

IN THE MATTER OF ARBITRATION BETWEEN

JEFFERSON PARTNERS L.P.,	)	
Db, JEFFERSON LINES	)	
	)	
	)	
	)	Steve Law, Grievant
AND	)	
	)	
ATU LOCAL 1498	)	
	)	
	)	

NAME OF ARBITRATOR: John J. Flagler

DATE AND PLACE OF HEARING: August 21, 2009; Minneapolis, MN

DATE OF RECEIPT OF POST-HEARING BRIEFS: September 28, 2009

APPEARANCES

FOR THE EMPLOYER: Scott Allan, Consultant  
The Allen Labor Group  
13211 Ridgemount Avenue W  
Minnetonka, MN 55305  
Sam Howell, Director of Operations  
Rob Cooper, Field Operations Supervisor  
Gary Magnuson, Regional Sales Manager  
Dave Arsvold, Company Representative

FOR THE UNION: Weston Moore, Attorney  
531 North Mur-Len, Suite B  
Olathe, KS 66062  
Richard Davis, Union President  
Steve Law, Grievant

## BACKGROUND

This matter is before the arbitrator to determine if the Employer violated the Collective Bargaining Agreement. The Collective Bargaining Agreement vests in management the right to discipline and discharge employees for cause. The Grievant here was discharged for failing to follow work rules.

## ISSUE

Was the Grievant terminated for just cause, and not, what is the appropriate remedy?

## RELEVANT CONTRACT PROVISIONS

### Article 31

**RULES, REGULATIONS AND POLICIES.** The Jefferson Safety Manual and Jefferson Rules Manual has been superseded by the Jefferson Lines – Safety and General Rules Manual (DOT employees), revised 3/06 and the Jefferson Lines Safety and General Rules Manual (Non-DOT employees) revised 3/06, and supplementing bulletins and shall remain in effect until superseded, or changed by subsequent reasonable rules and regulations not in conflict with this Agreement. Under the provisions of Article 7 (7.1), the Union reserves the right to grieve and/or arbitrate any rules, order, or regulation it now, or in the future, believes to be unreasonable on its face or applied in an unreasonable manner.

### ARTICLE 41

**DISCIPLINE-SUSPENSION-DISCHARGE.** Any member suspended or discharged and later through investigation or arbitration found not sufficiently guilty to warrant such suspension or discharge shall be reinstated in his former position with continuous seniority rights and will be paid for all lost time at his regular rate or such other remedy as which may be determined by the Arbitrator, provided complaint is filed by the Union within fifteen (15) workdays after the member received notice of the discipline complained of.

41.1 The member's record will be cleared of all such charges and will show no reference thereto, except as determined by the Arbitrator.

41.2 The Company agrees to notify each member in writing of the placing of anything against him or his record. An employee shall have the right to inspect his personnel file, if requested in writing, no more than once every six months in the presence of the employee's supervisor and one other management employee of the Company's choice. These viewings will be documented to file.

41.3 Any member charged with an offense involving discipline shall be notified in writing of such charges and the discipline to be administered, as soon as possible but in no event later than fifteen (15) work days from the date the Company became aware, or reasonably should have been aware, of such offense. In the event such member disagrees with either the offense with which charged or the discipline to be rendered, he shall be entitled to a hearing on such charge. The hearing shall be held within thirty (30) work days of the date the employee is charged and shall be at a designated time and date at the home division of the employee. A member shall have the right to be represented by officials of the Union. Should the Union not be represented at the hearing, the Union shall be furnished a copy of the Company notes of such hearing. A decision by the Company shall be rendered in writing, within ten (10) work days, from the date of conclusion of such hearing, with a copy to the Presidential Business Agent of the Union.

41.4 All disputes, differences and grievances shall be handled in accordance with the following procedure:

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41.4(f) The Chief Operating Office or his designee, shall render a written decision within ten (10) work days following the receipt of the written appeal as referred in (d) above. Such decision shall be sent to the Local Union President via Certified Mail.

41.4 (g) If the Union is not satisfied with the decision, it may submit the matter to arbitration as herein provided.

## ARTICLE 42

**ARBITRATION.** It is understood and agreed that the Union may proceed directly to arbitration following the decision from the Company in Article 41.3. In case of any disagreement as to proper meaning or application of any provision of this Agreement, the matter shall be referred to final and binding arbitration in the following manner:

42.1 Failing the settlement of any grievance, or unsatisfactory decision in a discipline case, such grievances or decisions may be submitted to arbitration provided the aggrieved party files for arbitration by notifying the Federal Mediation and Conciliation Service and Company within thirty (30) days following receipt of the Company's decision on a grievance appeal or disciplinary hearing.

42.2 The party requesting arbitration shall request the Federal Mediation and Conciliation Service to submit a list of seven (7) arbitrators to the Company and to the Union, from which one (1) shall be selected as the impartial arbitrator. The Company and Union shall equally share the cost of securing the list of arbitrators.

42.3 Within ten (10) work days following receipt of the list of arbitrators, the Union and Company representatives shall alternately strike one (1) name until one (1) name

remains, with the first strike to be determined by the “toss of a coin.” The remaining name shall be the impartial arbitrator.

42.4 The arbitration shall be conducted as soon as possible to hear the parties, weigh all the evidence and arguments on the matter and the impartial arbitrator shall be requested to render its written decision within thirty (30) work days following the date of the conclusion of the hearing or thirty (30) work days following the date briefs are to be submitted, if filed. The decision of the impartial arbitrator shall be final and binding to the parties.

42.5 The parties shall jointly bear the expense of the impartial arbitrator. The arbitrator shall have no power to alter or amend the provisions of the contract in any respect.

