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AMALGAMATED TRANSIT UNION  
LOCAL 1342

In the matter of the arbitration between:

AMALGAMATED TRANSIT UNION,  
LOCAL 1342

and

NIAGARA FRONTIER TRANSIT  
METRO SYSTEM, INC.

[Termination -  
Corey Walker]

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Appearances:

For the Union:

Joseph E. O'Donnell, Esq.  
Reden & O'Donnell, LLP

For the Employer:

Wayne R. Gradl, Esq.  
Counsel

ISSUE

The parties were unable to jointly stipulate an issue thereby leaving it to the Arbitrator. After a thorough review of the parties' individual proposals and the record in this case, I determine the issue to be:

Was the Grievant, Corey Walker, terminated for just cause in accordance with the Bus Accident Reduction Program and the Collective Bargaining Agreement? If not, what shall be the remedy?

BACKGROUND

The current Bus Accident Reduction Program [hereinafter the "Program"] went into effect on September 1, 2000 [Joint Exhibit 2] replacing the original Program which the parties had negotiated in 1995 [Joint Exhibit 3]. The Program establishes an Accident Review Committee [hereinafter the "ARC"]. The ARC consists of five [5] members; two [2] management employees and three [3] Bus Operators. The members of the ARC are selected jointly by the Union and the Employer. A Union representative may attend the meetings of ARC but has no

vote and must recuse him or herself when a vote is taken. The ARC makes decisions by majority vote. The ARC determines: [1] whether an accident is preventable; [2] the assessment of preventable accidents using an agreed on schedule which assigns points depending on the property damage and injuries which occur; and, [3] the appropriate "Personnel Action" in accordance with the schedule spelled out in the Program Agreement. [Joint Exhibit 2, pp. 3-4]

The introduction and the first two sections of this Program read in their entirety:

**The Bus Accident Reduction Program is based on the assignment of points for each preventable accident. The number of points assigned depends on the type and severity of the accident, and on any mitigating or contributing factors. When total current points reach specified levels, certain personnel actions occur.**

**1. Point Scale for Preventable Accidents**

- |    |   |                     |
|----|---|---------------------|
| A. | Property damage less than \$2000, or minor personal injury.   | 1-3 points          |
| B. | Property damage \$2000-\$5000, or multiple minor injuries.  | 3-5 points          |
| C. | Property damage \$5000-\$10,000, or multiple, more serious injuries, but not requiring hospitalization. | 5-9 points          |
| D. | Property damage over \$10,000, or personal injury requiring hospitalization.                            | 9-10 points         |
| E. | Gross negligence, or traffic violation by Operator.   | additional 2 points |

The following facts are considered in assigning points

- The degree to which Operator negligence or error caused the accident
- Whether the Operator violated any safety laws, and/or Metro operating rules.
- Amount of the property damage involved.
- Number/extent of personal injuries involved.
- Factors outside the Operator's control that may have contributed to the accident [faulty equipment, bad weather, visibility, etc.]

Assigned points drop off the Operator's record 12 months after each accident. The Accident Review Team may also deduct points for a particular accident depending on extraordinary, extenuating circumstances.

**II. Personnel Actions**

When current point totals reach or exceed the number shown below, the associated actions will occur:

<u>Action</u>	<u>When Required</u>
A. Re-instruction by Supervisor	1 point

- |  |                  |
|--|------------------|
| <b>B. One day Defensive Driving Review</b>   | <b>4 points</b>  |
| <b>Additional occurrences, within twelve months, will result in one-half day Defensive Driving Review and an appointment with the Employee Assistance Program.</b> |                  |
| <b>C. One week suspension, and Final Warning Before Termination. If action B was bypassed, the employee will also undergo the Defensive Driving Review.</b>        | <b>8 points</b>  |
| <b>D. Termination</b>  | <b>12 points</b> |

**Notes: Points drop off 12 months after the accident. [Id. at 2-3]**

Once the points to be assessed are determined, "the case is returned to the appropriate Supervisor for final action, including discussion with the Operator, according to the schedule of personnel actions." However, "The Union will retain the ability to utilize the grievance procedure in all accident cases." [Id. at 4]

In the ramp-up to the negotiations which produced the 2000 Program, the ARC submitted a proposal to the General Manager of Metro to update the dollar amounts of the property damage in the Program. In the subsequent negotiations the dollar amounts of the property damage in the "Point Scale for Preventable Accidents" were updated and increased substantially with the maximum property damage permitted without an assessment of 9-10 points doubling from \$5000 to \$10,000.

