

In the Matter of an Arbitration
Between

Amalgamated Transit Union,
Local 282

and

Regional Transit Service, Inc.

**ARBITRATOR'S OPINION
AND AWARD**

RE: [REDACTED] [REDACTED]
termination

A hearing was held on this matter on July 15, 2014 in Rochester, New York. The Union was represented by Jules Smith and the Employer by Roy Galewski. Each Party was given full opportunity to present evidence and to call witnesses. Witnesses were sworn. Post hearing briefs were dated August 15, 2014.

ISSUE

Was [REDACTED] [REDACTED] terminated with just cause. If not, what should be the remedy?

BACKGROUND AND POSITIONS OF THE PARTIES

The Grievant, [REDACTED] [REDACTED] was discharged on February 13, 2014. The termination letter stated that on the preceding day [REDACTED] was operating a bus and a cyclist was riding a bicycle near your bus:

you passed that bicyclist and maneuvered the bus to right to stop at a bus stop. When you stopped your at the bus stop, the bicyclist approached your window and accused you of cutting him off. You told the bicyclist that you might run him over next time. A few minutes later pulled away from the stop and struck the bicyclist. You stated aloud that the bicyclist had gotten his wish. Review of the onboard video surveillance shows you failed to avoid the bicyclist or take any preventative action to avoid striking the bicyclist... You are hereby charged with unsafe operation failure to exercise due care], failure to follow Authority training and procedures, unprofessional conduct, damaging the Authority's reputation, and endangering public safety." J2.

At the first level appeal the Union claimed "this one accident is not enough to warrant termination, given nine years of good service, and [REDACTED] "contends the bike hit the bus on purpose. Bike had plenty of room as he passed by." J3

The Employer denied the grievance noting that "the first time you passed the bike and pulled in to service the bus stop, you angled your bus in a manner that cut the bike off, forcing him to curb... The bike proceeded ahead of you inside the right side white line and curb. On your next attempt to pass the bike, as you were passing the bike, your bus was very close to the bike. The video shows you turning your steering wheel to the left to pass and then turning it back to the right. This is when contact with the bike happened, just past the front doors.... Your actions resulted in injury to the bicyclist." J3 The termination is based primarily on these actions and statements [REDACTED] made, as will be subsequently set out.

Janet Snyder, Labor Relations Director, stated that she viewed the videos the day of the incident and more carefully the following day, and she determined that [REDACTED] should be terminated. First, she found that [REDACTED] had cut off the cyclist when he pulled in

to a bus stop. He should, she stated, have slowed down or stopped to let the cyclist go past him. When the cyclist pulled up to [REDACTED] window and complained that [REDACTED] had "cut him off," [REDACTED] stated that if he had, the cyclist would have fallen into a snow bank. After the cyclist's inaudible response, [REDACTED] stated that maybe he would run over the cyclist "next time."

As [REDACTED] pulled away from the bus stop, Snyder stated that he did not leave sufficient space between the cyclist and the bus, a four-foot "bubble," which is required for cyclists as well as passengers, and the cyclist was hit and fell over. [REDACTED] subsequent statement that the cyclist "got what he wanted" was also improper, she added. These comments were not professional. Just as importantly, [REDACTED] endangered public safety by not leaving sufficient room between the bus and the cyclist.

Snyder also reviewed [REDACTED] disciplinary history. In one case, he allegedly made a left turn from the middle lane, not the designated left turn lane. C2. The Union argued that this matter could not be used since it still in the grievance process. Snyder responded that the matter had not been moved to arbitration and the last day for doing so was the day after the instant hearing. Although the Union in its brief stated that the matter was in the grievance process, I have no actual evidence of this matter's current status.

Snyder also noted that [REDACTED] had become involved in a motor vehicle accident with a tree, and the resulting impact caused damage to his bus. Apparently the passenger side mirror of the bus struck a tree, and [REDACTED] was charged with "failure to safeguard/protect RTS property."