42.6 Either party may, at its own expense, arrange for the taking of a transcription of the testimony. The party arranging for the taking of the transcription shall not be required to furnish a copy to the other party unless the other party shall bear one-half (1/2) of the expense of taking the transcription.

42.7 TIME LIMITS. It is agreed that either party hereto failing to comply with the time limits outlined in the Discipline-Suspension-Discharge-Grievance procedures and Arbitration Procedures, shall forfeit its case, unless the parties agree in writing to extend or waive the time limits. It is understood that, all reference to time limits herein shall exclude Saturdays, Sundays and Holidays as listed herein.

## STATEMENT OF FACTS

Jefferson Lines (the “Company”) is a Minnesota based business. It operates a fleet of buses with routes extending from Minneapolis to Dallas, serving thirteen states throughout the Midwest and the province of Manitoba, Canada. The Grievant was a bus driver for Jefferson Lines.

The Grievant was hired as a bus driver on March 10, 2008. On August 8, 2008, just five months after hire, the Grievant had his first of three accidents. His next two accidents occurred on September 28, 2008, and November 17, 2008. On November 17, 2008, the Grievant was placed on a three day suspension for having three preventable accidents.

The levels of discipline for preventable accidents are in The Safety and General Rules Manual which contains Company policies, procedures and rules. All bus drivers receive a copy of the Manual when hired and are expected to know and follow its rules. The Grievant received a copy of the Manual on March 10, 2008, which he signed, dated, and acknowledged and read and understood.

The Grievant was disciplined after each accident, and following his second and third accident, he was required to attend a “Back to Basics Enhanced Driver Training.” Following his

third accident and in addition to the class, he was also required to take a Defensive Driving course.

Two months after the third accident, on January 19, 2009, the Grievant failed to pick up a passenger who was waiting at the Fairmont, MN bus stop. Rob Cooper, Field Operations Supervisor, testified that the Grievant (1) failed to get out of his bus and physically check for passengers; and (2) then went to the wrong stop. Failing to physically check for passengers is a violation of the Safety and General Rules. The Employer has previously terminated employees for this violation.

The Safety and General Rules Manual states that the drivers must physically get out of the bus and check for passengers. (See Exhibit J-T at page 39, Stops are to be observed, "...the driver will be required to physically check with the agent...to determine if agent [sic] has any passengers...for his run...[there] will be NO EXCEPTIONS to the...procedures.").

The Grievant testified that he stopped in Fairmont "for ten seconds and left." He admitted that he did not get out and physically check for passengers. This was corroborated by the Grievant's own notes on the disciplinary document and testimony that he "just count[s] to ten" and leaves. Furthermore, Cooper testified that he checked the GPS records and found that the Grievant was in and out of the GPS zone in thirty-four (34) seconds.

Cooper also testified that the Grievant went to the wrong stop in Fairmont; the passenger was across the street at the Freedom Value Center, not at the Chamber of Commerce. The Grievant was previously notified in a memo that the stop had changed from the Chamber of Commerce to the Freedom Value Center.

The Grievant was also told by the dispatcher, David Reigstad, to pick up the passengers at the Freedom Value Center. The Grievant testified that he had a conversation with Reigstad about the Freedom Value Center stop, and that "Dave just told me to go in." However, he did not go in, or even stop at the right stop, and a passenger was left at the Freedom Value Center.

The Grievant's next rule violation came just three days after he left the passenger at the Fairmont stop. On January 21, 2009, he was issued a written warning for "soliciting an agent." The Safety and General Rules Manual specifically states that, "[a] driver shall not solicit for, or direct passengers to any location other than Company-designated stops. A driver is not to solicit a reduction in the price of meals or other items sold at rest or meal stops."

Gary Magnuson, the Regional Sales Manager, testified that he received a call from the manager of the Mankato "agency." The "agency" is where Company buses stop and where passengers may purchase tickets; some agencies also sell food. Magnuson testified that the Agency manager, Sharon Juliar, reported that the Grievant approached her in the back of the store and offered to change the meal stop from a Burger King in Jackson, MN to her stop in exchange for 20% of whatever the passengers purchased. Ms. Juliar testified that the Grievant's request "seemed fishy," and she reported it to Magnuson, who then reported it to Cooper.

Cooper discussed the matter with the Grievant who admitted talking to the manager about changing the stop. Cooper testified that in response to being accused of soliciting, the Grievant said, "If you don't ask, you won't get anything." Following the investigation, he was issued a written warning for the rule violation.

Less than one month after the Mankato solicitation incident, the Grievant again left a passenger at a depot. On February 17, 2009, he pulled into the Staples, MN depot "[opened] the door for 10 seconds and didn't see anyone," and left. He admitted that he did not physically go into the depot to check with the agent to see if there were passengers waiting for his bus. He also parked in the wrong parking spot.

On this date, the Grievant also made an unauthorized meal stop. The Grievant testified that he pulled around the corner to a restaurant, announced that he was stopping for food, waited 10 seconds, and since no one got up to go eat, he left. Cooper testified that this was an unauthorized meal stop and a clear violation of the Safety and General Rules Manual which states that "[meal] stops are to be made only at locations designated by the Company." Cooper again counseled the Grievant about not physically checking for passengers at stops and depots and making unauthorized meal stops.

Two weeks later, on March 3<sup>rd</sup>, the Grievant was involved in an incident in Grand Forks. Magnuson received a call from the depot manager at Grand Forks who told him that the Grievant drove into the depot in the wrong direction and pulled into a Grand Forks transit bus parking spot.

Carol Costello, the Office Clerk Specialist at the Grand Forks depot testified that he had parked in the wrong spot at least three times and was told each time not to do it and where to park. She testified that the Grievant was the only Jefferson Lines driver who parked in the wrong spot multiple times.