The parties also submitted as Joint Exhibits three [3] arbitration awards concerning operators who have been terminated as a result of assessments of the Accident Review Committee.<sup>1</sup> The details, dicta and rulings in these cases will be emerge in the presentation of the parties and my discussion of the case below.

The Grievant, Corey Walker [hereinafter the "Grievant"], was hired by the Niagara Frontier Transit Metro System [hereinafter the "Employer"] in August of 2002 as a part-time bus operator. Sometime in 2003 he was promoted to full-time bus operator and assigned to the Frontier Station.

On May 16, 2008 Grievant was on a 10:50 a.m. – 11:00 a.m. layover break at Frontier Station. His bus was parked across the access road from the Station against the "rail" which separates the access road from the employee parking lot. When he boarded the bus to resume his run, he checked his mirrors and saw another bus about to pass him on his left. Once the bus had passed, he pulled

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<sup>1</sup> Joint Exhibit 6 is an award by Arbitrator Thomas N. Rinaldo, Esq., which was rendered in 1999. Joint Exhibit 7 is a 2003 award by Arbitrator Jeffrey M. Selchick, Esq., and Joint Exhibit 8 is 2008 award by Arbitrator Edward A. Schmidt who was Impartial Chairman of the Board of Arbitration in that case.

out into the access road. As he pulled out into the road he remembered that he was wearing a non-uniform baseball cap and took his eyes off the road as he turned to hang up the cap. When he turned back he realized that the bus which had passed him had stopped dead in the middle of the road and immediately hit his brakes. However, given the proximity of the busses, a collision occurred. The collision resulted in damage to both busses and injuries to Grievant, who had to be transported to Kenmore Mercy Hospital as he was suffering pain in his shins and cuts on his hands.

On August 28, 2008 the matter of this collision was referred to the ARC. Grievant called in sick that day so he was not present to present his side of the case on that date. The Committee: [1] decided that the accident was preventable; [2] assessed 10 points for property damage as the Employer's "ballpark" figure for damage to the two [2] busses was \$33,220, far in excess of the \$10,000 maximum (Employer Exhibit 3); and [3] assessed 2 points for "gross negligence. Thus the total points assessed for the accident was 12 which required termination under the Program Agreement. Accordingly, Grievant was suspended pending termination effective August 28, 2008. [Joint Exhibit 14]

Grievant and the Union complained that this action was taken without Grievant's presence and, in accordance with an apparent understanding of the parties, the matter was again reviewed by the ARC on September 11, 2008. Grievant was in attendance and made a presentation to the Committee on that date. The ARC again assessed a total of 12 points which led to a recommendation of termination under the program. On October 2, 2008 Grievant was terminated by the Employer's Frontier Station Operations Manager. [Joint Exhibit 16]

On the same day, Grievant filed a grievance which stating that "the penalty was too harsh" and there were "extenuating circumstances" involved in the accident. [Joint Exhibit 4] The grievance was processed during October and November, 2008 with the Employer being unwilling to retract or mitigate the termination of Grievant. On December 11, 2008 Union President and Business Agent Crehan submitted a Demand for Arbitration to the Employer's Director of Surface Transportation.

The undersigned was chosen as Arbitrator by the parties and a two [2] day hearing on the matter was held on April 5, 2009 and April 22, 2009. Post hearing briefs were submitted by the advocates of the parties on July 31, 2009.

### **EMPLOYER POSITION**

The Employer submits that it diligently and faithfully followed the negotiated Program Agreement and the Collective Bargaining Agreement [hereinafter the "CBA"] in terminating Grievant. With respect to the Program Agreement, Employer Counsel stresses that the ARC unanimously determined that a total of 12 points was proper for Grievant's accident and, under the Program, an

assessment of 12 points requires that Grievant be terminated. Further, says Counsel, the arbitration hearing "did not include any proof or even contention that the Company committed any action which may be viewed as violative of the Parties' Bus Accident Reduction Program and/or CBA." [Employer brief at 22]

The proof offered in the hearing [including a DVD which portrayed the actions of Grievant] showed that Grievant took his eyes off the road and rear-ended another bus. The Employer says Grievant was well trained to have a duty of care which included being aware that he might encounter anything blocking the road in front of him and planning for a "way out" of such a situation. [Id. at 28]

