

STATE OF NEW YORK

In the Matter of the Arbitration Between

NIAGARA FRONTIER METRO SYSTEM, INC.

Employer,

and

AMALGAMATED TRANSIT UNION, LOCAL 1342

Union.

Grievance: Shawn Curtin Termination

OPINION AND
AWARD

APPEARANCES:

For the Employer

Wayne R. Gradl, Esq.
Counsel

For the Union

Reden & O'Donnell, LLP
Robert J. Reden, Of Counsel

BEFORE:

Peter A. Prosper
Arbitrator

In accordance with Section 11 of the Collective Bargaining Agreement between the Niagara Frontier Metro System, Incorporated (hereinafter called the "Employer" or the "Company") and the Amalgamated Transit Union, Local 1342 (hereinafter called the "Union"), the undersigned was selected as Arbitrator to hear and decide the grievance submitted by the parties to arbitration. Hearings were held at Employer offices in Buffalo, New York on March 12, and June 4, 2009, at which all parties were given full opportunity to submit data, memoranda and other documentary evidence, provide oral arguments and testimony, examine and cross-examine witnesses, and otherwise support their respective positions. The parties filed post-hearing briefs. Upon timely receipt of the briefs, the hearing was declared closed. This *Opinion* and its accompanying *Award* are based on the record as thus constituted.

ISSUE

The Union proposed the following issue:

Was the Grievant discharged for just cause? If not, what shall the remedy be?

The Employer proposed the following issue:

Was the Grievant discharged in violation of the Collective Bargaining Agreement?
If so, what shall be the remedy?

The Employer suggests that since the Collective Bargaining Agreement does not contain a classic just cause provision, the issue should simply be whether the Grievant's termination was a violation of the Agreement. The Union asks for a just cause justification for the termination. Section 11 states that the Employer must justify its decision to promote, demote, discharge or

suspend an employee [Joint Exhibit 1, Section 11-1]. There is essentially no difference between just cause and justification to terminate an employee. Therefore, as Arbitrator, I determine that the issue is the following:

Did the Employer have sufficient justification (just cause) under the Collective Bargaining Agreement to terminate Mr. Curtin.

If not, what shall be the remedy?

BACKGROUND

The Grievant, Shawn Curtin, had been employed by Niagara Frontier Transit Metro Systems Inc., from August 18, 1986 until August 13, 2008. At the time of his termination his work hours were from 7:00 a.m. to 3:30 p.m., with substantial overtime, working 48 to 68 hours a week according to his estimates. He was first hired as a porter cleaning subway stations, cutting grass, shoveling snow, and other jobs commonly performed by porters. He became a bus mechanic aide, working in three bus garages, Cold Spring, Frontier and Babcock. In 1988 he began working as an electrician at the subway. He then was awarded a position in the radio department, working in the bus shop in Cold Spring repairing radios and fare collection devices. His title was Communication Fare Specialist, a title he held until his discharge.

On August 7, 2008, the Grievant monitored a radio broadcast stating that Bus 2102 had a farebox jam, and the bus operator was calling for a bus change at the Utica Station, to which she was scheduled to arrive at 5:45 and, since he was nearby with his Company truck, stated that he would go and repair the farebox. When he arrived, he went into the bus and saw that the farebox was jammed. He opened the farebox and removed the jammed bills, putting several back after he secured the farebox so that he could be sure the farebox was working properly. He put the remaining bills

in his pocket, stating to bus driver Gayla Ross that he would put the bills in a vault in the shop. He then left and returned to his regular duties.

On August 8, 2008, Ms. Ross completed a Transportation Department Report [Company Exhibit No. 3] stating that the "repair man came and remove [*sic.*] money from fare box. Fix farebox put two dollars in the farebox then put the rest of the money in his pocket. Said he will put it in another vault." The bus had surveillance cameras which recorded the incident.

Operator Ross' Incident Report was forwarded to Cold Spring management, and Bus Shop Superintendent Dave Rugg was assigned to investigate the matter. He reviewed the surveillance recordings from Bus 2102 (both video and audio) which showed that the Grievant removed the bill transport, removed a number of bills, replaced the bill transport, fed a few bills into the farebox and put the remaining bills that he had taken from the bill transport and put them into his pocket. There was no count of the number of bills removed by the Grievant, but Operator Ross, who was interviewed by Mr. Rugg, described them as a "shit load" of cash. Superintendent Rugg also questioned the Grievant about his actions on Bus 2102. On August 13, 2008, Mr. Curtin was required to attend a meeting held by Mr. Rugg, with Tom Marsteller and Frank Boice in attendance. At the conclusion of the meeting a Disciplinary Notice was issued to Mr. Curtin [Joint Exhibit No. 2] in which he was suspended pending termination. On August 28, 2008, another meeting was held with Shawn Curtin, David Rugg, Tom Marsteller and Richard Chambers in attendance. At that meeting Mr. Curtin was informed that he was subject to termination [Joint Exhibit No. 3].