The Grievant admitted at the hearing that he "had already been warned to park in Jefferson Lines parking spots." He testified that Reigstad told him to only park in Jefferson Lines spots.

Ms. Costello testified that when she and a "couple other drivers asked the Grievant to move his bus, the Grievant simply finished unloading his passengers and luggage. Ms. Costello testified that the Grievant was in the spot for about five minutes, causing other buses to wait. The Grievant also testified that he did not leave the spot immediately but finished unloading his passengers and baggage before moving his bus.

Magnuson passed the information regarding the Grand Forks incident along to Cooper on March 3<sup>rd</sup>. Cooper testified that he was in union negotiations when Magnuson told him about the Grand Forks incident and would not be returning to the office until March 9<sup>th</sup>. Cooper stated that he would continue the investigation when he returned to the office.

However, on March 9<sup>th</sup>, the day Cooper returned to the office, the Grievant was involved in yet another incident involving a missed passenger. On March 9<sup>th</sup>, the Grievant completely

skipped the bus stop at Coffman Union, at the University of Minnesota, and in doing so, left a passenger behind.

Cooper testified that he contacted the Grievant about missing the stop. The Grievant said he thought the stop was “optional.” The Grievant corroborated Cooper’s testimony at the hearing; he testified that he thought the stop was optional. There was nothing on the run card or any other document entered into evidence that would suggest that the stop was optional, especially not on March 2, when school was in session.

Based on the evidence in hand and the Grievant’s prior rule violations, Cooper and Howell concluded that a face-to-face meeting with the Grievant would serve no purpose, as the Grievant had already given his side of the story for each event. Therefore, management decided to forgo the meeting and simply mailed the termination letter to the Grievant on March 12, 2009.

As per the contract, and at the Grievant’s request, a meeting was held on March 19<sup>th</sup> to discuss the reasons for terminating the Grievant. The Grievant had a union steward present, as well as Richard Davis, the Union President and Business Agent. Howell testified that the Grievant was “asked for [his] explanation on each item” in the termination letter. At the conclusion of the meeting, Davis requested reinstatement and restraining in lieu of termination. Howell told the Grievant and Union representatives that the Company had no interest in reinstating the Grievant.

Howell and Davis exchanged a number of letters which Davis objected to the termination and raised a procedural “timeline” issue. Davis moved the matter to arbitration on May 6<sup>th</sup>. The arbitration was held on August 20, 2009.

#### POSITION OF THE EMPLOYER

Requiring drivers to physically check for passengers at each stop is a fair and reasonable rule. By requiring drivers to physically get out of the bus and check for passengers, the Company creates some assurance that all passengers are picked up at each depot. Since it is the essence of the business to transport passengers, it is fair and reasonable that the Employer have rules to ensure all passengers are onboard when the bus leaves.

Richard Davis, the Union President and Business Agent, stated at the hearing that, “you [the drivers] are supposed to go in [to the depots].” He testified that he follows the rule and physically gets out of his bus to check for passengers. Davis admitted that in his 47 years of driving he has only missed one passenger.

Mr. Aarsvold, former VP of Operations testified that only four or five passengers a year are left at depots and stops. His testimony was not questioned by the Union. To achieve such a low rate of missed passengers, Aarsvold testified that the Company uses two tools: route guides and physical checks. The route guides tell drivers where to turn and where to stop along the route, the second tool – physically checking for passengers – guarantees that the driver will not

miss anyone. By applying these two simple rules, the drivers only miss four or five passengers in a year in the entire business.

The Grievant never argued that the rule was unreasonable or unfair; he simply made “judgment call(s)” to ignore it. The Union also never argued that the rule was unreasonable or unfair. In fact, the Union has conceded in a previous arbitration that the “Employer had substantive justification to discharge [a] grievant” for not physically checking for passengers. (ATU vs. Jefferson Lines), (March 8, 2008)(Arb. Gallagher).

In that case, Arbitrator Gallagher found that the grievant failed to:

Follow the Employer’s policies when he stopped at that Super America station on January 5, 2007. [The Grievant] drove his bus into the parking area in front of the service station building and left after 90 to 120 seconds, without getting out of the bus. [The Grievant] testified that he saw no cars parked there, that he looked through the service station windows and saw no one waiting in the booth where passengers usually wait for the bus, that he did not get off the bus to ask the clerk inside if there were any passengers to be picked up and that, because he thought there were no passengers, he drove off[.]” (Id.

Arbitrator Gallagher held that the grievant violated the same rule at issue here, and also found that the “Union concedes that the Employer had substantive justification to discharge the Grievant[.]”

The Grievant created his own rules for doing his job, rules that conflict with the Employer’s Safety and General Rules Manual. The Grievant testified that he had his own system for picking up passengers – “He would count to ten,” and if no one came out to the bus, he would leave. He testified that he “learned it from other drivers.” However, the evidence belies his claim. By applying his “count to ten” system, he left a total of eight passengers at various stops. If this were something he learned from other drivers, then other drivers would have similar “left passenger” statistics. Other drivers do not have similar numbers. As Aarsvold testified, there are only four or five passengers left at stops every year throughout the entire system.

The Grievant knew he had to physically check for passengers from reading the Safety and General Rules Manual. He had also been counseled and warned about his failure to check for passengers. He never argued that he was unaware that he had to physically check for passengers at each stop. Quite to the contrary, he demonstrated through his testimony that he knew the rule very well. When questioned about leaving the passengers in St. Cloud he stated, “I should’ve gone in.” He also testified that he had been “instructed to go in and ask the agent.” He did testify that he “made a judgment call” to ignore the rule.