**Such a care in following and maintenance of control are generally expected of all drivers who operate motor vehicles on the public highways. See N.Y. Veh. & Traf. Law § 1129[a]. As a driver of public transportation, the Grievant was charged with an even greater responsibility for care in following and maintenance of control than ordinary motorists. This greater responsibility included always driving to leave "a way out" in the even a vehicle his is following suddenly stops. See Joint Exb.8, pg.13. The Accident Review Committee assessed the Grievant and other drivers who rear-ended vehicles they were following with 2 additional points for "gross negligence" within the meaning of the Bus Accident Reduction Program, because diverting attention from the road while driving and then arguing that whatever vehicle or person struck should not have stopped or otherwise got in the way is simply an unacceptable mode of operation and mindset for a professional driver. [Id. at 30]**

The Employer maintains that, in addition to the evidence offered at the hearing, its position is supported by the three [3] arbitration cases, submitted as Joint Exhibits, which "clarified ambiguities and defined terms." The first case before Arbitrator Thomas Rinaldo was tried under the earlier Bus Accident Reduction Program which took effect on April 15, 1995. [Joint Exhibit 3] That 1999 case concerned a bus operator who, in making a left turn at excessive speed, struck two cars causing approximately \$35,200 total damage to property. [Joint Exhibit 6 at pg. 2] The ARC in that case found that the damage was more than six [6] times the then maximum of \$5000 and assessed 10 points for property damage which, when added to its assessment of two [2] points for "gross negligence," totaled 12 points and required termination under the Personnel Action section of the Program Agreement.

The Employer says: "This award addressed what might be viewed as the most fundamental and important ambiguity, specifically: Just what is the significance of an Accident Review Committee determination?" Arbitrator Rinaldo in his award, resolved this ambiguity by ruling: "An Arbitrator should defer to decisions made by the Bus Accident Reduction Program Accident Review Committee provided such decisions have a rational basis in fact are not otherwise arbitrary, capricious, or discriminatory." In the case before him, Arbitrator Rinaldo found that none of the conclusions reached by the Committee, including the 2 point addition for "gross negligence", "[did] any injury to the concept of reason" or were "unreasonable." [Employer Brief at pg. 12]

The Employer also points out that Arbitrator Rinaldo provided a definition for gross negligence: i.e., "negligence essentially equates to carelessness and gross negligence essentially equates to excessive carelessness." Additionally, Rinaldo concluded that: [1] "the fact that discharge was consistent with the Bus Accident Reduction Program points to a conclusion that the discharge in fact is supported by just cause"; and, [2], "the Bus Accident Reduction Program . . . constitutes the Parties' understanding as to how just cause will basically be applied in the case of driver responsibility for a bus accident." [Id. at 12-13]

In the second case [Joint Exhibit 7] Arbitrator Jeffrey Selchick was confronted with an incident in which a bus operator, who was engaged in a conversation with a passenger, rear-ended an automobile which precipitated a succession of collisions in which a total of six [6] vehicles were involved. Several persons, including the Bus Operator, had their injuries treated at a nearby hospital and the total in property damage, including the bus, was estimated to be \$32,840. [Id. at 5] The Employer states that in his 2003 award Arbitrator Selchick "honored Arbitrator Rinaldo's ruling that a discharge by operation of the Bus Accident Reduction Program was compatible with the overall concept of just cause and adopted Arbitrator Rinaldo's method of reviewing Committee determinations." The Employer stresses that Arbitrator Selchick upheld the Committee's assessment of 10 points for property damage and its assessment of two [2] points for gross negligence, finding that: "The record evidence supports the conclusion that the Grievant diverted her full attention from her driving duties as she spoke to a passenger for a substantial period of time before the accident occurred and as a result, struck a vehicle that had come to a stop in front of the bus." [Joint Exhibit 7, pg. 14] Thus, concludes the Employer, Arbitrator Selchick ruled that "diverting one's attention from the road and then rear-ending a vehicle that stopped in front of the bus was gross negligence." [Employer brief, pg. 14]

