BEFORE THE KCATA-ATU 1287 ARBITRATION BOARD
DOUGLAS BONNEY, IMPARTIAL ARBITRATOR

In the Matter of the Arbitration Between

KANSAS CITY AREA TRANSPORTATION AUTHORITY, Employer, and AMALGAMATED TRANSIT UNION, LOCAL 1287, Union.	)	FMCS Case No. 13-01129-8 (Adams Discharge)

Appearances:

For the KCATA: Jeffrey M. Place, Littler Mendelson, P.C., Kansas City, Missouri.

For the Union: Scott A. Raisher, Jolley, Walsh, Hurley, Raisher & Aubry, P.C., Kansas City, Missouri.

Hearing: April 17, 2013, at the KCATA Administration Bldg., Kansas City, Missouri.

Briefs Received: May 30, 2013 (KCATA) & May 31, 2013 (ATU 1287).

OPINION & AWARD

This case involves a grievance challenging the discharge of Ruden Adams ("the grievant") by the Kansas City Area Transportation Authority ("the Authority" or "KCATA"). At the hearing, the parties stipulated that this case presents no issue of arbitrability, either substantive or procedural, and that the following issue is properly before the Arbitration Board for decision:

> Whether the KCATA had just cause for the discharge of bus operator Ruden Adams; and, if not, what shall the remedy be?

Findings of Fact

The Authority operates the largest public transit system in the Kansas City metropolitan area. Every day it uses about 200 buses to carry over 55,000 passengers. To sustain that level of

service, the KCATA employs 500 experienced and conscientious professional drivers, known as "operators." The Union represents the KCATA's bus operators and most of its other hourly employees. Safety is job one for the Authority and its operators.

The Authority hired the grievant on March 15, 2004, and – like all KCATA operators – the grievant underwent an extensive seven week training program. During the remainder of her eight and a half years as a KCATA bus operator, moreover, the grievant received periodic refresher training seminars. During all of the training the grievant received, the Authority consistently emphasized that – as a professional driver – she had the responsibility to engage in defensive driving and to keep a keen lookout for hazards, including pedestrians.

On Friday, November 16, 2012, the grievant went on duty at about 2:00 p.m. During the night-time hours of her shift, the grievant operated one of the Authority's large buses on Route 27, which runs from the Van Brunt Transfer Center, along 27th Street, through the Crown Center/Union Station area, and into downtown Kansas City, Missouri. Shortly after 11:00 p.m., the grievant stopped at a red light at the intersection of Pershing Road and Main Street. At that point on the Kansas City street grid, Main Street is a major traffic artery so that the intersection of Main and Pershing is quite wide and very well lighted. On the northwest corner of that intersection sits Union Station, and to the southeast of the intersection is the Westin-Crown Center Hotel. The grievant was in the westbound lane on Pershing Road, and she had no passengers on her bus. It was a dark, moonless night, and the streets were dry at 11:00 p.m. Vehicular traffic was very light at that time of night.

A large bus has a wide front window that offers the operator a reasonably unrestricted field of vision. Although the windshield includes such obstructions as a metal divider in the

middle of the windshield and two long windshield wipers, it is less obstructed than the typical automobile windshield.

According to the view recorded by camera three on the bus, the traffic light was red as the grievant approached the intersection. As she slowed the bus down, the grievant was rubbing her chin and scratching her neck. She stopped well short of the intersection's stop line at 23:18:44.[1] As she sat at the red light, the grievant continued to rub her face. According to the video recorded by camera four, the grievant was looking off to the left, perhaps towards the fountain in the Pershing Road median west of Main Street and across the street from Union Station.

At 23:18:47, a pedestrian first appeared on the far right side of the picture recorded by camera three. The pedestrian was walking southbound on the sidewalk that runs along the west side of Main Street. When he first appeared in the video, he was perhaps forty or fifty feet from the marked crosswalk traversing Pershing Road. According to the view recorded by camera four, the grievant was looking slightly to the left of center and away from the pedestrian. The grievant continued to rub her face or eyes with her left hand while she sat at the red light and the pedestrian walked toward Pershing Road. During that time, the grievant did not turn her head from side-to-side in an effort to scan the scene for hazards.

