BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PROFESSIONAL TRANSIT MANAGEMENT OF WAUKESHA, INC.

and

AMALGAMATED TRANSIT UNION LOCAL 998

Case 1
No. 69518
A-6396

(Grievance concerning the discharge of P_ F_[1])

Appearances:

Ms. Summer H. Carlisle, with **B. Michele Sumara**, Attorneys, Hawks Quindel, S.C., 700 West Michigan, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the Union.

Mr. John Ravasio, Attorney, Professional Transit Management, 6405 Branch Hill-Guinea Pike, Suite 203, Loveland, Ohio 45140, appearing on behalf of the Employer.

ARBITRATION AWARD

The Union and Employer, above, are parties to a collective bargaining agreement covering calendar years 2006-2009 (Agreement). At their joint request, the Wisconsin Employment Relations Commission designated Daniel Nielsen of its staff as the arbitrator regarding the above grievance dispute. When Arbitrator Nielsen became unavailable to hear the case on the established hearing date, at the parties' joint request the Commission designated the undersigned Marshall L. Gratz to serve as the arbitrator.

A hearing in the matter was conducted at the UW-Waukesha on May 6, 2010. The parties submitted briefs and reply briefs, the last of which were exchanged through the Arbitrator on July 6, 2010, marking the close of the hearing.

ISSUES

The parties agreed that the **ISSUES** for determination in this matter are as follows:

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[1] For privacy reasons, Grievant is referred to throughout this Award by use of her initials.

1. Did Professional Transit Management of Waukesha, Inc., terminate P_ F_ for just cause?

2. If not, what shall the remedy be?

(tr. 3).

PORTIONS OF THE AGREEMENT

Article 2: Management's Rights

The employer will exercise the exclusive right, except as specifically limited by this agreement, . . . to determine the qualifications for rules and regulations governing the operation of its business and conduct of its employees; to determine and enforce discipline for violations of rules and other misconduct while on duty; to discipline, suspend or discharge employees; to take whatever steps are necessary to insure that all service is provided. The employer will notify the union president or union steward of any new or changed work rules that affect the working conditions of any union member before being posted and prior to the effective date. The Union shall have the right to challenge any rule or regulation.

ARTICLE 9: DISCIPLINE

Section 1

The right of discipline belongs to and remains with the employer. Employees covered by the agreement shall have the right to be heard in accordance with the grievance procedure provided in Article 10. If the discipline charges are not sustained, the employee's discipline record shall be cleared of the charges and in the case of any wage loss, shall be reimbursed for such loss.

ARTICLE 10: GRIEVANCE PROCEDURE

. . .

Section 2.

Should any grievance arise, the questions shall be disposed of in the following manner:

STEP 1. The affected employee shall reduce to writing, sign, and present to the Transportation Supervisor or his/her delegate any complaint which he/she feels needs adjustment, within five (5) working days after the affected employee knows or should know the facts causing the grievance.

. . .

Section 4

The time limitations in this article may be extended by mutual agreement of the Union and the Employer.

. . .

Section 8

If a grievance is not settled, and if arbitration shall not have been so demanded by either the Employer or the Union as provided in Article 11, such grievance shall be forever barred and extinguished.

. . .

PORTIONS OF THE EMPLOYER'S EMPLOYEE PERFORMANCE CODE

INTRODUCTION

Professional Transit Management of Waukesha, Inc. (PTMW) is committed to providing reasonable work rules with progressive discipline to govern the conduct and performance of its employees. This code is designed to inform and instruct the employee as to what is expected from them in the day to day execution of their job. PTMW is committed to progressive discipline so those employees are continually reinstructed in the performance of their duties, thus remaining an integral part of the company.

All employees are subject to the rules contained in the general section of the code.

Specific rules governing performance in various job classifications are also provided within this code.

Whenever an employee is subject to discipline, the employee's total work record, including all violations will be reviewed before determining any penalty. Penalties for violations of multiple rules occurring during the same time period will be dealt with at the discretion of management. This code is not intended to

provide rigid discipline guidelines on both management and the employee when discipline is warranted. As stated, the employee's total work record and the seriousness of the violation will always be considered.

Each employee is responsible for learning and understanding the rules and discipline contained in this code.

SECTION I - ADMINISTRATION OF THE CODE

Violation points will be awarded for infractions of the various rules contained in this code.

The assignment of violation points is designed to administer progressive discipline and to provide a means for judging the employee's overall performance.