The disciplinary process was substantially followed and proved procedural guarantees and fundamental fairness. The Grievant was put on notice that he might be terminated if he continued to ignore the rules. The series of warnings and disciplinary actions fully met the Employer’s obligation to notify the Grievant of the seriousness of his infractions. While the disciplinary track was not followed in the traditional sense – verbal, written, suspension,

termination – the process was fundamentally fair and the Grievant was given ample opportunity to give his side of the case.

Given the Grievant's rapid transgressions – three rule violations in his last eight days of employment – the Employer had to accelerate the disciplinary process.

The Employer's decision to terminate the Grievant was consistent with prior disciplinary actions for similar behavior. As noted in the case ATU v. Jefferson Lines, the Company has a history of terminating employees for failing to physically look for passengers at each stop and depot.

The Grievant gave no indication that he would have responded favorably to further coaching or counseling. He had received ample training and should have known how to do his job. As both Aarsvold and Howell testified, the Grievant had two and a half times as much training as other drivers. His repeated rule violations were not the result of ignorance, he willfully ignored the rules.

The Grievant continued to violate a simple rule: get out of the bus and physically check for passengers. This is not a difficult rule to understand or follow. One violation may be an oversight; multiple violations reveal a willful violation of the rule. An employer should not be expected to retain employees who willfully violate rules, especially when the rule violation results in passengers being left stranded at bus stops and depots.

Despite all the training, counselings, and disciplinary actions, the Grievant continued to engage in behavior that endangered the best interests of the Company. The Grievant's conduct posed a threat to the business and therefore discharge is justified.

The Grievant claimed he had insufficient training and that if he had known the routes better, he would have met his job expectations. This claim was refuted by his own testimony.

The Grievant had over twice as much training as other drivers, was also supplied with route guides and run cards which specifically tell the drivers where to turn and stop. The Grievant testified that he was trained on each run with another driver before he did the run. The Grievant and Cooper testified that the drivers turn in their "run card" with their pay envelope in order to get paid. On the run card are the places where the drivers stop. Therefore, the Grievant should have known where his stops were, since they were right on the run card. The Grievant testified that this is "the best way to be trained and to know the route...is to have a driver show you."

The Grievant's contention that it would take "about thirty times doing a route" to really "get it" is ridiculous. Given the route guide, run cards, and prior training on each run, there is no reason that a driver would need to repeat a trip "thirty times" before missing passengers at stops along the way.

This case is not about the Grievant's ability to drive, or whether he knew the route well or not, it is about his behaviors when he drove – missing passengers, soliciting agents, and ignoring rules.

The Grievant says he thought the Coffman Union stop was optional, that it was seasonal, and that he had no idea he was supposed to stop there. While the Coffman Union stop may have been “seasonal” and not open at times, it would be a required stop during the school year – which is when the Grievant failed to make the stop. The date he missed the stop was March 9<sup>th</sup>. School was in session, and there was nothing on the run card that would have indicated that the stop was optional. The Grievant's failure to stop at Coffman Union was just another example of his cavalier approach to his job. The Grievant's cavalier attitude is a common thread throughout this case and was especially marked in a comment he made about the accidents he had while driving the buses. When asked about the accidents he shrugged and said, “the Company has insurance.”

The Grievant was charged with soliciting an agent in Mankato and leaving passengers in Staples, MN and Fairmont, MN, as well as making an unscheduled meal stop in Staples, MN – all violations of reasonable rules that have been communicated to the Grievant. Not one of the incidents was grieved, despite the written warning and counselings issued by the Employer. The contract calls for grievances to be filed and pursued in a timely manner. Failing the submission of a grievance, a disciplinary action and finding of fact must be held as valid. The Union never requested a consolidation of the charges for this arbitration hearing. Therefore, the Union should now be barred from raising any objections to the written warning, counselings, or findings of fact.

In arguendo, there was substantial evidence that the Grievant did solicit the agent in Mankato, in violation of the Employer's rule prohibiting such solicitation. He readily admitted that he talked to the agent in Mankato about changing the stop from Jackson to Mankato. He characterized it as “making conversation,” but the evidence tells otherwise.

The Grievant's only response to the accusations was “if you don't ask, you won't get anything.” The Grievant's offhand comment could only be interpreted to mean that he was looking for some compensation for getting the stop changed.

This was further corroborated by the store manager in Mankato who testified that the Grievant solicited her for 20% of the profits from anything his passengers would buy at her store. She said the conversation with the Grievant “was like ‘I want money on the side.’”

In arguendo, there was substantial evidence that the Grievant did leave passengers at the Fairmont stop, in violation of the Employer's rule requiring drivers to physically check for passengers. He admitted that he did not get out of his bus and check for passengers at the Fairmont stop. In writing on the counseling memo that he pulled to a stop, counted to ten, and took off. In doing so, he left a passenger at the stop.

The Grievant tried to explain away the “missing passenger” by saying that he found out later that the stop was changed. However, that change was made several months before the date

in question, and the Grievant had notice of the change. Whether he stopped at the right or wrong stop was irrelevant. The issue was that he failed to physically check for passengers.

In arguendo, there was substantial evidence that the Grievant did leave passengers at the Staples, MN stop, in violation of the Employer's rule requiring drivers to physically check for passengers. There was also substantial evidence that the Grievant did make an unscheduled meal stop, in violation of the Employer's policy prohibiting such stops.

The Grievant admitted that he did not get out of his bus and physically check inside the depot for passengers at the Staples stop stating that he "did make the stop, opened the door for 10 seconds and didn't see anyone[,] and left. He also admitted that he went around the corner to a restaurant and made another one of these "ten second" stops for passengers who wanted something to eat. The Safety and General Rules Manual specifically prohibits meal and rest stops other than those established by the Employer.

