seating Corporation, currently in use. However, in the meantime, the Authority switched from a seat with polyurethane foam to one with silicone foam, which though more expensive, has a longer life. The Authority claims that at $2,298, it is now using the most expensive seat on the market.

The Grievant continued to have problems with the seats, which he testified was exacerbated by a back injury he suffered while driving. Indeed, in response to a question from the Arbitrator, he stated the new seats sagged to the right almost immediately. He continued to use the schedules to level the seat and sometime in 2005 again began placing the

schedules under the seat cover rather than on the seat. He testified that he often found the seat cover unfastened from the frame of the seat, but if it wasn't, he would pull it loose and occasionally, by so doing, would rip the cover.

Kohler testified that in March of 2006, two drivers complained to him that the Grievant was tearing the seat covers apart on the busses he drove. Kohler asked Hill to investigate.

Hill proceeded by assigning the Grievant to busses with no damage to their seats on March 21, 22 and 31 and on April 4, 6 and 7. In each instance except the last, the busses were returned with the seat cover pulled away from the frame or torn and schedules stuffed in the seat. On two occasions Hill started the bus before the Grievant arrived, thus starting the on-board surveillance camera. The cameras recorded the Grievant entering the bus, appearing to pull the seat cover away and stuffing something in the seat. In those instances, he made no attempt to test the seat, but immediately made his adjustments. In one instance, the cover was pulled from the frame and in the other, the cover was torn. On one occasion, the foam cushion itself was torn away from its base.

Kohler met with Tom Morgan, the Superintendent of Transportation, Hill, the Grievant and William Wilson, President of Local 1287 to discuss the damage to the seats, Hill's findings and to get the Grievant's side of the story. When asked about the damaged seats, the Grievant initially denied doing it and asked for proof that he was the one. When shown the before and after still and video pictures of busses he had been assigned, a damaged seat cushion that had been removed from one of the busses and video clips from the surveillance cameras, the Grievant admitted he had done some of the damage, but he said others were doing it as well. He was unable or unwilling to name other drivers who may have caused some of the damage. In Hill's memo about the meeting, he noted that the Grievant admitted to having had a conversation with Kohler three years before in which he had been told to stop damaging the seats. At the conclusion of the meeting, Kohler informed the Grievant he was being suspended pending a decision about discipline. At a subsequent meeting on April 12, 2006, the Grievant was discharged.

Positions of the Parties:

The position of the Authority is the Grievant repeatedly and deliberately pulled the seat covers away from the seat frames, tore the seat covers and tore seat foam in order to stuff bus schedules into the seats. He did this on the occasions observed, without even testing the seats to see if they had a problem and admitted doing it on all seats, regardless of age or condition. Committing such pervasive, non-accidental damage to

Authority property is a violation of a clearly stated and common sense rule that results in discharge. The Grievant was warned about committing the damage and although he quit temporarily, he resumed the practice at some point.

The Union's position is that the damage done was minimal and that it is difficult to determine what damage was caused by the Grievant and what was caused by normal wear and tear. The Union also argues that discharge is far too severe a penalty to inflict on a 30-year employee with an otherwise good record. In addition, the Union maintains that the Authority violated the contract by not notifying the Grievant within ten days of becoming aware of the offense.

Discussion:

There is no question that the Grievant did pull the seat covers away from the frames and did tear seat covers and the foam seat cushions on occasion in his attempt to "level" the seats. He admitted as much at the hearing and in the meeting where he was confronted with the evidence (after first denying any culpability until shown the pictures and other evidence). Moreover, he was very vocal about his intentions to other drivers. Two drivers testified that they heard the Grievant complaining about the seats and stating that if the company wouldn't fix them, he would. One testified that other drivers had complained that the Grievant was pulling the covers loose and that the Grievant's rants about the seats were repeated often.

The question that remains is whether the damage was so inconsequential as not to trigger punishment, or whether the punishment, especially given the Grievant's seniority, is too severe.