An employee may become subject to discharge when either of the following occurs:

1. The employee's disregard of a particular rule warrants the penalty of discharge as specified in the code, or

2. The employee accumulates enough violations points (15 or more) that he/she has, because of repeated violations of the code, reached the level which subjects them to discharge.

Whenever an employee accumulates 8 (eight) or more violation points, he/she shall be provided with a letter from their immediate supervisor advising him/her that subsequent rule violations could result in the suspension and/or discharge of the employee.

Whenever an employee accumulates twelve (12) or more violation points, he/she shall be provided with a letter from the general manager advising him/her that subsequent rule violations could result in the suspension and/or discharge of the employee. A copy of the letter will be placed in the employee's personnel file.

Violation of rules, which occurred twelve (12) months prior or more in the past, will not be considered in determining progressive discipline for similar violations of the same rule. At the end of a twelve (12) month period from the occurrence of a particular rule violation, the violation points accumulated for that particular rule violation will be subtracted from the employee's total point accumulation.

There are some violations, as identified in the code, which will not warrant progressive discipline but rather immediate dismissal. The code is not intended to identify every possible infraction. The employee is always expected to perform in an appropriate and mature manner. Any employee who engages in any illegal, dishonest, or other inappropriate action not specifically identified in this code may be subject to discipline or discharge.

. . .

When an employee has accumulated any violation points and has gone 6 (six) months without any performance code violations, 2 (two) violation points shall be subtracted from the employee's total point accumulation. In no case, however, shall the reduced point total be less than 0, i.e. no credits (- 1 or -2 as the point accumulation).

SECTION II - PENALTIES

The following penalties shall be assessed for violations of the code:

1. Termination: The involuntary severance of an employee. The employee will be paid for all time worked up to notification of termination or date of investigatory suspension.

2. Suspension: Unpaid layoff of 1 (one) or more days on which an employee is scheduled to work but ordered not to.

3. Reprimand: A written communication to an employee (with a copy in the employee's personnel file) advising of a deficiency in his/her performance.

4. Caution: An oral communication advising the employee of a performance code deficiency.

5. Violation Points: A numerical value assessed in conjunction with the above penalties used to evaluate the employee's overall performance.

Performance code infractions and their associated maximum penalties are classified into 5 (five) categories reflecting the seriousness of the infractions. The categories and penalties for repeated violations are:

CLASS 1- Violations for which an employee may be terminated.
First offense = Termination

CLASS 2- Serious violations of the performance code.
First offense = 3 (three) day suspension, plus 5 (five) violation points.
Second offense = Termination

CLASS 3- First offense = Reprimand plus 2 (two) violation points.
Second offense = 1 (one) day suspension plus 3 (three) violation points.
Third offenses and subsequent offenses until maximum point accumulation is reached = 3 (three) day suspension plus 4 (four) violation points.

CLASS 4 - First offense = Caution plus 1 (one) violation point.
Second offense = Reprimand plus 2 (two) violation points.
Third offense = 1 (one) day suspension plus 2 (two) violation points.
Fourth offense and subsequent offenses until maximum point accumulation is reached = 1 (one) day suspension plus 4 (four) violation points.

CLASS 5 - First offense = Caution.
Second offense = Caution, plus 1 (one) violation point.
Third offense = Reprimand, plus 1 (one) violation point.
Fourth offense and subsequent offenses until maximum point accumulation is reached = Reprimand, plus 2 (two) violation points.

Infraction for which the associated penalties are not covered above will be specifically outlined in later sections of the code.

In all cases, the employee's overall performance will always be reviewed when discipline is involved by examining the accumulated violation points to determine their overall status with PTMW. As a result, penalties may be modified, increased or decreased, to reflect the current situation and the employee's overall performance

SECTION III - GENERAL RULES AND REGULATIONS

The following shall be considered Class 5 Violations:

. . .

Preventable Accidents

An accident in which the employee did not do everything that could be reasonably expected to avoid the accident.

First Offense = Caution plus 2 (two) violation points
Second Offense = Reprimand plus 4 (four) violation points

Third offense = 3 (three) day suspension plus 6 (six) violation points
Fourth Offense = termination
Note: Accidents of a serious nature may result in omitting the first, second and/or third steps indicated in preceding paragraph. An accident may be considered serious when damage of $250 or more results.

SECTION VI - SPECIFIC RULES AND REGULATIONS

The rules and regulations contained in this section are those which are specific to a classification of employees.