At 23:18:58, the grievant's traffic light changed from red to green. When the light changed, the grievant turned her head slightly to the right so that she was then looking straight ahead in the direction of the traffic signal. A second after turning her head slightly, the grievant began to accelerate her bus into the intersection. At that point, the pedestrian was perhaps fifteen

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[1] The on-bus camera system's clock uses military time and was apparently running about fifteen minutes fast. The accident reports introduced at the hearing indicate that the accident occurred just after 11:00 p.m. For purposes of this case, the exact time is not crucial. The important thing is the amount of time the grievant had to observe the scene, and there is no evidence suggesting that the relative clock readings were unreliable.

feet north of the curb. At 23:19:02, the grievant said something to herself. Although the recording is not entirely clear, she probably said "thank the Lord." At 23:19:04, the pedestrian stepped into the crosswalk against a "Don't Walk" signal. Throughout this time, the pedestrian faced straight ahead and maintained a steady walking pace. When the pedestrian stepped into the crosswalk, the grievant's bus was about half way across this wide intersection.

As she drove across the intersection, the grievant never turned her head even slightly to the left or right. At 23:19:07, the grievant first saw the pedestrian. At that second, she abruptly turned her head to the right and screamed "Ahhh. Oh my God" or words to that effect. At essentially the same instant, the grievant's bus hit the pedestrian and knocked him into the air, dashing his body and skull against the curb. The grievant pulled her bus to a complete stop at 23:19:13. After calling for help, securing the bus, and opening the door, the grievant exited the bus to check on the injured pedestrian. Within a few minutes, an ambulance arrived and transported the pedestrian to Truman Medical Center, where he underwent surgery for a fractured skull and other injuries. The hospital released the pedestrian five days later, and he filed suit against the Authority on March 23, 2013.

Every time a KCATA bus is involved in a traffic accident the Authority follows a four step procedure: First, the Superintendent of Transportation determines whether the accident was "avoidable" or "unavoidable." Second, if he concludes that an accident was avoidable, the Superintendent refers the matter to the Safety Manager, who reviews the results of the investigation and – pursuant to the Authority's Avoidable Accident Analysis procedure – assigns points for operator misconduct, personal injuries to the operator, passengers, and pedestrians, and property damage. The number of points assigned in each of these areas increases in accordance with the severity of the rule violations or damages. Third, based on the total points assigned, the

Safety Manager then classifies each avoidable accident as “Minor” (3-5 points), “Moderate” (6-12 points), or “Major” (13 points and above). Finally, the Superintendent of Transportation assigns disciplinary points to the operator under the Authority’s Revised Accident Remediation and Discipline Policy (“Accident Discipline Policy”), which has been in place since August 1, 1995. Specifically, the Superintendent assigns five (5) points for each “Minor” accident, seven (7) points for each “Moderate” accident, and twenty-four (24) points for each “Major” accident. The Accident Discipline Policy provides that an operator who accrues twenty-four or more avoidable accident points in one rolling twelve month period is “Subject to discharge.” Thus, if the Safety Manager determines that an accident was “Major,” an operator is “Subject to discharge” based on a single accident.

In this case, Gaylord Salisbury, the Authority’s Superintendent of Transportation, initially determined that the accident was “avoidable” based on a review of the various accident reports, the bus camera videos, and an interview with the grievant. Specifically, Superintendent Salisbury concluded that the accident was avoidable because the grievant failed to scan for and recognize the pedestrian as a known hazard and failed to take action to avoid hitting the pedestrian.

After determining that the accident was avoidable, Superintendent Salisbury passed the accident to B. J. Garcia, the Authority’s Manager of Safety and Instruction, for the assessment of points in accordance with the KCATA’s Avoidable Accident Analysis procedure. Safety Manager Garcia assessed five (5) points because the grievant failed to follow the Authority’s policies requiring bus operators to drive defensively, to avoid accidents, and – specifically – to yield to pedestrians at all times and under all circumstances, including when the pedestrian is in violation of traffic rules or laws. Next, Safety Manager Garcia assessed the maximum of twelve

(12) points for the pedestrian's life-threatening injuries. Thus, the Authority assigned a total of seventeen (17) points under its Avoidable Accident Analysis, which defines an avoidable accident as "Major" if it yields a total of thirteen (13) or more points. In compliance with the Authority's policies, the grievant received twenty-four (24) disciplinary points for having a major avoidable accident on November 16, 2012.