The Grand Forks incident was another example of the Grievant following his own rules in contravention to the Employer's rules, policies, and procedures.

The Grievant admitted that he pulled into the depot in the wrong direction. He says he made a "judgment call" to do so instead of going around the block and pulling in the right way.

The Grievant admitted that he pulled into the wrong parking spot and unloaded his passengers and baggage in spite of the depot manager and other drivers' objections. He testified that he decided to simply finish the job and then move his bus.

The Grievant also testified that Reigstad, the Jefferson Lines dispatcher, had previously told him to make sure he parked in the Jefferson Lines parking spot.

Carol Costello, the Office Clerk Specialist in Grand Forks, testified that the Grievant had pulled into the wrong parking spot at least three other times, in spite of her requests not to do so. Costello testified that no other Jefferson Lines drivers have to be told more than once; the other drivers may park in the wrong spot once, but never again. The evidence was clear that the Grievant parked in the wrong spot at least three times.

There are no mitigating circumstances that would justify reducing or overturning the Grievant's discipline. The Grievant continued to violate rules and leave passengers at depots and stops, regardless of the "coaching and counseling" he received. The Grievant has clearly shown that there is no reason to mitigate the disciplinary action here based on the hope that the Grievant may finally change his ways.

Arbitrators routinely credit years of good service as warranting mitigation value in assessing the severity of the penalty where guilt of charges is established. Here, there are no substantial periods of service to credit. The Grievant was only employed for one year and two days. And within that time frame he racked up three accidents, left eight passengers stranded, solicited an agent to get "a cut in the action," and repeatedly ignored simple parking instructions

at a transit stop. No disparity of disciplinary treatment was shown nor any other extenuating factors claimed by the Grievant.

### POSITION OF THE UNION

The Grievant and Richard Davis, the Union President and a bus driver of forty years experience, each testified that a driver must be trained on each specific route before going alone and, even after being trained, it is not until many trips along the route that the driver can learn and commit to memory all that must be known to drive the route correctly and efficiently. Grievant's trouble began after he was moved to routes with which he was unfamiliar.

The Grievant was hired by Jefferson Lines in March, 2008 to work as a passenger bus driver in Minneapolis, MN. He spent several months in training as a bus driver. He was provided some classroom training and also trained with various other drivers on multiple routes. The evidence presented by the Company does not show how extensive his training was or if his on-the-job training was consistent with those policies and methods that Jefferson contends should be employed by drivers. There was no testimony from anyone who actually provided training to the Grievant or witnessed him being trained.

He was assigned his first route in June, 2008 and worked this route for about six (6) months. He was reassigned in January, 2009 from his very first route assignment to a weekly schedule that requires him to service three (3) different routes during the course of each work week. The Grievant, who had only been employed for nine (9) months and had experience on only one (1) route, was abruptly assigned to drive, not just one (1) unfamiliar route, but three (3). He was required to accomplish this task without any additional training or even so much as a familiarization run with an experienced driver. Davis testified that being required to drive multiple routes each week, instead of the same route every day, makes learning and remembering the demands of the route extremely difficult, especially for an inexperienced driver.

The Grievant tried to learn the routes as he worked. Though he found performing all the required tasks, while also teaching himself three (3) routes to be challenging, he felt he was progressing well. But, he made some mistakes during the learning process.

He unintentionally omitted a stop from one of his routes until the mistake was brought to his attention. He then corrected the mistake and there were no more complaints about him missing the stop.

Jefferson alleged, as the catalyst for discharge, that he missed three (3) passengers at the St. Cloud, MN terminal on March 11, 2009. The letter of discharge alleges that he missed three (3) passengers because he "didn't bother to pull into the terminal or go in...and, instead, only drove around the building and stopped for a couple of seconds before leaving." This allegation is simply not true. The conduct alleged in St. Cloud, MN – the allegation that led to his discharge on the very next day – is not true and supported by the evidence.

The Grievant testified that he stopped at the terminal in St. Cloud. He heard the terminal attendant announce the arrival of his bus. Passengers then exited the terminal and boarded. He assisted a number of disembarking passengers with their luggage, removing it from the storage compartments located at the bottom of the bus, and also assisted those passengers boarding the bus by stowing their luggage and collecting their tickets.

The facts asserted by the Grievant, that passengers boarded and exited the bus in St. Cloud, could have easily been disputed by Jefferson with the use of ticket records, if untruthful. But, more importantly, the version of events recorded in the discharge letter and relied upon to discharge the Grievant would have been found, prior to the discharge, to be untrue, if Jefferson had invested even a little effort toward verifying the claim alleged to have been made by the terminal agent.

The claim that the Grievant did not stop at the terminal could not possibly have been true. Passengers arrived in St. Cloud on the Grievant's bus and departed St. Cloud on his bus. Jefferson need only have looked at their records to have discovered this truth. Jefferson discharged the Grievant, heard his denial of the facts at a post-discharge meeting and even proceeded to arbitration without ever checking the ticket records to verify his denials; or, in the alternative, Jefferson did check the ticket records and proceeded to arbitration without correcting the record.

In light of the Grievant's testimony, Jefferson fell to an alternate version of the events in St. Cloud – "O.K. he stopped, but he did not go inside the terminal and his failure to physically walk into the terminal resulted in passengers missing the bus." This attempt to use an alternative theory to cast the blame upon the Grievant is not supported by the evidence. The terminal in St. Cloud was described as a typical bus terminal with multiple loading areas, and passengers gathered within the terminal that are arriving from and waiting to depart to various destinations. The Grievant testified that he heard his arrival announced. This truth seems evident since passengers left the terminal and boarded his bus. There is simply no evidence to support Jefferson's suggestion that the three missed passengers would have boarded the bus had the Grievant only walked into the terminal. The evidence presented by Davis, a driver with forty (40) years of experience, was that, despite the contention of Jefferson's management, drivers are not trained that they must walk into terminals like the one in St. Cloud that are staffed and operated exclusively as bus terminals, as opposed to unstaffed locations that are used as pick-up and drop-off points.