On August 28, 2008, Vincent O. Crehan, on behalf of Mr. Curtin, filed a grievance with the Company [Joint Exhibit No. 4], protesting the action of the Company, seeking reinstatement of Mr. Curtin. The Union filed a Demand For Arbitration with the Company [also Joint Exhibit No. 4] on

October 10, 2008. On October 15, 2008 the Company acknowledged receipt of the Demand For Arbitration. The undersigned was selected as arbitrator, and the issue is now properly before me for evaluation and binding decision.

RELEVANT CONTRACT PROVISIONS

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 therefore 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.

....

11-2.1 **Employee Having 20 or More Years of Service.** When a full-time employee has been continuously in the service of the Company for at least twenty (20) years, he or she shall not be discharged, if he or she is physically and mentally able and capable of performing his or her duties, except for willful or flagrant or deliberate or frequent violation of rules or regulations of the Company, but may be otherwise disciplined as circumstances may in the opinion of the Company justify...

POSITION OF THE EMPLOYER

The Company states that the Grievant, Shawn Curtin, was discharged for theft, which is wilful or deliberate misconduct. The immediate dismissal of employees who engage in theft or dishonesty is long- established and an accepted part of labor relations jurisprudence. The Company notes that a review of the surveillance video tape reveals that after repairing the farebox on Bus 2102 the Grievant is heard telling the bus operator that he was going to put the rest of the money into the vault back at the shop. The Grievant, however, did not turn in the money he took from the bus for

placement in the shop safe after he returned from making the repair and was unable to satisfactorily account for the money he took. This, asserts the Company, is theft, justifying dismissal from employment. The Grievant occupied a job that provided him with recurring opportunities to misappropriate Company funds, and the ability of Company management to detect the theft of funds from fareboxes such as that involved in this matter is extremely limited, further adding to the reasons for the Grievant's discharge.

Walking away with Company money without good cause, lying to a witness about what was going to be done with that money, and being unable to explain how that money was actually turned into the Company when questioned a few days later combined to establish theft, argues the Company.

The Company argues that it has clearly established cause to presume that this Grievant had stolen farebox money from Bus 2102 on August 7, 2008, by presenting an Operator's Incident Report and surveillance camera footage from Bus 2102 which conclusively shows that on August 7, 2008, the Grievant did repair a farebox bill jam and then pocketed what the operator described as a "shit load" of cash instead of simply putting that cash back into the farebox. Having walked away with Company money that could have instead been returned to the farebox, a presumption of theft arises and the Grievant incurs the burden of rebutting that presumption by credibly explaining why he took the money. The Grievant was dismissed because he was unable to credibly explain why he took the Company funds on August 7 or account for those funds when questioned on August 13, 2008.

The Company states that when questioned about the money he took from the farebox, the Grievant responded that he was taught by former maintenance specialist Dan Struzyk that he should hold back some dollars to maintain a cache of test dollars in the truck to test the dollar farebox, as he would do for coins for farebox testing that was maintained in the Company truck. The Company notes that real coins must be used to test the farebox coin collection mechanisms, but transfer slips

can be used to test fare box mechanisms instead of real dollars. However, states the Company, the Grievant was unable to show any cache of test dollars, including the money he took from Bus 2102.

The Company argues that the Grievant was inconsistent in stating where he put the dollars that did not go back into the farebox. He told the bus driver that he would put them in the vault back in the shop. When asked by Mr. Rugg at the meeting on August 13, 2008, the Grievant stated that he put the dollars in a cashbox in his truck. When Mr. Rugg and the Grievant went to the truck, the cashbox had coins in it but no dollar bills. The Grievant also said at times he would give dollars that he had taken from repaired fareboxes to Sam Falcone on Thursdays at Frontier.

