In the Matter of the Arbitration

between

Niagara Frontier Transit Metro System, Inc.

and

Amalgamated Transit Union, Local 1342

AWARD

(Gary Fischer Termination)

In accordance with their collective bargaining agreement the parties thereto submitted the following issue to me for arbitration:

> Was the Company justified in terminating the employment of Gary Fischer under the terms of the parties' cba?
>
> If not, what shall the remedy be?

On April 29 and May 20, 2011, hearings on the above matter were held at the offices of the employer in Buffalo, New York. At these hearings both sides were represented and given full opportunity to present oral and documentary evidence. Both parties submitted briefs, upon receipt of which I declared the hearings closed.

FACTS LEADING TO THE GRIEVANCE

The facts underlying the instant matter are straightforward and, for the most part, not in dispute. The grievant, Gary Fischer, was hired in September of 2009 as a Helper in the Company's Frontier Bus Garage. Part of his job involved moving buses for cleaning

and service. At the time of his termination he had a clean disciplinary record.

On August 4, 2010, Fischer was working his regular second shift, and, in the course of moving Bus #2209, sideswiped one of the Company's passenger vans, breaking a window panel on the curb side of the bus and causing minor damage to the van. The bus driven by the grievant was supplied with six surveillance cameras and an audio recorder. An exterior camera showed the bus hitting the van followed by an audible crashing sound. An interior camera showed the grievant turning toward the back of the bus when the sound occurred. The same camera showed that a few moments later Fischer got off the bus and walked away.

The grievant did not report the accident, allegedly because he did not know it had occurred. The damage, however, was brought to his attention by a supervisor. The Company, in fact, maintains that the grievant was questioned on "several occasions" on August 4 and consistently denied both having an accident and noticing that the bus window had been damaged. On August 5, at the direction of Vehicle Maintenance Supervisor Michael Komenda, Fischer filled out an accident report, stating that he had no "knowledge of how the back window got broken."

On August 6 the grievant took a leave of absence and consulted the employer's EAP. When he returned on November 9, he received a Disciplinary Notice stating that he was "suspended with recommendation for termination...." He was terminated effective December 7, 2010. The reasons for both the suspension and termination were listed as his causing the accident, failing to report the accident, being untruthful when denying knowledge of the accident and filing an accident report which "was contrary to the facts and false."

On December 7, the Union grieved Fischer's termination. The grievance was duly processed and denied on the grounds that:

> Mr. Fischer (sic) actions of not reporting the accident and his dishonesty were the cause of his termination. The failure to report an accident is a recognized ground for dismissal and in Mr. Fischer's case he was given several opportunities to admit to the accident but instead affirmatively represented that he did not have an accident while driving bus 2209.

The grievance has been submitted to me for binding arbitration.

PERTINENT CONTRACT PROVISIONS

SECTION 8 – LEAVES OF ABSENCE

8-3 **Disability.** For the purposes of this Section 8 the term "disability" shall include ... any other illness, condition, or injury of any type which might in any way affect the employee's ability to perform all the duties required of his or her job classification. Each employee is required to immediately report to the Company any and all disabilities ...

SECTION 11 – DISCIPLINE, GRIEVANCES AND ARBITRATION

11-1 Power of promotions, and of demotions, discharge, suspension and other discipline, shall be vested in the Company, but the justification therefor may constitute a grievance to be adjusted as hereinafter provided. Any dispute arising out of the interpretation or application of this Agreement shall be subject to the grievance and arbitration procedures.

SECTION 18 – PROVISIONS RELATING TO ALL EMPLOYEES

18-1 **Employees' Bonds and Duties.** It is expected that employees will be diligent and regular in the performance of, and attendance upon, their duties with the Company; ...and the Company shall be privileged to sever from its employment such employees ... who in its judgment fail to be diligent and regular in the performance of, and attendance upon their duties. The exercise of such judgment by the Company will, however, be subject to the grievance procedure.

POSITIONS OF THE PARTIES

The Company

The Company argues that it properly terminates employees who damage its property and fail to both report the damage and acknowledge responsibility for it. This penalty was upheld by Arbitrator Thomas Rinaldo in a 2004 decision strikingly similar to the instant matter and should be upheld here. In each case the grievant struck a parked bus while moving another one, failed to report the accident, denied any knowledge of it and repeated the denial in an accident report. The responsibility of each employee was established through the surveillance cameras and each was fired for dishonesty.