In addition, [REDACTED] was charged with leaving the scene of the accident and failure to immediately notify Radio Control of the accident. [REDACTED] apparently did notify Radio Control later in his route. [REDACTED] was also charged with falsifying a business document because the

Employer's review "clearly contradicts your report." The Employer imposed a three-day suspension. Employer 3. After the first level appeal, the suspension was "adjourned in contemplation of reducing them to a written warning should you not be issued any similar disciplinary charges within the next six months of the hearing date." Employer 4.

Finally, again in late 2013, [REDACTED] received a written warning for poor on time work performance. Employer 5. The charge was that [REDACTED] was "running late." The notice of disciplinary charge notes that [REDACTED] had received counseling memoranda in the past for running late. Employer 5.

Snyder stated that when a driver is more than six minutes late a question about performance arises although there may be reasons or mitigating factors, for instance, safety concerns that provide justifiable excuses for the time. She also noted that on the day of the incident, [REDACTED] was already four minutes late when he hit the bicyclist, although she was not aware whether [REDACTED] knew that he was late.¹

Snyder said the first time [REDACTED] passed the bicyclist, the bicyclist was a couple feet from the curb within the parking lane. Nevertheless, she argues, the bus should have stopped and let the bicyclist go by, and then move to the bus stop, and that [REDACTED] violated the "four foot rule." Snyder said the bus was not four feet from the bicyclist although the Union argued that in its view of the video the bicyclist was within the parking lane and the bus was on the left side of the line.

It does appear from a video, however, that there is more than a full bus length between the bus while at the bus stop and the bicyclist, although Snyder stated that was not the case. Subsequently the bicyclist goes around back of the bus and raps on the driver's window saying

¹ In his testimony, [REDACTED] testified that he was aware that he was late.

that [REDACTED] had cut him off. [REDACTED] responded that he might run him over next time. It is not clear whether any passenger or the bicyclist heard that statement, but the Employer argued that this would be irrelevant in any event.

The potentially most serious event occurred a very short time thereafter. The Employer argues that after picking up passengers at the bus stop, [REDACTED] proceeded to pass the bicyclist, who had by then had moved ahead of the bus, and, [REDACTED] turned the steering wheel to the right, thus causing the bus to hit the bicyclist and knock him down. The Union on the other hand, argues that the bicyclist was hitting or pounding on the right side of the bus and simply lost his balance and fell.

The video indicates that when the bus did pass the bicyclist, the bicyclist was to the left of the parking lane, thus forcing the bus to either stop, pass the bicyclist or cross the midline of the street. The latter clearly would not have been wise, particularly as the video shows at least one car coming towards the bus on the other side of the street. There was some noise when the bus, but Snyder stressed it was merely the bus hitting the bicyclist and, she concluded, the bus should not have been so close. When a passenger noted that the bicyclist had fallen, [REDACTED] stated that the bicyclist "had gotten his wish."

Dave Kester, Occupational Safety Manager, testified that he had been a training supervisor, and he had discussed the training of new bus operators as well as participated in the two in-service training sessions that are scheduled each year. He noted that bicyclists and pedestrians might do "odd things," so bus drivers need to take care of them by giving them a wide berth. Kester stated that there should be a 3-4 foot space between the bus and the bicyclist or pedestrian. In other words, there should be as much room as possible for the bus to get around them. Employer 6.

Kester also noted that there had been regular training about professionalism in which bus drivers are taught that they are the Employer's representative in front of the public and they are responsible to maintain the image of the Employer. He also discussed the Smith System which stresses the 5 Keys of defensive driving including a "space cushion around the vehicle." If that cushion is not there, he noted, the bus should stop. He also stated that disagreements and altercations must be avoided, and drivers may have to apologize even if they feel, even correctly, that they are correct. See Employer 7 – 12.

██████ the Grievant, testified that on the day of the incident the weather was clear and the roadway was clear of snow and ice, although there was snow on the ground. ██████ stated he saw the bicyclist approximately a block before he had to make a passenger stop. He noticed the bicyclist was in the parking lane and ██████ went around a parked car, so ██████ stated that he slowed down. He then pulled past the bicyclist and pulled into the stop. The bicyclist then pulled around the bus and knocked on the driver's window claiming that ██████ had cut him off. ██████ stated that if he had indeed cut him off he would have landed in a snowbank. And then he said perhaps he would hit the bicyclist the next time. Again, these remarks were not defended by ██████ who said he was tired, irritable, and not feeling well due to a cold.