In the third case, Arbitrator Edward Schmidt, as Chairman of the tri-partite panel considered an incident in which a Trolley Operator rear-ended the vehicle he was following causing considerable property damage as well as the fatality of a passenger. The ARC assessed the operator 12 points, including two [2] points for "gross negligence." The Employer focuses on the Union's contention "the fact that the vehicle the grievant rear-ended 'stopped suddenly' was a mitigating factor" and highlights Arbitrator Schmidt's observation that the "grievant was properly charged with 2 points for gross negligence, because he had been following the vehicle in front of him too closely and was not able to stop in time." It then cites Arbitrator Schmidt's October 10, 2008 award to the effect that :

**The Company indicated that when a driver is trained, he is taught to always leave "a way out" in the event he comes upon a stopped vehicle. Further, Company policy states that rear end collisions are inexcusable." [Employer brief, pp. 14-16]**

Reviewing these arbitration decisions the Employer emphasizes that Arbitrators Selchick and Schmidt followed the standard set by Arbitrator Rinaldo: i.e., "An Arbitrator should defer to the decisions made by the Bus Accident Review

Committee provided such decisions have a rational basis in fact and are not otherwise arbitrary, capricious or discriminatory.”

The Employer stresses that if this standard is not applied: [1] “the disregard of such [ARC] determinations would be tantamount to a failure to uphold a process and prescribed discipline expressly agreed-on by the Parties”; and, [2] “selective enforcement issues would arise and the future operations would thereby be jeopardized.” [Id.] at 21-22.]

The Employer submits that it has followed the Bus Accident Reduction Program Agreement step by step in the instant case and both the language of the Program and the standard set in three [3] precedent arbitrations justify its decision to terminate Grievant.

To the Union’s claim of “extenuating circumstances,” the Employer counters that said claims represent “rearguments and issues considered and decided in prior awards.” [Id.] at 23] More specifically, the Employer shows that the claim that Grievant should not have been charged two [2] points for “gross negligence” was litigated in the Selchick arbitration. There, as in the instant case, the Grievant was determined to be guilty of gross negligence because the Operator “had diverted her attention from the road and then rear-ended a vehicle that had stopped in front of her.” Similarly, in the Schmidt arbitration, when the Union argued that the fact that the vehicle Grievant was following stopped suddenly was a mitigating factor, Arbitrator Schmidt rejected the claim because operators are trained to always leave “a way out” when confronting barriers in the road. Arbitrator Schmidt also rejected this mitigation argument because there is a Company policy “that rear-end collisions are inexcusable.” [Id.] at 23-24, emphasis in the original]

The Union also argues that the Employer shares some responsibility for the accident in that it had created warning devices, signs that are located along the rail opposite the Frontier Station, which read “Caution: Busses Making Brake Tests.” [Union Exhibits 9-11] These signs are topped by flashing lights to alert operators and others in the vicinity that they may encounter a bus being driven by a mechanic who is testing the brakes on the bus. Apparently, these flashing lights were used in the past but the practice was discontinued. The Employer rejects this Union claim as irrelevant because the bus in front of Grievant could have “plausibly stopped for a pedestrian or because a vehicle pulled out of one of the garages or because a stray cat ran in front of the bus.” Whatever the reason that the bus stopped, Grievant had the “core responsibility” to keep his eyes on the road and the vehicles in front of him; a responsibility that Grievant clearly failed when he diverted his attention from the road to hang up his cap “with the accelerator under foot.” [Id.] at 27]

Another Union claim is that the mechanic driving the bus Grievant rear-ended bears some responsibility for the accident in that he stopped suddenly and therefore said mechanic should have also been disciplined. The Employer

counters this claim of discriminatory discipline by showing: [1] although both the mechanic and Grievant are in the same bargaining unit, the Program and the actions of the ARC only applies to bus operators and not mechanics; [2] the mechanic was assigned to test the brakes on the bus he was driving and such action requires that the bus be stopped; and [3] "Regardless of why the mechanic decided to stop the bus he was driving, he had the right to expect that whatever vehicle happened to be following him would be doing so at a safe distance and sufficiently observant to be able to react to his stop by stopping instead of rear ending him." Id. at 30]

The Employer submits that since the Union failed to show any violation of the CBA or the Program Agreement, it centered its case on "the wrong assigned to the Company at the arbitration [which] was refusing to negotiate and agree on higher property damages amounts for the scale of accident severity set forth in the Bus Accident Reduction Program." The Employer feels that this is a Union ploy to raise the maximum property damage level from \$10,000 to \$20,000, so that another review by the ARC would lead the Committee to assess less than 12 points which would require discipline short of termination. [Employer brief, pp. 22-23]