RULES LISTED BELOW ARE APPLICABLE TO BUS DRIVERS:

Listed by class of violation, they are:

. . .

CLASS 3

. . .

b. Failure to make stops and pickups

. . .

BACKGROUND

The Employer is a private company which, under contract with the City of Waukesha, Wisconsin, manages the Waukesha Metro transit system.

The Union has represented a bargaining unit of full-time and part-time bus operators of the Employer since approximately 1985. (tr. 138, ex. 1, p. 3).

The parties' latest agreement covers calendar years 2006-2009, and the parties stipulated that the Agreement provisions governing wages, hours and working conditions have remained in effect during the course of the contract hiatus thereafter. (tr. 3).

The Company has, pursuant to Agreement Art. 2, promulgated an Employee Performance Code (Code) which establishes a discipline system under which employees accumulate points for violations of the Code. Portions of that Code are set forth above. A five-member Accident Review Board plays a role in determining whether accidents are "preventable" within the meaning of the Code. That Board consists of two voting Union members and two voting Employer members and the Union's Chief Steward who is a non-voting member.

Until her discharge, the Grievant, P_ F_, had been continuously employed by the Employer as a bus operator for approximately one month less than 19 years. (tr. 106).

On September 8, 2009, Director of Transit Operations, Tracy Harrington, issued an employee discipline notice to the Grievant imposing the termination at issue in this arbitration. That notice specified the following bases for the termination:

> Preventable Accident - 2nd within 6 months. Employee has accumulated 16 violation points - per Section 1 of the Performance Code, 15 or more points is cause for termination. . . . Miscellaneous Information: Employee termination for repeated code violations resulting in 15 or more points.

Attached to the notice was a September 2, 2009, Accident Review Board determination regarding the accident referenced above. That determination read, in pertinent part, as follows:

> The accident you were involved in on 8/19/09 has been determined "preventable" following a review by the Accident Review Board.
>
> The National Safety Council has defined a "preventable" accident as one wherein the driver did not do everything reasonable to have prevented it.
>
> Circumstance:
> You were driving bus #142 on Route 6. You were at West High School, turning left from the main drive onto the drive in front of the school building. There was a barricade there to block traffic from using the driveway. You reported the sun was shining in your eyes and you did not see the barricade as you made your turn. There were no injuries.
> ---
>
> The Review Board commented:
>
> 1) It is the responsibility of the bus operator to adjust to traffic and weather conditions including sun glare.
>
> 2) Collisions with fixed objects are preventable.
>
> Waukesha Metro Transit expects all employees to make safety their top priority.

. . .

A timely grievance was initiated and advanced through the Agreement grievance procedure, requesting that Grievant be made whole on the grounds that termination was an excessive penalty in the circumstances and that "These violations you described did happen but

were not serious enough to warrant termination. Discipline was way too heavy-handed." The grievance was processed without resolution through the pre-arbitral steps of the Agreement grievance procedure. Harrington's Step 3 management response read, in pertinent part, as follows:

> On Tuesday, October 6, 2009, we met on the Step 3 grievance submitted by former operator P_ F_. As discussed in that meeting, Ms. F_ was terminated for excessive points violations on September 8, 2009. Subsequent to that meeting, on October 9, 2009, Waukesha Metro Transit received a Last Chance Agreement proposal from Local 998.
>
> Waukesha Metro Transit has reviewed all circumstances relating to Ms. F_'s performance history and termination. In the past year, Ms. F_ has had repeated safety related violations, including:
>
> -Use of cell phone while operating Metro bus - the third violation occurred on school property and the uniformed officer who reported this stated that the bus was traveling at excessive speed through the school parking lot while the driver talked on her cell phone
>
> -Failure to stop at railroad crossing -- two incidents, occurring approximately one month apart for the CDL disqualifying violation
>
> -Failure to make a customer requested stop -- the caller who reported this stated that the driver missed her stop because she had been on her cell phone. While Metro couldn't verify this allegation, the driver admitted that she had been distracted and had missed the passenger stop, leaving this woman and her infant daughter off in the roadway
>
> -Two preventable accidents in less than 4 months -- the second of which occurred on school property
>
> For each violation, Ms. F_ was issued discipline as outlined in the Performance Code. Discipline was progressive, Ms. F_ having been issued a suspension in March 2009 after her third cell phone violation. Management attempted to enlist Ms. F_'s help and cooperation in turning around her performance in a meeting with her in April to discuss the potential for further discipline including termination if she continued to exhibit unsafe behaviors. During and subsequent to this meeting, Ms. F_ indicated no desire or willingness to accept responsibility and change her pattern of unsafe behaviors. The two preventable accidents occurred after this meeting.
>
> Ms. F_'s termination was based on her accumulation of 15 or more violation points, most of which were for safety related violations. It is clearly stated in

the Performance Code that an accumulation of 15 or more violation points is grounds for discharge. Not only was Ms. F_'s termination in keeping with our Performance Code, it is also in keeping with past practice and in accordance with our responsibility to provide a safe workplace for all employees.