Subsequently, ██████ pulled the bus away from the bus stop, and he saw the bicyclist on the road in front of him and the cyclist was not in the parking lane. Indeed the photos that were captured from the video as well as the videos themselves indicate that the bicyclist was clearly to the left of the parking lane when he passed around the back of the bus and proceeded ahead of the bus. Union 1 - 4. The reason for this is not clear, but it may be that there seemed to him to be ice or slush or snow in the parking lane or he may have wished to irritate or slow down ██████. We have no evidence of the cyclist's motivation, but even an interview might not have shed

much light on the matter. Nevertheless the bicyclist was not pulling around any parked cars at that time. Union 1-4. Instead, to summarize, the cyclist was in front of the bus outside, that is to the left, of the painted parking lane.

█████ stated that when he left the bus stop he was aware that the bicyclist was outside the parking lane. Nevertheless, █████ stated that he passed the bicyclist and he did not hit him. Instead, █████ argued that the bicyclist was in "my lane." █████ stated he had to stay behind the bicyclist, but then █████ believed that the cyclist had pulled in toward the parking lane. That is, he believed the bicyclist had turned closer to the curb, and █████ began to pass the cyclist and then heard "boom, boom, boom." He looked to his right and saw the bicyclist on the ground. It is at this time that a passenger notes that the cyclist had fallen, and █████ stated that the cyclist had "gotten his wish." He did call Dispatch at this point and █████ again concedes he should not have made that comment. He doubts that anyone on the bus heard the statement because there were only two people on the bus and they were in the middle to the back of the bus. Nevertheless, he did hear a passenger's comment.

It is clear from the video that there was not a four foot space between the bicyclist and the bus when the bus began to pass the bicyclist on the right, but █████ responded upon cross that the bicyclist was "way out of the parking lane and I thought he was pulling back to the shoulder." He also noted that he was aware that he was running late.

His remark about the bicyclist getting what he wanted, █████ noted, was related to █████ belief that the bicyclist wanted to get hit, but not seriously, in order to seek damages from the Employer. █████ stated that he did not want to scare the bicyclist by using his horn: instead, he "just wanted to get going. █████ stated that "I'd take my shot and get on down the road." █████ also stated that the bicyclist knew that the bus was behind him "so I didn't use my horn." He

stated that if he had used the horn, the bicyclist might have gotten more upset. He noted that his training included use of the horn to make riders aware of the bus' presence, but [REDACTED] stressed that the bicyclist obviously knew the bus was there.

The Videos

Focusing first on the first charged offense, the rear view camera, not part of the post-hearing video submitted to me but shown during the hearing, suggests there is a considerable space between the back of the bus and the bicyclist when the bus gets to the bus stop. The space is such that I cannot conclude that the driver made a mistake by, for instance, by not hanging back and following the bicyclist until the bus stop was reached.

It is clear that the bicyclist was upset for he then pulls around and criticizes the driver for "cutting him off." It is at this time that the driver makes the first of his unfortunate and improper comments, as he conceded, to the bicyclist, although whether or not these comments were heard by either the bicyclist or the passengers is not clear. In response [REDACTED] first seems to say that he could have run the bicyclist into a snowbank and second that perhaps he will run him over the next time.

The bicyclist then proceeds in front of the bus and clearly, as the still pictures provided by the Union as well as the video made clear, is riding outside the parking lane. It seems unlikely that, as [REDACTED] seems to have assumed, that the bicyclist was seeking some kind of injury to secure compensation from the Employer, although it is possible that he was purposely riding in the traffic lane in order to slow down the bus. The cyclist's motivation, however, is not relevant to this proceeding.