Had the Grievant been a "regular" driver, the damage he caused would have been of less consequence since it would only affect the few busses he might drive daily. As it is, the Grievant is an "Extra Board" driver who drives the busses for those on vacation, sick, or absent for any reason. Consequently, he could over time, in theory, drive almost all the busses in the fleet. Since he habitually pulled the seat cover out of the seat frames of all busses he drove, assuming they weren't already pulled or torn out, over the course of a year he could cause considerable damage. The Authority estimated that it cost three to four dollars to refit the seat cover into the frame, about $12 to replace the seat cover panel, if ripped, and over $350 to replace the silicone foam seat cushion. These figures do not include the labor to make the repairs. If labor is included, the seats that are torn cost about $95 to repair, according to

There was no estimate of how many of each type of repair was required as a result of the Grievant's efforts. The Authority submitted exhibits of reports of the condition of seats on all busses on several specific dates. The report of the inspection taken shortly after the Grievant was discharged indicated that on 65 busses the seat cover was loose from the frame and that on 51 busses, the seat covers were ripped. A report completed in June or July of 2006 indicates that 16 seats were ripped and one "un-tucked," which is a substantial decrease. However, a report completed in September showed 101 were pulled out, 8 torn and one cut. Although the number of seats that were ripped or torn declined dramatically, the number of seats where the cover had separated from the frame actually increased. So it is difficult to get an accurate measure of how much damage the Grievant caused, but one must assume it is of some consequence.

Causing non-accidental damage is one of seven offenses for which the Authority's Discipline Code calls for summary discharge. The others include stealing from the Authority or customers, carrying or displaying a weapon, causing or promoting a work stoppage, use or distribution of drugs or alcohol and going to the bathroom in other than designated places. Other offenses call for progressive discipline, starting with warnings and often including two suspensions before discharge.

There is no issue as to whether the Grievant received equal treatment when he was discharged for a violation of Section VIII (5.2), since there was no evidence presented that anyone else had been charged with or disciplined for non-accidental damage to Authority property. There was also no evidence presented as to what was the disposition of other cases where employees violated rules calling for summary discharge, so there is no clear indication whether the summary discharge penalty is uniformly used.

In this instance, the Authority became aware that the Grievant was damaging the seats in 2002, when Kohler was told by Hill of the damage. Kohler testified he told the Grievant to stop and that he was subject to discharge if he continued. The Grievant remembers the instruction but denied there was any warning of job loss. However, the Grievant also denied committing any damage at all when first confronted with it in the initial investigation meeting. Moreover, at the third step meeting the Grievant claimed that his lie at the earlier meeting couldn't be held against him because it wasn't tape recorded. In short, the Grievant isn't very credible.

The Union noted that Kohler not only didn't discharge the Grievant on this first offense, but also didn't make a record of the warning. One can only conclude that this amount of damage was not of a magnitude that was

contemplated when the discipline code for non-accidental damage was developed with summary discharge as the penalty. Also, as in the later incident, the exact amount of damage was unknown and perhaps the evidence was not as strong (i.e. no pictures or video) as with instant incident. Even so, it is very troubling that the Authority didn't give a last chance warning in writing.

So now we come to a second offense. The question now is whether committing damage that was insufficient to cause discharge in the first instance is sufficient to discharge him in the second.

In this instance, there are factors of both mitigation and aggravation to consider. On the one hand, we have a 30-year employee who apparently hasn't had any other serious problems during his tenure. There is, perhaps, no other mitigating factor that arbitrators consider more when judging whether a penalty is justified than long seniority.

On the other hand, the Grievant is unrepentant, as though he has some God given right to make whatever adjustments in the seats he pleases, regardless of whether he damages them or not. He boasts about it to other employees and has gotten to the point where he damages the seats without trying them because he just knows they won't be right. He refuses one and perhaps two offers of a custom designed pad because he just can't be bothered to carry one around, even though other drivers don't find that objectionable. Finally, he doesn't seem to recognize he has done anything wrong. Moreover, it is telling that, he claims he never received a warning that he would be discharged but was so quick to lie about it when first confronted. It goes without saying that repeatedly causing damage to your employer's property is a punishable offense.

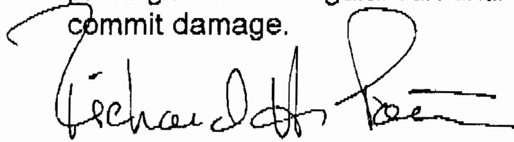
If an employer had a history of "zero tolerance" with regard to non-accidental damage or other offenses calling for summary discharge, or if it had documented that he was being given a last chance, this would be an easy decision. However, in the instant case, the Authority made a significant exception and signaled that this particular type of damage may not be quite as serious. Therefore, this Arbitrator cannot bring himself to uphold the discharge of a 30-year employee.

Award:

The grievance is granted in part. The Grievant will be reinstated, but with no back pay.

This is a "last chance" reinstatement. If the Grievant commits any other act of non-accidental damage, the Authority may summarily discharge him. The Authority may take reasonable steps to monitor the Grievant,

such as daily inspections or removing him from the Extra Board list and placing him on a regular run until it is satisfied that he will no longer commit damage.



Richard H. Potter December 18, 2006