Upon review of your proposed Last Chance Agreement and the discussions at the meeting on Tuesday October 6, 2009 your request to have Ms. F_'s employment reinstated has been evaluated. In the final analysis, Waukesha Metro believes that reinstating this employee would expose the employee, our passengers and the community to significant risk. Therefore, the Step 3 grievance and Last Chance Agreement submitted on behalf of Ms. F_ is denied.

. . .

It is undisputed that, during the 12 month period preceding the date of her discharge, the Grievant had accumulated 15 violation points, as listed in the table below.

Incident Date	Discipline Notice Date	Violation	Violation Points Assessed	Other Discipline Imposed
9/10/08	9/12/08	Use of cell phone while operating a bus	2	Reprimand
1/15/09	1/19/09	Unsafe act: rolling stop at a railroad tracks	1	Caution
2/19/09	2/19/09	Unsafe act: rolling stop at a railroad tracks	2	Reprimand
3/11/09	3/11/09	Use of cell phone while operating a bus	2	1 day suspension
4/6/09	4/8/09	Failure to make a stop -- validated customer complaint	2	reprimand; Director Harrington also spoke with Grievant on 4/8/09 about the missed stop and to reinforce cell phone policy and how this impacts her job (ex. 23 back of p. 4, and ex. 24)
5/21/09	5/26/09	Preventable Accident	2	Caution
8/16/09	9/8/09	Preventable Accident	4	Discharge
		Total:	15 violation points	

The Employer acknowledges that its assertions in both its employee discipline notice of termination and in its Step 3 Grievance response, above, that Grievant had 16 points as of the date of her discharge were incorrect. (tr. 88-89).

At the arbitration hearing, the Company presented testimony by Harrington, Dispatcher/Supervisor and Accident Review Board Chairperson Daniel Peterson, and Dispatcher/Supervisor and Lead Trainer Kevin Jay. The Union presented testimony by the Grievant and Bus Operator and Union Chief Steward Apolonio Alonso.

At that hearing, the Union stated that "There is no dispute over the incidents underlying Grievant's accumulation of points." (tr. 102).

Additional factual background appears in the **POSITIONS OF THE PARTIES** and in the **DISCUSSION**, below.

POSITION OF THE EMPLOYER

The Employer clearly met the recognized standards for just cause for its discharge of the Grievant. During the rolling 12 month period preceding her discharge, Grievant had accumulated 15 points under the Employer's established point system, for a series of undisputed violations of the Employer's published rules reasonably related to the Company's legitimate interest in efficient and safe operation of its business: two preventable accidents, a failure to make a passenger-requested stop; three uses of cell phone while driving; two failures to stop at railroad crossings. The record establishes that the Grievant had adequate warning regarding the Employer's rules and the consequences for violating those rules. The Employer investigated in a thorough, fair and objective manner that revealed substantial proof that Grievant committed the rule violations for which she was discharged.

The penalty of termination was reasonably related to the seriousness of Grievant's offenses and the Grievant's employment record. During the 12 months preceding the discharge, after an earlier collision with a fixed object, Grievant, without a valid explanation, Grievant hit a fixed object, a barricade on school property, on a clear and dry day while driving only five to ten miles per hour after having on an earlier occasion struck another fixed object damaging the bus mirror. She also committed repeated safety-sensitive violations of rules against use of a personal cell phone while driving a Company vehicle and against failing to come to a full stop at railroad crossings, in addition to a failure to make a passenger-requested stop.