█ comments to the angry bicyclist were doubly unfortunate because of what happened subsequently. Viewed in the forward looking camera, the bicyclist is clearly in the vehicle lane rather than the parking lane when the bus passes him. The Union argues, with justification, that the bicyclist is violating New York State vehicle law at that point. But it is also clear that when █ passes the bicyclist there is no indication that the bicyclist is pulling over into the parking lane as █ testified. Yet, it is also not clear, despite the Employer's argument, that █ moves the steering wheel to the right in order, perhaps, in a negligent fashion, perhaps to brush against the bicyclist or to cause the bus and cyclist to be even closer. The Employer argued at the hearing that it does not claim that █ intentionally hit the bicyclist, and the videos certainly do not suggest such an intent. Nevertheless, this video clearly shows that, although the bicyclist is outside the parking lane, █ clearly tries to pass him, showing that an only very narrow space existed between the bus and the bicyclist.

█ then calls 911 stating that the bicyclist ran into the side of the bus. When a passenger stated that the bicyclist was down, █ stated that he "got what he wanted." There is, however, no reason to believe that the bicyclist was seeking a modest injury especially when he reflected his anger at being cut off.

█ subsequently tells a police officer who arrives at the scene that he had room to pass the bicyclist but the bicyclist apparently "swerved into the back of the bus." Thus, █ suggested not that the bus hit the cyclist but, rather, that the cyclist hit the bus. █ does not mention that he believed the cyclist was hitting the bus and lost his balance.

The video does seem to indicate that the bus is as far to the left as █ could probably safely go, and it also indicates, as already noted, that the bicyclist was also to the left of the

parking lane. It certainly suggests that there was not enough space between the bus and the bicyclist, that is, surely there was no "cushion."

There is also no evidence from this video at least, to indicate that the bicyclist pounded on the side of the bus and lost his balance. I do not, for instance, hear a series of bangs; instead there seems to be one and, presumably, this is the time the bus hits the bicyclist. The curbside camera is unclear as it is in the shadows but it also does not reveal any series of knocks by the bicyclist on the side of the bus. Moreover, [REDACTED] statement to the officer at the time does not support this allegation.

The videos do not reveal how the bicyclist comes into contact with the bus. At 5:01 just after leaving the bus stop the bus seems to pass the bicyclist indicating that there was at least some room between the two. The next view is of the bicyclist on the ground with no indication as to how he arrived in that location. Again, no series of knocks to the side of the bus can be heard, although perhaps there was one noise which suggests the bicyclist hit the bus or vice versa at approximately 4:56. The front door camera does not indicate the distance between the bus and the cyclist, although the bus is clearly close to the bicyclist when it begins to pass as the cyclist can clearly be seen through the windows at the front-side of the bus. At some point thereafter, perhaps at the midpoint to the end of the bus, there is presumably contact between the two then the bicyclist falls down. Again, there is no evidence that [REDACTED] turns the wheel to the right in order to bump the bicyclist. Indeed there seems to be only one "bang," presumably when contact is made between the bus and the bicyclist.

POSITIONS OF THE PARTIES

Employer first argues that although the Employer set out [REDACTED] disciplinary record, including three matters which occurred between November 2013 and January 2014, Snyder testified that her determination to discharge [REDACTED] was based on the February 12, 2014 incident and that “the disciplinary history did not motivate that decision.” Nevertheless, the Employer stresses that [REDACTED] disciplinary record is relevant in that it cannot be seen as a mitigating factor or any reason to lessen the effect of [REDACTED] “serious misconduct on February 12, 2014.” Employer brief page 4.

The Employer argues that [REDACTED] engaged in unsafe operation for the failure to exercise to care in that he disregarded his training to leave approximately a 3-4 feet “space cushion” when approaching a bicyclist. The accident occurred, it argues, because [REDACTED] was within inches of the bicyclist when the accident occurred. Kester testified that drivers were instructed that if they “could not maneuver his bus around a bicyclist or pedestrian while allowing 3-4 feet between the bike/person and the bus, he should stop the bus and wait until the bus could safely pass the bicyclist with adequate space.” Employer brief page 8. It stresses that [REDACTED] admitted on cross-examination that he “took a chance” when he attempted to pass the bicyclist, and this it argues, demonstrates that [REDACTED] knew he was required to leave a certain space between the bus and the bicyclist and that he “knowingly accepted a safety risk.”

