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In the Matter of the Arbitration between

AMALGAMATED TRANSIT UNION, LOCAL 1342

-and-

NIAGARA FRONTIER TRANSIT
METRO SYSTEM, INC.

OPINION

AND

AWARD

Grievance: Louis Hall - Discharge

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BEFORE: Jay M. Siegel, Esq.
Arbitrator

APPEARANCES: For Amalgamated Transit Union, Local 1342
Reden & O'Donnell, LLP
By: Terry M. Sugrue, Esq., of Counsel

For the Niagara Frontier Transit Metro System, Inc.
David J. State, Esq., General Counsel
By: Wayne R. Gradl, Esq. of Counsel

In accordance with the Collective Bargaining Agreement (Joint Exhibit 1) between the parties (Union & Company), the undersigned Arbitrator was selected by the parties to hear a grievance and render a binding determination. A hearing was held at the Company's offices on February 1, 2016 in Buffalo, New York.

The parties were accorded a full and fair hearing, including the opportunity to present evidence, examine witnesses and make arguments in support of their respective positions. The record was closed on or about March 1, 2016 after the Arbitrator received the parties' written closing arguments.

ISSUE

The parties did not stipulate to an issue to be decided by the Arbitrator in this proceeding. The Union proposed the following:

> Was the Grievant Louis Hall properly discharged on or about July 1, 2015, under the parties' Bus Accident Reduction Program?
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> If not, what shall be the remedy?

The Company proposed the following issue:

> Was the Grievant Louis Hall properly discharged on or about July 1, 2015, under the parties' Bus Accident Reduction Program for having accumulated 12 points by reason of an accident occurring on March 8, 2015?
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> If not, what shall be the remedy?

The parties' positions reflect a disagreement they have regarding whether Grievant's discharge was proper under the parties' Bus Accident Reduction Program. The Union contends that a proper application of the Bus Accident Reduction Program should have resulted in Grievant having accumulated only 10 points under the Reduction Program at the time the Company discharged him. Hence, the Company's proposed issue asserts a factual contention that the Union disagrees with.

The Arbitrator finds that the Union's position represents a neutral statement of the parties' dispute that in no way prejudices the Company. For these reasons, the Union's proposed issue is accepted by the Arbitrator as the issue to be resolved.

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 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 19 – WORKING CONDITIONS, PRACTICES, ETC., TO CONTINUE

19-1 The present working conditions, practices, rules and regulations of the Company not altered or modified by this Agreement, shall continue in full force and effect except in the understood and agreed that the hours of work and scheduling of runs may be revised by the Company if it deems such revision necessary by reason of the Award or determination of any Board of Arbitration herein proved for. However, it is understood and agreed that the Company shall always be privileged from time to time to revise, supplement and otherwise change its rules, provided same are not in conflict with any specific provision of this Agreement, and if in conflict or inconsistent with any such specific provisions, such revised, supplemental, or changed rules or regulations shall be subject to the approval of the Union which approval the Union agrees not to unreasonably withhold.

BUS ACCIDENT REDUCTION PROGRAM

I. Point Scale for Preventable Accidents

Effective January 1, 2010 and each year thereafter, the property damage amounts will be determined by the CPI-U as determined by the Bureau of Labor Statistics from the previous calendar year. If the CPI-U increases, decreases or remains idle, the property damage amounts will be adjusted accordingly. The Accident Review Committee will utilize the property damage amounts in effect on the day of the accident.

A. Property damage less than 1-3 Points

	$2,600 or minor personal injury	
B.	Property damage $2,600 - $6,500 or multiple minor injury, but not requiring hospitalization	3-5 Points
C.	Property damage $6,500 - $13,000 or multiple, more serious injury, but not requiring hospitalization	5-9 Points
D.	Property damage over $13,000 or multiple personal injuries requiring hospitalization	9-10 Points
E.	Gross negligence or traffic violation by operator	Additional 2 Points

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II. Personnel Actions

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

	Action	When Required
A.	Re-instruction by Supervisor	1 Point
B.	One day Defensive Driving Review Additional occurrences, within twelve months will result in one-half day Defensive Driving Review and an appointment with the Employee Assistance Program	4 Points
C.	One week suspension and Final Warning Before Termination; if action B was Bypassed, the employee will also undergo the Defensive Driving Review	8 Points
D.	Termination	12 Points

NOTE: Points drop off 12 months after the accident.