Management then reviewed the details of the grievant's accident and decided that discharge was the appropriate discipline based on the severity of the misconduct at issue in this case. Although Section 1.12(e) of the parties' collective bargaining agreement ("CBA" or "agreement") expressly prohibits the Authority from considering stale discipline (defined as discipline more than twelve months old) for purposes of assessing progressive discipline, that provision permits management to consider an employee's overall record in "determining whether moderation of discipline is warranted." Because the grievant had been involved in four other avoidable accidents during her eight and a half years of service, which was more than twice the rate of avoidable accidents for an average operator, management decided that the grievant's overall record did not warrant moderation of the discipline. Thus, effective November 27, 2012, the Authority discharged the grievant based on her involvement in a "Major" avoidable pedestrian accident on November 16, 2012.

Positions of the Parties

Employer: The Authority contends that "[a]s key personnel employed in the public transit system, [operators] owe a higher duty of care to members of the public than the average motorist." Because the grievant violated Missouri law and KCATA rules on defensive driving and yielding the right-of-way to pedestrians at all times, the grievant's operation of the bus on November 16, 2012, fell short of the duty of care required of a professional driver. Specifically,

the grievant did not scan the scene of the accident adequately and thus failed to keep a proper lookout for possible hazards. In this case, the Authority properly followed its Accident Remediation and Discipline Policy. Because management found the grievant's accident to have been "avoidable" and "Major," the Authority properly discharged the grievant based on her failure to follow KCATA policies. The grievance should be denied.

Union: The Union contends that the Authority did not have just cause for the grievant's discharge, and – as a remedy – it seeks reinstatement with full back pay and benefits. In support of this claim, the Union advances the following arguments:

- "[A]ccident cases . . . do not provide an exception to the contractual requirement that an employee's discharge must be and can only be for 'just cause.'"
- "[T]he mere fact that [the grievant] was unable to see the pedestrian or that an accident occurred – even one involving serious injuries – is not proof that the accident was avoidable or that the operator was 'reckless,' 'careless' or acted improperly."
- "The Authority has failed to prove that the accident was 'avoidable' or that Ms. Adams violated KCATA policy. The fact that it was not necessary for Ms. Adams to vigorously move her head [from] left to right – the only 'fact' upon which the Authority relies – does not prove that she did not scan the intersection, as is required. . . . [T]he evidence reflects that Ms. Adams was doing everything that was expected or required of her as she waited for the light to change and proceeded through the intersection. Nevertheless, she did not see the pedestrian. . . . A fair review of the video reflects that Ms. Adams may not have seen the

pedestrian, not because of some alleged failing or inattentiveness on her part, but because the pedestrian was very difficult, if not impossible, to see."

- "[T]here is something wrong about the investigation that was conducted by Mr. Salisbury." Specifically, the Union contends that the Authority's investigation was flawed because Mr. Salisbury never asked Ms. Adams whether she had scanned the intersection and never asked her about the "apparent inconsistency in what she said" to the police and road supervisors in the immediate aftermath of the accident.
- The Authority never specified the exact rule that the grievant allegedly violated in either the discharge notice or the grievance step answers.
- The grievant did not have "'ample time' to avoid the accident."
- It was improper for the Authority to base the discharge decision – in part – on the grievant's inability to explain why she did not see the pedestrian.
- The pedestrian was extremely difficult to see because the intersection was not well lit, the pedestrian's clothing made him blend into the background, vertical utility poles and other obstructions made the pedestrian less visible, the grievant could not look in every direction at the same time, and "the pedestrian was – at times – in a 'blind spot' and may not have been visible to [the grievant] for that moment she may have been scanning in his direction."
- The fact that the grievant did not receive a traffic citation and that the pedestrian was also negligent support the grievant's contention that the discharge was not for just cause.

- Mr. Salisbury improperly used the grievant's old avoidable accidents in deciding that discharge was the proper penalty.