The Employer also argues that [REDACTED] disregarded his training when he made comments to the bicyclist, especially the one referring to [REDACTED] running him over the next time. It also argues that after the accident [REDACTED] comment that the bicyclist “got his

wish” was also inappropriate and inconsistent with his training. These comments, it also argues, fulfilled the charge of “damaging the Authority’s reputation.”

The Employer also argues that even if the bicyclist should have been on the right side of the white line indicating the parking lane, [REDACTED] still attempted to pass the bicyclist “while leaving almost no space between the bus and the bicycle.” Employer brief page 10. Instead of either leaving a 3-4 foot space cushion between the bus and the bicyclist, or, alternatively, slowed the bus down or stop to wait for a safe situation, [REDACTED] attempted to pass the bicyclist, apparently unsuccessfully.

In response to the Union’s claim that the bicyclist was acting unlawfully under New York State Vehicle and Traffic Law Section 1234 because the bicycle was not being driven near the right hand curb or edge of the roadway, the Employer stresses that Section 1146 provides that “every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist upon any roadway and shall give warning by sounding the horn when necessary.” [REDACTED] did not sound the bus’ horn nor did he exercise due care.

At the hearing [REDACTED] testified that he believed the bicyclist was hitting or punching the right side of the bus as the bus passed just before the accident. This could not be determined either by Snyder or myself from the video. However, as the Employer argues, if the bicyclist was close enough to the bus to punch the bus, then [REDACTED] disregarded his training and operated the bus in an unsafe manner by driving so close to the bicyclist that the bicyclist was able to reach out and touch the bus.

There is no evidence to assume that the bicyclist swerved into the bus either intentionally or not and since it is clear and admitted that the bicyclist was to the left of the parking lane the bus had to be close to the bicyclist when the bus passed.

The Employer also argues that it is irrelevant whether the bicyclist or passengers heard his various comments it deems inappropriate because these comments were nevertheless made “in the presence of customers and to a member of the public.”

Finally the Employer argues that there are no mitigating factors to lessen its determination that discharge is appropriate in this case. The fact that [REDACTED] testified he had a cold and was not feeling well on February 12, 2014 could clearly not be deemed mitigating factors. It also notes that [REDACTED] was not a long term employee, having been employed for somewhat over nine years.²

The Union’s argument is that the discharge was not based on just cause primarily because [REDACTED] did not “strike” the bicyclist as stated in the February 13, 2014 letter of termination. J2; Union brief page 1. It argues that after the bicyclist pulled around the bus he began to ride “to the left of the line separating the road from the parking/bicycle lane to his right.” It argues that by doing so, the bicyclist was clearly “impeding traffic in violation of New York Vehicle and Traffic Law Section 1234 (a) requiring him to ride as close to the curb as possible.” Union brief page 8. Indeed, it argues that both the video and the Union exhibits 1-4 demonstrate that the bicyclist had begun to ride to the left of

² Snyder testified that at the time of the accident, [REDACTED] was approximately 4 minutes late, and, assuming that he knew that, he would also know that if he stopped or slowed down he would possibly go over the 6 minute mark when the Employer would take notice of his “lateness.” Since he had received a written warning for poor on time work in November 15, 2013, this may well have been on [REDACTED] mind. Such a concern, however, is obviously no excuse for acting in an unsafe manner.

the lane marker. It argues that [REDACTED] carefully pulled his bus passed the bicyclist and moved the bus to the left away from the bicyclist. [REDACTED] believed that the bicyclist 'was beginning to pull to the right, returning to the bicycle/parking lane he had been riding when he first spotted him on Main Street. Although the bicyclist had plenty of room to pull far to the right as after the right he chose to actually move towards the bus after it pulled alongside of him." Union brief, p. 11.

