IN THE MATTER OF ARBITRATION

BETWEEN

KANSAS CITY AREA TRANSIT AUTHORITY

AND

AMALGAMATED TRANSIT UNION LOCAL 1287

(ALDEN LOCKETT, GRIEVANT)

APPEARANCES FOR THE COMPANY:

Jeffrey M. Place, Attorney, LITTLER MENDELSON, PC.
Bob Kohler, Director of Transportation

APPEARANCES FOR THE UNION:

Scott Raisher, Esq., Attorney, JOLLY WALSH HURLEY RAISHER, ET AL.
Alden Lockett, Grievant, Bus Operator
Fred Ersery, Bus Operator and Union Vice President

ARBITRATOR: Ronald G. Iacovetta, FMCS 3342

INTRODUCTION:

In compliance with the Memorandum of Agreement between the parties a lack of agreement and resolution this case resulted in a request to move to Arbitration and the arbitrator was selected and notified of appointment by FMCS (Federal Mediation and Conciliation Service) on May 1, 2012 and the Arbitration hearing was held on May 22, 2012. The parties agreed to a submission of Post-Hearing Briefs. Post Hearing Briefs were received fro the parties on July 5, 2011 which represents the official closing date for receipt of testimony and evidence in this case.

This case involves the discharge of Mr. Alden Lockett, bus driver for the Kansas City Area Transit Authority, for lying to company investigators about his involvement in transporting a furnace into his house on November 23, 2011. Video surveillance was conducted on that day by INTERTEL INC. to document the activity of Mr. Lockett to determine his degree of mobility in consideration of a Workman's Comp injury claim which stemmed from an injury on January 26, 2011 after slipping on ice in KCATA's parking area when reporting to work.

On January 28, 2011 KCATA received a "letter of legal representation" from attorney Allan Bell whom Mr. Lockett had retained. Conservative medical treatment was provided during the following months for back pain in the form of physical therapy, cortisone injections, pain medications and referral to a physician specialist.

On July 27, 2011, the treating physician concluded that Mr. Lockett had reached "maximum medical improvement (MMI)." However, on August 12, 2011 Mr. Lockett telephoned KCATA's third party administrator/adjustor for Workmans' Compensation claim matters and indicated that his back was "on fire" and on November 9, 2011, a letter from attorney Bell was received indicating that Mr. Lockett was " still in extreme pain and required immediate medical treatment."

Attorney Bell also indicated that if KCATA failed to provide immediate treatment a doctor of Lockett's choosing would be secured and KCATA would be held accountable for payment of any resulting fees and costs. The record also indicates that Mr. Lockett obtained medical treatment from a North Kansas City hospital ER on November 12, 2011. Bob Kohler. KCATA's Director of Transportation noted in management's third-step response (dated February 6, 2012) that KCATA arranged to have Mr. Lockett surveilled while off duty by a private investigation firm to determine his degree of mobility (Jt. Ex. 14).

. The video surveillance taken on November 23, 2011 shows Mr. Lockett assisting another individual in carrying a furnace up a flight of stairs to the side of his house (Jt. Ex. 6). The particular furnace model was later determined by specification data to weight around 110 lbs. A Deposition of Mr. Lockett taken on behalf of the employer on December 8, 2011 revealed a lack of truthfulness

when queried about his assisting in the carrying of the furnace up steps to his house. Based on this evidence the Company cited Work Rule 4.1 which states that Operators will not make dishonest or misleading written or verbal reports, including sick pay, overtime, etc., and affirming that individuals found guilty of such an offense are subject to discharge on the first offense. On January 16, 2012 KCATA notified Mr. Lockett of the decision to terminate his employment for violation of work rule 4.1.

THE UNION'S STATEMENT OF FACTS, POSITION AND ARGUMENT

On January 26, 2011 while reporting to work slipped on some ice and fell. He went to the Providence Hospital Emergency Room for treatment and was seen later that day at Corporate Care, the KCATA's worker's compensation doctors. He was later referred to Dr. Eden Wheller, another Authority doctor for further evaluation and treatment. In February 2011 he was returned to regular duty as a bus operator without restrictions or limitations. However, Mr. Lockett continued to experience physical pain and was again evaluated by Dr. Wheeler who recommended continued conservative treatment. He was also referred to Pain Care, where he was given joint injections in March, April and June 2011. And while the injections provides some relief he continued to have problems in the lower back and numbness and pain radiating down his left leg.

As the deposition reflects and as he (Lockett) testified, he would begin experiencing pain and numbness when he did things for too long or tried to do too much–such as driving a bus for a long time or when it bounces a lot. (Deposition, Jt. Ex. 10 at 96, 104-105, 117, 126). On November 17 2011 Lockett went to see his regular doctor because of continuing pain. He was examined, prescribed medication and given a joint injection (Jt. Ex. 178). Lockett testified that like other injections it relieved the pain for a period of time and made it easier to do things.

In late 2010 the furnace had gone out at Mr. Lockett's house and had to be replaced. Having made it through the winter he put off purchasing a new furnace but with winter again approaching he began looking to buy a new furnace that he could afford. On November 23, 2011 Mr. Lockett was able to find a furnace on sale for $500 at "Patrick's. While he could afford to purchase the furnace he could not pay for installation and decided to install it himself with the help of family and friends.

As the video surveillance (Jt. Ex 7) reflects and Lockett testified, upon arriving at home with the furnace he asked two individuals standing on the front porch if they would help move the furnace form the car to the house bu neither would help (and he recalled one saying he had a bad knee). Then Lockett and his step son moved the furnace from the car and up approximately ten steps and around the side of the house (see video, Jt. Ex. 7). Lockett testified that he did not have any difficulty carrying the furnace–that the end he had it did not seem very heavy and that the joint injection he had received six days earlier made his lifting the furnace easier. Specification data indicated that the furnace weighed 110 lbs. (Specification Sheet, Jt. Ex. 8 at 4)

As Mr. Lockett testified, he felt he needed to help move the furnace because he "was under

a lot of pressure" to get it installed since it would likely be getting colder and his wife was concerned and anxious to get the furnace working since four kids were in the house. Mr. Lockett explained that he was working full time and had to "squeeze in" time to work on the furnace whenever he could. Mr. Kohler testified that it was his understanding that Mr. Lockett had a "dire need" for getting the furnace in the house and working given the time of year.

Mr. Lockett testified that some time before purchasing the furnace he heard operators talking about another operator with a pending worker's compensation claim who was fired for "having lifted a furnace" or something. He indicated that while he knew nothing about the facts or circumstances of this case but this was on his mind when he gave his deposition on December 8, 2011 in connection with his pending workers compensation claim. Mr. Lockett indicated he had not really thought about the other case he heard about until the Authority's attorney, Mr. Brown, began asking about a hot water heater and a furnace and he panicked thinking that he could lose his job for having moved the furnace and he made the mistake lying when asked if he had moved a furnace. Counsel contends that Mr. Lockett's motivation (and his response) was based on his fear that he could be fired for having carried a furnace.

Mr. Lockett testified at the hearing that he loved his job, needed the income and benefits and that contrary to what his worker's compensation attorney may have suggested in a letter (Jt. Ex. 9), he never intended or talked about resigning and Mr. Kohler affirmed in testimony that following his return to work and throughout the processing of his grievance he never heard Mr. Lockett say anything about wanting to resign. Lockett explained that lying about moving the furnace was never about money or workers compensation benefits but solely due to his fear of losing his job. And, on January 11, 2012 Mr. Kohler called Mr. Kohler to "confess" and talk about what he had done. Mr. Kohler noted in testimony that Mr. Lockett was "very forthcoming" in admitting that he had lied during the deposition and that he had lied to protect his job because he had heard that another employee had been fired for lifting a furnace.

Mr. Kohler also testified that Lockett repeatedly indicated that it had nothing to do with money and that he was "not trying to beat the Metro out of nothing and his pursuit of the worker's compensation claim was solely to have his physical problems taken care of. In addition< Mr. Kohler acknowledged having talked to Mr. Lockett regarding the letter from the attorney to KCATA which he though was bizarre since Mr. Lockett had never indicated any interest in resigning his job (Jt. Ex. 9) and noted that Lockett indicated to him that he did not know his attorney had sent the letter or had made such demands for money.

