

IN THE MATTER OF ARBITRATION BETWEEN

Amalgamated Transit Union, Local 1005,
Union,

and

Metro Transit, a division of Metropolitan Council,
Employer.

OPINION AND AWARD

Sherif Mohamed Grievance

BMS Case No. 09-PA-0271

ARBITRATOR:

Gerald E. Wallin, Esq.

DATE OF AWARD:

February 7, 2009

HEARING SITE:

Minneapolis, Minnesota

HEARING DATES:

December 4 and 29, 2008

POST HEARING BRIEFS RECEIVED:

January 23, 2009

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JURISDICTION

The hearing in this matter was conducted on December 4, 2008 with additional evidence taken via conference call on December 29, 2008. The undersigned was selected to serve as arbitrator pursuant to the parties' collective bargaining agreement ("Agreement") and the procedures of the Minnesota Bureau of Mediation Services. The parties submitted a discipline grievance to arbitration. No procedural issues were raised. The Agreement provision calling for award issuance within forty-five days after receipt of post-hearing briefs was waived. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross-examination. The parties post-hearing briefs and reply briefs were received on or before January 23, 2009, which closed the record, and the matter was taken under advisement.

ISSUES

The parties' collective bargaining agreement ("Agreement") provides that any discipline imposed by the Employer "... shall be just and merited."¹ The parties stipulated that this text establishes a traditional just cause standard for the arbitral review of disciplinary action. Accordingly, the issues for determination are stated as follows:

1. Was the discharge of Grievant Sherif Mohamed by notice dated August 5, 2008 for just cause?
2. If not, what shall the proper remedy be?

BACKGROUND AND SUMMARY OF THE EVIDENCE

The instant dispute arose out of Grievant's discharge for his participation in contentious verbal exchanges as well as physical altercations between him and members of a group of nine teenage passengers that boarded the bus he was driving on July 15, 2008. In the first of two physical altercations, Grievant was spit upon by one female passenger just before she exited the bus. Grievant was then struck by a second female just before she exited. Grievant used the handle of his ice scraper to strike the second female in the head. Moments later, when a male and the second female

¹Agreement Article 5, Section 1.

returned and cursed at Grievant while standing on the sidewalk approximately six feet back from the open front door of the bus, he charged out of the bus after them with his ice scraper in hand and precipitated the second physical altercation. Many, if not all, of the members of the group participated in the altercation and Grievant was severely beaten before they ran off. He was hospitalized via ambulance and was diagnosed with multiple injuries including a traumatic brain injury.

At the time of his discharge on August 5, 2008, Grievant had just under four years of total service with the Employer as a bus operator. He was hired on September 27, 2004 and began undergoing training for part-time driving duties. He completed training on December 3, 2004. He became a full-time bus operator on January 7, 2006.

The bus Grievant drove was equipped with a surveillance recording system that consisted of five video cameras and two microphones. The cameras provided four views of the interior of the bus and one view out the front windows to show Grievant's perspective of the street ahead. One microphone was near Grievant's location and picked up his conversations with passengers boarding the bus as well as those passengers near the front of the bus. The other microphone was near the rear of the bus. The system captured the relevant events from the time the group boarded his bus at State and Concord Streets in St. Paul, Minnesota shortly after 9:00 p.m. that evening. The system also time-stamped each frame of video from each camera location. Each camera took a new frame at intervals of slightly more than one-tenth of a second. The playback capability provides for real-time speed as well as fast and slow motion. In addition, the video can be stepped through frame-by-frame, both forward and reverse, to provide stop-action for each frame. As a result of this recording system, there is essentially no dispute over the events leading to Grievant's discharge.

The Employer publishes a Bus Operator's Rule Book & Guide to regulate customer relations between Bus Operators and passengers. Among the provisions of the book, the Employer cited Grievant as having violated the following:

100 INTRODUCTION

Metro Transit exists for one reason – to serve the public's transit needs. As a Metro Transit bus operator, you are in a very powerful position. The kind of treatment you show those who ride our buses has enormous influence on people's decisions

whether to ride public transit or use their own cars.

You are expected to provide friendly, courteous service to the public. Driving skillfully and safely, providing on-time service, greeting those who ride your bus, responding courteously to their inquiries and requests, providing accurate information in response to their questions about service are just a few of the ways you can effectively serve our customers. * * *

* * *

120 SERVING THE PUBLIC

There are two things to remember in dealing with the public.

- Everyone you encounter in public is either a customer or a potential customer.
- Individuals form judgments of you and Metro Transit according to how you act.

The bus operator's job is very stressful. Dealing with the pressure of large numbers of customers and daily peak-hour traffic is enough to try most people's patience. But this in no way relieves the bus operator of this requirement – you must conduct yourself professionally at all times when you are wearing your bus operator's uniform. * * *

* * *

324 SOME TIPS ON COLLECTING FARES AND PROCESSING TRANSFERS

Bus operators are expected to collect fares in an efficient, orderly fashion. Most customers know the proper fare and pay immediately upon boarding. For customers who do not know the proper fare or lack sufficient cash or convenience fare items, the bus operator's duty is simple and straightforward:

Inform the customer of the proper fare once.