Here, as in Rinaldo's case, the grievant's claim of ignorance of the collision is negated by the audio and video recordings that show that he turned his head toward the back of the bus when the sound of the crash occurred. Moreover, on the day of the accident his supervisor informed him of the accident and showed him the damage. Nonetheless, Fischer neither mentioned hearing the crash nor advised his supervisor that his personal problems might have induced a lack of concentration that resulted in his failing to notice either the crash or the damaged window.

The employer gives little credence to the Union's argument that Fischer, who had previously reported an accident, would have done the same thing here had he known of the collision. The prior accident lodged a bus in the wash rack and could not have been denied. The Company notes that this is the grievant's second accident within his single year of employment, which, it suggests, provides a motive for him to lie about its occurrence.

Similarly, the employer does not believe that the crash failed to register on the grievant due to stress in his personal life. He made no mention of any impairment when questioned on August 4 and said nothing about it on August 5 when he filled out the accident report. Instead, the matter of emotional issues first surfaced when the grievant began a leave of absence on August 6. Prior to this he had not taken time off for his marital problems, which allegedly commenced on January 27, 2010, when his wife withdrew some $98,000 from their funds; increased in June, when she told him she would use the money to leave him and buy herself a condominium; and culminated on July 25 (their anniversary), when she removed her personal effects from their house.

While the grievant's physician, Dr. Douglas Golding, testified that marital stress "could" have produced an "acute stress reaction" which "could" have caused his accident to fail to register, the Company emphasizes that Fischer said nothing to his doctor about stress during a routine visit on July 25. Neither did the grievant seek counseling between the latter date and August 4. Even when he saw Golding on August 9, he reported no memory loss or mood swings and was described as having a normal attention span and concentration. Moreover, Golding testified that his diagnosis of "acute stress reaction" was based on Fischer's own description of what had occurred rather than on any objective physiological or neurological characteristics. Significantly, Golding agreed that he could not know whether or not the crash actually registered with the grievant. In short, the employer contends that there was no proof that the grievant suffered from an emotional problem that prevented the noisy crash from registering.

Additionally, the Company asserts that the arbitrator need not determine whether the grievant's personal problems caused his alleged obliviousness to his accident.

According to arbitral precedent, discipline must be evaluated on the facts available at the time of its imposition rather than on "post-discharge rehabilitation." (Citations omitted) Furthermore, the acceptance of *ex post facto* excuses could nullify the employer's policy of requiring employee honesty by making stress a built-in absolution for any failure to report an accident. Had Fischer suffered from emotional issues that might have impaired his performance, he should have informed his supervisor of this (as per contract Sect. 8-3) when initially questioned about the accident rather than after his denial of knowledge went unaccepted.

Fischer's failure to mention his alleged condition on either August 4 or August 5, says the employer, makes his case virtually identical to the one decided by Rinaldo. There the grievant failed to inform the Company that she ever heard a crash, while here Fischer failed to report a mental impairment that allegedly was responsible for both the accident and his failure to remember its occurrence.

For the reasons set forth above, the Company asks that the grievance be denied.

The Union

The Company, says the Union, contends that Fischer knew he had damaged two buses but chose not to report the accident. Moreover, it asserts that the grievant intentionally lied to his supervisor about the accident and claimed he had no knowledge of it. Last, the employer believes he submitted a dishonest accident report. The only proof provided by the employer is its videotape.

The video, however, merely shows that at 6:54:24 p.m., after an "audible noise," the grievant looked toward the rear of his bus for a "split second" before continuing on

his way. At 6:55:52 p.m. he parked the bus and left it without looking at the area of the damage. Under these circumstances the Union maintains that the video does not "conclusively demonstrate" that Fischer had actual knowledge of the accident or of damage done to his bus or any other vehicle.

First, the Union asserts that one cannot determine what caused the noise on the tape because of other sounds on it. Second, says the Union, one cannot know what Fischer actually heard because the recording microphone is not above the driver's seat but rather is in the center of the bus. Third, the employer's records show that Fischer suffers from a hearing loss.

At most, the grievant was guilty of carelessness in failing to investigate the origin of the noise that caused him to turn his head. But it should not be concluded that he knew of the accident and failed to report it. Not only is the video insufficient to establish that the grievant lied, but he is unlikely to have done so since his "minor" accident did not jeopardize his employment, because he was aware of the surveillance cameras and because he had previously reported accidents.