The Company also dismisses the Grievant's contention that he put the money in Bus 2129. The Company argues that if the Grievant returned the cash through the dollar input slot there would be a record of that input, its time and even that the Grievant had initiated the input. The farebox work on Bus 2129 was done on the afternoon of August 12, 2009, and involved the adjustment of the vault door and lock switch. The Grievant explained that he accomplished the repair on Bus 2129 by using a wire to cause the vault door on the farebox to open and that after the vault door was open dollars could be pushed through a narrow slot and until they fell into the vault. Superintendent Rugg testified that he personally tried to input dollars into the farebox in this manner and found the process difficult and cumbersome. Surveillance cameras on Bus 2129 could have been recording while the Grievant was making the August 13 repair. At the meeting in which the Grievant claimed putting dollars into Bus 2129, Superintendent Rugg excused himself from the meeting to go to the area where the office of the person responsible for overseeing the bus surveillance cameras was located. After he returned to the meeting the Grievant advised Mr. Rugg that he was now unsure that it was Bus 2129 to which he returned the money, and that he did not remember into which bus vault he did the money.

The Company concludes by stating that it has demonstrated that the Grievant stole the money he pocketed from Bus 2102 on the afternoon of August 7, 2008, as required by the proof

requirements and principles articulated by Arbitrator Markowitz in a prior award and by other arbitrators in comparable cases of theft or dishonesty. As such, the penalty of discharge was appropriate, notwithstanding the Grievant's seniority with the Company. Accordingly, the Company had "justification" for terminating the Grievant's employment and the present grievance is properly denied.

POSITION OF THE UNION

The Union contends that the burden in any discharge case where criminal conduct is alleged is the employer's alone; it should not be shifted to the Union. Moreover, argues the Union, as is the case with criminal conduct, such criminal intent must also be proven, that is, the Company must show a criminal intent to steal dollar bills. The Union submits that the Company has failed to do so.

The second point made by the Union is that the Company's investigation was not complete before it discharged the Grievant. The Union noted that the Company failed to interview Sam Falcone and Dan Struzyk before discharging the Grievant, thereby failing to accord him his due process rights.

The Union also charges that mere suspicion of theft fails the just cause test. The Union rejects the Company's conclusion that when the Grievant retained possession of money from the bus farebox without notifying management, he became presumptively guilty of stealing those funds. The Union argues that Mr. Curtin testified persuasively that he took the dollars from the cash box, and deposited it into another cash box. The Union also contends that video evidence of an alleged theft may not be enough to prove intent to steal. When the Grievant put the money in his pocket, he knew

the bus was equipped with video equipment. His actions were totally in the open, and are inconsistent with any intent to steal.

The Union rejects the Company's position that when Mr. Curtin retained possession of Company funds for several days without notifying management that he had possession of these funds or making arrangements with management for the proper deposit of these funds, he became presumptively guilty of stealing those funds [Joint Exhibit No.5]. The Company's presumption that Curtin had stolen the money he removed from the farebox does not convert it into a fact. According to the Union, Mr. Curtin testified clearly and persuasively what he had done with the dollars that he took out of the cash box, explaining how that had been his practice which he had learned from Mr. Struzyk. The money was not stolen.

The Union further argues that the procedure used by Mr. Curtin violated no Company rule. The Company had no policy that it communicated to Mr. Curtin on what to do with dollars retrieved from a repaired farebox. Although the Company asserts that it is an unwritten policy to feed the dollars immediately back into the fare box from which they were retrieved or to take them to a supervisor, it had never told the Grievant of this policy. Therefore, asserts the Union, not only does the Company lack evidence of theft, it lacks evidence that Mr. Curtin violated any rule or policy of the Company.

The Union argues that the Company failed Arbitrator Daugherty's "Seven Tests of Just Cause," and argues that the Company fails every one of the seven tests.

The Union states that Mr. Curtin's more than twenty years' service with the Company affords him protection from discharge. Section 11-2.1 of the Collective Bargaining Agreement provides that employees with at least twenty years service shall not be discharged except for flagrant or deliberate

or frequent violation of rules or regulations. The Union holds that the Company could not show willful, deliberate or frequent violation of rules or regulations because no rules exist. The Union also insists that no theft occurred. The Grievant placed the dollars in the Company truck, and then later placed them in a bus farebox cash box.

The Union argues that the evidence is clear that the Company has not shown theft or any violation of rules. The Union states that even if there are doubts or suspicions, "the accused must always be given the benefit of substantial doubts" as announced by Arbitrator Aaron in *Armour-Dial, Inc.*, 76LA96, 99 (1981).