Impartial Arbitrator's Opinion

Section 1.12(b) of the parties' labor contract requires the Authority to have just cause to discipline or discharge its employees. At arbitration, the employer bears the burden of proving just cause. In order to shoulder that burden, the employer must prove both that the employee committed the offense for which she was discharged and that the offense warranted the degree of discipline imposed.

As a preliminary matter, the Union argued that "the Authority must present facts, not mere assumptions, suspicions or unsupportable conclusions" to meet its burden. The Union further urged that, as Arbitrator Dilts required in the *McGlothen Discharge* case, the Authority must prove its case by clear and convincing evidence. Although the Union is certainly correct that mere speculation cannot satisfy an employer's burden of proof, I do not believe an employer must prove its case by clear and convincing evidence. Relying on phrases like reasonable doubt and clear and convincing evidence "is just playing with words." Remarks of David Feller, *Admissibility of Evidence*, in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting of the National Academy of Arbitrators, Stern & Dennis, eds. (BNA Books 1983) at 136. Indeed, such word play may actually obscure the main purposes of labor arbitration: contract interpretation and dispute adjustment. Rather than import such legalistic concepts into labor arbitration, I believe "an arbitrator must always require the highest degree of proof so that he is certain in his own mind that the alleged conduct occurred and the penalty was warranted." *Kroger Co.,* 71 LA 989, 991 (Heinsz 1978).

Where the employer bases discipline on an employee's involvement in an accident, the employer must prove that it gave its employees adequate advance notice of its rules on safety and accident-based discipline. In order to uphold accident-based discipline, furthermore, an arbitrator must be convinced that the discipline was "based upon facts which indicate that the driver was guilty of some definable violation of company rules, or state or municipal law." *Union Street Bus Co.*, 102 LA 976, 978-979 (Sweeney 1994). Management must also demonstrate that the specific accident giving rise to discipline was preventable and that the employer based the discipline decision on a thorough investigation of the circumstances leading to the accident.

In this case, the grievant's testimony and the video recordings from the bus cameras constitute the key pieces of evidence. As an initial matter, I want to acknowledge the Union's sage observations about the limitations of the video evidence. First, the videos do not reflect what the grievant saw. They depict what was in the field of view of each camera. Second, each camera was fixed in place and unable to turn. Third, none of the cameras was mounted at the level of the grievant's eyes. Although I have remained cognizant of these limitations as I have considered the facts and issues before me, I have also considered some additional limitations of the cameras. For instance, unlike the human eye, the cameras used here did not record stereoscopically or in color, both of which aid in the ability of a person to "see." Furthermore, although human peripheral vision is very sensitive to movement, cameras cannot recreate that facet of human sight. The grievant's ability to see stereoscopically, in color, and with peripheral vision should have enhanced her ability to see the pedestrian. I have considered all of these factors in deciding this case.

In weighing the important issue before me, I have also kept in mind that transit operators have a very difficult job. They must drive huge vehicles on relatively narrow streets, and they must watch out for and anticipate the unexpected moves of other drivers and pedestrians. They must be the "adults" on our streets. Fortunately, the Authority's operators have an outstanding overall safety record and have set an admirable example for the public traveling on and sharing the roads with the KCATA's buses.

In this case, the Authority has proven that it provided the grievant and all of its operators with adequate notice of its rules regarding safe driving and accident-based discipline. The KCATA trains operators to drive defensively, to keep a constant lookout for hazards, and to understand that "[a]n avoidable accident is one that [the operator] could have avoided, regardless of who was at fault." The Authority's Manual of Instruction, Operating Rules, and Discipline Code for Transportation Department employees clearly establishes that "[t]he standard Accident Prevention Formula is: See the hazard; Understand the defense; Act in time." The Manual further prescribes that "[t]he operator is in charge of the bus and of the passengers and is held responsible: a. For the safe operation of the vehicle[.]" The Manual also specifically mandates that operators must "[y]ield the right-of-way to pedestrians crossing the street, regardless of whether it is a marked crosswalk or in the center of the block where there is no crosswalk. When a pedestrian is crossing the street, drive with caution and practice defensive driving habits." Further, since at least 1995, the Authority's bus operators have known that the employer engages in a detailed analysis to determine whether an accident is "avoidable" and to classify avoidable accidents as "Minor," "Moderate," or "Major."