Jefferson also alleged within the letter of discharge and repeated before the Arbitrator, that on March 2, 2009, the Grievant parked his bus facing the wrong direction; refused to move the bus; and, argued with two drivers and a terminal agent in Grand Forks. Again, the allegations there are false, and again Jefferson's witness, this time Rob Cooper, did not check the facts.

Grievant testified to his version of the events in Grand Forks and gave a perfectly rational explanation for what he did on March 2, 2009, with regard to the placement of his bus, and flatly denied engaging in any argument or being insolent, as Cooper had alleged. So, Jefferson called a rebuttal witness, the terminal agent. This rebuttal witness directly supported the testimony of the

Grievant on every issue, testifying that he was not rude, he did not argue with anyone, and he did not move his bus as quickly as possible.

Jefferson has failed to meet the burden imposed upon it to demonstrate through competent and reliable evidence that “just cause” existed to discharge the Grievant.

The burden is upon the Employer to establish “just cause” for any disciplinary action taken, especially where, as here, the Collective Bargaining Agreement specifically requires “just cause.” The Arbitrator should be completely convinced that the employee committed the acts alleged and that the severity of the penalty is appropriate. Jefferson has failed to meet this burden. The undisputed evidence and the evidence from Jefferson’s own rebuttal witnesses, establish that the conduct alleged to have provided “just cause” for discharge did not happen.

Grievant did not fail to stop in St. Cloud, MN. He picked up passengers and let off passengers at that terminal. He did not refuse to move his bus in Grand Forks, ND and he did not argue with or otherwise act rude and insolent toward two bus drivers or the terminal agent. Jefferson did not meet its burden, its obligation, of establishing that Grievant engaged in this alleged misconduct. Jefferson was wrong about their facts and they were wrong when they incorrectly concluded that the Grievant had engaged in conduct that justified discharge.

It is said to be axiomatic that the degree of penalty should be in keeping with the seriousness of the offense. Less serious infractions of employer rules and careless workmanship do not justify discharge on the first offense, and usually not even for the second or third offense, but instead justify some milder penalty aimed at correction. Here, the mistakes made by Grievant, all were not so severe as to justify discharge. This is especially true when one considers management’s failure to train him properly and adequately.

It was not unreasonable for management to expect the Grievant as an inexperienced employee, to begin operating three (3) new routes without making mistakes. Management put him out there on his own, without adequate training and then demanded a level of performance that could not possibly be attained. The real-life situations and variances in how routes should be driven and must be driven are apparently unknown to Cooper, the supervisor who instigated the discharge of the Grievant. Cooper had the particular facts of the alleged incidents wrong and had an unrealistic view of the duties and demands facing drivers.

Grievant testified that Davis, the most experienced driver at Jefferson, testified that each route is different. Each route has its own list of special considerations and facts that a driver can only learn through extensive training (which was not provided) and/or experience. The specific demands and requirements of each route vary from route-to-route, according to time of year, time of day and as Jefferson makes changes based upon business considerations. A one-time ride-along on a route in June is not sufficient training to equip a driver to properly drive and take responsibility for a route in January. Yet, this is exactly what Jefferson demanded of the Grievant, times three (or the separate routes he was assigned).

The Collective Bargaining Agreement provided under the facts of this case, that the Grievant be reinstated to his former position and made whole for all lost wages. Jefferson has

failed to demonstrate that he engaged in the conduct alleged. It is clear that he did not commit the acts alleged to have occurred on March 11, 2009, in St. Cloud, MN. It is also clear that he did not commit the acts alleged to have occurred on March 9, 2009 in Grand Forks, ND. One must therefore conclude that the Grievant was “not sufficiently guilty to warrant...discharge.” It is also true that his mistakes or violations of Jefferson’s alleged policies were the result of inexperience and inadequate training, not the result of willful misconduct. Training is appropriate to remedy such a situation.

Discharge is not warranted by the proven facts. The most serious of the allegations are inaccurate and largely untrue. The most serious and inflammatory portions of those allegations that prompted discharge are simply untrue and baseless. Cooper made the allegations and claimed he was accurately reporting what he was told by others; never even by anyone who claimed to be a witness. Those third and fourth-hand allegations were improperly relied upon to discharge the Grievant. Those third and fourth-hand allegations were distorted, exaggerated and, in some instances, false. It is only just that the mistakes and errors be corrected by reinstating the Grievant. Justice also requires that he be made whole.

Jefferson failed in its obligation to properly investigate the allegations against the Grievant before discharging him.

Based upon the forgoing, the Union requests that the Arbitrator find that the misconduct and job performance deficits of the Grievant were not so serious as to justify discharge and that Jefferson lacked “just cause” to discharge him. As a remedy for Jefferson’s contractual violations, the Union requests that the Arbitrator reinstate the Grievant to his position as bus driver with full back-pay and the restoration of all benefits and seniority.

## DISCUSSION AND OPINION

The outcome of this case turns on resolution of conflicting testimony concerning the dispositive facts on which the Company relied on in its decision to terminate the Grievant’s employment. Probably the most logical way to examine the conflicting testimony is to review the matter chronologically in the order of the charges lodged by the Company to justify the discharge.

- Three driving accidents resulting in a three day without pay per disciplinary letter of November 18, 2008.