In support of this contention, the Employer notes that: [1] the Union President testified that he had been attempting to get the Employer to negotiate and update the property damage schedule, but no negotiations had occurred; and, [2] In direct contrast to the "ball park" estimate of \$33,200 for the damage to the two busses involved in the accident used by the ARC in assessing the damage, the Union waited until the arbitration hearing to submit a Maintenance Department cost statement showing a total of \$18,560 for property damage to both vehicles. It is no surprise, concludes the Employer, that this costing is slightly less than the maximum of \$20,000 sought by the Union. [Union Exhibits 1 2, & 3 (a-d)]

To counter this Union ploy the Employer insists that the ARC must apply the current Program Agreement as written and whether the property damage is \$33,200 or \$18,560, both amounts are far above the current \$10,000 maximum of the negotiated agreement. Finally, the Employer notes that this Union argument does "not involve any bad faith or unfair tactic on the part of the Union, but must be rejected nonetheless." Id. at 33, emphasis in the original]

The Employer concludes:

**There is no evidence that the Grievant's dismissal was implemented in a manner contrary to the policies and procedures set forth in the Bus Accident Reduction Program. Nor is there any evidence that the Accident Review Committee's unanimous decision that the Grievant's May 16 accident was properly assessed 12 points according to the Program as written was in violation of the terms of the Program, or an unreasonable departure from how the Program has been administered in the past or otherwise arbitrary, capricious or discriminatory. The**

present Grievance simply involves the Union's hope for an award that will decline to honor the negotiated Program. However, inasmuch as the Grievant's dismissal occurred according to the terms of the Program and the routine and proper operation of the Accident Review Committee, the present Grievance is properly denied. [id. at 40-41]

### UNION POSITION

The Union has a more extended interpretation of Arbitrator Rinaldo's award. The Union shows the manner in which Arbitrator Rinaldo harmonizes the Program with the parties' CBA. Arbitrator Rinaldo stated:

**“. . .the parties have, in addition to the Bus Accident Reduction Program, negotiated in essence a “just cause” standard to be applied when an employee has been disciplined. This observation raises the question of what effect does the Bus Accident Reduction Program have on the just cause standard, when, as here, an employee challenges discipline administered thereunder. This Arbitrator views the Bus Accident Reduction Program as constituting the Parties' understanding as to how just cause will basically be applied in the case of driver responsibility for a bus accident. Thus, the Bus Accident Reduction Program sets forth a procedure that the Parties have agreed upon to assess whether discipline should be imposed on a driver due to responsibility for an accident. Moreover, the Program sets forth a substantive basis for the administration of discipline through its point assessment table and accompanying discipline. . . .**

Indeed, the Program seems to provide a fair method of having both labor and management review the responsibility of a driver involved in an accident. An Arbitrator should defer to decisions made by the Bus Accident Reduction Program Accident Review Committee provided such decisions have a rational basis in fact and are not otherwise arbitrary, capricious or discriminatory. Nonetheless, a member of the bargaining unit, in view of the contractual standard of just cause, may be in a position to challenge a disciplinary decision as lacking in just cause even if the decision reflects conformance with the procedures and substance of the Bus Accident Reduction Program.” [Union brief, pp. 14-15, emphasis added to the original]

The Union points out that the underlined sentence above assures the Grievant of the contractual protection of just cause. Further, the Union emphasizes that immediately following this statement Arbitrator Rinaldo created a two-pronged test for use in cases of discipline administered under the Program asking two [2] questions which detail that test:

**First, does the disciplinary decision pass muster under the criteria of the Bus Accident Reduction Program? Secondly, if the decision does pass muster under the Program, is there any other basis to conclude that the disciplinary decision is lacking in just cause? [Joint Exhibit 6, pg. 10]**

The Union admits that given the facts of the instant case, “analyzed in a vacuum,” the Employer's decision to terminate Grievant “technically passes muster under the criteria of the Program.” Therefore, the Union case focuses on the second prong of the test “which asks in relevant part, ‘Is there any other basis to conclude that disciplinary decision is lacking in just cause?’” The Union

