STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS

BEFORE SANDRA SMITH GANGLE, ARBITRATOR

In the Matter of the Arbitration between	)	
AMALGAMATED TRANSIT UNION, LOCAL 1575, Union, and **GOLDEN GATE BRIDGE, HIGHWAY & TRANSPORTATION DISTRICT)** Employer,	)	**Stephen Ware Discharge Grievance**
	)	**CASE NO: ARB 09-0335**
	)	**OPINION AND AWARD**

Hearing Conducted: August 10 and 11, 2010

Representing the Employer:
DIANE MARIE O'MALLEY, Attorney at Law
MARK C. GABEL, Attorney at Law
Hanson Bridgett LLP
425 Market Street, 26th Floor
San Francisco, CA 94105

Representing the Union:
EILEEN M. BISSEN, Attorney at Law
Neyhart, Anderson, Flynn & Grosboll
44 Montgomery Street, Suite 2080
San Francisco, CA 94104

Arbitrator:
SANDRA SMITH GANGLE, J.D.
Sandra Smith Gangle, P.C.
Arbitrator / Mediator
P.O. Box 904
Salem, OR 97308

Date of Decision: November 9, 2010

BACKGROUND

This matter came before the arbitrator pursuant to a Memorandum of Understanding ("MOU") between Golden Gate Bridge, Highway & Transportation District, Bus Transit Division, (hereafter "the Employer" or "the District") and Amalgamated Transit Union, Local 1575 (hereafter "the Union") for the term of March 1, 2008 through February 28, 2014. *Jt. Ex. No.1.*

A grievance was filed by the Union on or about October 10, 2009, following the Grievant's termination. The parties, having been unable to resolve the matter through the contractual grievance procedure, agreed to arbitrate the dispute. The parties mutually selected Sandra Smith Gangle, J.D., of Salem, Oregon, from a list provided by California Department of Industrial Relations, State Mediation and Conciliation Service, as the labor arbitrator who would conduct a hearing and render a final and binding decision.

The arbitrator conducted the hearing on August 10 and 11, 2010 in a conference room at 185 N. Redwood Dr., San Rafael, California. The parties were thoroughly and competently represented by their respective attorneys throughout the hearing. The Employer was represented by Diane Marie O'Malley and Mark C. Gabel, Attorneys at Law, Hanson Bridgett LLP, San Francisco, CA. The Union was represented by Eileen Bissen, Attorney at Law, Neyhart, Anderson, Flynn & Grosboll, San Francisco, CA.

Neither party objected to procedural or substantive arbitrability of the grievance. The parties were each afforded a full and fair opportunity to present testimony and evidence in support of their respective positions. A certified court reporter, Lisa P. Galli, of

Professional Reporting Services, Inc., Walnut creek, CA, was present throughout the hearing and made a record of the proceeding, which was subsequently reduced to a transcript and provided to the arbitrator and both attorneys.

The Employer went forward with its case-in-chief first, as the grievance involved a disciplinary matter and the Employer bore the burden of proof. The Union then presented its case-in-chief and the Employer had the opportunity to rebut. The following witnesses appeared and testified under oath or affirmation and were subject to cross-examination:

(a) ***For the Employer:*** Richard Hibbs, *Director of Bus Operations, District*; Charlie Van Leuwen; Cassidy Bennett, *Safety & Training Supervisor, District*; Clifford Koch, *Safety & Training Superintendent, District*; Teri Mantony, *Deputy General Manager, Bus Division, District*.

(b) ***For the Union:*** Ray Messier, *President/Business Agent, ATU Local 1575*; Stephen Ware, *Grievant*, Kenneth W. Sims; Richard Hibbs, *Director of Bus Operations, District (adverse witness).*

At the close of the hearing, the parties elected to present written briefs of final argument to the arbitrator thirty (30) days after receipt of the hearing transcript from the court reporter. Upon receipt of the attorneys' briefs by e-mail transmission on October 11, 2010, the arbitrator officially closed the hearing and took the matter under advisement. She has weighed all the testimony and evidence offered by the parties at the hearing and has given careful consideration to the arguments, which were thoroughly and cogently presented by the attorneys, with supporting legal authority, in reaching her decision.

STATEMENT OF THE ISSUE

The parties stipulated to the following statement of the issue in this matter:

Whether there was just cause to discharge the Grievant, Stephen Ware and, if not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 7. DISCIPLINE

1. . . . An employee will not be disciplined or dismissed nor will entries be made against an employee's record without sufficient cause, and the employee shall be furnished with a full, complete and clearly written statement of the charges made against him or her. . . .

ARTICLE 8. DISCIPLINE INVOLVING REMOVAL FROM SERVICE OR DISMISSAL

1.The causes for which a driver may be discharged shall include the following:

. . . . .

F.Physical violence or serious threat of physical violence.

. . . . .

ARTICLE 11. ARBITRATION

. . . . .

3.The arbitrator shall be requested to expedite his (sic) decision, as the parties normally expect a decision to be issued within thirty (30) calendar days after conclusion of the hearing. No arbitrator shall have the power to change, modify or amend any provision of this Memorandum of Agreement. . . . .

ARTICLE 53. ACCIDENT AND INCIDENT REPORTS, DRIVER'S DAILY LOGS

1.Operators will be required to promptly report all accidents or incidents by radio to the Dispatcher on duty.

. . . . .

3.Operators involved in an incident, which requires a report, must submit the incident report to a designated District official within twenty-four (24) hours from the time the incident occurred. . . .

ARTICLE 65. MANAGEMENT RIGHTS

All matters pertaining to the management of operations, including . . . . discharge or discipline for proper cause, are the prerogatives of the District, subject to such limitations as are set forth elsewhere in this Agreement.

Jt. Ex. No. 1

STATEMENT OF THE FACTS

The undisputed facts of the matter are as follows:

The District operates Golden Gate Transit, a public transit system, on routes in the city of San Francisco, Marin County and other areas. The Union represents employees of the transit system, including bus operators.

The Grievant was hired in April of 2008 as a bus operator. He underwent a ten-week training program, which involved behind-the-wheel instruction and classroom training. A portion of the classroom training involved customer relations.