Analysis and Finding. The Grievant accepted that the three cited accidents were preventable and chose not to grieve the three day unpaid suspension. Perhaps most damaging to the Grievant’s position in his discharge challenge is the cavalier attitude he expressed in response to an investigatory interview about these accidents. The Grievant never denied that his response was, in effect, “Well, the Company has insurance,” when informed that the Company had incurred several thousands of dollars of damage to its buses because of his deficiency in handling his assigned vehicle.

- January 19, 2009, violation of rule by failing to go into Fairmont, MN depot to check for passengers resulting in a passenger report of being stranded.

The Grievant testified that he was confused about the location of the pick up area believing it to be the local Chamber of Commerce office. He stated that he drove to that site and found that it was not open, then checked through the window of Lucie's Cafeteria and saw no passengers in the booths.

He further explained on the memo of the inquiry from Field Operations Manager Robert Fields that: "Dave just told me to go in. I usually just count to ten for passengers. I don't want to leave anyone behind."

Analysis and Finding. The Grievant presented an "admission against interest" in the legal sense of the term by stating that he "usually" followed a silent ten second count procedure at various depot stops, without leaving the bus to enter the waiting areas to check for passengers – as expressly prescribed in the Company's Rules. In his own defense, the Grievant claims that he learned this method of waiting for passengers without checking inside the depot from other drivers. This claim collapses from its own illogic.

As the Company correctly points out, if other drivers were to follow this same technique for pick ups at various depots they would average similar numbers of missed passengers. Instead of some six or more a year, however, the relevant statistics show that fewer passengers were left behind throughout the entire system than were missed by the Grievant in one year. Further, local union president Davis contradicted the Grievant's testimony in this regard by stating that he consistently enters all but the large metropolitan depots to seek waiting passengers. Further, Davis testified he is unfamiliar with any other drivers following the ten second countdown described by the Grievant.

Accordingly, it is found that the Grievant violated the published rule requiring that he leave his bus and enter the various depots – except for major metro depots – to announce the bus is ready for immediate boarding. Instead he willfully chose to substitute his own personal method for picking up passengers which eventually resulted in six to eight people missing their ticketed bus trips.

- January 21, 2009. Issued a written warning for violating the anti-solicitation rule in Section H of the Safety and General Rules Manual which states "meal stops are to be made only at locations designated by the Company. The driver shall not solicit for or direct passengers to any other location other than Company-designated stops. A driver is not to solicit a reduction in price of meals or other items sold at rest or meal stops." The credible testimony, including again the admission of essential guilt by the Grievant establishes that he sought from the manager of the agency at Mankato to have 20% of money spent by passengers kicked back to him for arranging to have the designated meals moved from Burger King to this location.

The Grievant explained his reason for this solicitation to Rob Cooper by declaring he did not like Burger King and defended his request for the 20% kickback by stating "If you don't ask, you won't get anything."

Analysis and Finding. The Grievant attempted to dismiss this serious violation as merely “chit-chat” in passing without any real intent to gain any monetary benefit from his off-hand suggestion. This attempt to diminish or invalidate the seriousness of this misconduct misses the mark by a wide margin. On the face of the matter, the solicitation constitutes not only an obvious violation of a clearly stated prohibition, but, further, an ethical breach which could potentially reflect negatively on Jefferson Lines, as well as on the business relationship with Burger King.

The Grievant’s lame attempt at minimizing this offense fails and he stands guilty of the misconduct for which he was given the written warning in January 21, 2009.

- February 25, 2009. Missing a passenger at the Staples, MN depot on February 17, the sparse facts show that after receiving a written warning only one month earlier for the same offense, the Grievant again invoked the same defense which Cooper rejected in the Fairmont incident, i.e., he told the dispatcher that “I did make the stop, opened the door for 10 seconds and didn’t see anyone.” In his February 25<sup>th</sup> letter of reprimand, Rob Cooper instructed the Grievant that:

The passengers need longer than that for them to make it to your bus, and you need to physically get out of your seat and check inside the agency for passengers and packages. At a minimum we need to be waiting at least three minutes.

Analysis and Finding. The Grievant claimed as defense to the dispatcher that he “went around the block to give the passengers a break for a sandwich or something” – presumably to allow waiting passengers to arrive at curbside. This line of excuse falls of its own absurdity. By his own alibi the Grievant violated yet another Company rule – that of making an authorized rest and meal stop after an earlier rest stop at nearby Wadena.

Based on these facts the disciplinary letter of February 25<sup>th</sup> was warranted.

- March 12, 2009. The agent at the St. Cloud Metro Stop called Jefferson Lines to report that on March 11<sup>th</sup> the driver failed to pull into the terminal and neglected to enter the building. Rather, the St. Cloud agent stated that the Grievant pulled around the building, stopped for a couple of seconds and drove off leaving three passengers behind.

Cooper’s March 12<sup>th</sup> notice also stated that on March 9<sup>th</sup>, Jefferson’s operation office received notice that the Grievant had not stopped his bus at the University of Minnesota Coffman Union stop as was listed on his Grand Forks run card. His excuse was that he thought the stop was optional.

The same letter charged that the Grievant on March 2<sup>nd</sup> had pulled into the Grand Forks depot facing the wrong direction, parked in the wrong parking spot, blocked a local transit bus trying to unload a wheel chair passenger, refused to move promptly, and engaged in argument with the agent and other transit drivers. The Grievant denied intentionally blocking traffic and explained that heavy traffic at the time caused him to travel around the block and discharge his

passengers in the only spot open to him. He told the agent only that he was about completed his unloading and would leave shortly.