This pattern was not an isolated stretch of subpar performance in the context of an otherwise exemplary career. Rather, Grievant's overall career record shows a long history of rule violations, totaling 48 violation points, with at least one violation every year from 1991 through 2009. She accumulated 32 points since 1998, 28 points since 2002, 26 points since 2005, and 18 points from March 2008 to September 2009. Grievant was disciplined on May 7, 2003, March 31, 2005, June 6, 2008 and March 11, 2009 for using a cell phone while operating a vehicle. She has had at least five preventable accidents, four of which resulted in disciplinary action, and the last two of which involved hitting fixed objects. Despite training, retraining, warnings and other discipline, the Grievant engaged in the above pattern of serious violations of a safety-sensitive nature that left the Employer no other recourse than discharge.

Grievant's record during the last 12 months of her employment, when considered in the context of her record overall, shows that the Employer was justified in concluding that she constituted a very serious liability on the road.

The record does not support the Union's contention that Grievant was subjected to disparate treatment. The other employees' cases cited by the Union are all distinguishable from Grievant's pattern of violations. While the Employer's system allows room for the exercise of the sort of reasonable employer discretion applied in other instances, the Employer's determination to impose discharge in this case was consistent with the terms of its published disciplinary system and reasonably related to Grievant's undisputed and persistent pattern of serious safety-related rule violations and her unfavorable overall employment record.

For those and other reasons, the Employer requests that the Arbitrator deny the grievance in all respects.

POSITION OF THE UNION

The Union does not dispute the violations that led to Grievant's point accumulation and does not dispute the right of the Company to impose discipline for those violations. (Union brief at 9). Rather, the Union challenges the propriety of the penalty of termination, asserting that the Company's imposition of that level of discipline is without just cause in all of the circumstances.

In Grievant's case, the Company applied its point system in a rigid and unfair manner, ignoring the nature of the violations and significant mitigating factors including: the Grievant's overall work record in her nearly 19 years of employment, the Company's failure to put the Grievant on fair notice that her job was in jeopardy, the minor damage involved in the two preventable accidents (a broken bus mirror in the first and a damaged barricade but no bus damage at all in the second), and the Grievant's being distracted by serious marital difficulties for which she sought and obtained intensive counseling that concluded in July of 2009. The record also clearly establishes that Company has, without justification, treated Grievant more harshly compared to other similarly situated employees in its imposition of discipline and violation points and in its willingness to offer last chance agreements in spite of point totals. The Company's failure to apply and enforce the rules of its own Code in a non-discriminatory manner violates the requirements of just cause.

The evidence shows that, except for "a bad year" [Union brief at 11] involving "a series of unfortunate mishaps" during the last 12 months of her employment, Grievant's overall work and safety record has been "good to excellent." (tr. 102-103). In that regard, between 1991 and 1999, she was assessed only a total of four points -- an average of one-half of one point per year; between 2000 and 2007, she was assessed 10 points -- an average of 1.4 points per year. Until 2008 she had never accumulated more than 7 points under the Employee Performance Code, and for the majority of her 19 years with the Employer she operated her bus with 0-1 accumulated points. Moreover, in 1999, she received a safety award for

outstanding accomplishments in Safe Driving for the year, and in 2008 she was a Safety Award Winner for having completed nine accident free years. In any event, the Employer has not shown that Grievant's overall work record was any more problematic than that of the other employees cited by the Union whom the Employer retained in its employ despite 12 month disciplinary histories more problematic in various respects than Grievant's.

For those and other reasons, the Union requests that the Arbitrator find that the Employer did not have just cause to terminate the Grievant and that the Arbitrator order that she be reinstated and made whole, ". . . subject to any modification of the penalty as ordered by the Arbitrator." (Union brief at 18).

DISCUSSION

The parties' stipulation to ISSUE 1 establishes that the Employer's discharge of the Grievant is to be analyzed on the basis of the just cause standard. Accordingly, the Employer bears the burden of establishing that its action in this case met that standard by showing both that the Grievant engaged in conduct detrimental to the Employer's legitimate interests and that the penalty imposed was reasonable in the circumstances.

It is undisputed that the Grievant committed rules violations that had accumulated 15 violation points in the rolling 12 month period ending on the date of her discharge. The Employer clearly has shown that its legitimate interests were at stake as regards each of those violations.

In light of the parties' **POSITIONS OF THE PARTIES**, above, this case turns on whether the discharge penalty was unreasonable either because it subjected Grievant to disparate treatment, or because Grievant was not on fair notice that her job was in jeopardy, or because the penalty was disproportionate to the violations committed and/or because the penalty was excessive in light of the Grievant's overall record.