The Grievant began driving on routes with passengers in late July or early August of 2008. Between that time and September 27, 2009, he received no discipline. During the same period, the District received three letters from passengers who had ridden on the Grievant's bus, commending the Grievant for his courteous service.

In March of 2009, a new digital fare-machine system, called Odyssey, was installed on all District buses. Operators were trained on the various procedures for using the new machines, including how to charge, collect and record passengers' fares.

One of the new procedures involved the issuance of transfers. Previously, an operator would issue and punch a paper transfer at such time as a passenger requested

one, either upon initial boarding or upon exiting the bus. According to the new process, a transfer would be issued electronically by the fare machine. The passenger was expected to request the transfer upon initial boarding, for proper record-keeping by Odyssey.

Some problems arose after the new fare machines were placed in operation. One of the problems involved issuance of transfers. Many passengers forgot to request their transfers upon boarding the buses, but continued to ask for them upon exiting, in accordance with their habitual practice. The District authorized operators to issue "courtesy transfers" electronically, until passengers adjusted to the correct procedure.

As time passed, the District took steps to educate passengers on the new fare procedures and to persuade them to change their old habit regarding transfers. On May 14, 2009, the District's deputy general manager, Teri Mantony, issued a notice to all District employees, in which she announced a tightened enforcement policy, to become effective on May 19. The notice provided as follows, in relevant part:

> As promised, we are ready to start allowing the farebox to do its full job this coming Monday. That includes asking passengers to handle their own cash, letting the farebox validate transfers, and requiring customers to request their transfers upon boarding to assure that additional travel time is not granted when a passenger deliberately waits to ask for the transfer. . . .
>
> *Exhibit E-18*

In an earlier version of the notice, Ms. Mantony had indicated that she anticipated problems with enforcement of the new transfer policy, including possible confrontations between passengers and drivers who "operate by the book". *See Exhibit U-6.* That language was left out of the May 14 notice, however.

A few days later, on May 18, 2009, a notice was posted at passenger-loading stations announcing that the new rules were being fully enforced. Specifically referenced was the requirement that customers request transfers upon boarding, and the following statement:

> We will no longer issue the courtesy transfer once the bus has left your boarding point.
>
> *Exhibit U-5, see Tr. 343.*

Transit brochures that explained the new fare-processing rules were available on all buses. The following text, relating to the new transfer procedure, appeared on p. 9 of the brochure that was in circulation between September 13 and December 12, 2009:

> **Transfers Within the GCT System**
> Passengers may transfer between GCT buses or between GCT buses and Golden Gate Ferries with the following restrictions:
>
> 1. Travel must be in the same direction within the date-time period indicated on the transfer.
> 2. Transfers are issued by farebox only at time fare is paid. Advise driver of your destination and mention to transfer to another bus or ferry when boarding. Transfers are based on fare and ultimate destination. . . . .
>
> *Jt. Ex. 2, p. 9*

On Sunday morning, September 27, 2009, an event occurred that ultimately led to the Grievant's discharge. A 19-year-old male passenger, Charlie Van Leuven, boarded the Grievant's Bus #80 in San Francisco and told the Grievant his destination was San Rafael. The last time Van Leuven had been on a bus was when he was in high school in 2008. He did not have quite enough money to pay the full fare for his stated destination, but the Grievant accepted the amount he deposited in the fare box.

When Van Leuven boarded the bus, he was carrying a glass jar containing some clear liquid. The Grievant told Van Leuven he could not bring the liquid onto the bus.

Van Leuven exited the bus and drank the liquid, then re-boarded the bus and took a front seat across from the driver's seat.

When the bus arrived at the transit station in San Rafael, Van Leuven got up and prepared to exit. He then asked the Grievant to give him a transfer, so he could go on to Fairfax, which is in the same fare district. The Grievant denied the request, telling Van Leuven he should have requested the transfer upon boarding the bus in San Francisco. Van Leuven objected, saying all the Grievant had to do was push a button. The Grievant then directed Van Leuven to read the policy on issuance of transfers, and he pointed to the transit handbooks, which were available in a plexiglass container by the bus door.

Van Leuven responded, "F--- you, man" then descended the steps toward the door. *Tr. 68:22.* While exiting the bus, he threw an object in the direction of the Grievant. The Grievant did not know what the object was, but believed it could be the glass jar that Van Leuven had been carrying. He also believed that Van Leuven had called him an offensive name.

The Grievant immediately exited his driver's seat and followed Van Leuven out the door of the bus. He pursued Van Leuven along the platform beside the bus and, upon reaching Van Leuven, made physical contact with him. A scuffle ensued between the two men. During the scuffle, both men fell onto the pavement and against a metal bench. After a minute or so of struggle between the men, two bystanders approached, told the men to stop and separated them.

The Grievant returned to the bus, took his driver's seat and waited while new

passengers entered the bus. He then continued on his route. Meanwhile, Mr. Van Leuven crossed the street and made a phone call to his father, to ask for a ride home to Fairfax.

The Grievant did not call the security guard who was on duty at the San Rafael transit station that morning. Also, the Grievant did not report the incident to his dispatcher by radio or to his supervisors by written report.

On or about October 6, 2009, Deputy General Manager Mantony received a letter from an attorney representing Mr. Van Leuven. The lawyer alleged that the operator of a bus traveling between San Francisco and San Rafael had committed "an aggravated assault and battery" on his client on September 27. *Exhibit E-10.* He alleged that Van Leuven had been physically injured as result of the assault and was being treated for those injuries. He enclosed copies of reports from a medical clinic and a chiropractor and photos of his client, which showed a scrape on Van Leuven's upper chest and bruises on his arms. *Exhibit E-10A.* The lawyer demanded a cash settlement of $20,000 from the District to compensate Van Leuven for his injuries. He also demanded that the District discipline the responsible bus operator and document same to Mr. Van Leuven. *Ex. E-10.*

Ms. Mantony promptly contacted Operations Manager Richard Hibbs and asked him to investigate the claim. Hibbs retrieved the videotapes from cameras that had been running on all buses that had operated between San Francisco and San Rafael on September 27, 2010. One of those buses was #80, which the Grievant had been driving. Hibbs found two tapes from bus #80 that contained still pictures, taken a few seconds apart, showing portions of the events that had apparently occurred during the event that

Mr. Van Leuven's lawyer reported in his letter. An audio tape from inside bus #80 was also retrieved and contained some muffled sounds of voices that had been recorded during the event. Hibbs made a disk of the relevant portions of both of the video tapes and the audio tape. *See Exhibit E-11.*

Hibbs subsequently notified the Union that the Grievant had apparently been involved in an incident that was likely to lead to discipline. He arranged an investigatory meeting to learn the Grievant's version of the facts. He provided the lawyer's letter and the recordings from Bus #80 to Business Agent Ray Messier, for his review.