LEGAL ARGUMENT AND CONSIDERATION

Union Counsel has noted (in brief) legal argument relevant to this case noting that the employer bears the burden of justifying such a serious action by providing sufficient and compelling evidence that the discharge was for "just cause" and that this is especially relevant where a discharge is based allegations of fraud where the impact on an employee may be so drastic that arbitrators have characterized such discharges as "tantamount to economic capital punishment' (See Cannon

Electrical Co., 28, LA 879, 883 (Jones, 1967). Union Counsel holds that the Authority must prove, by competent and reliable evidence that () not only is Mr. Lockett guilty of the alleged misconduct charged, but also (2) in light of any proven misconduct, that his discharge–instead of some lesser penalty - was either warranted or required. The Union contends that the Authority's evidence falls short of meeting this burden.

A. The Authority's Reliance Upon And Application of Rule 4.1 Is Not Appropriate In This Particular Case.

The Union contends there is an initial question that should be addressed, namely, whether , in a case like this (a pending worker's compensation case) –the application of rule 4.1 to discipline an employee for statements made related to this claim, is appropriate.. Counsel noted that in the processing of the grievance the parties, generally, and the Union in particular, did not focus on the applicability of Rule 4.1. However, Counsel notes that in reviewing the specific language of the rule the comments noted in Mr. Kohler's Step iii decision (Jt. Ex. 14(and his concerns expressed during hearing testimony, it appears that a fair reading of the rule suggests that it was not to be applied in a case such as Mr. Lockett's.

Counsel notes that Rule 4.1 prohibits an operator from making any "dishonest or misleading written or verbal reports, including sick pay, overtime etc. Counsel notes that the rule provides that "this list is not all inclusive," the Union submits that those additional documents to be included must be similar in nature and scope to those identified in the rule and as noted by Elkouris' in How Arbitration Works at 498., "where general words follow an enumeration of specific terms, the general words will be interpreted to include or cover only things of the same nature or class as those enumerated... " Counsel holds that the specific language of the rule describes work place documents that are well known and familiar to both management and employees alike - documents that are used and filled out on a regular-almost daily basis.

Counsel cites the fact that operators have numerous reports they are expected to complete such as on the job duty reports, accident reports and occurrence reports. In addition operators are also required to, on occasion, give verbal statements to supervisors that will be incorporated into reports and there are numerous documents that operators are expected to complete from time to time regarding pay, sick leave, time off and related benefits. There are also other documents such as employment application and related documents that operators are expected to complete and update from time to time.

The Union submits that by its express language and prior application, Rule 4.1 is directed at false or misleading statements being made in these documents and there is nothing to suggest that the rule, or any prior application, is or can be applied to this type of case where statements are made in a deposition taken in a "litigation" context in a separate proceeding before another agency. Counsel notes that the Union is unaware of any other case where Rule 4.1 has been applied in this context other the case of the "other operator' who locket understood was discharged for moving a furnace although such discharge was grieved and is pending in arbitration.

Union Counsel asserts that as Mr Kohler pointed out in his step III decision (Jt. Ex. 14), the Missouri Division of Workers Compensation may be better equipped to "sort through the myriad of issues and the opinions of multiple doctors" regarding his claim, including whether certain statements are false and their significance and effect. Accordingly, Counsel contends that rather than Mr. Kohler making certain assumptions about statements and discharging employees based on those assumptions the parties may be better served by letting the Division of Workers' Compensation make those determinations, in light of its expertise and experience in dealing with compensation claims.

Counsel notes that if an employee estimates the weight of something he carried or his physical abilities is challenged, the Division is in a better position to determine the effect, if any, upon the claim. Counsel reaffirms that the Union does not wish to suggest that an employees false or misleading statements made during a deposition in relation to a workers' compensation claim should be ignored or that the employee should get a "free pass" Rather, the Union suggests only that the Division may be the appropriate forum to address those issues rather than having them addressed as a rule violation in a disciplinary context. The Union suggests that in this specific case the Authority's reliance upon and assessment of discipline under Rule 4.1 was inappropriate and his discharge be set aside and no discipline imposed.

B. An Arbitrator Has Both The Authority and Obligation to Modify Disciplinary Penalties in Appropriate Cases.

Counsel notes appropriately that arbitrators are reluctant to modify management's discharge decisions but often do so in appropriate cases where Management has not established compelling and sufficient evidence to justify such action. Counsel Cites case examples in support of this reality. The Arbitrator is well aware of the burden of proof requirements and the authority to dismiss or modify discipline where there is insufficient and compelling evidence in support of management action.

C. The Authority Is Required To Provide Convincing Evidence That Mr. Lockett Actually Committed The Offense For Which He Was Discharged. In This Case, The Authority Must Prove That Lockett, By His Actions And Words, Intended to Defraud The Authority. Because It Has Failed To Do So, His Discharge Must Be Set Aside.

Counsel notes that Mr. Lockett was discharged for violation of Rule 4.1 and as the rule reflects, and as Mr. Kohler testified, an employee's violation of the rule does not result in "automatic" discharge; an employee is only "subject to discharge". Counsel notes that whether an employees is discharged or assessed a lessor penalty will depend upon the particular facts and circumstances involved in the case and not every dishonest or misleading statement or lie will result in an employee's discharge. Counsel cites the requirement of "intent" in criminal law. The Authority has accused Mr. Lockett of lying about moving a furnace with the intent to defraud the KCATA given his workmans' comp claim. Counsel notes Mr. Kohler's testimony that it "appeared " to him that Mr. Lockett was trying to "exaggerate his physical condition and limitations" for the

purpose of maximizing his compensation thereby defrauding the KCATA. (Jt. Ex. 14) However, the Union submits that the Characterization of Mr. Lockett's misconduct by the Authority is without substantial evidence beyond any reasonable doubt since such intent has not been established or proven.

D. The Appropriate Standard Of Proof

The Union contends that the Authority does not meet the appropriate standard of proof ti conclude that Mr. Lockett was trying to defraud KCATA . Counsel appropriately notes that arbitrators require employers to meet the "beyond a reasonable doubt standard to sustain a charge of fraud, theft or similar offenses citing Elkouris' How Arbitration Works (BNA 5th Ed. 1997) at 907

and cites the words of Arbitrator Heinsz in Kroger Co., 71 LA 989, 991 (1978) who stated that:

> Terms such as "clear and compelling evidence", "a preponderance of evidence", "beyond a reasonable doubt", or "reasonable man standard" often becomes no more than simple phrases. Instead of adhering to any of these, this Arbitrator believes that ... since these (discharge cases) involved the more serious industrial penalty, an arbitrator must always require the highest degree of proof so he is certain in his own mind that the alleged conduct occurred and the penalty is warranted.

Counsel also cites the statement by Arbitrator Spencer in Columbia Presbyterian Hospital, 79, LA 24, 27 (1982) "The Arbitrator cannot sustain a discharge for theft because the arbitrator believes it is more likely than not that the employee committee the offense. Rather, the Arbitrator must be completely convinced that the employee was guilty." Union Counsel contends that the Authority has not presented compelling evidence that Mr. Lockett was intent on defrauding KCATA and his discharge was unwarranted given this reality.

Counsel contends that the Authority has not proven the charge upon which the discharge is based—the intent to defraud. Counsel has also argued that KCATA has relied on Lockett's statements in his deposition regarding his statements that he did not help move the furnace and attributing to them a meaning and significance not supported by the evidence. Counsel contends that the mere fact that Lockett misrepresented his involvement in moving the furnace does not prove his intent to defraud KCATA and that the facts and circumstances reasonably support the conclusion that Mr. Lockett did not intend to do so. Counsel has argued that Mr. Lockett's forthright and credible testimony regarding his intention and motivation belies such an intention.