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III. Administration

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Any Operator may reduce his or her current point total by two points by enrolling in and completing a New York State Point and Insurance Reduction Program course. The Point Reduction option is not available if the accumulated point total is twelve or more points. It may be exercised at any other time, except not more than two points will be deducted in any twelve month period.

In conjunction with the provisions above, an Operator involved in a preventable accident, contingent on their accumulated point total, may reduce points and avoid the required Personnel Actions resulting from the accident, by enrolling in and completing the Point Reduction Course within thirty calendar days of the Accident Review Committee's decision.

BACKGROUND FACTS

Grievant Louis Hall was a Bus Operator for the Company when the Company terminated him for accumulating 12 points under the Bus Accident Reduction Program ("Program"). An assessment of 10 points for an accident that occurred on March 8, 2015, coupled with an assessment of points for earlier accidents in the 12 month period preceding March 8, 2015, constituted the basis for the Company's termination decision.

The record shows that, under the Program, Grievant was assessed one point each for preventable accidents on each of the following dates:

- January 30, 2014
- February 13, 2014
- June 19, 2014
- July 11, 2014

Thus, within the 12 month period immediately preceding July 11, 2014, Grievant had accumulated four points under the Program.

Pursuant to the Program, Grievant's four point accumulation required him to attend a one day defensive driving review. Instead, Grievant completed a New York State Department of Motor Vehicle-approved Accident Prevention Course ("Prevention Course") on September 24, 2014. This reduced his accumulated points by two and he was not required to attend the one day defensive driving review.

On June 18, 2015, Grievant was assessed 10 points under the Program for a preventable accident that occurred on March 8, 2015. The Company's discharge decision was predicated on its conclusion that the March 2015 accident and its 10 point penalty placed Grievant at 12 points under the Program.

The parties' dispute centers on how the Company calculated the 12 points that led to Grievant's discharge under the Program. When Grievant completed the DMV Accident Prevention Course, he was entitled to a reduction of 2 points under the Program. The Company reduced the total points to 2 points and applied them to the preventable accidents of January 30 and February 13, 2014. Under the Company's calculation, taking into account Grievant's preventable accidents of June and July 2014 and their 2 point total, the additional assessment of 10 points for the March 2015 preventable accident reached the 12 point threshold.

In contrast, the Union claims that, when the Company applied the 2 point reduction, the 2 points should have been applied to the June 19, and July 11, 2014

accidents. If the reduction was performed this way, and taking into account the Company's rolling 12 month period in calculating points under the Program, there would have been no points to add to Grievant's 10 point assessment for the March 2015 accident. If Grievant had not been placed at the 12 point level, he would not have been discharged under the Program.

The record shows that the Program was first negotiated by the parties in 1994. Changes have been made to the Program over the years but the basic scheme of the Program regarding preventable accidents, assessment of points, and the consequences (Personnel Actions) to Operators when various point levels are reached has remained intact. The current version of the Program reflects revisions made in 2009. According to the testimony of Company witness David Rugg, who was Manger of Operations and Safety for the Company in 1995, the 2 point reduction procedure based on the Prevention Course was added in 1995. Mr. Rugg, whose familiarity with the Program continued until 2010 when he became Manager of Bus Maintenance and Equipment, testified that the 2 point reduction was intended to be applied and has been applied to the 2 earliest points in an Operator's point total.

POSITION OF THE COMPANY

The Company asserts that the testimony of Mr. Rugg established that the 2 point reduction for taking the Prevention Course in the Program has been consistently applied so that the two oldest accident points on an Operator's record are removed. The

Company notes that the application of the 8 point reduction operates so that an Operator can avoid a Personnel Action resulting from a preventable accident. The Company maintains that the 2 point reduction program provides an Operator with limited insurance based on future preventable accidents. By way of example, the Company states that if Grievant had been involved in a preventable 8 point accident in December 2015, the removal of the accident points from his January and February 2014 accidents would have resulted in Grievant being at the 10 point rather than the 12 point level.