At the meeting, the Grievant did not deny that a confrontation and scuffle had occurred between himself and a young man on his bus on September 27, 2009. He explained that the young man had thrown an object at him, which he had believed to be a glass jar, and that the item had hit him in the chest or shoulder. He admitted he had left his seat and pursued the man off the bus, intending to talk to the man to find out what had been thrown at him and to get the man's name. He accepted responsibility for the scuffle that had ensued and said he was sorry. *Tr. 47-49.* He did not view the tape.

Mr. Hibbs subsequently reported back to his supervisor, Deputy General Manager Mantony, and a decision was reached to issue a notice of intent to dismiss the Grievant. The document, which was provided to the Grievant, stated as follows, in pertinent part:

> **Notice of Intent to Record Discipline:**
> Based on the facts presented, it is the intention of Golden Gate Transit to make an entry to your record as reflected below:
>
> **Violation(s):** 'Bus Operator Conduct While On Duty' – Article 8.1F of the MOU: Physical Violence

Observation: Operator Ware got off the bus and engaged in an unwarranted physical attack on a passenger on the platform at the San Rafael Transit Center. Operator Ware did not report the incident as required by radio, nor did he complete an incident report.
Discipline: Dismissal.

Exhibit E-6.

The Union subsequently grieved the dismissal. The matter proceeded through the grievance process and is before the arbitrator in this matter.

POSITIONS OF THE PARTIES

The District: The District contends it had sufficient cause, pursuant to the MOU Articles 7(1) and 8(1)(F), to discharge the Grievant for attacking passenger Van Leuven on September 27, 2009. The Grievant's conduct in leaving his seat, pursuing Mr. Van Leuven, then attacking and causing physical injuries to him, had been violent and was unwarranted and inexcusable.

The District asserts that the Grievant initiated the encounter with Mr. Van Leuven when he refused to give the passenger a transfer, although he had been trained to issue a courtesy transfer if a passenger requested one upon departing from the initial route. The District does not deny that Van Leuven responded angrily to the Grievant's refusal, including using an offensive word, and that he tossed a transit brochure in the direction of the Grievant. The Grievant, however, escalated the situation into a violent confrontation when he left the bus. The entire episode justified his termination.

The Grievant should not have left his seat, pursued Van Leuven off the bus and attacked him physically. The Grievant had options available to him that he failed to

pursue. He could have shut the door as Van Leuven left. He could have called the security guard who was on duty at the transit station to assist him. He could have called the dispatch office and requested the intervention of a supervisor. Instead, he escalated the situation improperly, turned it into an aggressive attack and caused injuries to Van Leuven, ultimately leading to a claim against the District for compensatory damages.

The Grievant's conduct was further aggravated in that he failed to report the incident by radio and he did not file a written incident report, as required by the MOU. Also, he never showed remorse or admitted that his attack on Van Leuven was wrongful.

The District contends that arbitrators have routinely upheld terminations involving assaults on passengers by transit drivers, even where the passengers provoked the assault and their unions argued that the drivers' conduct amounted to self-defense. The District offered a number of arbitration awards to support its theory that the Grievant's discharge was based on facts similar to those cases and should be upheld.

The Union: The Union contends the District failed to prove, by clear and convincing evidence, that it had just cause to discharge the Grievant.

First, the District failed to demonstrate that the Grievant had been given notice that, if he left his seat and exited the bus under the circumstances that arose on September 27, 2009, he would be terminated. Although the Grievant had received some training in customer relations, he had not been trained in how to deal with a confrontation with an angry passenger who assaulted him by throwing something at his person.

The Union also denies that the Grievant engaged in any "unwarranted physical

violence", as alleged. The Grievant left his seat because he believed he had been hit by something dangerous and he wanted to get the name of the perpetrator. He never intended to beat up Mr. Van Leuven. The evidence does not show that he punched, slapped or kicked Van Leuven during their encounter. He merely attempted to tap Van Leuven on the shoulder and ask for his name and information. Yet, when he reached out to touch Van Leuven, the young man used his elbow to knock the Grievant down to the pavement and a scuffle ensued. Van Leuven's report of what transpired is exaggerated and lacks credibility. The Grievant's version is credible and should be accepted as factual. It shows that the Grievant was not the aggressor.

The Union further asserts that there was procedural irregularity in the District's imposition of discipline. The District failed to consider the Grievant's overall work record, which included three letters of commendation from passengers who expressed appreciation for the Grievant's courteous treatment in difficult situations.

Also, the Union asserts the District failed to apply discipline to the Grievant in an even-handed manner. Specifically, another District bus operator, K.S., had been involved in a confrontation with a passenger under a nearly-identical set of circumstances to those that occurred on September 27, 2009, yet K.S. is still employed with the District. Therefore, the Grievant's discharge was discriminatory and should be overturned.

Finally, the Union asserts that, even if the Arbitrator should find that the Grievant acted inappropriately in dealing with Mr. Van Leuven, there were mitigating circumstances that should have warranted a lesser penalty than discharge. Specifically,

the Grievant had not been specifically trained on how to deal with aggressive or abusive passengers, especially one who throws an object at his chest, while he's behind the wheel. Also, the three commendations from passengers demonstrate that the Grievant was not a violent person. Finally, the Grievant demonstrated that he has learned from the incident. He has taken proactive steps on his own initiative to seek counseling in how to deal appropriately with his anger. His responsible efforts to change his behavior in the future show that he would be unlikely to repeat his impulsive response to Mr. Van Leuven if he were attacked by another passenger.