Counsel also notes that Mr. Lockett's statement in his deposition that he could lift the furnace did not mean to imply he could not do so without help (Deposition, Ex. 10 at 43, lines 9-14 and at 46, line 14) and while he may have lied about actually having helped carry the furnace he

acknowledged that he "could have done it indicating that he believed he had the physical ability to do so with some assistance. And as the Video confirms he was able to help carry the furnace with the assistance of his stepson. Counsel notes that given these statements Mr. Lockett can hardly be accused of misrepresenting his abilities or limitations.

Counsel also notes Mr. Lockett's response when asked "What is the most you think you can carry by yourself then." Mr. Lockett indicated "Probably 35 pounds by myself, So I couldn't do it for a long distance. And when asked if he could carry 35 pounds up your steps to your house Lockett stated"I could do it with some problems, but I could do it. (Deposition, Jt. Ex 10 at 49, lines 2-9). Counsel notes that Mr. Lockett's 35 pound estimate was just that and was not intended to be a hard and fast number and was not describing an absolute precise limit in terms of his physical capability and could have carried another 10-15 pounds or more on occasion and the end of the furnace he was carrying may not have weighed more than 45 pounds.

Counsel contends that the composite of Mr. Lockett's statements in the deposition indicates that he was not attempting to falsely describe his physical ability or limitation and , notwithstanding his lying about not moving the furnace he had indicated that he had the ability to do so. Accordingly, Counsel contends that his statements can hardly be characterized as an attempt to exaggerate his physical condition or limitation. Counsel notes further that when Mr. Lockett was asked about the heaviest thing he had lifted since his last exam he indicated that it was a box of Christmas decoration that weighed about 20 pounds—again noting that this was an estimate of what he actually lifted himself and since his only assisted in moving the furnace with his stepson (and noting later that he had the light end) he did not mention this when asked the question about how much he had lifted by himself.

Counsel contends that when read in context the statements Mr. Lockett made in the deposition are reasonable. And, Counsel notes that while Mr. Kohler characterized the statement as significant he did not recall ever having discussed the statement with Lockett in the interest of conducting a full and fair investigation. And, Counsel notes that while Mr. Kohler stated he believed Mr. Lockett's statements were significant and were made with the intent to defraud KCATA he did not recall any "extensive discussion with Mr. Lockett regarding any of them.

Finally Counsel notes that when Mr. Lockett was asked what was the most he had lifted since his injury he indicated it was the furnace when it was in the basement and moved and slid it over estimating that it was around 10 pounds. (Deposition, Jt. Ex. 10 at 42, line 16-25 and 43, line 1-3). However, Counsel notes that for the Authority to seriously suggest that Lockett falsely testified that the most he had lifted since January 2011 was only 10 pounds is erroneous, out of context and makes no sense that he would make such a statement since he had just talked to the Authority doctor on December1 about having moved a box of Christmas decorations that was estimated to weight 20 lbs. In summary, Counsel contends that putting aside his admitted statement regarding the furnace, other statements warranted clarification and the Authority has failed to prove them to be false, dishonest , or made with an intent to defraud the KCATA. Counsel has argued that no evidence was presented confirming the Authority's contention that Lockett's statements taken together or separately would

have hade any impact or effect on either the money or benefits he might receive or would have resulted in "maximizing" his recovery.

Counsel cites Arbitral authority noting appropriately that misconduct cannot be assumed, it must be proven and while there is no question Mr. Lockett lied about moving the furnace and the Authority justified Lockett's discharge not only on that fact alone, but upon additional "facts and circumstances (namely his other deposition statements and Mr. Kohler's assumption that these statements were made with the intent to defraud KCATA .

Counsel contends that there is no evidence that helping to move a furnace would have any impact on his Workmans' compensation claim or that any of his deposition statements would have any impact on the claim which is best determined by medical authority. Counsel has argued that there is no compelling evidence that there was any intent by Mr. Lockett to defraud KCATA. On the contrary, Counsel notes that Lockett has stated consistently and credibly throughout grievance processing and arbitration that his lying about helping to move the furnace was only to protect his job and the fact that he misrepresented his role in moving the furnace does not, in and of itself, prove that he did so with an intent to defraud.

Counsel also noted that Mr. Kohler cited two additional circumstances that were significant in confirming his opinion that Lockett intent was to defraud the Authority. These were, (1) Lockett's having retained a lawyer shortly after the injury; and (2) the fact that the lawyer's December 7 "demand letter" (Jt. Ex. 9). As Lockett explained, a man at Corporate Care advised him to get an attorney and retained an attorney across the street (Mr. Bell). Counsel cites the settlement demand in the Lawyers's December 7 letter (Jt. Ex. 9) and notes that Mr. Lockett first learned of the letter when he was in an investigative meeting with Mr. Salisbury and later Mr. Kohler and Lockett indicated to both the he did not know the attorney had sent the letter and was not aware of the demands contained therein and did not recall any discussion with the Attorney regarding the demands.

Counsel also notes that Fred Ersery was present in the meeting with Lockett and Salisbury when the letter first came up and he recalled Lockett being so upset he went and called the lawyer's office and while he was not in he spoke to his secretary on a speaker phone and was able to hear the conversation. Mr Ersery testified that he heard the secretary say words to the effect that "As a matter of record, we just send those letters out and it was clear to Mr. Ersery that Lockett was telling he truth about not having seen or had knowledge of the content of the letter and he told Salisbury the same when they next met.

Finally, Counsel notes that in a letter from Attorney Bell to Jonathan Walker , Union President he affirmed the lack of discussion with Lockett regarding the settlement demands noting "I do not believe I specifically made Mr. Lockett aware of the exact amount of any demands forwarded to the opposing attorney, but this demand was, I believe, in line with Mr. Lockett's complaints to me as to the treatment he was needing and the likely disability involved. It is clear to this Arbitrator (given the reaction of Lockett to the lawyer's letter, the lawyer's secretary comment

and the affirmation of the Lawyer himself) that Mr. Lockett was not aware of or had approved the content of the letter. Accordingly, the Arbitrator can find no compelling basis that the securing of an attorney or that the attorney's "Demand" letter provides any credible evidence that Mr. Lockett was trying to defraud KCATA. Such Letters are common in Workmans' Comp. litigation cases in an attempt to not only insure adequate compensation for an injury sustained but to insure favorable compensation for the attorney.

Counsel contends that KCATA has failed to prove that Lockett's discharge was either warranted or required and the failure to utilize the policy of progressive discipline warrants setting aside the discharge. Counsel cites the fact that Mr. Kohler acknowledged that the concept of corrective or progressive discipline is an essential element of the Authority's discipline policy. Counsel notes that he testified that the purpose of the Authority's discipline policy is corrective and not punitive: the general philosophy being that an employee should not be unduly punished or penalized for even proven misconduct if some lesser penalty may be sufficient to correct the problem. Counsel had argued that in this case the Authority has failed to prove why Lockett's summary discharge–rather than a lesser penalty - was either warranted or required.

Counsel argues that given the evidence, there is nothing to suggest that Mr. Lockett was an "incorrigible" employee or one who would not be responsive to corrective discipline noting that neither his one-day suspension in 2011 for having failed to get permission to purchase a sandwich, nor his attendance record suggest that Lockett over the course of his five and one-half years with KCATA had a significant discipline problem. Given the testimony and evidence in this regard the Arbitrator must agree and cannot give this record any weight in consideration of whether or not Mr. Lockett was discharged for just cause.

Union Counsel contends that Lockett is truly repentant and genuinely sincere in testifying that what he did will never happen again acknowledging he had a lapse of judgement for which he is ashamed. As he testified he "tells his kids all the time not to lie." and one of the hardest things he had to do was explain to them that he had been discharged for lying. He testified that he call Mr. Kohler on January 11 because of his overwhelming guilt about having lied about the furnace and explained that as part of his job and through the church, he used to walk up and down the streets of Kansas City, Kansas finding problem kids and mentioning them and teaching them not to lie or steal and "do the right thing." He indicated that over the years he may have mentored 150 kids and would often see some of them who say "thank you, Mr. Lockett" or "thank you for teaching me: and the like. Lockett testified that he lied to protect his job and family and questioned by the Authority he indicated that the need for money does not justify lying and "no one should lie."Counsel notes that KCATA will downplay Mr. Lockett's testimony in this regard but believes it is relevant to a determination of the award in this case contending that Mr. Lockett deserves a second chance..