Analysis and Finding. The abbreviated stop at St. Cloud Metro consisting of but a few brief seconds, again without leaving the bus, constitutes an unacceptable repetition of a rule violation for which the Grievant had twice before been issued warnings and reprimands. There should have been absolutely no room for doubt concerning the mandated procedure for collecting passengers after Supervisor Cooper's February 25<sup>th</sup> written notice which instructed the Grievant, as follows:

... You need to physically get out of your seat and check inside the agency for passengers and packages. At a minimum we need to be waiting at least three minutes.

The Grievant claims that at large shared depots such as St. Cloud Metro, drivers seldom enter the building, but this assertion fails to excuse the Grievant neglecting to leave his seat and physically present himself for at least the three minutes called for by Supervisor Cooper.

Stranding yet another three passengers most certainly threatens the reputation of Jefferson Lines among local people who depend upon the bus for their travel needs. One can reasonably expect these three to share their complaint with family and friends. Such word of mouth communication, it should be noted, represents a strong factor in the success or failure of any local user business.

In like vein, the Grievant's skipping of the U of M Coffman Union stop cannot be explained away by the Grievant's excuse that he thought this stop was optional. The location was conspicuously marked as first stop on his route ticket. He could hardly have missed the fact that the academic year was in session as evidenced by the crowds of students passing Coffman Union as one writer noted "as thick as a rabbit warren." After 30 years on that campus I can readily attest to the heavy dependence commuting students have on bus transit and how disruptive it can be to their hectic schedules to miss a planned connection.

As to the situation in Grand Forks, when the facts are fully revealed, the criticism of the Grievant's conduct in this instance was, to say the least, overblown. His stop in a location reserved for Metro buses was prompted by a full parking lot plus a misparked Metro bus which would have totally blocked the exit way if the Grievant had headed the "right way."

The charge that he refused to move and argued with the agency representative and other bus drivers proved baseless. Instead the credible testimony indicates that he was very near to completing the unloading of baggage with his passengers already off the bus. The more likely version of what he said to the agent and drivers was something in the order of "I'm just about finished. I'll be out of here in a few seconds" – which, in fact, the depot representative agreed in her testimony.

In light of the foregoing findings, the rule violations committed by the Grievant in missing passengers and potential passengers by failing to follow required procedures is hereby sustained.

The charges against the Grievant for his conduct at the Grand Forks depot, however, are hereby dismissed as misstatements of fact.

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This review ought not close without review of the Union's procedural objection that the Company's response to the grievance missed the contractual deadline. At the hearing, the credible testimony showed that the delay in transmitting the April 2<sup>nd</sup> written response was probably a mere hitch in the mails. More importantly, despite the contract provision for forfeiture, a missed deadline must still be a substantial, rather than a mere incidental technicality to quality as a harmful error. Further, the Union never pursued its untimeliness claim with any prior evidence of strict compliance to this provision.

Consequently, no procedural defect can be found to disturb a resolution of this grievance on the merits.

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All that remains to be reviewed is the affirmative defense offered by the Union in the Grievant's behalf. The main feature of this defense argues that this Company neglected to provide the Grievant with sufficient training to perform his job effectively and avoid the honest errors which caused his work performance to be judged deficient. This line of defense lacks merit for the reason that a lack of adequate training – if it were true, which has not been shown – had nothing to do with the misconduct for which the Grievant was discharged.

Specifically, the record discloses that he was guilty of repeated failures to follow the clearly worded directive to void stranding passengers by following the practice of leaving his seat on the bus and going into the agency depots to announce that the bus was available for immediate boarding.

No amount of training could be more effective than the repeated written warnings and reprimands for the Grievant's willful refusal to abide by this direct order.

The Union argues further that the penalty of discharge is unduly harsh where corrective action should have been afforded. The Grievant's repeated defiance of Supervisor Cooper's efforts to guide him to complying with the procedure mandates for collecting passengers.

In like vein, no amount of training would suffice to raise the Grievant's ethical sensibilities to those that an employer, vested with public trust as a bus company must be, can rely on. Specifically, the Grievant's response to his violation of the no soliciting rule was a rejection of its basic ethical principle, i.e., that a responsible employee does not use the Company's time to propose a kickback scheme to one of its agents (or to anyone else). The Grievant's cynical response when confronted about this impropriety was "If you don't ask (for the kickback) you don't get anything."

His equally cynical response when informed that his three preventable accidents caused the Company several thousands of dollars in damage to its equipment was a flippant “The Company has insurance” – as if to say the damage is no skin off my nose. This kind of cynicism and nonchalance about the consequences of his misconduct defeats the Union’s earnest plea for further efforts at correction.

At last this analysis comes to the suggestion that the penalty of discharge is unduly harsh relative to the seriousness of the misconduct. This contention runs afoul of the well settled principle that an arbitrator ought not “dispense his own private brand of industrial justice” in the words of Justice William O. Douglas in United Steelworkers of America v. Enterprise Wheel and Car, 363 U.S. 593 (1960). Justice Douglas went on to write that while the courts had no business second guessing arbitrators, where an arbitrator substitutes his personal sense of industrial justice for that of the employer, where guilt has been proven, he can expect the Courts to vacate his decision.

Arbitrators, of course, do set aside or reduce employers’ disciplinary actions frequently but only where guilt is not established or in the face of mitigating circumstances which the employer ignored in the disciplinary decision. In the instant case, the Union has presented no mitigating circumstances – no length of meritorious service, no disparate treatment, no complicity of supervision in the misconduct. Absent such a showing of mitigating or extenuating circumstances it cannot be found that the discharge was unwarranted.

#### DECISION

Based on the forgoing findings and conclusions, the grievance is hereby denied.

October 7, 2009  
Date

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John J. Flagler, Arbitrator