For these reasons the Union asks the arbitrator to find that there was not sufficient cause for the discharge. The arbitrator should grant the grievance and reinstate the Grievant with full backpay or, if appropriate, order a reduced penalty.

DISCUSSION

The arbitrator's responsibility is to interpret and apply the parties' collective bargaining agreement to the facts of the grievance. In this case, the agreement is called a Memorandum of Understanding (MOU).

The agreement provides, in Article 7, that discipline or discharge will only be issued against an employee for "sufficient cause". *Jt. Ex. #1*. In Article 53, the standard is referenced as "proper cause". *Id.* The parties do not dispute that they intended the phrases "sufficient cause" and "proper cause" to have the same meaning as "just cause", which is the disciplinary standard most commonly found in collective bargaining agreements.

Many arbitrators have defined just cause by referring to the "seven tests" or principles that Arbitrator Carroll R. Daugherty devised for determining its essential elements. *See, for example, Enterprise Wire Co., 46 LA 359 (1964).* In recent years, however, arbitrators have moved away from a mechanical implementation of the seven Daugherty tests. While the majority continues to rely on the same principles, they have reduced the number of tests to four. Arbitrator Joseph Duffy articulated the four essential requirements of just cause in a 2006 discharge case. *See, Washington Federation of State Employees and Washington State Department of Social & Health Services , AAA Case No. 75 390 459 05 (Arb. Joseph Duffy, June 2, 2006).* He said the Employer must prove, through clear and convincing evidence, all of the following:

1. That the grievant had notice of the rules to be followed and the consequences of non-compliance;
2. That the grievant engaged in the alleged misconduct;
3. That there was procedural regularity in the investigation of the misconduct; and,
4. That the Employer applied discipline in a reasonable and even-handed manner, including using progressive discipline when appropriate.

Id., at 13; see also, Lankford et al, "Did He Do It?: Employer Handbook 'Just Cause' Meets the Collective Bargaining Agreement", U of Oregon LERC Monograph #17, 17,20.

This arbitrator agrees with Arbitrator Duffy's analysis. First, the clear-and-convincing standard of proof has long been applied by the majority of arbitrators in discharge cases, where misconduct of a serious and potentially criminal nature is alleged, such as assault. *See, Elkouri & Elkouri, How Arbitration Works (6th Ed. 2003) at 950-51.* Not only has the grievant lost his or

her livelihood in such a case, but a stigma has attached to the grievant that will likely have a detrimental effect on his or her future employability. Secondly, the arbitrator agrees that all the elements of Arbitrator Daugherty's seven-step analysis for determining whether an employer had just cause for discharging a grievant are included within the four-step analysis.

The arbitrator will now proceed to apply the four tests to the facts of the instant grievance.

I. *Did the Employer provide notice to the Grievant of the rules to be followed and the consequences of non-compliance?*

The Employer cited "Article 8(1)(F) of the MOU: Physical Violence" as the reason for the Grievant's discharge and asserts that the Grievant committed an "unwarranted physical attack" on passenger Van Leuven, then failed to report it to District management. A specific statement of charges, as required by Article 7(1), provided as follows:

> Operator Ware got off the bus and engaged in an unwarranted physical attack on a passenger on the platform at the San Rafael Transit Center. Operator Ware did not report the incident as required by radio, nor did he complete an incident report.
>
> *Exhibit E-6.*

Section 8(1)(F) of the parties' Memorandum of Understanding provides that "physical violence or serious threat of violence" may justify the penalty of discharge. An "unwarranted attack on a passenger", if proven, would be an example of such prohibited "physical violence".

The evidence showed that Grievant was advised during his initial training that he should not engage in confrontations with passengers. *Tr. 219:6, 220:11.* In any fare dispute, he should strive to "de-escalate the problem", avoiding a fight. *Tr. 220:17-23.*

The Grievant's training manual contains the following protocol for avoiding being

drawn into a verbal or physical fight when dealing with difficult customers:

- Remain polite:
- Clearly state the Company policy;
- Do not get drawn into a discussion of policy or your actions;
- If the customer persists, call the dispatcher; Ask to have the offender removed.

Exhibit E-13, Section 11.

The training manual also includes, in the Human Resources section, a two-page document entitled "Violence in the Workplace", which provides in pertinent part:

The District is committed to preventing workplace violence and to maintaining a safe work environment. Given the violence in society in general, The District has adopted the following guidelines to deal with intimidation, harassment, or any other threats of violence that may occur in the workplace.

. . . . .

If the District's investigation determines that an employee is responsible for threats of violence or any other conduct that is in violation of these guidelines, the District will take prompt disciplinary action [that] may include immediate termination.

. . . . .

- Employees must not engage in any conduct that threatens, intimidates or coerces another employee, a customer, vendor, or member of the public at any time. . . .

- Employees should report all threats of violence, both direct and indirect, as soon as possible to their supervisor or to any other supervisor. This directive includes threats by employees, as well as threats by members of the public. In making this report, employees should be as specific as possible.

- Employees should report all suspicious individuals or activities to a supervisor as soon as possible. Employees should not place themselves in peril. If employees see or hear a violent commotion, they should not attempt to see what is happening. In such circumstances, employees are to call 9-1-1 immediately and take appropriate protective measures.

- Employees should cooperate fully with security, law enforcement and medical personnel who respond to a call for help. . . . .

Exhibit E-13, Human Resources Section; Ex. E-4.

Further, Article 53(1) of the parties' MOU requires all employees to report "incidents" to Dispatch by radio. Article 53(3) requires them to file a written report within 24 hours of any "incident". The MOU is clear notice to the Grievant of those requirements. The word "incident" is defined in the Training Manual as follows:

"This would include, but is not limited to, ill passengers, threats of violence toward the Operator, fights between passengers and the removal of any passenger for any reason.
Exhibit E-13, Section 5, p. 13

The arbitrator finds that the Grievant had notice that he could be disciplined, up to and including discharge, for an unwarranted physical attack on a passenger. He had been notified that he should avoid confrontations and he knew he was obliged to report "incidents", such as threats by passengers, by radio to Dispatch and by written report.