Union Counsel has offered testimony and evidence in support of the contention that discharge was not warranted in this case. Counsel acknowledges that some form of discipline should be an option including a suspension. Counsel references the disciplinary rules (Jt. Ex 2) where there are a number of rule violations that call for a severe suspension. For example Rile 1.5 ("reckless

driving") and Rule 5.7) ("failure o possess the proper licence") both provide for severe suspension. Counsel notes that what the Authority believes is a "severe suspension" can be found in the rules. For example on page 46 a severe suspension is defined as follows; "Severe Suspension is five (5) or more days." Therefore, Counsel holds that if it is determined that a severe suspension is in order the Authority's rule provides that it be for 5 or more days.

Counsel notes Mr. Ersery's testimony that there have been a number of employees who have ben discharged with a violation of Rule 4.1, but not discharged noting the case of Deborah Simmons where altering information provided by her doctor in support of her FMLA medical leave, resulting in more time off and receiving pay and benefits she was not entitled to and was charged with a violation of Rule 4.1. However, as Counsel notes, she only received a 4 day suspension even though the undisputed facts show that Ms. Simmons knowingly and intentionally altered her FMLA papers with the clear intent of getting pay and time off to which she was not entitled (she received 8 hours of sick leave pay to which she was not entitled and had to pay it back)

Union Counsel notes that this case illustrates the fact that it is not uncommon, in a case of admitted misconduct, for an Arbitrator to reinstate an employee without back pay. However, Counsel notes that in this case the Grievant has been off work for almost 7 months. Counsel suggests that if the Arbitrator is inclined to reinstate Mr. Lockett with some suspension time assessed, the Union would like the Arbitrator to consider a discipline the Authority has described as severe (five or more days), or the discipline assessed against Ms. Simmons (four days).

UNION SUMMARY ARGUMENT AND POSITION

The Union contends that the discharge of Mr. Lockett on January 6, 2012 for having violated Transportation Department Rule 4.1 was not for just and sufficient cause. A grievance was filed same day and Bob Kohler, Director of Transportation denied the grievance at Step III on February 6, 2012. The Grievance was then submitted to arbitration in compliance with Section 1.13.4 fo the Memorandum of Agreement (Jt. Ex. 1 at 15-18).

The Union contends that the Kansas City Area Transportation Authority's decision to discharge Mr. Lockett was not for just cause and should be reversed. Union Counsel has noted that the Authority has the burden of proving that Mr. Lockett is guilty of the offense charged and that his discharge was warranted or required. The Union contends that the Authority's evidence fall short of meeting this burden. While the Union has acknowledged that Mr. Lockett's conduct (having lied about helping to carry a furnace) cannot be excused or ignored the discipline imposed was unreasonable and excessive and inconsistent with the Authority's policy of corrective discipline and contrary to the concept of "just cause."

Union Counsel notes that the Counsel for KCATA urged in opening statement that we focus was on the narrow issue of Lockett having "lifted and carried the furnace with the assistance of another person." Union Counsel holds that if this was the only focus we would have had a brief hearing and would have submitted a short brief with the issue would have been only whether having

lied about moving a furnace justified his discharge or whether a lesser penalty would have been appropriate.

However Counsel notes that the Authority did not focus on that narrow issue and in an effort to justify Mr. Lockett's discharge it related additional facts and circumstances that it alleged constituted "false testimony" in order to create the impression that Mr. Lockett engaged in a calculated scheme to intentionally and knowingly defraud KCATA. Given this reality Counsel has argued that this is now what the Authority must now prove by competent and reliable evidence. Counsel contends that since the Authority is justifying discharge of Mr. LOCKETT on a charge of fraud it must prove that the facts and circumstances it has alleged and that Mr. Lockett acted with the requisite "intent" to do so and if not the discharge should be set aside.

As noted at the hearing the Union is not asking the Arbitrator to resolve issues regarding Mr. Lockett's compensation claim and entitlement to benefits since these are matters to be addressed b the Missouri Divers of Workers' Compensation. Counsel notes that consideration should be give to the "charge" upon which Lockett's discharge is based noting that, as Mr. Kohler has testified and th disciplinary documents confirm, he believed that LOCKETT "exaggerated his physical condition and limitations" for the purpose of maximizing his recovery" and defrauding the Authority and offered false testimony in order to get more money and benefits than he was entitled to receive.

Counsel notes that these allegations were made to justify discharge in this case and, therefore, must prove these allegations via credible and reliable evidence. Counsel contends that while Mr. Lockett's conduct and testimony may be of concern to the Division of Worker's Compensation it does not excuse the Authority from its obligation to prove the allegations it has made against Mr. Lockett in this case to justify discharge. Counsel notes that there is no question that Lockett lied about helping to carry a furnace but contends that this alone does not prove the other facts and circumstances relied upon by the Authority or an alleged intent to defraud. Counsel contends that except for Lockett's admission regarding the furnace the Authority has failed to prove its case. Counsel contends that the Authority:

*has failed to prove any correlation or relationship, whatsoever, between (a) his statements, (b) his physical capabilities and limitations and © his claim for benefits. Counsel contends that no evidence was presented suggesting that any specific action or statement had direct and relevant "nexus" with his physical abilities that would have resulted in "maximizing his recovery,"

* has failed to prove that any of the statements would result in "maximizing his recovery" or would have had any impact or effect on his claim.

* has failed to prove that any of the additional statements relied upon were, in fact, false or constituted "false testimony" or made with the intent to defraud.

*has failed to prove that the additional "circumstances" relied upon in any way reflected or supported the alleged scheme on Lockett's part or intent to defraud.

*has failed to prove that Lockett, by his statement regarding the furnace, had any intent whatsoever to defraud the KCATA. In fact, Counsel contends the evidence is to the contrary and Mr. Lockett's testimony regarding his intention and motivation in doing so–the fear of losing his job–belied such intent.

Counsel has argued that having lied about moving the furnace cannot be fairly or reasonably characterized as part of a knowing and intentional effort to defraud the KCATA. However, Counsel conceded that having lied about moving the furnace warrants some form of discipline short of discharge. Counsel has argued that the Authority's failure to utilize progressive discipline is important in this case given the fact that there is no evidence that Mr. Lockett was an "incorrigible" employee or one who would not respond to corrective discipline. Counsel contends that a suspension would have been sufficient to deter such conduct and serve as a lesson to other employees. Counsel notes the case of Debra Simmons who received only a four day suspension in a case where she forged documents supporting absences on three days and had to repay for 8 hours of sick leave.

Counsel contends that in the context of Corrective discipline punishment should not only fit the crime but the criminal as well. Counsel argues that While Mr. Lockett made a serious mistake he is not the "criminal" that KCATA has portrayed him to be and he deserves a second chance. For the foregoing reasons the Union requests that the grievance be sustained, that Mr. Lockett's discharge be set aside, that he be reinstated to his former position and that all pay and benefits lost as a result of his discharge be restored. The Union also requests that the Arbitrator retain jurisdiction to address any further questions that may arise regarding implementation of an award.

THE KCATA'S POSITION IN THIS CASE

The Kansas City Area Transit Authority has argued that the discharge of Mr. Lockett was for just cause citing Work rule 4.1 which specifies that employees who make dishonest or misleading written or oral statements are subject to discipline which could include discharge for the first offense. The dishonesty cited by KCATA was the statements in the deposition taken on December 8, 2011 in relation to a workers Compensation Injury (claim # 11-005457) conducted by Charles E. Brown with Fields and Brown LLC, 1100 Main Street, Suite 1600, Kansas City, Missouri 64105. Counsel notes that in this deposition Mr. Lockett denied helping to carry a furnace up steps to his house (Jt. Ex. 10, pp. 34-52).