The Union further maintains that the employer has misread the grievant's statements about the accident. While the grievance response states that Fischer "affirmatively represented that he did not have an accident...," what he really said was that he had no recall or knowledge of the accident. It was this very lack of knowledge that caused him to seek help from EAP representative Karen Walsh, as well as go to the emergency room of the Buffalo General Hospital, where he was diagnosed with "acute reactions to stress." At Walsh's recommendation he also saw Ilene Donofrio, PhD, who noted that he cried when discussing his circumstances.

Fischer's medical records, says the Union, show that he was distraught over his situation, which focused on his broken marriage rather than concern for his job, as the employer concludes. Thus his symptoms existed several months before he knew his employment might be jeopardized. The Union suggests that the Company has taken a "hard line" with the grievant because it is concerned that employees who had never previously been treated for stress would avoid reporting accidents and blame their lack of recall on such stress. Here, however, the Union emphasizes that on July 23, 2010, Golding found Fischer to be depressed, had a history of reporting problems with meeting obligations and was experiencing fatigue. The Union concludes that the grievant had sought medical treatment before the occurrence of the accident.

The Union also notes that Supervisor Michael Komenda testified that if Fischer had reported his accident, he would have received, at most, a one-day suspension. Since the grievant had no recall of the accident, it would have been dishonest of him to tell his superior that he was aware of it or to say that in his accident report. Instead, he has honestly and consistently stated that he simply does not recall the accident. Since the evidence supports his claim, his employment should not be terminated.

As noted above, the Union called Fischer's physician, Dr. Douglas Golding, who testified that the grievant's deteriorating marriage caused his "acute stress reaction" and that said reaction was the "competent producing cause of his amnesia event" of August 4, 2010. Even if the employer's video is accepted as proof of its case, the Union argues that it has successfully raised Fischer's stress reaction as an affirmative defense, which the employer must rebut. Despite having its own physician at the hearing, the employer failed to call him with the result that Golding's testimony went unrefuted. Should the

employer attempt to rely on a report of November 2, 2010, from the Dent Neurological Institute to counter Golding's testimony, the Union notes that said report deals only with the absence of a neurological disorder rather than the psychological issues and symptoms to which Golding attested.

Last, the Union maintains that the instant matter may be distinguished from the grievance before Rinaldo. The grievant there called out upon hearing a noise that proved to be a crash. She also left her bus to look at the damaged area. Fischer only turned for a moment and did not leave his bus. Additionally, Rinaldo appeared concerned with the grievant's statement, "I didn't do it," before any accusations were made. Rinaldo also emphasized the grievant's lack of a positive work record, which involved four prior accidents and a disciplinary record. Fischer, in contrast, had never been disciplined. Most importantly, the medical testimony here supported Fischer's "inability to comprehend or remember what occurred" on August 4, 2010.

For the reasons set forth above, the Union asks that the grievance be sustained and Fischer be reinstated "to his former Helper position with full back pay and benefits less a one...day suspension for having caused the accident on 8/4/10."

DISCUSSION AND OPINION

The instant case does not turn on the Rinaldo Award. While that grievance is undoubtedly similar to Fischer's, Rinaldo essentially determined that the discharge should be upheld because the grievant lacked credibility. Such findings have no bearing on subsequent arbitrators. Should I determine that Fischer's story is credible, his discharge

will be overturned. Otherwise, it will not.

Neither do I accept the Company's argument regarding the application of "post-discharge rehabilitation" to the matter at bar. If, in fact, the Union has demonstrated that Fischer's mental state resulted in the failure of the accident to "register," he may not be disciplined for falsification. Moreover Fischer has not attempted to rehabilitate himself by asking for mitigation based on facts ascertained after his termination. Neither is he saying that he had a legitimate excuse for engaging in unacceptable behavior. His claim is that he neither lied nor falsified his accident report because at the time he left the bus he did not know he had had an accident. Again, if the Union can demonstrate that the accident did not register, discipline is inappropriate.

I cannot, however, agree with the Union's contention that, standing alone, the video and audio recordings introduced by the Company fail to establish the grievant's guilt. The employer's burden is to prove by clear and convincing evidence that the grievant had an accident, knew of the accident and failed to report it. It must also show that when asked, he lied about his awareness of the accident and that he, therefore, knew his accident report was inaccurate.