There is no evidence, however, that the Grievant was ever notified he could be disciplined for getting off the bus. In fact, District officials testified at the hearing that drivers are not prohibited from leaving their seats and exiting the bus, if they need to use a rest room, assist a passenger, or defend themselves in an attack by a passenger. *Tr. 49, 21-24; 223: 21.*

II. Did the Employer prove that the Grievant committed the alleged misconduct?

The answer to this question appears at first blush to be simple. A video-taped record, kept by two cameras on the Grievant's bus on September 27, 2009, showed that the Grievant left his seat after a discussion with Mr. Van Leuven, pursued Van Leuven outside the bus for a distance of approximately one bus-length and became involved with the young man in a scuffle, upon reaching him from behind. The two men are seen fallng

to the ground, then disappearing behind an obstruction and out of the camera's view for a few seconds, then returning into camera vision, still scuffling. By then, the Grievant was up on his feet, but bending over, and Van Leuven was still down on the pavement, grabbing the Grievant's legs. Two bystanders are seen approaching and separating the men. *See Exhibit E-11.* The entire incident appears to have taken about two minutes.

Those portions of the video do not tell the whole story, however. The evidence, taken as a whole, shows that the Grievant and Mr. Van Leuven were initially engaged in two verbal conflicts when Van Leuven first boarded the bus in San Francisco. Each of those conflicts, as well as a third conflict that occurred upon arrival in San Rafael, had resulted from the Grievant's enforcement of rules or policies of the District with which Van Leuven was unfamiliar, because he wasn't a regular bus rider. The communication between the two men was cooperative at first, but Mr. Van Leuven eventually became angry and his anger was clearly directed at the Grievant.

The initial conflict, in San Francisco, involved a glass jar with liquid inside. The Grievant notified Van Leuven that he could not bring liquid onto the bus, so Van Leuven went outside and drank the contents, then re-boarded. Van Leuven then told the Grievant his destination was San Rafael and the Grievant told him the fare. Van Leuven said he did not have enough money, but the Grievant allowed Van Leuven to ride anyway for a reduced fare, as he had been trained to do.

Van Leuven held his glass container in his hands throughout the trip to San Rafael. The early portion of the video shows him passing the container, approximately one litre in

size, back and forth between his right and left hands. Then, when the bus arrives in San Rafael and Van Leuven leaves his seat to disembark, he drapes his coat over his left arm and left hand, which is still holding the glass jar. The Grievant, whose seat has been across from Van Leuven's seat throughout the trip, would have observed Van Leuven passing the jar back and forth, then covering it with his coat.

Van Leuven then asked the Grievant for a transfer, to allow him to travel on to Fairfax. The Grievant denied Van Leuven's request, informing him that District policy required that the transfer be requested upon initial boarding in San Francisco. Hearing that response, Van Leuven asked how he would get to Fairfax, since he didn't have any money left. He indicated he knew the Grievant could issue a transfer by pushing a blue button on the fare machine. The Grievant continued to refuse the request, however, directing Van Leuven to read the transfer policy in the transit manual which was in a container near the door.

Although the sounds on the audio recording are incomplete and muffled, the arbitrator could hear bits and pieces of the men's conversation. Their tone was civil, in spite of its adversarial nature. There was no yelling by either the Grievant or Van Leuven. Van Leuven demonstrated anger through words and actions, however. Van Leuven admits he said, "F--- you, man", to the Grievant, although the Grievant thought Van Leuven had called him a name. Also, the video shows Van Leuven waving his arm in the air, indicating frustration. Then, while descending the steps, Van Leuven is seen throwing an object behind him and then it disappears. The object is not visible on the

floor of the bus in the frames that follow the toss. The parties agree that the object was a transit manual and that it hit the Grievant in the chest.

The Grievant testified at the hearing that he thought the passenger had thrown the glass jar at him. He was startled and felt threatened. His exact testimony was as follows:

"[Van Leuven] seemed irate. He called me something that --- it was unintelligible. . . . it sounded like he called me some type of a name. . . . . And then he threw this guide at me and it hit me in the chest. It startled me. I thought he threw the jar at me."
Tr. 402, lines 10-18.

The video then shows that the Grievant immediately rose from his seat and followed Van Leuven down the steps. He explained his flight as follows:

"I got out of the seat because as the passenger exited the bus, he spun around and I thought he was going to, again, throw the jar at me. And I didn't want to be in the confinements of the driver's compartment."
Tr. 404, lines 3-6.

"…And the reason I got off the bus wasn't to beat up Mr. Van Leuven. That's not the reason I got out of my seat. I got out of my seat because I felt threatened there."
Tr. 442, lines 12-15.

The arbitrator finds that the evidence does not prove the Grievant initiated any unwarranted conflict with Mr. Van Leuven prior to his leaving the bus. He correctly stated District policy to Van Leuven on three separate issues – the need to empty his glass jar of its liquid, the need to pay a fare for travel to San Rafael that happened to take all of the passenger's money, and the requirement that a transfer needed to be obtained upon initial boarding.

It was Van Leuven who appeared somewhat agitated, gradually became angry and initiated an assault on the Grievant. First he said, "F--- you, man", then he threw a transit

brochure at the Grievant, hitting him. When the Grievant left his seat and pursued Van Leuven, he reasonably felt threatened because his personal space had been violated and he had been struck by an object that he believed was a glass jar and could be dangerous.