Counsel for KCATA noted at the Arbitration hearing that Mr. Lockett's deposition statements were contradicted by the video surveillance which clearly documented that he helped another individual carry the furnace up the steps to his house. Bob Kohler, Director of Transportation, considered this dishonesty significant representing an attempt to defraud KCATA in the Workman's Comp injury claim.

In addition, Counsel noted other events and disciplinary action's that raised questions and about Mr. Lockett's trustworthiness and integrity. In particular KCATA cited Mr. Lockett's

attendance record (Jt. Ex. 5) noting some attendance deficiencies and was given several Written Attendance Warnings between January 2011 and December 2011. In addition Counsel noted an incident where Mr. Lockett left a disabled bus he was retrieving in violation of work rule 3.3 which prohibits leaving a bus at any unauthorized point on the route to transact personal business or purchase food. (Jt. Ex. 15). Mr Lockett was charged with the rule infraction on April 5, 2011 when he was out on a pull and stopped at Hum Dingers on 9th and Prospect and was seen coming out of the store by Supervisor Lockett. For this violation Mr. Lockett was suspended one (1) day which was to be served on Friday April 8, 2011 (Jt. Ex. 15).

Notwithstanding the discipline record, Counsel has argued that the Company's decision to discharge Mr. Lockett was due solely to his dishonesty in violation of work rule 4.1 which states that "Operators will not make any dishonest or misleading written or verbal reports, including sick pay, overtime, etc." and noting that a first offense is subject to discharge pending investigation. (Jt. Ex. 14).

The Investigation into violation of work rule 4.1 was a result of the surveillance conducted by Intertel, Inc. On behalf of KCATA in connection with Mr. Lockett's Workman's Comp injury claim stemming from his fall in the Company parking lot (Jt. Ex. 6). The Surveillance documented, via video, Mr. Lockett helping to carry a large box containing a furnace up to his house on the date indicated and the deposition taken on 12/8/2011 before the Division of Workers Compensation Department of Labor And Industrial Relations documented Mr. Lockett's dishonesty in answering questions about his involvement in carrying the furnace up to his house. Based on the clear lack of honesty the Company found there was sufficient and just cause for termination. The Company contends the lack of honesty in the deposition taken on 12/8/2011 was a clear violation of work rule 4.1 and finds the video evidence and Mr. Lockett's deceit in denying that he helped carry the furnace up to his house an indication of an attempt to defraud the company in connection with his Workman's Comp claim.

In addition, Counsel noted that Mr. Lockett had retained an attorney (Allen H. Bell) who made various demands for immediate medical treatment and a settlement demand in the amount of $150,000 on December 7, 2011 which included an allowance for future medical treatment, diagnostic test, possible back surgery, physical therapy, pain prescriptions and future missed work. In addition the letter of February 6, 2012 from the attorney notes that a settlement demand was also made in that same letter but that it would have included allowance of his (Mr. Lockett) resignation from KCATA. (Jt. Ex. 18).

Mr. Lockett's attorney stated in the Letter of February 6, 2012 that "I do not believe I specifically made Mr. Lockett aware of the exact amount of any demands forwarded to the opposing attorney, but this demand was, I believe, in line with Mr. Lockett's complaints to me as to the treatment he was needing and the likely disability involved, based on the Independent Medical Examination (IME) we had arranged for him. Again, the $150,000 was demanded of KCATA to avoid future court costs, deposition fees, attorney fees, future medical treatment, diagnostic tests, possible back surgery, physical therapy, pain prescriptions and future missed work TTD benefits."

Bob Kohler, KCATA Director of Transportation, noted in his Third Step Grievance response the letter of November 9, 2011 from attorney Allen Bell which indicated that his client was in extreme pain and required immediate medical attention. Mr. Kohler noted that Mr. Lockett obtained medical treatment from the North Kansas City Hospital ER on November 12, 2011. In addition, Mr Kohler notes that "Given Lockett's persistent and ongoing subjective complaints of extreme physical pain which seemed out of proportion to objective medical findings, KCATA arranged to have Mr. Lockett surveilled while off duty by a private investigation firm.

The investigation occurred on November 23, 2011 which showed via video Mr. Lockett assisting in carrying a furnace up steps to his house which was later determined to weight 141 lbs. In addition, Mr. Kohler notes that at the request of Lockett's attorney he (Lockett) was scheduled for re-examination with KCATA's physician specialist on December 1, 2011 and purportedly told him that the heavies thing he had lifted was a 20 lb. Box of Christmas decorations since he was examined by the physician specialist on July 27, 2011. Mr. Kohler notes further that the deposition of Mr. Lockett was taken on December 8, 2011 and Mr. Lockett denied helping to carry a furnace up to his house and stated that "I couldn't lift it if you paid me to lift it." Mr. Kohler noted that a copy of the deposition was made available to KCATA on December 14 or 15, 2011 and on December 22, 2011 KCATA Superintendent of Transportation Gaylord Salisbury advised ATU Local 1287 Vice president Fred Ersery of the matter and KACTA's intent to investigate the matter further and noted that Salisbury advised Mr. Lockett of the investigation and potential disciplinary consequences on December 23, 2011.

Bob Kohler notes in his Third Step Grievance Response to Mr. Lockett that Salisbury and Manager of Road Supervision Tommie Hill interviewed Lockett on January 6, 2012 with Ersery and Union Steward Azar Clarke representing Lockett. Mr. Kohler cites the fact that upon being confronted with the video evidence he first asserted that the box did not contain a furnace but finally admitted that it was the furnace but contended that "it was an itty bitty thing." Mr. Kohler further noted that on January 11, 2012 Mr. Lockett called hm and indicated that he lied during the deposition to protect his job noting he was aware that KCATA had terminated another employee for similar conduct (for lying about carrying a furnace or something). In addition Mr. Kohler notes that in the follow up meeting on January 13, 2012 with Salisbury, Hill, and Ersery , Mr. Lockett provided the excuse that the day before he had helped carry the furnace he had received a cortisone injection and had taken pain medication which made it possible for him to help with the furnace.

Bob Kohler noted that the Discharge Decision was based solely on a violating work rule 4.1 where a first offense calls for possible discharge from employment.

Mr. Lockett was discharged January 16, 2012 and the Grievance was filed on January 16, 2012 and a third -step Grievance meeting was scheduled for February 1, 2012. Bob Kohler notes that he, Mr. Lockett, Mr. Walker, Mr. Hill were present at the third step grievance hearing and Mr Lockett explained that he had to replace a faulty furnace at his home which had failed and that he was facing financial hardship and a dire health condition for his wife and once again noted that he had lie under oath to protect his job having been made aware of another employee who was fired for

similar conduct and that he followed the bad advice of others. In addition, Mr Lockett indicated he had received an MRI about a week before although it was unclear how this would justify his lying about the furnace or his physical condition.

Bob Kohler testified that after the meeting was concluded on February 1, 2012 Mr. Walker phoned Mr. Kohler and left a message asking if KCATA was aware of an October 3, 2011 medical report from Dr. Hopkins implying that the report somehow favored Mr. Lockett. Mr. Kohler noted that Attorney Bell directed this report to ATA's Workers' Compensation Attorney sometime after January 20, 2012 (approximately 4 days after Lockett's termination). KCATA management received the report on February 12, 2012 with a cover letter from Attorney Bell which states that "While addressing the elephant in the room, while it is true that Mr. Lockett, being afraid he would lose his job apparently stated during his deposition that he only pushed the furnace, but the video apparently shows him carrying it with assistance of his son-in-law, Mr. Lockett was not under any work restrictions at that time. As Mr. Lockett has stated, he had taken pain medication knowing that he would have a hard day ahead of him, with having to replace his furnace with little help, and of course, he was in pain prior to moving the old furnace and was still feeling the same pain, but not by any more than prior to moving the furnace." Mr. Kohler, notes that Attorney Bell referenced the Hopkins report for the purpose of advancing a permanent partial disability (PPD) rating and a corresponding settlement demand amount.