“emphatically believes this query must be answered in Mr. Walker’s favor (i.e., the scales of justice must be tipped in favor of the just cause protections contained within the parties’ cba and away from the inequitable application of the antiquated property damage figures contained within Section 1 of the Program and their effects, here, termination).” [Union brief, pg.16)<sup>2</sup>

The Union alleges four [4] factors involved in the termination of Grievant which are not consistent with just cause principles: [1] “The Property Damage component of the Program’s point scale has become antiquated to the point where it now conflicts with recognized just cause protections contained within the parties’ CBA” [Id. at pg. 8]; [2] The Company’s partial responsibility for the accident due to its failure to activate the existent warning devices which warn personnel when a mechanic is testing the brakes on a bus; [3] the mechanic driving the bus Grievant rear-ended also shares responsibility for the accident in that he “chose to suddenly stop his bus . . . without any warning whatsoever”; and, [4] said mechanic was not disciplined and “this type of disciplinary inequity existing between members of the same bargaining unit does not pass the gut test.” [Id. at pg. 18]

The Union claims that the property damage scale of the current Program Agreement is woefully out-of-date. It points to the testimony of two [2] witnesses, one from the union and one from management, both of whom served several years on the ARC, that the obsolete values in the current Program have been an on-going concern for the Committee. The Union witness testified that the Committee had formulated a proposal to increase the property damage amount and relied on the Chairman of the Committee to inform upper management and the Union. However, “despite ongoing discussions at the Committee level, which spanned years, nothing ever changed.” [Id. at 9]

Further, says the Union, when the Union President was made aware of the concern of the ARC in 2005, he made repeated requests, both verbally and in written form, asking top levels of management to enter into discussions and negotiations to increase the property damage rates. These attempts were met with promises of “looking into it” and/or silence. The Union feels that “it appears obvious that the Company is content to keep the September 1, 2000 property damage values in place despite their inequity.” [Id. at 9-10 and Union Exhibits 5-7] The Union concludes that “the Company’s current regime has conveniently turned a blind eye to the situation resulting in an inequitable application of the Program itself which cuts against fundamental principles of fairness which are central to the just protections contained within the parties’ cba.” [Id. at 10]

The Union suggests that “If the property damage figures contained in Section 1 of the Program were proportionally increased as they were between 1995 and 2000” the present maximum of \$10,000 would be doubled to \$20,000 and:

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<sup>2</sup> The just cause protections are found in Section 11 of the Collective Bargaining Agreement entitled “Discipline, Grievances and Arbitration.”

Given the actual amount of the property damage arising from Mr. Walker's 5/16/08 accident in the amount of \$18,560.02 [Union Exhibit 1], had Section I of the Program been modified as noted above, Mr. Walker would have fallen into subsection C of the Program, reflecting property damage in the range of \$12,500 to \$20,000. If such were the case, the ARC would have assessed anywhere from 5 to 9 points for Mr. Walker's 5/16/08 accident. Consequently, at most, Mr. Walker would have received a point total of eleven [11] [i.e., 9 points for property loss and 2 points for gross negligence] and, therefore, pursuant to Section II, PERSONNEL ACTIONS, of the Program, Mr. Walker would have received a one week suspension and final warning before termination instead of termination. [Union brief, pp. 5-7]

The Union is frustrated by the Employer's failure to even respond to the requests of Union President Crehan and, "more importantly, the long standing concern of the ARC itself" relative to the escalation in bus costs and the implicit rise in the cost of repair to such busses. This frustration leads the Union to ask the Arbitrator to intervene. The dramatic increase in the costs of busses and associated maintenance is such that:

**. . . at this juncture, it is only fair to conclude that the negotiated just cause provisions contain within the parties' cba now outweigh the antiquated property damage figures contained within the Program and their effects, even though said amounts were previously negotiated.**

**It is respectfully suggested that the Arbitrator must tip the scales of justice in favor of protected just cause principles given the antiquated nature of the property damage figures, especially in light of the Company's on-going failure to address the obvious inequities in the Program.**

**To be clear, the Union is not requesting the Arbitrator to legislate changes to the negotiated Program. Rather, the Union merely seeks to have negotiated just cause protections enforced. [Id. at 11-12]**

The Union also argues that the Employer contributed to Grievant's accident by its failure to use the flashing light warning device it had specifically designed to warn personnel in the area when, in the terms displayed on the warning signs, there were "Busses Making Brake Tests." Had the warning lights been operating, Grievant would have been "placed on heightened alert" and there would have been "at least, a greater probability that the accident would not have occurred." [Id. at 17] The Union asks that this contributory negligence on the part of the Employer be considered a mitigating factor in favor of Grievant.