The District points out that, if the Grievant had given Van Leuven a "courtesy transfer", the throwing of the transit manual would not have taken place. That may be a correct assumption. However, the Grievant was not required to issue a courtesy transfer. He did nothing wrong by refusing Van Leuven's request. In fact, the evidence shows the District had discouraged the issuance of courtesy transfers since mid-May, more than four months earlier, even though Deputy General Manager Mantony had acknowledged that there could be confrontations if a driver "operate[d] by the book", and refused to issue a transfer when a passenger made a belated request upon disembarking. *See Ex. E-18, U-6.*

Further, the evidence shows the District had given the Grievant somewhat conflicting instructions during customer-relations training about how to handle situations like the one that arose on the bus with Van Leuven. First, trainer Cassidy Bennett testified that she routinely instructed drivers that they should "never get out of their seat to confront a passenger in an argument". *Tr. 221: 13-15.* She said drivers were advised not to get "drawn into a verbal or physical fight", but to "remain polite, state the company's policy, . . . don't get out of your seat in a confrontation, don't make it personal. . ." *Tr. 241:17-24.* But she also acknowledged that bus operators are "allowed to defend themselves if they're assaulted … [they're] not expected to sit there and get beat up without defending [themselves]." *Tr. 223:21-22.* "To protect yourself, stand up and get them away from

you, push them away from you. . . Once you are out of harm's way, when the passenger gets off the bus, you simply close the doors." *Tr. 224:6-9, 12-14.* The Grievant recalled Ms. Bennett's advice as emphasizing getting out of harm's way by getting out of the driver's seat area. He testified she had told them this:

"[T]he driver's compartment is where you are most vulnerable. And she said 'always protect yourself in that situation or get out of it. You know, if you get under attack, that's the last place you want to be'." *Tr. 471:20-24.*

Supervisor Hibbs admitted at the hearing that, when Mr. Van Leuven threw the transit guide at the Grievant, he committed an "assault" on the Grievant. *See. Tr. 148, lines 15-16.* He also said the Grievant had had the right to defend himself in that situation. He acknowledged that the Grievant had not been specifically trained as to how to accomplish such self-defense, however. *See, Tr. 153:1-8.*

The arbitrator concludes, from the testimony of both Ms. Bennett and Mr. Hibbs, that, once the Grievant felt genuinely threatened, he had the right to get out of his seat and get off the bus. His goal in leaving had been twofold – to find out what had been thrown at him and to get the name of the man who had thrown the item. The arbitrator finds that, under the circumstances, that goal was reasonable and in keeping with his training. He did not intend to attack Van Leuven or threaten to harm him.

What happened next went beyond the Grievant's original intention, however. As shown by the video, Mr. Van Leuven walked quickly away from the door of the bus and the Grievant hurried behind him, a distance about the length of the bus, to catch up.

The Grievant testified that he tapped Van Leuven on the shoulder, saying, "Please

stop" and "Turn around", but Van Leuven responded by turning his body sharply to the left and then jabbing the Grievant in the ribs with his elbow. That action caused both men to lose their balance and fall toward a metal bench. *Tr. 405:2-25.* The Grievant acknowledges that they struggled back and forth at the bench and that he managed to take the jar away from Van Leuven, because he was afraid Van Leuven would throw it at him. He then pushed Van Leuven away from him and moved backward towards the bus. *Tr. 406:4-18.* Van Leuven testified quite differently. He said the Grievant initially grabbed his neck and shoulder and held him tightly in a "sleeper hold". *Tr. 72: 10-22.* Grievant "threw him" against the bench, causing injuries to his hip, elbow and shin. *Tr. 73:4-10*.

The Grievant's version of the story is more credible than Van Leuven's, because it is more consistent with the video pictures. The men clearly engaged in a scuffle, then fell to the left out of the camera's view. The Grievant then is visible backing away from Van Leuven and attempting to stand up, but Van Leuven grabs the Grievant's legs and pulls him back down.

Van Leuven acknowledged that he tried to "tackle" the Grievant by "grabbing him behind his knees". *Tr. 73:15-25.* He contended the Grievant "threw [him] back down" at that point. *Tr. 74:3-4.* The video does not show such a movement, however.

Eventually, the two men were physically separated by two bystanders and they moved away from each other. Testimony by both men confirms that each of them accused the other of "assault" at the end of their encounter. *Tr. 74:24-25; 408:5-8.* There is no evidence Van Leuven was injured or needed medical assistance. *Tr. 408.* He said

he ran across the street to a deli and called his Dad for a ride. *Tr. 76:21-23.* When prompted to state how he was feeling physically, however, he said he was "full of adrenaline. Scared, in pain all over," and his "collarbone was scratched". *Tr. 77:7-13.*

The Grievant then returned to his bus and, after a few minutes, resumed his route. He did not call Dispatch to report the incident and he did not file a written report with his supervisor, as required by the MOU.

In conclusion, the District did not prove, by clear and convincing evidence, that the Grievant committed an unwarranted physical attack against passenger Van Leuven, as alleged. The encounter on the platform of the San Rafael station was not an act of intentional assault or violence by Grievant, but an impulsive reaction of self-defense. *See, e.g., Lowery v. Standard Oil, 63 Cal. App 2d 1, 146 P.2d 57 (1944).* The Grievant believed at all times that Van Leuven had assaulted him on the bus and that he should talk to Van Leuven, get his name and learn what the item was that had been thrown at him.

The evidence does show that the Grievant exercised poor judgment in continuing to pursue Van Leuven when Van Leuven walked away. As a professional bus operator, he should have realized that the initial assault was over and the perpetrator was no longer threatening him or anyone else. The Grievant was not thinking rationally, however. He found himself drawn into a physical scuffle in which Van Leuven thought he was the aggressor because he reached out and touched Van Leuven. The Grievant had been told he should avoid getting drawn into such scuffles, but his training had been minimal at best regarding how to do so safely.

The District's training manual is very thick and contains a number of written instructions about the need to avoid threats by passengers and members of the public. Trainer Bennett acknowledged in her testimony, however, that she had spent less than one hour of the ten-week training on that particular subject. *Tr. 246:4-6.* The Grievant agreed with her time assessment. It would not have been possible to cover all the material in the manual about dealing with confrontational passengers in one hour.

Bennett also said she had conducted no role-plays dealing with confrontational situations during the training on that issue. *Tr. 230:1-22.* In view of the District's concerns about confrontations between angry passengers and drivers, the training should have been more specific on how drivers should deal with such incidents. The Grievant could have benefited from acting out some realistic examples in a role-play format. Such experience might have helped the Grievant to control his impulsive reaction and decline to pursue Van Leuven, avoiding further conflict with him.