Moreover, the facts of this case show overwhelmingly that the grievant could have and should have avoided the pedestrian accident on the night of November 16, 2012. The pedestrian

first became visible in the camera three video at 23:18:47. The grievant's traffic signal changed from red to green at 23:18:58. The pedestrian stepped off the curb and into the crosswalk at 23:19:04, and the bus hit the pedestrian at 23:19:07. Thus, the grievant had a total of twenty seconds between the time the pedestrian first appeared in the video and the collision. Furthermore, the grievant had eleven seconds to scan the scene and recognize the pedestrian as a potential hazard before she even started to accelerate the bus into the intersection. Finally, the grievant had at least three seconds to take defensive action between the time the pedestrian stepped off the curb and the time the grievant's bus hit the pedestrian.

Despite the significant amount time available for the grievant to scan the scene, recognize the hazard, and take defensive action to avoid the accident, the grievant testified that she did not see the pedestrian until an instant before impact. An operator who fails to see and then hits a pedestrian who is right in front of her is negligent unless the operator can adequately explain the failure by showing, for example, that the pedestrian darted into the street unexpectedly or stepped into the street from behind an obstruction. Here, there was no adequate explanation of the grievant's failure to see the pedestrian, who was in her field of view for at least twenty seconds. In fact, in positing possible but unproven "blind spot" and other explanations for the grievant's error, the Union engaged in mere speculation.

More importantly, however, the video also clearly shows that the grievant was inattentive and that she was not scanning the scene for hazards as would a normally prudent operator. Instead, the video shows the grievant rubbing her face and staring off into space with her head turned slightly to the left and away from the pedestrian. The grievant never turned her head to scan the scene during the eleven seconds the bus was stopped at the red light or after she started to accelerate the bus across the intersection.

Although the grievant testified and the Union contends that she was scanning the scene by shifting her eyes back and forth without moving her head, I find that testimony and the Union's contentions incredible. In response to my question on this score, the grievant demonstrated that she was scanning mostly by moving her eyes, but during her demonstration she also moved her head several degrees from side-to-side as she moved her eyes. If the grievant had been scanning in the way she demonstrated at the hearing, it would have been obvious on the videos recorded by cameras two and four, which would have shown at least some head movements from side-to-side. But those videos show the grievant looking slightly to the left without any head movement at all. After the grievant started to accelerate the bus into the intersection, her head was pointed straight ahead and showed absolutely no movement from side-to-side. Because the grievant failed to scan the scene and failed to recognize the potential hazard posed by the approaching pedestrian, I find that the Authority has proven that this accident was preventable, that the grievant violated KCATA policies, and that the grievant was at fault in causing the accident.

The Union insists that the pedestrian was difficult to see. I reject that claim and find that the pedestrian was in full view of the bus for at least twenty seconds before impact. The area where the accident took place was well lighted; the pedestrian's clothing did not camouflage him from the grievant's view; the utility poles and other potential obstructions never obscured the view of the pedestrian for more than an instant during those twenty seconds; and any "blind spot" that the grievant's bus may have had cannot excuse her failure to see the pedestrian for twenty seconds.

Furthermore, I find that the Authority conducted an unbiased and thorough investigation of the accident and the grievant's role in that accident. In particular, the Authority promptly

dispatched supervisors to the accident scene, collected several written reports regarding the accident, interviewed the grievant, and reviewed the bus camera videos pertaining to the accident. Although the Union argues that the investigation was faulty because Mr. Salisbury failed to ask the grievant specific questions, I reject that contention. Industrial due process may require employers to ask employees for their versions of events before firing them, but it does not prescribe in minute detail how management should conduct such interviews.

Finally, I find that the Authority did not violate Section 1.12(e) of the parties' CBA by considering the grievant's prior accidents for purposes of assessing progressive discipline. Instead, the Authority considered the grievant's past accidents in determining whether the grievant's record merited a mitigation of the discharge. As the Union acknowledged in its brief, this distinction "may be a narrow one," but I find that management drew the distinction in compliance with Section 1.12(e).