The two [2] other factors that the Union wishes the Arbitrator to consider concern the mechanic who tested the brakes on the vehicle Grievant rear-ended. The Union finds it "troubling" that this mechanic "chose to suddenly stop his bus in the middle of the driveway in front of the Frontier Station without any warning whatsoever." Further, the Union feels that although the mechanic is in another section of the bargaining unit and therefore not subject to the Bus Accident Reduction Program, "it seems fundamentally unfair" that Grievant should be terminated and this mechanic, whose negligence also contributed to the

accident, should not be disciplined at all. The Union argues that "this type of disciplinary inequity existing between members of the same bargaining unit simply does not pass the gut test." [Id. at 18]

The Union concludes:

**While the Union earnestly believes termination is an excessive penalty given the totality of circumstances leading up to the 5/16/08 accident, including Mr. Walker's actions, it is not suggested that some form of penalty would be inappropriate.**

**For the Union and Mr. Walker, success in this arbitration would serve as a wake-up call to the Company to once again "value [ ] the input of the Committee" as it previously did under Mr. Schill's watch [Jx-2], rather than ignoring the Committee's on-going concerns over the obvious inequities associated with the property damage figures of the Program which the Committee itself has tried to change for years. . . .**

**Consistent with the positions set forth above, the Union, on behalf of Mr. Walker, respectfully asks for an Opinion and Award directing Mr. Walker's reinstatement along with any and all additional relief deemed appropriate by the Arbitrator consistent with applicable just cause principles. [Id. at 20-22]**

## DISCUSSION

The parties submitted three [3] arbitration cases in which operators were involved in collisions and the ARC made assessments which led to operators being terminated. These cases illustrate how my colleagues have established a harmony between Section 11 of the CBA, entitled "Discipline, Grievances and Arbitration," and the Program Agreement.

In the initial case, decided by Arbitrator Rinaldo in 1999, the Employer's decision to terminate the operator was upheld. However, as the Union suggests, Arbitrator Rinaldo established a "two-pronged test" which harmonized the Program with the just cause principle implicit in Section 11.1 of the CBA. More specifically, Arbitrator Rinaldo required

**. . . a two-part inquiry. First, does the disciplinary decision pass muster under the criteria of the Bus Accident Reduction Program? Secondly, if the decision does pass muster under the Program, is there any other basis to conclude that the disciplinary decision is lacking in just cause? [Joint Exhibit 6, pg. 10]**

To illustrate the application of the second prong of the test, Arbitrator Rinaldo used as an example the issue of whether an employer conducts a fair investigation which is one of the due process requirements of the just cause doctrine. [Id. at 9] Further, in his 2003 award, Arbitrator Selchick considered another due process requirement of the just cause doctrine when he denied the Union's claim that the Employer's action constituted double-jeopardy. [Joint Exhibit 7, pg. 15] Finally, in the third cited case, Arbitrator Schmidt considered and denied the Union's claim that the discipline was too severe because there was the mitigating factor that the Grievant was suffering a "diabetic incident"

when the collision occurred. [Joint Exhibit 8, pg. 13] Thus in all three [3] cases the Arbitrators, utilizing the second requirement of Arbitrator Rinaldo's test, considered and decided whether there was "any other basis to conclude that the disciplinary decision is lacking in just cause."

In the instant case the Employer cites a sentence from the Rinaldo award: "An Arbitrator should defer to decisions made by the Bus Accident Reduction Program Accident Review Committee provided such decisions have a rational basis in fact and are not otherwise arbitrary, capricious, or discriminatory." The Employer suggests that I read this sentence as dispositive of the matter before me. However, the Employer fails to cite the next following sentence: "Nonetheless, a member of the bargaining unit, in view of the contractual standard of just cause, may be in position to challenge a disciplinary decision as lacking in just cause even if the decision reflects conformance with the procedures and substance of the Bus Accident Reduction Program." [Joint Exhibit 6, pp. 9-10] Thus, the sentence cited by the Employer reinforces the first requirement of Arbitrator Rinaldo's test, and the next following sentence reinforces the second requirement of said test.