Finally, Mr. Kohler noted in his February 6, 2012 response to the Grievance that the Missouri Division of Workers' Compensation will no doubt sort through the myriad issues and the opinions of multiple doctors to determine if Mr. Lockett has a valid disability claim and is entitled to some level of compensation. Mr. Kohler notes in this response that KCATA's immediate issue with Mr. Lockett is the blatant dishonesty displayed by him while providing sworn testimony during the deposition and Mr. Lockett admitted his dishonesty but asked that it be excused because he was attempting to protest his job.

Mr. Kohler also noted that Attorney Bell also seems to imply that Lockett's dishonesty should be excused because he was not under any medical restrictions at the time he carried the furnace and this should explain why he chose to do so but does not serve to explain why he chose to lie about doing so during the deposition. Mr. Kohler concluded by stating that "Locket was obviously attempting to defraud KCATA and/or deceive by offering false testimony during the deposition, and such behavior unquestionably justifies discharge under Work rule 4.1. Severe consequences are warranted for such serious conduct. The Grievance is denied at the third step."

Company Counsel has argued in hearing and in post-hearing brief that KCATA discharged Mr. Lockett after he lied under oath during a deposition in connection with his worker's compensation filed against KCATA. Counsel contends that while the Grievant has acknowledged the lie and has expressed regret it cannot be excused even if his motivation was only to protect his job and maintain his income and benefits in order to provide for his family. Counsel has argued that such justifications are insufficient to overturn the discharge in this case. In addition Counsel has argued that the Grievant's misstatements about his physical activities were material

misrepresentations in connection with his workman's comp case. Company Counsel has argued that the Grievant violated the core obligation of honesty that is essential to the employment relationship and on that basis KCATA had just cause to discharge him and the discharge should be sustained.

Counsel notes that under the terms of the Labor Agreement, "[t] he Union . . . recognizes that the power of discipline is vested exclusively in the Authority, and it will not attempt to interfere with or limit the Authority in the discharge of discipline of its employees for just cause; subject . . . to the right of any employee . . . who may be discharged or disciplined to present a grievance . . . the question whether he has been discharged or disciplined for just cause." See Exhibit 1, Section 1,12 (b), p. 12. In this context KCATA has promulgated a series of work rules known as the Discipline Code. Included within this code is rule 4.1, which provides that "Operators will not make any dishonest or misleading written or verbal reports, including sick pay, overtime, etc. (this list is not all-inclusive) First offense: Subject to discharge pending investigation." Exhibit 2, Manual of Instruction, Operating Rules and Discipline code, Rule 4.1, p. 42.

A. Grievant's Work-Related Injury and Subsequent Treatment

Counsel cites the Grievant's work related injury and subsequent treatment (Exhibits 3, 4 and 5) noting that treatment of the injury occurred over many months following the January 26, 2011 injury in the employee parking lot and continued to receive physical therapy into the Summer months of 2011. Counsel notes that the treating physical released the grievant from physical therapy in August 2011 and a dispute then arose between the Grievant and KCATA's third-party workers' compensation administrator regarding whether the Grievant needed additional treatment or was suffering from any permanent partial disability. While Counsel affirms that the issues raised in the ongoing workers' compensation case, including whether the Grievant requires further treatment and whether he sustained any permanent or partial disability is beyond the scope of the Grievance before the Arbitrator and such issues are noted only because they form the backdrop and establish the context in which the relevant facts must be considered.

B. Grievant's Observed Off-Duty Activities

Counsel has noted that when KCATA's workers' compensation administrator elected to place the Grievant under surveillance in November and December given the Grievant's claim of continuing medical problems which were inconsistent with the reports from the treating physician. Counsel contends that the surveillance video recorded on November 23 is critical to the present case (Exhibit 7) given the fact that it reveals that the Grievant helped carry a furnace up to his house which weighed 110 pounds (Exhibit 8) and this was inconsistent with statements made by the Grievant in the deposition conducted on December 8, 2011 (Exhibit 10). The video surveillance showed that the Grievant helped carry the furnace up steps to his house. Counsel notes that the Grievant clearly lied about his involvement in carrying the furnace and that he continued his effort to deceive KCATA after the deposition in the Grievant's completion of the errata sheet where he reaffirmed that he did not lift the furnace but only slid the furnace with help (Exhibit 11).

C. KCATA'S Investigation and Discharge Decision

KCATA's workers compensation attorney notified the Authority that the Grievant's deposition testimony was inconsistent with his activities observed on the surveillance video. Superintendent Galleried Salisbury notified the Grievant that the KCATA would investigate his apparent lack of honesty. Salisbury met with the Grievant and the Union representative on January 6, 2012. Counsel notes that the Grievant initially denied he had helped carry the furnace up to his house but whe3n confronted with the video he admitted he had done so. Counsel noted in testimony and post-hearing brief that on January 11, 2011 the Grievant telephoned the Director of Transportation, Bob Kohler and admitted that he had lied and that he had done so because he was afraid he would lose his job if he admitted to carrying the furnace and that his concern was based on a rumor that another employee had been discharged for moving a furnace while on a workers' compensation leave.

Bob Kohler, indicated that the grievant denied that he lied in order to maximize his workers' compensation settlement and indicated that his attorney had acted without his knowledge in making a settlement demand. The Arbitrator notes that the comments of the attorney's secretary (Overheard by Mr. Ersery) and the letter from attorney Bell affirms that Mr locket was not aware of the content of the letter. Rather, the comments of the attorney (and his secretary) indicate to the Arbitrator that the demands in the letter was standard strategy and protocol in such cases and the testimony and evidence suggests that Mr. Lockett did not authorize and was not made aware of such demands made.

Counsel contends that Mr. Kohler considered each of the Grievant's admissions and claims during the phone conversation and reviewed the video and deposition transcript and concluded the Grievant had attempted to deceive KCATA in his statement that he had not lifted more than ten pounds since his injury and had not carried a furnace, However, Counsel also notes Kohler's testimony that on January 12, KCATA received a report form the Grievant's treating physician Dr. Wheeler who noted that in a meeting with the Grievant on December 1, 2011 he indicated that the heavies thing he had lifted was a box of Christmas ornaments which weighed about 20 pounds. The Grievant confirmed in testimony that he had made the statement to Dr. Wheeler and indicated that he either forgot about lifting the furnace , or did not consider the furnace when answering the question about how much he had lifted or was responding to what he had lifted by himself. The Arbitrator notes that in the Arbitration Hearing the Grievant indicated that he could not lift more than 35 pounds and that he had the light end of the furnace. Exhibit 8 indicates that the furnace weighed 110 pounds. Counsel's assertion that the Grievant bore at least half this weight (or 55 lbs) cannot be substantiated. It may have been considerably less than that.

The Grievance assertion that he had the light of the furnace could very well mean that he was handling a weight of 35 pounds or less and the preponderance of weight was being born by the person assisting carrying the furnace up steps. The Arbitrator is familiar with furnace design and it is generally true that the top end of a furnace is much lighter than the bottom which contains the burner assembly, control ignition valve and the like. The Top of a furnace would normally be substantially lighter than the bottom and somewhat heavier only if it contained a coil for air-

conditioning and even then would likely be somewhat lighter than the bottom part of the furnace. While this possibility does not excuse the lying about helping to carry the furnace it is reasonable to assume that the Grievant may have been bearing a weight of 35 pounds or less in handling the top end of the furnace and was, therefore, capable of doing so without undue distress. Also, it is clear that since Mr. Lockett was under no medical restriction at the time he could have helped carry a furnace weighing 110 pounds for a short distance without aggravating his medical condition and such activity would not, in and of itself, automatically compromise his workmans' Comp claim.

D. Grievant's Work History

Company Counsel cited in testimony and in post-hearing brief Mr. Lockett's work history noting attendance policy violations with three written attendance warnings and five Notifications of Placement on Attendance Warnings and two suspensions for work rule violations. However, the Arbitrator does not find the Grievant's work history relevant to consideration of this case given the fact that this record does not have relevance to the reason(s) for discharge and such history is not sufficiently noxious or compelling to provide supportive rationale for discharge.