Finally, the evidence clearly shows the Grievant had been notified of his duty to report the event that occurred outside the bus, both by radio and in written form. The duty is set forth in the MOU – so it is a negotiated requirement of every driver in the Union. Also, the Grievant had filed reports of incidents in the past. *Exhibits U-19, U-20, U-21, U-22.* Regardless of his belief that he had acted in self-defense during the physical conflict with passenger Van Leuven, the Grievant knew he was required to file those reports, yet he chose not to do so.

III. Was there procedural regularity in the investigation of the alleged misconduct?

The Union contends that the District violated basic notions of fairness and due process by failing to consider the Grievant's overall work record before recommending termination. The Union argues that the District failed to review the Grievant's personnel file, which contained important information about the Grievant's favorable history of dealing with difficult passengers courteously. Because of that failure, the District was unable to make a fair judgment about the Grievant's conduct and the appropriateness of discharge as a penalty. The Union cites *McCartney's, Inc., 84 LA 799, 803-04 (Nelson, 1985),* in support of its argument regarding the importance of due process in evaluating the fairness of a disciplinary action: "It is the *process*, not the result, which is in issue." (emphasis in original)

The record shows that Mr. Hibbs issued the *Notice to Record Discipline: Dismissal*, on or about October 9, 2009, then upheld the discharge at the first grievance level on October 13, 2009. *See, Exhibits E-6, E-7.* Hibbs testified that he had checked the Grievant's disciplinary record on his own computer screen, but admitted he did not look at the Grievant's file. *Tr. 155:7-14.*

Ms. Mantony upheld the discharge on appeal. *Exhibit E-17.* She admitted that she did not review the Grievant's file either, though she said she gave the Grievant "100% credit" for the favorable facts he told her about, to show mitigation in the Van Leuven situation. *Tr. 339:8-14.*

By failing to check the Grievant's file, both Hibbs and Mantony missed several favorable letters that were placed there. On three separate occasions during the Grievant's short tenure with the District, passengers on the Grievant's bus had made calls or sent e-mails to District

management, commending the Grievant for courteous and professional service under difficult conditions that they had observed. The Customer Relations Department had notified the Grievant of each of those reports and congratulated him. *Tr. 393-396; Exhibits U-8, U-9, U-10.*

In rebuttal the District pointed out that the Grievant had had a number of customer complaints as well as commendations during his fifteen- month period on the job. Only one of those complaints was admitted to the record, however, as the Grievant pointed out that the others had been contested or unsubstantiated. And the one complaint that was admitted involved a fare dispute, not a customer-relations conflict. *See generally, Tr. 457-465; Exhibit E-23.* Also, it is not clear that the complaint would have been found in the Grievant's file, as it had not led to disciplinary action.

The arbitrator agrees with the Union that Mr. Hibbs and Ms. Mantony should have checked the Grievant's file before reaching their decisions on the penalty of discharge. While Hibbs and Mantony knew that the Grievant had no prior discipline and Mantony allowed the Grievant to offer a verbal explanation of his good record, both should have looked at his file and read the actual statements of commendation from the three prior passengers. One of them reported that Grievant had been "extremely patient and professional with three passengers that were potentially problematic on the bus." *Exhibit U-8.* Another came from a tourist who said she had "never met a more courteous bus driver." *Exhibit U-10.*

This procedural defect, though minor, might have made a difference in their decisions on the appropriate level of discipline in this matter. The evidence of the Grievant's patience in some of his early conflict situations on the job could have helped them to draw the conclusion that he would benefit from progressive discipline, rather than meriting dismissal.

IV. Did the Employer apply discipline in a reasonable and even-handed manner, including using progressive discipline, if appropriate?

The Union asserts that the District discriminated against the Grievant by discharging him for his conduct during the incident on September 27, 2009, when his conduct was nearly identical to that of another District driver, who remains employed at this time. The Union relies on the testimony of K.S., who was the driver in the previous situation, which occurred about three years prior to the Van Leuven incident, in support of its argument.

K.S. testified that he initially asked a young person to stop talking on a cell phone on the bus. The young person complied, then swore at K.S. When exiting the bus, the young person threw a transit manual at K.S., hitting him in the face. K.S. left his seat, exited the bus behind the young person and physically accosted him, throwing him into a tree. The passenger called police and they came to the scene. K.S.'s supervisor came to the scene. *Tr. 449:25-450:1.* There is no evidence, however, that K.S. filed an incident report with the District. *Tr, 456:23-25.*

The arbitrator agrees that the incident involving K.S. is remarkably similar to the dispute between the Grievant and Mr. Van Leuven. Each driver initially enforced District policy on proper bus behavior to a passenger, then the passenger retaliated by swearing at the driver and throwing a transit manual at him, hitting him. Each of the drivers then exited the bus and physically engaged with the irate passenger in a scuffle.

Comparing the physical encounters in the two incidents, the arbitrator agrees that K.S.'s reaction in throwing the passenger into a tree was no less "violent" than the

Grievant's scuffle with Van Leuven had been. The fact that K.S. is still working for the District, while the Grievant is not, tends to show disparate treatment under similar facts, in light of the application of MOU Section 8(1)(F) to both employees.

There are two significant differences between the two incidents, however. The first is the comparative length of service of the two men. K.S. had been working for the District about four years when his incident occurred, while the Grievant had only been working one and a half years before the Van Leuven incident. The second is that K.S.'s supervisor was made aware of his incident immediately, while the District was unaware of the Grievant's incident until it received a claim for damages from Van Leuven's lawyer. The District was caught by surprise, unable to do an immediate, full and fair investigation, as it had done in K.S.'s case. Witness interviews could not be obtained. The District had to scramble to gather the video and audio tapes and try to reconstruct all the facts in the Grievant's case more than a week after the incident had occurred. If the Grievant had made his reports, as required, the District would not have been prejudiced in this way.

The arbitrator does not agree with the Union that the District's decision on the Grievant's case, though different from its decision on K.S.'s case, was discriminatory. The difference in the two drivers' terms of service and the fact that the Grievant did not report his incident to Management in a timely fashion, while K.S. did, make this case dissimilar from K.S.'s case. Further discussion on the appropriateness of progressive discipline will be included in the next section of this report.