The Company also argues there was no evidence introduced by the Union to refute Mr. Rugg's testimony. The Company rejects the Union's position, which is to apply the 2 point reduction to the most recent accident points, which would extend the possible future benefit of the 2 point reduction as long as possible. In the Company's view, the Union's position is untenable. The two paragraphs in the Program that address the 2 point reduction, when read together, establish that the point reduction option is not intended to avoid pending point charges that can lead to dismissal. According to the Company, if an Operator cannot use the Prevention Course option to avoid dismissal when a pending accident can lead to a point total of 12 or more, then the reduction option based on the Prevention Course should be applied consistently so as not to allow an Operator to avoid dismissal when a future accident can lead to a point total of 12 or more.

The Company asserts that the Union's argument that the Company did not properly apply the 2 point reduction to Grievant is a breach of contract claim on which

the Union has the burden of proof. Since the Union failed to refute Mr. Rugg's testimony, it clearly failed to meet its burden.

The Company also stresses its management rights under the parties' Agreement. The Company views the Program as one that restricts its right to dismiss Operators for negligent driving. As such, it is a policy or program that should be construed narrowly and not in a manner that provides negligent bus operators greater immunity from dismissal than what the Company actually agreed to provide. The Company maintains that the Program, including the 2 point reduction, is generous. Its interpretation of the Program and the 2 point reduction available to Operators is consistent with the intent of the 2 point reduction as reflected in the plain language of the reduction provision itself. The Union's failure to offer evidence of a different practice or different intended meaning than set forth in the testimony of Mr. Rugg must result in an Award in favor of the Company.

POSITION OF THE UNION

The Union claims that the Company has the burden of proof because this is a disciplinary proceeding. The Union insists that the Company is required to establish that Grievant had 12 current total points based on the assessment of points for the March 8, 2015 accident. More specifically, it is the Company's burden in this proceeding to establish that the language in the Program that "points drop off after twelve months" did not apply to the January 30, 2014 and February 13, 2014 accidents.

The Union maintains that the plain and unambiguous meaning of the relevant language in the Program, including the 2 point reduction, requires the conclusion that Grievant never reached a current point total of 12 points to justify his discharge. The Union asserts that the dispute centers on the meaning of the two paragraphs in the Program addressing the 2 point reduction. According to the Union, it cannot be asserted that the language in the Program itself regarding points "drop off" after 12 months means that these points are not to be counted against an Operator for Personnel Actions under the Policy. It is also not disputed that the "current" points referred to in the 2 point reduction based on the Prevention Course applies to points assigned to an Operator at the time he completes the Prevention Course.

Focusing on the use of "total" in the two paragraphs devoted to the point reduction ("an operator may reduce his or her current point total by two points"), the Union refers to the dictionary definition of "total" and contends that it should mean the entire number or amount of points that the Operator currently has at the time of the two point reduction. The Union argues that the correct analysis to follow is to recognize, in the first instance, that Grievant had 4 total points when he took the Prevention Course in September 2014, and, as a result of completing the course, his current point total was reduced to 2 points. Subsequently, because of the passage of 12 months, the 2 points assigned to the accidents of January 30, 2014 and February 3, 2014 "dropped off." In the Union's view, the combination of the "dropping off" of the 2 points because of the passage of 12 months and the reduction of 2 points because of the Prevention Course meant that all four of the

assigned points under the Program had been either reduced or dropped off by February 13, 2015. Hence, when Grievant was assessed 10 points for the March 8, 2015 accident, there were no points for these 10 points to be added to.