KCATA's SUMMARY ARGUMENT

Counsel affirms that the only issue before the Arbitrator is whether KCATA had just cause to discharge the Grievant for lying in his deposition about his role in carrying a furnace up to his house. Counsel has argued that the Grievant's violation of Rule 4.1 is undisputed and the Grievant's lies during his deposition are material to the employment relationship since the Grievant was either lying to increase his worker's compensation claim or lying to avoid discipline and both represent an unacceptable breach of the Grievant's duties as an employee.

Counsel also notes that the Grievant's decision to help carry the furnace up to his house is not at issue since the Grievant had every right to do so since he was not under medical restriction. Counsel holds that the Grievant was only prohibited from lying about it after the fact. Counsel notes that lies have consequences (as Union Counsel affirmed in opening statement). Counsel has argued that in this case the Grievant lied under oath and KCATA had just cause to terminate employment on that basis. Counsel cites the following in support of KCATA's position in this case:

A. Grievant's Misconduct is Undisputed.

Counsel notes that the Grievant admitted during the January 6 investigator interview, in his telephone conversation with Director Kohler on January 11, and at the Arbitration hearing in this case that he lied during his deposition.

B. Grievant's Lies Were material to the Employment Relationship.

Counsel notes that KCATA has observed that the effect of the Grievant's attempted misrepresentation, had it succeeded, would have been to increase any permanent partial disability

payment received in connection with his workers' compensation claim. And, Counsel notes that under the Missouri Workers' Compensation Law, "'permanent partial disability' means a disability that is permanent in nature and partial in degree." (MO. Rev.Stat 287.190.6 (1). Injured employees receive "compensation . . . for . . . proportionate loss of use of one or more members mentioned in the schedule of losses." Back injuries are typically treated as proportionate injuries to "the body as a whole," and are paid under that schedule. The more severe the injury and restrictive the lifting limitations, the greater the permanent disability payment. Therefore, Counsel asserts that the Grievant's false claims that he had not lifted more than ten pounds since his injury and could not lift more than 35 pounds would have directly increased his monetary compensation had the deception gone undetected. Counsel notes that the Grievant misrepresented his lifting ability to Dr. Wheeler , his treating physician when he indicated the most he had lifted was 20 pounds. These statements led Mr. Kohler to conclude that the grievant was attempting to crate a record that would support a larger
payment to which he was not entitled.

C. KCATA Had Just Cause to Terminate Grievant's Employment

Counsel has reaffirmed in post-hearing brief that the Employer had just and sufficient cause to discharge Mr. Lockett given the evidence in this case, Counsel cites case authority in this regard citing Sho-Me Power Electric Cooperative, 129 L A. 72 (Pratte, Arb. 3011)where an employee had been arrested for passing a bad check and several other infractions. When questioned the employee fabricated a false story and was discharged, Arbitrator Geoffrey Pratte affirmed the discharge, indicating that " "[t]he bounced check is not the real issue. Many honest people have bounced a check because of mistakes.. . . What is the real issue is an attempt to cover up what had really happened until the Grievant was compelled to acknowledge the truth." (129 L.A. at 78.

Counsel also cites In Greyhound Lines, 128 L.A. 679 (Jerry Fullmer, Arb., 2010) where an employee who was stabbed during a domestic dispute was unable to perform his work because of his injuries. The employee first claimed to have been injured while working for another employer in another state, but later changes the story as the employer attempted to get information about the employees status. The Employer ultimately discharged the employee for providing false information about his injury and the need for medical leave. The Arbitrator upheld the discharge noting that the employer was entitled to know the reasons for the Grievant's absence and attempt to cover up the true nature of his injury.

The Arbitrator noted further that "Giving false reasons to justify sick leave is often held to be justification for discharge. 128. L.A. at 684. In rejecting the Union's claim that the Arbitrator should reinstate the employee because the employer's work rule prohibiting dishonesty did not affirmatively require discharge the Arbitrator stated "the language gives the Company [discretion] to impose either termination or a lesser penalty for given offenses, depending upon their severity . . . . [A] serious dishonesty offense may result in termination for the first offense. Such a termination would not only be consistent with the terms of the rule, but with the core of arbitral jurisprudence which countenances termination for such offenses." 128 L.A. at 684.

D. The Arbitrator Cannot Substitute His Discretion for that of Management,

Counsel contends that much of the testimony presented at the hearing was designed to raise sympathy for the Grievant and while KCATA acknowledges that the consequences of the Grievant's actions in this case have caused significant hardship it must not invalidate a disciplinary decision that was supported for just cause. Counsel notes that Arbitrator Pratte explained (In Sho-Me Power, 129 L.A. at 79) that "if an Arbitrator "cannot find that the Company acted without just cause in firing the Grievant." the Arbitrator cannot reinstate the Grievant, "even though he personally would like to reinstate him to his initial position without pay. An Arbitrator's personal feelings cannot rule in interpreting a contract."

E. Comparable Employees

In the hearing and in post-hearing brief Counsel addressed the fact that Union Counsel referenced other employees who were disciplined for violating Rule 4.1, but were not discharged. Counsel notes that KCATA acknowledges that Ardis High and Deborah Simmons were both disciplined under Rule 4.1 but were not discharged. While KCATA has affirmed that it was, in fact, appropriate for the Union to refer to the Simmons discipline under Rule 4.1 Counsel notes that the principle of just cause requires that KCATA consider the individual circumstances in each case to of employee misconduct and not every violation of Rule 4.1 merits discharge. Counsel notes that Simmons and High did not lie under oath. Counsel notes that High had a long and unblemished work record and the Evidence of Simmons misconduct was not as compelling as the evidence in this case.

In addition, Counsel cites the fact that Union Vice President Fred Ersery acknowledged that KCATA discharged former employees Ricky Douglas and Queen Hinton under Rule 4.1. KCATA had discovered that Douglas had lied about the circumstances surrounding a traffic accident, and Hinton lied about her criminal record on her application. Counsel notes that in both cases KACTA concluded that I had just cause to discharge these employees in the best interest of the Authority. Counsel further notes that in the High and Simmons cases KCATA determined that lesser penalties were appropriate. Counsel contends that in the present case the Grievant's decision to lie under oath was sufficiently serious to justify discharge.

KCATA'S CONCLUSION

Counsel notes that KCATA is fully aware that the discharge of any employee cannot be taken lightly. However, the Authority's position is that the Grievant deliberately lied under oath about a matter directly tied to his employment relationship with KCATA and whether the Grievant was attempting to obtain money from KCATA or attempting to avoid feared discipline, the result is the same. Counsel contends that given the evidence in this case the KCATA had just and sufficient cause to terminate the Grievant and the grievance must be denied.

ARBITRATORS DISCUSSION AND CONSIDERATION

In consideration of all the evidence and testimony in this case the Arbitrator notes the following:

1. The Arbitrator finds questionable the applicability of work rule 4.1 in this case. Rule 4 (Honesty) deals with material actions relative to honesty on the job which includes penalty for dishonest or misleading written or verbal reports, including sick pay and overtime (Rule 4.1) ; failure to report an arrest while on duty (Rule 4.2) ; failure to notify dispatcher and carry out instructions in case of an accident (Rule 4.3); failure to properly collect fares and/or transfers (Rule 4.4) and failure to turn in lost articles found on Authority property (Rule 4.5). These work rules appear to apply directly to job activities and responsibilities and variable discipline possibilities are involved for infractions. As noted by Elkouris' in HOW ARBITRATION WORKS at 498., ". . . where general words follow an enumeration of specific terms, the general words will be interpreted to include or cover things of the same general nature or class as those enumerated. . . "

While there is the notation under Rule 4.1 that the list is not all-inclusive the context of Work rule 4.1 through 4.5 relate to activities and responsibilities while on the job and/or reporting job related activity such as over-time, sick pay and the like. The applicability of Rule 4.1 to a deposition taken in relation to a workman's comp case is questionable The Arbitrator finds the Unions's argument compelling that the specific language of Rule 4.1 relates to filing traditional work place documents and verbal reports to supervisors done on a regular basis and there is nothing to suggest in the rule or its prior application that it was to be applied to this type of case where statements are taken in a "litigation" context in a separate proceeding.