The video and audio recordings constitute clear evidence that the grievant was driving the bus when the accident occurred. No one has suggested otherwise. They also clearly show that four seconds after the collision a crashing sound occurred at the same moment Camera #4 showed the window crack. As noted above I find that the sound is consistent with the breaking of the bus window. Not only is there a crashing sound moments after the collision, the grievant reacts to the sound by turning toward it.

There is no plausible explanation of the sound except the damage caused by the

collision. I do not agree with the Union's contention that "it is hard to distinguish what the noise actually is..." While there may be other noise on the audio, my viewing of the audio and video recordings makes it clear that the noise was a direct result of the accident. Neither do I accept the claim that one cannot determine what the grievant actually heard because of the placement of the microphone. The facts here are relatively simple. The grievant's bus sideswiped a van and moments later a crashing sound occurred at the same time the glass of the bus window cracked. At that point the grievant apparently stopped the bus and clearly turned toward the window.

There was no evidence that Fischer's hearing loss prevented him from hearing the sound that caused him to turn. Neither is there any evidence that the hearing loss caused him to misinterpret that sound. In short, the Company's audio and visual recordings provide clear evidence, which has convinced me that Fischer was aware of the crash at the time it occurred. Undoubtedly his rotation toward the damage may have been unrelated to the crash or even unrelated to the simultaneously occurring sound. One, of course, can never determine what sensations another has experienced. The audio and visual evidence, however, supports the conclusion that he heard a crashing sound and reacted by turning toward it. Under these circumstances I cannot find that at the time of the accident he was unaware of the probability that he had hit something.

The grievant's failure to investigate the sound that he heard was hardly mere negligence. If all an employee had to do to deflect responsibility for an accident was to avoid looking for possible damage, the Company would have little recourse in dealing with unreported vehicular wreckage. The grievant's responsibility was at least to report the crashing sound. When he did nothing but deny any knowledge of the damage that

that he actually had an "amnesia event." The alleged event is particularly difficult to accept because Fischer alleges that he forgot hearing the noise that caused him to turn only a minute after it occurred.

As Golding attested on cross-examination, he found no objective evidence that Fischer actually forgot the accident as opposed to having lied about forgetting it. The physician further stated that he grounded his diagnosis on the grievant's history, which in turn is based largely on what Fischer told him. Additionally, Golding did not see the video upon which the employer's proof is based. The short of it is that Golding heard the grievant, believed him and formed a diagnosis based on Fischer's presumed credibility. While that is precisely what a physician is supposed do, a labor arbitrator must weigh an employee's statement against the evidence supplied by the employer. Here the video and audio recordings make it extremely difficult to believe that less than a minute after reacting to an accident, the grievant simply forgot about it. Under these circumstances I cannot fault the employer for failing to rebut Golding's testimony.

The second problem is that when confronted with the damage, the grievant did not suggest to his supervisor that he was in any way impaired by emotional problems or anything else. Thus over the two-day period before Fischer took his leave of absence, he simply stated that he had no knowledge of the accident. Komenda testified that two supervisors informed him that they had repeatedly asked the grievant about the accident and that he repeatedly denied any knowledge of it. Fischer did not deny this or suggest that he told anyone that he might have been distracted by his personal problems. As with the surveillance recordings, the grievant's failure to give any indication of distraction for two days makes accepting his allegation of amnesia very difficult.

Tom Marsteller, Superintendent of the Bus Garage at the time of the incident, testified that he recommended Fischer's termination because the Company has consistently fired employees who fail to report accidents. On cross-examination he conceded that while it might be that unreported accidents do not always result in termination, he knows of no situation where they did not. The latter remark is not a refutation of his testimony on direct. Moreover, David Rugg, Manager of Bus Maintenance and Equipment (who denied the grievance at Step 2), also testified without refutation that the Company has consistently terminated employees who fail to report an accident.

In the instant matter the employer has presented clear and convincing evidence that the grievant had an accident while driving his bus, reacted to the sound of the bus window breaking and not only failed to report the sound, but when confronted with the damage caused by the collision, falsely denied any knowledge relating to it. Under these circumstances and for the reasons set forth above, the grievance is denied.

August 5, 2011

James R. Markowitz
Arbitrator

State of New York }
} SS.:
County of Tompkins }

I, James R. Markowitz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

August 5, 2011
(Dated)

(Signature of Arbitrator)