For all of these reasons, I find that the Authority has proven that the grievant was guilty of misconduct as a result of her role in this preventable accident.

Having concluded that the grievant engaged in misconduct, I must next determine whether the grievant's offense warranted discharge because "the reasonableness of a disciplinary penalty is an essential ingredient of just cause for discipline." *Luddington News Co.*, 78 LA 1165, 1167 (Platte 1982). Even so, however, "an arbitrator 'should not substitute his judgment for that of management unless he finds that the penalty is excessive, unreasonable, or that management abused its discretion.'" *Franz Food Prods.*, 28 LA 543, 548 (Bothwell 1957).

The grievant struck me as a sincere and conscientious bus operator and a very pleasant person. She was an honest and reliable employee for the KCATA for eight and a half years, and she often worked fifty or sixty hours a week on the extra board. She used her best efforts to

operate her bus safely. And she was obviously extremely distraught as a result of the major pedestrian accident that she had on November 16, 2012.

In this case, however, I cannot conclude that discharge was excessive or unreasonable or that management abused its discretion in imposing the ultimate industrial penalty. The grievant fell woefully short of both the Authority's and the public's reasonable expectations for professional drivers. The grievant's failure to scan the scene for known and obvious hazards like an oblivious pedestrian entering a crosswalk against a "Don't Walk" signal was an abject failure to practice the most basic element of defensive driving. In addition, although the grievant had significant seniority and an apparently otherwise acceptable record of service, her accident record was significantly worse than the average KCATA operator. Thus, there is nothing in the grievant's record that would be sufficient to mitigate her gross negligence.[2]

The parties attached to their briefs several arbitration decisions, many of which involved buses striking and injuring pedestrians. Predictably, the awards varied widely, and each party cited awards favorable to its position. Because each accident case turns on its unique facts, however, such decisions are of extremely limited value in resolving this case. After reviewing all of the attached decisions, I specifically find that each one is distinguishable from this case on its facts and that none of them controls (or is even particularly relevant to) this case.

I will, however, specifically mention the *Elmore Discharge* case, mostly because it involves these parties and is the closest to the facts of this case. There, while making a left turn in downtown Kansas City, a bus operator with twelve years' seniority struck and severely injured a pedestrian who was crossing the street in the crosswalk and with a "walk" signal. Elmore

[2] I specifically find that the pedestrian's obvious negligence in crossing against the signal and failing to look out for vehicles cannot mitigate the grievant's misconduct. Both KCATA policies and Missouri laws are clear: drivers must yield the right-of-way to even negligent pedestrians. In addition, the fact that the police did not issue the grievant a traffic citation is irrelevant to the just cause issue.

testified that he scanned the scene but simply did not see the pedestrian crossing the street in front of him. Arbitrator John Gradwohl found that the Authority had sustained its burden of proving that the accident was "major" and "avoidable." Nonetheless, without much explanation, he reinstated the employee without back pay. I could distinguish *Elmore* on its facts since Arbitrator Gradwohl found that Elmore scanned the scene and kept a proper lookout whereas I have found that the grievant failed to do so. But I think that parsing the facts so closely would ring a false note. Instead, I will simply say that, although Arbitrator Gradwohl is a very experienced and well-regarded labor arbitrator, I disagree with his decision in *Elmore*. I think putting a professional driver back to work on these facts – where there are no significant mitigating factors[3] – verges on substituting the arbitrator's judgment for management's. I simply do not believe it is proper for an arbitrator to second guess management's selection of a penalty without good reason, and – since I see no good reason here – I decline to reduce the penalty.

Award

The grievance is denied.

Dated: June 5, 2013

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Douglas Bonney, Impartial Arbitrator

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Fern Kohler, Employer Member,
Concurring

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Jonothan P. Walker, Sr., Union Member,
Dissenting

[3] Such mitigating factors might include, among other things, an employer's contributory negligence or a grievant with exceptionally long seniority and an unblemished work record. *See, e.g.*, *Bi-State Dev. Agency & ATU Div. 788* (Erbs 2005)(employer failed to train employees how to compensate for known fare box blind spot); *Erie Metro. Trans. Auth. & ATU Local 568* (Potrocky 2000)(reinstating employee with over thirty years' seniority).