The Code provides that an accumulation of 15 violation points is a potential basis for discharge. The Code also makes it clear, however, that an accumulation of 15 violation points is not automatically or always an appropriate basis for the imposition of the discharge penalty. Rather, the Code states, in its Introduction, as follows:

> Whenever an employee is subject to discipline, the employee's total work record, including all violations, will be reviewed before determining any penalty. Penalties for violations of multiple rules occurring during the same time period will be dealt with at the discretion of management. This code is not intended to provide rigid discipline guidelines on both management and the employee when discipline is warranted. As stated, the employee's total work record and the seriousness of the violation will always be considered.

Claimed Disparate Treatment

The Union has relied heavily on its contention that the Employer is guilty of disparate treatment. The Union has compared the Employer's disciplinary response to the Grievant's rules violations and violation point level with the Employer's responses to the rules violations and violation point levels of other employees who were not discharged by the Employer, including a table in its reply brief (at 2) comparing in detail the Employer's treatment of the Grievant with its treatment of three other employees who were not discharged by the Employer despite 12 month periods involving accumulations of 16, 18 and 17 violation points, three preventable accidents for two of the employees, and a variety of other rules violations in the case of all three of those employees.[2]

The Arbitrator finds the Union's disparate treatment comparison flawed because each of those three other employees was retained in the Employer's employ by reason of one or more last chance agreements entered into among the employee, the Union and the Employer during the 12 month period analyzed in the Union's detailed comparison. Each of those last chance agreements that the Union offered into evidence expressly provided that "It is agreed that this Last Chance Agreement is non-precedent setting and will not be relied upon for any reason, except as required to implement and enforce this agreement." (rejected ex. 35, pp. 28, 32, 42). For that reason, the Arbitrator sustained the Employer's objections to the Union's attempts to introduce those agreements into evidence. It is the Arbitrator's view that by entering into those special agreements, the Union and Employer agreed, among other things, that neither would rely on those agreements for any purpose other than enforcement of the terms of those agreements themselves. As a part of each of those agreements, the Employer waived the imposition of termination and agreed that, if various conditions set forth in the agreements were met, the Employer would continue to refrain from imposing termination. However, it is inappropriate, in the Arbitrator's opinion, for either party to rely in this proceeding on the fact that the Employer has refrained from imposing termination or other disciplinary action waived as a part of those last chance agreements. That conclusion undercuts the factual basis for much of the Union's contention that the Employer is guilty of disparate treatment in this case.

To the extent that the Union is arguing on disparate treatment grounds that the Employer should have imposed fewer points for the rules violations totaling 15 in Grievant's case, such an argument is untimely as regards all but the last four points imposed for the Grievant's second preventable accident in a rolling 12 month period. A grievance could have been initiated (and in one instance [ex. 3] a grievance was initiated but not appealed to arbitration) regarding the propriety of the disciplinary actions resulting in the first eleven of the 15 points Grievant had accumulated at the time she was discharged. Any issues regarding the

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[2] In its initial brief, the Union also referred to a fourth employee who was not discharged despite having committed a third preventable accident within a 12 month period. However, as the Employer points out, that employee did not commit violations, taken together, that would make the employee subject to discharge under the Code. A third preventable accident within a 12 month period does not subject an employee to discharge under the Code absent special circumstances (ex. 2, pp. 7-8), and the employee involved had not accumulated a total of 15 violation points during a 12 month period. (ex. 39).

propriety of those 11 points could and should have been raised by way of grievances at the times those disciplines were issued. The Union's contentions in this case that the imposition of those first eleven points or the Company's failure to offer retraining as a means of avoiding or eliminating some or all of them was improper on grounds of disparate treatment or any other grounds are therefore rejected as untimely under the portions of the Agreement Art. 10 Grievance Procedure quoted under **PORTIONS OF THE AGREEMENT**, above.

As regards the last four points imposed for the Grievant's second preventable accident in a rolling 12 month period, the record, when penalties waived based on Last Chance Agreements are disregarded, does not persuasively establish that it was inappropriate, on disparate treatment or any other grounds, for the Employer to impose those points. The accident involved was Grievant's second preventable accident in a three month period. It followed multiple safety-related violations within a 12 month period, several of which were repeated violations of the same rule. There are instances of record in which the employer has previously imposed four points for a second preventable accident (e.g., ex. 37, p. 33, re 5-17-08 and 10-3-08). The Union has pointed to only one instance in which the Employer has failed to impose four points for a second preventable accident that was not a part of a last chance agreement; and in that instance, the employee was assessed three points and a three day suspension regarding the accident involved and the employee's failure to immediately report that accident. (ex. 36, p. 22). While retraining opportunities apparently have been used in the past in conjunction with point reductions or eliminations or other reductions of the penalties that otherwise could have been imposed for preventable accidents, in the context of her numerous other safety-related violations in the preceding 12 months[3], the Arbitrator is persuaded that the Employer's decision to impose four violation points rather than offer Grievant retraining following her August 19, 2009, accident, did not constitute inappropriate disparate treatment of the Grievant.[4]