This Arbitrator agrees with Arbitrator Rinaldo's harmonization of the Program Agreement with Section 11 of the CBA through his artful two-pronged test. In the instant case, the Union concedes that the Employer's decision to terminate Grievant "technically passes muster" under the first requirement of this test. Therefore, to complete the second prong of said test, I must consider the four [4] Union claims that the Employer's termination of Grievant "is lacking in just cause."

The Union first asks the Arbitrator to intervene in the matter of the "antiquated" nature of the property damage dollar amounts in the Bus Accident Reduction Program, "even though said amounts were previously negotiated." It suggests that "the Arbitrator must tip the scales of justice in favor of protected just cause principles given the antiquated nature of the property damage figures, especially in the light of the Company's ongoing failure to address the obvious inequities of the Program." However, continues the Union:

**To be clear, the Union is not requesting the Arbitrator to legislate changes to the negotiated Program. Rather, the Union seeks to have negotiated just cause protections enforced. [Union brief, pp. 11-12]**

The Union does not specify which of the principles or "protections" of the just cause doctrine which it seeks to have enforced with respect to this claim, but rather follows the statement above with a hypothetical. "As noted in the Statement of Facts, if dollar value figures were increased proportionally as they were in 2000, the dollar amounts contained within Section 1. D of the Program would have been increased to \$20,000" and since the actual damage figures were \$18,560.22 [Union Exhibit 1], Grievant would have been assessed less than

12 points and, therefore, "spared the penalty of termination for the unfortunate events occurring 5/16/08." [Union brief, pp. 12-13]

Since the Union has not provided me with the specific principle of the just cause doctrine to guide my analysis, I can only assume that the Union wants me to apply a general principle of fairness to the problem of tipping the "scales of justice" when considering the out-of-date property damage amounts in the Program Agreement. But this approach is contradictory to my own concept of the role of the arbitrator and the injunction of the Supreme Court.

**When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution to the problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement: he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.<sup>3</sup>**

Thus I must accept both the CBA and the **current** Program Agreement as the negotiated product of the parties and draw my award from the essence of those documents **as written**. I am therefore constrained from "tilting the scales of justice" by imposing my own or the Union's "brand of industrial justice" in this matter.

In addition to the claim above, the Union cites three [3] mitigating factors which must be considered under the just cause principle that the discipline imposed must be consistent with the seriousness of the offense. The Union first enters an argument that the Employer is guilty of contributory negligence because it did not actuate the flashing lights on the signs warning of mechanics testing the brakes on busses. The Union is correct in its hypothesis that had the lights been flashing the probability of the Grievant being "alerted" to drive more carefully would have been increased. However, the ARC found that the accident was "preventable" by Grievant and assessed two [2] points for Grievant's "gross negligence." Further, the evidence, especially the disc showing Grievant taking his eyes off the road seconds before the collision, convinces me that he was the proximate cause of the accident; i.e., but for his negligence the accident would not have occurred. In doing so Grievant violated the Employer's well understood rule that operators should always keep their eyes on the road and plan for "a way out" in the event of any possible collision. While the failure of the Employer to actuate the safety warning device arguably **may** have prevented the accident, this Union conjecture

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<sup>3</sup> *USW v. Enterprise Wheel & Car Corp.* [363 U.S. at 597] [1960]; dicta reiterated in *United Paperworkers Int'l Union v. Misco, Inc.* 484 U.S. 36 [1987]

does not have the weight to excuse the fact that Grievant was the proximate cause of the collision or overturn the determinations of the ARC and the subsequent decision of the Employer to terminate Grievant.

Finally, the Union claims that the mechanic driving the bus Grievant rear-ended: [1] contributed to the collision by suddenly stopping the bus; and, [2] was not disciplined for this action. These claims are rejected because the mechanic was merely carrying out the orders he had been given to test the brakes and therefore committed no violation of the Employer's rules.

### **FINDING**

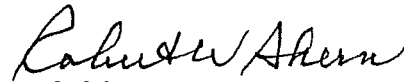
The termination of Grievant is proper and in accordance with the Bus Accident Reduction Program and with the Collective Bargaining Agreement.

### **AWARD**

The grievance is dismissed.

**Dated:**            September 21, 2009

**Robert W. Ahern**

  
**Arbitrator**