V. Did the District prove just cause for discharge? If not, what should the remedy be?

The District relies on arbitration awards involving violent conduct by bus drivers in other transit districts, to support its contention that the Grievant's conduct justified discharge as the appropriate remedy. *See,* Chicago Transit Authority, *83 LA 424 (Arb. Meyers, 1984)* and Greater Cleveland Regional Transit *Authority, 125 LA 230 (Arb. Sulkina 2008),* Each of those cases is distinguishable from the instant case, however.

In *Chicago Transit*, the bus driver swore at, grabbed and physically ejected a passenger, then failed to report the incident to his superiors. There had been no provocation whatsoever by the passenger, however, except that the passenger had failed to close the rear door after his companion exited the bus. Also, the driver/grievant had already received progressive discipline, a fourteen-day suspension, for a prior passenger complaint, and other passengers had filed complaints against him after the suspension was implemented. Therefore, progressive discipline had been shown unsuccessful at correcting the grievant's outrageous behavior. The arbitrator found, under the circumstances, there were no mitigating factors and upheld the discharge.

The *Greater Cleveland* case was more complicated. In that case, the driver, a female, had become involved in a conflict with a group of unruly high school students. One of the students was a male, the others female. The arbitrator found that the driver's dispute with the female students was excusable under a self-defense theory. Her dispute

with the male student was not excusable, however, for several reasons. First, the two had kicked and hit each other. Second, the grievant denied that she had fought with the male, but a teacher, who had separated the two, testified to the true facts, showing that the grievant had lied. Third, the observer testified that, after the parties had been split apart, the driver continued to yell at the boy and said she would "cut" him and would "throw something" at him. The arbitrator determined that the driver had "thrown away" her self-defense argument by continuing to threaten the boy after the initial fight ended. Therefore, this case is not comparable to the facts of the instant matter.

There are several reasons why discharge was an excessive penalty in the instant matter. First, the arbitrator has found that the District did not prove that the Grievant committed an "unwarranted physical attack" on Van Leuven, as alleged in the statement of charges. While the Grievant exercised poor judgment in pursuing Van Leuven, his intention had not been to attack the man, but only to talk to him. His judgment was somewhat clouded by fear at the time, because he believed the man had thrown a glass jar at him on the bus and that he had been struck by the jar.

The most serious error that the Grievant committed was to decline to report the incident. He knew he was required to do so, but he intentionally declined to comply with his obligation. He testified that he didn't think he had enough information to file a report, because he didn't have the perpetrator's name. *Tr. 409:2-18.* He knew at that point, however, that he had allowed himself to be drawn into a violent situation and he needed to report it with or without the passenger's name. He probably felt embarrassed.

When he was confronted with questions by Supervisor Hibbs after the District received Van Leuven's lawyer's letter, the Grievant told the truth. He did not lie or cover up any facts. He also said he was sorry. Unfortunately, however, by not notifying the District of what had happened, he had caused the District to be hampered in defending itself promptly and meaningfully in response to the letter. Van Leuven's lawyer had accused the Grievant of having committed an "aggravated assault and battery" on his client, intentionally causing him serious injuries, on September 27, 2009, and that accusation had prejudiced the District into reaching the conclusion it did on the Grievant's conduct. As a result, it believed the worst and implemented the ultimate level of discipline.

The arbitrator is persuaded, however, that the Grievant recognized his error and took steps after his discharge to make amends. He wanted to find out what had gone wrong on September 27, 2009, and why he had responded to Van Leuven's behavior so impulsively and defensively. He testified that he voluntarily underwent several therapy sessions in anger management, consulting with a psychotherapist in November and December of 2009. He returned for a refresher session before the arbitration hearing and said he intended to continue such sessions. *Tr. 417:2-418:13; Tr. 420:15-18.* He said he had learned some things about himself he had be unaware of and had learned about humility as well.

Such evidence of voluntary post-discharge rehabilitative efforts is often accepted by arbitrators as a mitigating factor in determining the appropriateness of discharge as a

penalty for a grievant's on-the-job misconduct.. *See, e.g., Elkouri, supra, at 979.* One of the cases that the District relied on in support of the Grievant's discharge addresses the issue of post-discharge rehabilitation and the analysis is actually helpful when the facts are compared to the Union's case. *See Southern California Rapid Transit, 96 LA 1113 (1991).* In the *Southern California* case, the grievant had been discharged for violent conduct. The arbitrator indicated that the grievant's efforts to rehabilitate himself by consulting with a psychotherapist had been "laudable". However, during the post-discharge counseling process, the grievant had expressed a homicidal threat against his supervisor, so the psychotherapist had had to report it to the threatened supervisor, as required by law. Based on the threat to kill the supervisor, rather than the on-the-job event that had led to the discharge, the arbitrator denied the grievance.

The arbitrator believes that the anger management training and counseling has been appropriately undertaken by the Grievant. Because the Grievant has learned about his personality issues, it is unlikely he would respond as impulsively in the future as he did with Van Leuven, if he were confronted by an aggressive or abusive individual. Also, he clearly testified that he would file reports of all reportable incidents in the future.

Having considered all the facts and circumstances, the arbitrator finds that discharge was an excessive penalty. There was no just cause for that level of discipline in response to the Grievant's conduct that occurred on September 27, 2009. While some discipline was appropriate, the discharge should be reduced to a six-month suspension without pay and the Grievant should be reinstated to his position as a bus operator.

AWARD

For the reasons set forth in the preceding analysis and decision, the grievance is granted in part. The discharge shall be reduced to a six-month suspension. The Grievant shall be reinstated to his position as a bus operator and shall be made whole for all losses beyond the six-month suspension. The arbitrator hereby retains jurisdiction for sixty (60) days to assist the parties with implementing the remedy. The parties shall mutually share the responsibility for the arbitrator's fee and expenses.

DATED this 9th day of November, 2010.

/S/
SANDRA SMITH GANGLE, J.D.
Arbitrator