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[3] In at least two instances, the Employer exercised its discretion not to impose certain additional disciplinary actions on the Grievant during that 12 month period. Once by not charging Grievant with what would have been her fourth cell phone violation in 12 months as regards the customer report (denied by Grievant) that she had been using her cell phone when she admittedly missed the stop requested by the customer (ex. 23, p. 3); and on another occasion by not charging Grievant with driving at a high rate of speed on school property as reported by the Waukesha police officer who had also reported that Grievant had been using a cell phone while doing so, for which Grievant was disciplined. (tr. 92-93; ex. 22)

[4] The Employer asserts that it provided Grievant with some safety-related retraining in early 2007, but the Arbitrator finds the record inconclusive regarding that contention. Employer witness Kevin Jay testified (tr. 40) that he conducted that retraining about two weeks after issuing a February 14, 2007, pre-retraining report outlining the planned retraining and related information. (ex. 19). The Grievant testified she did not recall receiving that retraining. (tr. 120). Jay acknowledged that he would customarily have produced a post-retraining report in such circumstances (tr. 41), but the record contains no such post-retraining report documenting that the planned retraining was, in fact, conducted.

Claimed Lack of Fair Notice of Job Jeopardy

The Union's contention that prior to August 19, 2009, accident the Grievant had not been given fair notice that her job was in jeopardy is also not, on balance, persuasive. It is undisputed that the Grievant received disciplinary notices in connection with each of the points that she was assessed as listed in the table in the **BACKGROUND**, above. Each of those notices contained language stating

> This discipline notice shall remain in your file and discipline shall be counted for period of 1 year from the date of the incident. Future performance deficiencies may result in further discipline including suspension from duty and/or termination of employment. This notice shall serve as the basis of any future discipline for performance deficiencies.

(emphasis added). Each of those notices also contained a specification of the number of points issued and the number of points accumulated. It is also undisputed that the Grievant had previously received copies of the Employer's Employee Performance Code which specifically provided that a second preventable accident was a four point offense and that an accumulation of 15 or more points was a potential basis for termination. The record also reveals that Grievant was previously charged 4 points for a second preventable accident, albeit in 1998. (ex. 5, p. 2). More significantly, Grievant testified as follows regarding the aftermath of the August 19, 2009, accident:

Q After the accident occurred, what did you do?

A I got a little upset, but I called into the office to let them know -- let the dispatch office know that I was involved in that accident and told them the circumstances and then they came out.

Q Who came out?

A Mike Hanson came out.

Q Why did he come out?

A I was visibly upset on the phone, so he came out and brought another driver and then the standard procedure is to bring a camera and so forth to take pictures if necessary.

Q Why were you upset after the accident, P_?

A Because I knew I was up there on points, but I didn't know how many points I had, so -- and just with the accident itself, I had gotten upset.

Q On August 18th, did you have any discussions with anyone about the status of your job? The day of the accident.

A I am sorry. Yes, I did.

Q With who?

A With Mike, the dispatcher that had come out to the scene that day. I told him that I was upset and I didn't want to lose my job and he told me to calm down and he relieved me for one trip and I had gone back to the office.

. . .

(tr. 108-109) (emphasis added).

While there is at least some question whether the employee disciplinary notices issued to the Grievant after she passed the eight and 12 point accumulation levels precisely conform to the "letter from their immediate supervisor" format called for in the fourth and fifth paragraphs of Section 1 of the Code and used previously at least in 1997 and 1988 (tr. 121 and 170, ex. 40, pp. 55a and 55b), the record satisfies the Arbitrator that the Grievant was nevertheless on fair notice and aware at the time of the August 19, 2009, accident that her job might be in jeopardy if she were to experience another preventable accident.