The Union asks that the grievance be granted and Mr. Curtin reinstated to his position with full back pay and benefits, and without loss of seniority. The Union also states that should the arbitrator in the instant case find some measure of fault in Curtin's actions, Mr. Curtin should be reinstated with full back pay and benefits, less a minor penalty consistent with Section 11-2.1.

DISCUSSION

The incident involves the Grievant, Shawn Curtin, and his actions following repair of a farebox on bus 2012. After monitoring a call stating that the farebox on bus 2012 was malfunctioning, the Grievant volunteered to repair the box when it pulled into the Utica station, indicating that he was only a couple of blocks away. When he entered the bus, the passengers had already egressed, leaving the bus driver the only person on the bus. The monitor cameras recorded the Grievant's entering the bus and repairing the farebox. The issue arose when the Grievant placed an uncertain number of dollar bills, taken from the farebox, into his pocket after putting two of them

back into the farebox to confirm that it had been repaired. He informed the bus driver, Gayla Ross, that he would put the money into the vault back at the garage when he returned.

When Company officials read Ms. Ross' report, they assigned Bus Shop Superintendent Dave Rugg to investigate the matter. The Grievant was called in for an interview (interrogation) during which his responses were questioned by Mr. Rugg. Mr. Rugg's testimony and that of the Grievant's at the arbitration hearing leads to the conclusion that Mr. Curtin was not only attempting to obfuscate, but he was less than truthful. For example, he told Ms. Ross that he was going to put the money in the vault when he got back to the shop. He did not do that. In addition, as indicated below, Mr. Curtin changed his testimony several times.

During Mr. Rugg's interview of Mr. Curtin, the Grievant stated that he had put the money in a box in his Company truck. When Mr. Rugg went to examine the box, the Grievant stated that he took the money from the box and put it in a farebox on bus 2129 that he had repaired. At that same interview the Grievant stated that perhaps it was not bus 2129 but some other bus on which he had put the money but couldn't identify it. When confronted with the possibility of an examination of the places that Mr. Curtin said he put the money (physical examination of the box in the truck and a video of his activities on bus 2129), Mr. Curtin changed his testimony.

At the hearing Mr. Curtin testified that he was taught by Daniel Struzyk to keep some money taken from fareboxes in his truck in order to use it to test fareboxes that were not working because dollar bills are superior to transfer slips for testing even though transfer slips are usable. It is not clear that Mr. Struzyk taught Mr. Curtin to hold back dollars when repairing fareboxes. Mr. Struzyk was asked if he taught Mr. Curtin what to do with dollars from a farebox, and he responded that he said to do what the GFI guy said. "I said it is up to you. I said that I make sure I have coins and

dollars” [Arbitrator’s Notes]. Mr. Struzyk did not testify that he directly told Mr. Curtin to hold back money.

Mr. Curtin was asked what he did with the accumulation of money he had placed in the box. He testified that if he didn’t have a vault jam in a while and had stack of bills, he would “tell Sam [Falcone] on Thursday and put them in canvas bag that Sam had.” Mr. Falcone testified that Mr. Curtin did that only one time. Mr. Curtin also testified that if he hadn’t seen Sam for awhile and didn’t have a fare box problem, he would deposit them into the cash box in the farebox he was fixing at the time.

Mr. Curtin also testified that he kept the bills from the farebox in bus 2102 because he was “nervous” about the number of people waiting to get on the bus, and didn’t want to delay them any longer. On cross examination he stated that it would not take very long to feed twenty one dollar bills into the farebox. The grievant testified that he was aware of the cameras in the bus and assumed that it was turned on and working, and therefore would not do anything illegal while repairing the farebox in bus 2102. It is difficult to comprehend that if the Grievant had been aware that the camera was turned on, and that because he told Ms. Ross that he was going to put the money in the vault back at the shop, that he would put the money in the truck without explanation to Company officials.

The Company introduced evidence [Company Exhibit Nos. 10, 11, 12] that the Grievant tested with transfers rather than dollar bills. The Union argues that the Grievant repaired hundreds of fareboxes and that he used transfers only when he didn’t have dollars to test the fareboxes.