The Arbitrator finds Union Counsel's comment that the Missouri Division of Worker's Compensation may be in a better position to evaluate and determine whether a statement is false and the effect, if any, of the statement upon the claim and may be the appropriate forum to address those issues rather than having them addressed as a rule violation in a disciplinary context Mr. Kohler's has also suggested in his Step III decision that the Missouri Division of Workers' Compensation may be better equipped to "sort through the myriad of issues and opinions of multiple doctors" regarding Mr. Lockett's injury claim (Joint Ex. 14).

2. Although the Arbitrator does not find compelling the applicability of work Rule 4.1 to this case consideration must be given to the evidence that Mr. Lockett violated a standard of honesty (whether covered under work Rule 4.1 or not). There is no dispute that Mr. Lockett lied during his deposition in stating that he did not carry (or assist in carrying) the furnace up to his house. It is also clear that Mr. Lockett asserts that he did so given his fear that he may lose his job since he heard a rumor that another employee had been fired for doing something similar after filing a workmans' Comp claim.

Mr. Kohler found the lie about the furnace and comments about how much he had lifted since his injury when meeting with his physician evidence that the Grievant was attempting to defraud the Company and should be terminated on that basis. The Arbitrator does not find this argument compelling . Mr. Lockett also estimated he could lift 35 pounds and there is no compelling evidence that the end of the furnace he was carrying weighed more or less than 35 pounds. However, whether the Grievant could lift 35 pounds or more on his own is irrelevant to consideration of this case since the Authority's decision to terminate was based on his lying about helping to carry the furnace and the conclusion that this represented an attempt to Defraud KCATA.

The Arbitrator finds the testimony of Mr. Ersery (who overheard the conversation with his Attorney's secretary) and the letter from the Attorney indicating that Mr. Locket was not privy to the details of the "demand"letter that was sent to the opposing attorney compelling. The Arbitrator does not find the securing of an attorney by the Grievant evidence of any attempt to take advantage of KCATA. Securing of an attorney in workmans' comp cases is common and advisable. Nor does the Arbitrator find the "demand" letter from Attorney Bell evidence that there was an attempt to take advantage of KCATA in his workmans' comp case.

In addition, it is clear that Mr. Lockett was not under medical restriction at the time of the video surveillance and could have helped carry the furnace without violating a restriction. However, given Mr. Lockett's continued insistence that he needed medical attention and was continuing to suffer pain for his back condition KCATA scheduled the surveillance to determine the degree to which the Grievant was disabled since this was relevant to a workmans Comp determination of monetary and medical benefits.

While Mr. Lockett's motivation for lying about his role in carrying the furnace up to his house may be interpreted as an attempt to insure maximum benefit in his workmans' comp claim the evidence and testimony does not provide credible or compelling support for this conclusion. More specifically, while the Grievant lied about the furnace, the evidence does not support a conclusion that it was done with the intent to defraud the KCATA. The basis upon which a termination is based must be supported by competent, reliable evidence. As noted by Arbitrator James (cited in Union's post-hearing brief) ". . .a discharge cannot be based on conjecture, surmise or suspicion, or anything but hard, material, and known facts." And, as other authorities have held misconduct cannot be assumed, it must be proven.

Since KCATA has justified Mr. Lockett's discharge on the assumption that he lied with the intent to defraud and steal from the Authority the Grievance must be sustained given the lack of convincing and compelling evidence that this was the case. In the considered judgement of the Arbitrator Intent has not been proven or established in this case. Assuming that Work Rule 4.1 has some applicability corrective discipline would have been more appropriate in this case..

3. While work Rule 4.1 may not be directly relevant or applicable to this case, dishonesty cannot be excused or condoned. Clearly Mr. Lockett was dishonest in answering questions during his deposition in connection with his Workmans' Comp case. However, it is the considered

judgement of the Arbitrator that the import and implication of statements made during this deposition have specific relevance only to the Missouri Division of Workers Compensation who can only determine the degree of disability Mr. Lockett has sustained and the disability compensation that is appropriate.

The fact that the Grievant lied during the deposition about helping to carry a furnace may influence the decision by the Division of Workmans' Comp in determining the degree of disability and benefits but this will also be largely based on medical testing and evaluation. The Arbitrator concurs with the Union position that the relevance and import of the lie during the deposition is more appropriately considered in determining Workmans' Comp compensation and benefits rather than in the context of Work Rule 4.1 which relates more specifically to responsibilities on the job or responsibilities in connection with specific job duties and reporting requirements.

4. While the Arbitrator is reluctant to suspend or modify a discharge decision it is appropriate in this case. In the judgement of the Arbitrator since intent to defraud has not been proven or established in this case and the applicability of Rule 4.1 to this case is questionable the Arbitrator is must set aside the discharge of Mr. Lockett. However, given the fact that dishonesty was documented in statements made during his deposition by the Division of Workmans' Comp and assuming some applicability of Work Rule 4.1 (however weak) to this case or the prohibition of dishonest behavior generally as noted in the "Conclusion" of the Manual of Instruction-Operating Rules and Disciplinary Code (Jt. Ex. 2, p. 46), the Arbitrator is compelled to require discipline in the form of a suspension.

"Just cause" requires the Arbitrator to consider all the facts and circumstances relative to the penalty imposed by management and determine applicability and fairness and the Award is based solely on this consideration. In this case the Arbitrator finds the penalty does not meet the test of "just cause" since the evidence of fraud is not proven beyond any reasonable doubt in this case and this was the primary basis for discharge rather than some lessor corrective discipline. Mr. Kohler acknowledged in testimony that the concept of corrective discipline is an essential element of the Authority's discipline policy and the purpose is to be corrective not punitive and the Arbitrator finds that corrective discipline would have been warranted in this case.

In consideration of all the evidence and testimony in this case the Arbitrator finds that the Authority failed to demonstrate with convincing and compelling evidence that the Grievant was attempting to defraud the KCATA and that a Summary discharge rather than a lesser penalty, was warranted or required. Jt. Exhibit 2 (Page 46) notes that severe suspension is five (5) days or more and the Arbitrator finds Corrective Discipline more appropriate in this case in consideration of the admitted dishonesty in the Grievant's deposition whether or not work Rule 4.1 has direct import or relevance to this case. The Arbitrator also finds Corrective Discipline appropriate in consideration of past practice and has taken due notice of the fact that Ms. Simmons received only a 4 day suspension for forging documents and such action clearly demonstrated "Intent to Defraud" the KCATA while intent to do so was not established or proven beyond a reasonable doubt in this case.

ARBITRATION FINDING AND AWARD

IN CONSIDERATION OF ALL THE EVIDENCE AND TESTIMONY IN THIS CASE THE ARBITRATOR MUST SUSTAIN THE GRIEVANCE. ALDEN LOCKETT'S DISCHARGE SHALL BE SET ASIDE AND HE SHALL BE REINSTATED TO HIS FORMER POSITION BY AUGUST 15, 2012 AND ALL PAY AND BENEFITS LOST AS A RESULT OF HIS DISCHARGE SHALL BE RESTORED. THE ARBITRATOR ALSO FINDS THAT A 5 DAY SUSPENSION WITHOUT PAY SHALL BE IMPOSED AS A FORM OF CORRECTIVE DISCIPLINE FOLLOWING REINSTATEMENT. THE ARBITRATOR WILL RETAIN JURISDICTION IN THIS CASE TO ADDRESS ANY QUESTIONS AND TO INSURE COMPLIANCE AND IMPLEMENTATION OF THE AWARD.

Respectfully Submitted

Ronald G. Iacovetta, Arbitrator (FMCS 3342)
July 15, 2012