Claimed Disproportionate/Excessive Penalty

As the Union persuasively points out, the Employer's progressive discipline system is based not only on points within a rolling 12 month period, but also on a consideration of the employee's entire work record. The Arbitrator finds persuasive, for the reasons outlined in the third paragraph under **POSITION OF THE UNION**, above, that the Grievant's accumulation of points in the year prior to her termination reflects that she was "having a bad year" during the 12 month period preceding her discharge, in the context of a nearly 19 year career with a record that was at least average and generally either good or excellent, except for that bad year. The Arbitrator comes to that conclusion by applying the provisions of Sec. 1 of the Employer's Code expressly defining violation point accumulations of 0-2 as "excellent" overall performance, accumulations of 3-5 as "good" overall performance and accumulations of 6-8 points as average overall performance. The Arbitrator also finds it significant that the Grievant earned a safe driving - 1 year award in 1999 and that she also earned a safety award in 2008 for "9 accident free years."

In that context, the Arbitrator finds the Employer's imposition of discharge in this case to be excessive and inconsistent with the requirements of just cause.

In reaching those conclusions, the Arbitrator has found particularly persuasive the following factors.

On the one hand, Grievant did have a bad performance year during the 12 months leading up to her discharge. Her violation points as of the date on which she was discharged did total 15, the accumulation total defined by the Employer's Code as a potential basis for discharge. And that point total did culminate in two preventable accidents within a span of just three months (both involving collisions with fixed objects, one on school property), after three previous progressive disciplines regarding cell phone use and two regarding railroad crossing violations, all of which were safety-related.

On the other hand, after receiving a reprimand on February 19, 2009, for her second failure (in the latest rolling 12 month period) to come to a full stop at a railroad crossing and a one-day suspension for what was her third cell phone use violation on March 11, 2009, and after Harrington talked with her on April 8, 2009, about the failure to stop incident and to reinforce the cell phone policy and how it impacts her job, Grievant avoided any further such violations. That suggests that Grievant was at least eventually willing and able to improve in response to corrective disciplinary actions taken by the Employer, albeit only after multiple progressive disciplines regarding cell phone use and railroad crossing violations. While Grievant thereafter had two preventable accidents during the latest rolling 12 month period, neither was particularly serious. The first involved damaging her bus mirror due to colliding with a traffic pole while turning at a slow speed to avoid a collision with a car in a road construction area. The second involved colliding at slow speed with and damaging a newly-erected barricade on a school driveway with no damage to her bus. Grievant met her obligations to self-report those accidents. In addition, Grievant's performance at times during the rolling 12 month period preceding her discharge appears to have been affected by distractions due to serious marital problems that she was experiencing. The Grievant took steps to moderate or avoid those distractions and to resolve those personal issues by means of intensive counseling arranged through the Employer's Employee Assistance Program, which concluded in late April of 2009 (ex. 35, pp. 11-14). At the arbitration hearing Grievant testified that, as of the time of the hearing, her marriage remained intact and that her personal problems had been resolved (tr. 123).

In the context of the record as a whole, the Arbitrator is not persuaded either that Grievant is unable or unwilling to take steps to eventually conform her conduct to the Employer's safety-related rules in response to progressive discipline or that the Grievant is such a liability risk that she cannot reasonably be reinstated to her former position.

In all of the foregoing circumstances, and particularly in the context of the Grievant's nearly 19 years of prior service to the Employer, the Arbitrator finds it appropriate to order the Employer to reinstate the Grievant without loss of seniority, but without backpay.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the **DECISION AND AWARD** of the Arbitrator on the **ISSUES** noted above, that:

1. The Employer, Professional Transit Management of Waukesha, Inc., did not terminate the Grievant, P_ F_ for just cause. The Employer did have just cause to discipline the Grievant, but termination was an unreasonable penalty in the circumstances.

2. As the remedy, the Employer shall, within 10 calendar days of the date of this Award, offer to immediately reinstate the Grievant, P_ F_, to a bus operator position equivalent to the position she held prior to her discharge, without loss of seniority, but without backpay.

3. The Arbitrator reserves jurisdiction for a period of sixty (60) calendar days from the date of this Award (or for such additional period as the Arbitrator may order within that period), to resolve, at the request of the Union or the Employer, any dispute that may arise as to the meaning and application of the remedy ordered in 2., above.

4. The Union's requests for relief besides those noted in 2 and 3, above, are denied.

Dated at Shorewood, Wisconsin, this 28th day of September, 2010.

Marshall L. Gratz /s/

Marshall L. Gratz, Arbitrator

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