The Union also argues that the still photographs show that while the bicyclist was to the left of the white line and, while being passed by the front of the bus, he lifted his left hand off the handlebars and began to bang on the passenger side window. It further argues that the bicyclist lost his balance and fell away from the bus.

The Union stresses that due process was violated since the Employer acted with improper haste to discipline [REDACTED] when they had 14 days from the date of the infraction to file a charge under Section 6 (A) of the Collective Bargaining Agreement. It also notes, apparently correctly, that the Employer made no attempt to interview the passengers on the bus to determine what they saw or heard nor was there any questioning of the bicyclist.³

It argues in short, that the Employer failed to demonstrate that [REDACTED] "struck the bicyclist" but, rather, the illegally-riding bicyclist caused the accident by his dangerous actions, including banging on the bus' windows as it passed him.

³ Snyder stated that the cyclist was in the hospital having surgery.

DISCUSSION

Clearly the most serious allegation by the Employer is that [REDACTED] allowed the bus to hit the bicyclist. There is no argument that he acted intentionally, although Snyder testified that she believed [REDACTED] turned the wheel to the right as he was passing the bicyclist. That is not demonstrated by my review of the videos nor is there support for the Union's contrary belief that [REDACTED] was turning to the left to avoid the bicyclist at that time. The evidence suggests, on the other hand, that [REDACTED] was going in a fairly straight line when he passed the bicyclist. Indeed since the bicyclist was clearly to the left of the parking stripe, there was little room for [REDACTED] to go to turn the wheel to the left and, as noted, there is also no evidence that [REDACTED] turned the wheel to the right. Had he done so, he clearly would have hit the bicyclist.

First, I do not fault the Employer's investigation in this case for not interviewing the passengers, whether or not their names were known, or the bicyclist, who according to Snyder was in the hospital. The Employer relied on the videos alone, and their case will stand or fall upon them. Similarly, given the obvious difference between a bus and a bicyclist, it is not relevant that the bicyclist was also acting improperly by riding to the left of the parking lane white line. This is not a case such as Cole's Food Stores, 117 LA 616 (2002) submitted by the Union, where the Employer failed to interview the employee involved. It is obvious there was an obligation on [REDACTED] part to make sure he had sufficient space so as not to endanger the bicyclist.

Second, this is not a case where the Employee is being punished for an unwritten, unpublished or uncommunicated policy as in Donaldson Mining Employer 98 LA 471

(1988) also submitted by the Union. It is clear from the testimony of Kester, and unchallenged by the Union or the Grievant, the drivers were told to keep a cushion of approximately 3-4 feet between the bus and a bicyclist or pedestrian. Indeed, the Grievant did not say that he was unaware of such a policy which, after all, seems not only obvious but also covered by Section 1146 of the New York State Vehicle and Traffic Law.

Third, as noted earlier, the charge leveled at the hearing that [REDACTED] improperly cut off the bicyclist when he passed him to reach a bus stop is not supported by the videos. Moreover, as the Union argues, this charge does not appear to be part of the initial charges in the letter of termination. Union Brief page 25.

It is clear that when the bicyclist argued that [REDACTED] had cut him off, [REDACTED] responded that if he had done so, "he (the bicyclist) would have landed in a snowbank." Worse, [REDACTED] stated that perhaps next time he would hit him. He did not contest the impropriety of his sentence about hitting the bicyclist the next time but his excuse was that he was "tired and irritable" and had a cold.

Moreover, it does seem likely that [REDACTED] various comments, which he conceded were improper, were heard by either the bicyclist or passengers. After the accident, for instance, [REDACTED] responds when a passenger states that the cyclist is on the ground.

The two contested statements by [REDACTED] can be distinguished. His statement that "maybe I'll run you over next time" is of course clearly improper, and there is no reason to believe that the statement was not heard by at least the bicyclist if not passengers as well. The second statement, "he got his wish" is certainly much less of concern and is based on what is probably a fanciful assumption by [REDACTED]. The one clearly improper

statement does not, certainly by itself, add much weight to the Employer's argument for termination.