On cross examination the Grievant was asked the following question: “If you took money with you after a farebox repair and the next day when working in the morning you fed it into a

farebox of another bus, you couldn't be accused of stealing could you?" Mr. Curtin responded: "I could be accused of theft as soon as I walked away with the bus." It was then suggested to Mr. Curtin that if he fed it into another bus the next morning and someone had reported that they saw him walk away the previous night with the money, that he could get the record because his feeding the money into a fare box is recorded. While the Grievant acknowledged this, he said that if he "white jumps" the logic board, all the records are erased, and that the money could not be verified. Mr. Curtin certainly got the point of the question but attempted to avoid a direct answer.

Mr. Curtin has experience in documenting money he takes from machines. He was asked about his experience in handling money when repairing ticket machines when he worked for the subway (rail) line. He testified that when he opened a machine he put the money in his pocket and when he got back to the rail shop he put it in a tool box and filled out a form stating our name, badge number, what vending he got it out of, the time, date, how much he took out, badge numbers. He was then asked who taught him to collect stuck money and take it back to the shop, and the Grievant replied that it was his partner at the time. He then was asked if he ever saw the procedure in writing, and he answered no. Mr. Curtin was aware that monies in fareboxes and ticket machines belonged to the Company. He knew, or should have known, that if he removed money from fareboxes he must either put it back or turn it in to his supervisors or to someone who would record the return. When he took the dollars from the farebox in bus 2102 he told no one that he did not replace the dollars or what became of them.

Mr. Curtin was aware that he was taking Company money and that it was not documented. Given his past experience repairing ticket machines, the Grievant knew that it was appropriate to

document monies he took from Company machines. He knew that he could take dollars from fareboxes and not document it with no one knowing.

Mr. Curtin's response to questions at the hearing were attempts to cover for inconsistencies in his prior statements. He acknowledged that he told bus driver Ross that he was going to put the money in the vault back at the shop. He did not. He said that he put the money in a box in his truck, and when Mr. Rugg went to check, Mr. Curtin said that he took the money from the truck and put it in farebox 2129 which he repaired. When Mr. Rugg went to check the camera record for bus 2129 the Grievant stated that he wasn't sure that it was bus 2129 but couldn't recall which bus it was. Mr. Curtin also said that he put money various times on a Thursday in a canvas bag that Sam Falcone used to collect monies from minibuses. Mr. Falcone testified that Mr. Curtin did that only one time.

The Union argues that the Company has not proved that Mr. Curtin stole the money. If an individual takes money that rightfully belongs to the Company without documenting where the money went, it can be presumed that it was a theft unless the individual has a reasonable and rational explanation and can show where he put the money. In the instant case, Mr. Curtin was not only unable to show where the money went, he changed his testimony of where he put the money. His explanations are not credible.

Mr. Curtin's testimony regarding the dollars from bus 2102 is not credible. He took money from a farebox that he repaired and could not account for where it went. His various explanations are simply not credible. He is guilty of theft of Company money.

The issue of penalty must now be addressed. The Union argues that Section 11.2 provides that when a full-time employee has been continuously in the service of the Company for at least twenty (20) years, he or she shall not be discharged if he or she is physically and mentally able and

capable of performing his or her duties. The Union states that because Mr. Curtin has more than twenty years with the Company, discharge should not be an alternative. However, Section 11.2 also states that an employee may be discharged "for willful or flagrant or deliberate or frequent violation of rules or regulations of the Company.." Theft is an example of flagrant misconduct. The arbitration literature is replete with hundreds and hundreds of examples in which employees have been discharged for theft. The grievant misappropriated money. He is guilty of theft. The Company's decision to discharge is appropriate.

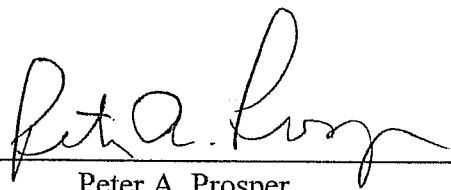
Therefore, as the duly selected arbitrator, after careful consideration and review of the testimony, evidence, arguments and submissions of the parties, I hereby make the following

AWARD

The Grievant, Shawn Curtin, was discharged for just cause.

The grievance is denied.

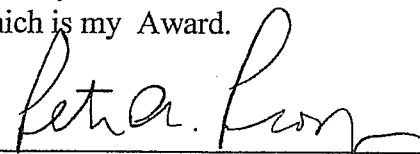
Clifton Park, New York
September 4, 2009



Peter A. Prosper
Arbitrator

I, PETER A. PROSPER, do hereby affirm on my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

September 4, 2009



Peter A. Prosper