The Union rejects the Company's reading of the Program's language. It contends that the Company has not applied the "points drop off the Operator's record 12 months after each accident" language to Grievant's January and February 2014 accidents simply because he took the Prevention Course. The Union insists that it would have been easy to state in the Program that the "oldest" points are to be reduced or that the 12 month drop off language does not apply if the Prevention Course is taken. The Program does not contain such language. Moreover, Mr. Rugg admitted he could not identify any language in the Program that stated that the "oldest" points are to be reduced or that the "drop off" language does not apply to the oldest points when the insurance course is taken. The Union stresses that the Program states that assigned points "drop off" 12 months after an accident and that Operators can reduce their current point total by taking the insurance course. Both the "drop off" and the "reduce" clauses must be considered fully operational and neither clause can be seen to cancel out the other.

The Union also rejects the Company's reliance on the Mr. Rugg's testimony regarding past practice or the parties' intent when the reduction language was added to the Program. The Union identifies the arbitral principle that evidence of a past practice cannot be considered if it is inconsistent with a clear and unambiguous statement of

contractual intent that has been set forth in an Agreement. Also, the Union notes that bargaining history evidence cannot trump language that is clear and unambiguous.

The Union claims there is no evidence of an unequivocal practice that would vary the meaning of the contractual language. The Union maintains that, despite the fact that the Program has been in existence for 20 years, no prior cases were identified by the Company of applying the alleged practice of reducing the oldest points and not applying what the Union claims is the clear "points drop off 12 months after the accident" language. Union Executive Board Member Kline testified that even the Company's managers did not agree that the "current point total" meant that the oldest points should be reduced and the "drop off" language should not apply.

OPINION

In this proceeding, the Arbitrator's task is to resolve the differences between the parties regarding the proper interpretation of the Program, particularly the 2 point reduction an Operator receives after successfully completing the Prevention Course. A fair reading of the Program reveals that the language is silent as to how the Company must apply the 2 point reduction, other than to reduce the "current point total by two points." The Arbitrator will state his analysis below that, in view of the silence regarding how the 2 point reduction is to be applied, the Company acted in a manner that was reasonable and consistent with the Program, a Program that reflects the Company's agreement to restrict its managerial rights to impose discipline. Accordingly, Grievant

received all benefits to which he was entitled by his successful completion of the Prevention Course and the Company properly applied the Program and its point assessments to Grievant, justifying his termination.

There are several features of the Program and the 2 point reduction about which the parties have no dispute. First, the parties agree that the Prevention Course cannot be taken by an Operator who has been charged with a preventable accident and, as a result, has reached the discharge level of 12 points. This feature of the Program is explicitly stated in its language ("the point reduction option is not available if the accumulated point total is twelve or more points"). Second, the parties agree that the 2 point reduction earned by an Operator when the Operator takes the Prevention Course cannot be applied to any point assessment charged for a future accident. This observation is supported by the Award issued by Arbitrator Schmidt in an earlier dispute between the parties.

The present controversy concerns the Company's decision to apply the 2 point reduction Grievant earned by taking the Prevention Course in September 2014 to his preventable accidents of January 30, 2014 and February 13, 2014. Grievant was assessed a point each for these preventable accidents. By applying the 2 point reduction in this fashion, the Company determined that Grievant had 2 points on his record due to preventable accidents of June 19, 2014 and July 11, 2014, each of which resulted in a 1 point assessment. Thus, when Grievant was assessed 10 points for a March 8, 2015 preventable accident, Grievant's point total reached the terminable level of 12 points

because the June and July 2014 accidents were within 12 months of the March 2015 accident.

There is no language in the Program that explicitly addresses how the 2 point reduction is to be applied in relation to preventable accidents on an Operator's record. All that the language of the Program states is that there is a reduction of the Operator's "current point total by two points." The Arbitrator, therefore, does not accept the Union's argument that there is a language in the Program that unambiguously provides that the Company must apply the 2 point reduction to any particular accident or accidents. The only statement of intent found in the 2 point reduction language, other than there is a reduction of the "current point total by two points", is that an Operator, if the Prevention Course is taken, "may reduce points and avoid the required Personnel Actions resulting from the accident." This language was applied to Grievant in that his successful completion of the Prevention Course reduced his points from 4 to 2 points. Thus, he was able to avoid the required Personnel Action of taking the one day defensive driving review that he would have been obliged to take had he not completed the DMV Accident Prevention Course.