I do not find sufficient evidence from the video that the bicyclist was banging on the side of the bus, although it is possible that more than one noise can be heard on the curbside video or that the bicyclist fell when he lost his balance. It is clear that the bus passes the bicyclist until at some point beyond the passenger door.

In an event, as the Employer argues, the bicyclist, even if he was still to the left of the parking lane, was too close to the bus whether he was "punching" the bus or not. I note, initially, that [REDACTED] told the patrol officer that the bicyclist must have swerved into the back of the bus. He did not claim that the bicyclist pounded on the side of the bus or that he may have lost his balance by doing so. I also do not find that [REDACTED] turned the wheel in order to hit or frighten the bicyclist but, on the other hand as he testified, he believed he could go fairly straight and pass the bicyclist safely. By doing so, however, he obviously did not leave a sufficient cushion between the bus and the bicyclist.

This action, not cutting off the bicyclist and not [REDACTED] one improper statement, lie at the center of this case.

It's at this point that we must look again at [REDACTED] testimony. He noted that as he pulled away from the bus stop he noticed that the bicyclist was on the road but not in the parking lane as shown in the video. [REDACTED] stated that he passed the bicyclist and he did not hit him with the bus. He knew that the bicyclist "was in my lane," and he was aware, he stated, that he had to stay behind the bicyclist, but he **believed** that the bicyclist pulled in to the right, that is, into the parking lane, although this is not shown in the video.

As the Union stresses, at the time of impact the bicyclist was apparently still to the left of the yellow line. ■■■ testified that the bicyclist was "way out of the parking lane," but ■■■ believed he was pulling back to be closer to the shoulder of the road. ■■■ also noted that "I was running late." In other words, ■■■ believed that the bicyclist was pulling back into the parking lane, although this is not indicated in the videos. ■■■ stated that he did not use his horn because he did not want to scare the bicyclist. Instead, ■■■ thought he would "take my shot and get on down the road."

It is, finally, not clear how the bicyclist fell down. Either he hit the bus, because the bus was too close or he swerved into the bus or, alternatively, he was hitting the side of the bus and lost his balance. In any case, whichever version is believed, ■■■ was driving too close to the bicyclist. He "took his shot," but it was not a reasonable or proper "shot."

There is certainly just cause for discipline in this case but not for termination. Concededly, this is a difficult determination. ■■■ acted in an unprofessional and unsafe manner, and his personal problems that day are clearly no excuse. He is not a long-term employee whose penalty should be mitigated on that basis. On the other hand, he has worked for the Employer for nine years. Reinstating him, but without back pay is a substantial penalty, and ■■■ should understand that the period for which no back pay is awarded shall be deemed a period of suspension, a matter that places him in a serious position in relation to progressive discipline. Given all the circumstances, ■■■ should be returned to work within one week of the receipt of this award but without back pay or seniority credits.

EXHIBITS

Joint

1. Contract
2. Termination Letter
3. First Level
4. Level 2 Appeal

Company

1. Video
2. Discipline 1/3/14
3. Discipline 11/19/14
4. Appeal 12/13/13
5. Appeal – on time work – 11/15/13
6. Training documents 5/05
7. In-service training record 3/6/10
8. In-service training record 11/6/10
9. In-service training record 9/29/07
10. In-service training record 3/3/12
11. In-service training record Spring 2013
12. Customer Service – power point of Spring 2013

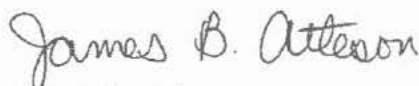
Union

1. Picture 4.04.59
2. Picture 4.05
3. Picture 4.05.02
4. Picture 4.05.03

AWARD

The Grievant, [REDACTED] is to be reinstated within one week of the receipt of this award but with no back pay or seniority benefits.

Sincerely,



James B. Atleson

Arbitrator

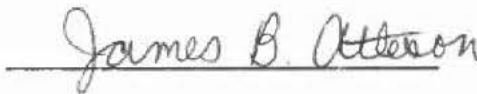
State of Maine

County of Cumberland

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

8/27/14

Date



James B. Atleson
Arbitrator