As the Company has noted, Grievant also received another potential benefit when he completed the DMV Accident Prevention Course by virtue of his total points being reduced from 4 to 2. That is, if Grievant had been in a preventable accident that carried with it an 8 point assessment, instead of the 10 points he received for the March 8, 2015 accident, he would have not reached the 12 point termination level under the Program.

The question before the Arbitrator is whether the Company appropriately administered the Program by applying the 2 point reduction to Grievant's accidents of January 30 and February 13, 2014. In framing the question in this manner, the Arbitrator recognizes that it is the Company who administers the Program save for the Accident Review Committee, which consists of three Operators and two management employees, each with one vote.

As the Company has observed, the Program constitutes a limitation on it managerial rights. Under the Program, the Company has agreed to a set of parameters it must follow in seeking to impose discipline for Operators involved in preventable accidents. For example, an Operator whose careless driving has led to an accident that resulted in property damage of over $13,000 or multiple personal injuries requiring hospitalization, but who was not grossly negligent or guilty of a traffic violation, can be assessed nine to ten points under the Program. (Program, I[D]). If this Operator at the time of the accident had no points existing under the Program, the Operator could not be terminated. If this same Operator, shortly after the expiration of a year from the date of the earlier accident, becomes involved in another preventable accident involving over $13,000 of damages or multiple personal injuries requiring hospitalization, and the Operator was not grossly negligent or guilty of a traffic violation, the Operator could not be terminated. The 12 month rolling period, by the time of the second preventable accident, would have taken the first preventable accident off the Operator's record.

Without the Company's agreement to the Program, one might imagine that this Operator, after the second preventable accident, might well be considered a candidate for discharge.

By applying the 2 point reduction after an Operator completes the Prevention Course in the manner it did, the Company did not deprive the Grievant of the benefits set forth in the explicit language of the Program. What the Company has done is apply the 2 point reduction to the oldest accidents on an Operator's record that are within the 12 month period then in place for the Operator in order to ensure that the more current or newer accidents will remain on the Operator's record before they are removed by application of the rolling 12 month period. The Arbitrator finds this approach not only to be consistent with what Mr. Rugg testified was the intent of the Program and its 2 point reduction feature but also consistent with reason. Put differently, the Company, consistent with the parameters of the Program, has taken an approach to ensure that the most current preventable accidents of an Operator, subject to the 12 month rolling period constraint and the reduction in total points after the Prevention Course is taken, are taken into account.

The Arbitrator finds that the Company's approach did not prejudice the Grievant. He was afforded the opportunity to avoid the Personnel Action at the 4 point level he reached before taking the Prevention Course and his overall total points were reduced by two. As the Arbitrator understands the Union's proffered interpretation of the Program, Grievant, in addition to being given those benefits that the explicit language of the Program provided him with, should have been given an additional 2 point reduction.

That is, after completing the course, Grievant's total points under the Program were reduced from four to two. In essence, the Union is claiming that they should have been reduced to zero by the time of the March 8, 2015 accident despite the fact that Grievant had two preventable accidents within a year of March 8, 2015 and already had 2 points reduced from his point total of four after completing the Prevention Course in September 2014. Seen in this light, the Union's interpretation is not required by the language of the Program and does not particularly square with a reasonable understanding of the Program itself. Accordingly, the Arbitrator declines to accept the Union's arguments and finds that the Company's application of the Program, including its 2 point reduction feature, was properly applied to Grievant.

Accordingly, and based on the foregoing, I find and make the following:

AWARD

The Grievant Louis Hall was properly discharged on or about July 1, 2015 under the parties' Bus Accident Reduction Program.

Dated: March 30, 2016
Cold Spring, New York

Jay M. Siegel, Esq.
Arbitrator

STATE OF NEW YORK)
COUNTY OF PUTNAM)

I, Jay M. Siegel, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this Instrument, which is my Opinion and Award.

Dated: March 30, 2016

Jay M. Siegel, Esq.
Arbitrator