If, after you tell the customer the fare, the customer does not pay or pays less than required, let the matter drop. Remember, you are not a police officer. * * *

* * *

496 COURTEOUS CONDUCT

Employees must be courteous to others at all times. Patience and self-control must be used to avoid aggravating situations. * * *

* * *

497 SERIOUS OFFENSES UNDER THE RULES OF EMPLOYEE CONDUCT

The following are some of the offenses which are considered serious. Violations may result in severe disciplinary action, including but not limited to suspension or discharge.

* * *

- c. Threatening a citizen, customer or other employee with bodily harm or

causing a physical altercation on Metro Transit property or on a Metro Transit vehicle.

* * *

532 READING AND DEFUSING THE SITUATION

Greeting all who board your bus forces you to pay attention. * * *

Learning to “read” individuals is your first line of defense against attack. There are more steps you can take, such as de-escalating a situation or defusing a conflict with an unstable individual.

* * *

533 DISTURBANCES OR CRIMINAL ACTIVITY

If individuals are disturbing the peace, you should use your best judgment in handling the situation. Unless you believe that doing so would escalate the situation, you should ask them to cease their activity. If they fail to do so, then:

* * *

3. If holding for police, keep both doors open to allow an escape route for the perpetrators. Do not attempt to trap them on the bus. Do not attempt to pursue them.

* * *

5. Cooperate with the perpetrators whenever possible. Resistance may provoke violent behavior. Defending yourself and your customers is permitted.

* * *

534 PHYSICAL ENCOUNTERS

Metro Transit bus operators should avoid physical confrontations wherever possible. This means refraining from leaving the bus operator’s seat to settle disputes unless it is necessary to do so to defend yourself or customers from physical attacks. It also means avoiding physical contact unless you or a customer are being attacked. If you are under direct physical attack, and you believe physical harm, serious injury or death may result, use only enough force to subdue the attack and restore order. Once the attack ceases, do not pursue the assailant. *If you use more force than necessary, you may be personally liable for having acted outside the scope of your employment.* Bus operators who have been certified to do so may use an approved aerosol device to defend themselves only.

* * *

536 FARE DISAGREEMENTS – INVALID TRANSFERS – FORGED PASSES

If a person is refusing to pay proper fare or trying to use an invalid transfer, inform the person of the proper fare *once*. If the customer still refuses to pay, you have done your job and should let the matter drop. * * *

* * *

According to the evidence, Grievant’s bus was already running 8 minutes late when the group of teenagers boarded his bus. Some members of the group sought to avoid paying the proper fare or any fare at all. When one male claimed he was age twelve and was paying for himself and his twin sister, the supposed twin sister hid her face and tried to walk to the back of the bus. The male put a \$1 bill in the fare box for the two of them. The fare for age twelve and under was only \$.50. Grievant challenged her and the male and said to them, “Don’t play games with me. I’m not going anywhere.” Then he told the male to watch his language, talk nice, and respect people. He went on to ask the male if that was what they teach in the home and the school. He asked the question again. Then he asked the male, “Do you want to punch me in the face?” Grievant finally refused to issue a transfer for the sister unless she paid the proper adult fare of \$1.50. The supposed twin sister is the female who later struck him when exiting the bus.

Shortly thereafter, another female tried to board by paying only \$.50. Grievant asked her how old she was. When she claimed to be twelve, Grievant said, “No you’re not. Stop lying. I’m not going anywhere.” During his discussion with this female, Grievant twice slammed the fare box pedestal with both of his hands. Grievant refused to give the female a transfer and continued to hold the bus. This female is the person who later spit on Grievant when exiting the bus.

During this time, a passenger who was not part of the teenage group, objected to the delay and told Grievant that she had given a dollar to one of the teenagers saying, “Cuz I gotta go.” Grievant left his driver’s seat and went back to the area where the passenger was seated and began angrily lecturing her and those around her about the reasons why the teenagers should be paying \$1.50 each. During this time, another passenger, also not a member of the teenage group, complained that Grievant should just drive the bus. Grievant replied that he was doing his job and if the passenger did not like it, he should get off.

By this time, the teenagers had settled into the very rear seats of the bus. Grievant returned

to his seat and began driving toward downtown St. Paul. Grievant anticipated that the teenagers might give him trouble so he contacted his control center and reported the situation. The Employer's Transit Police were dispatched to intercept his bus upon reaching the downtown area.

When Grievant stopped on Robert Street near 5th Street, several of his passengers exited the bus along with the teenagers. All of the males and one of the females in the group exited the bus via the rear door. The remaining two females walked to the front of the bus to use the front exit door. All of the other passengers who were exiting via the front door were ahead of the two females.

Just before turning toward the door and stepping off the bus, the first female spit on Grievant. She then hurriedly left the bus. The second female then took a swing in the direction of Grievant and immediately thereafter started for the exit door. Grievant swung at her head with the handle of his ice scraper. The video showed the handle making contact with the left rear quadrant of her head as she moved away from Grievant and toward the exit door. Then Grievant swung at her a second time but missed because she was very nearly out the door. She continued moving rapidly away from him. As she ran away from the bus, Grievant walked to the door, looked in her direction, and said, "Come on, bitch."

Grievant's ice scraper is for clearing the bus doorways of ice and snow that might accumulate in the winter. It is more like a chopper than a scraper. It has the same blade configuration as the long-handled implement commonly used to chop ice. The blade is approximately five inches by seven inches and is approximately one-eighth of an inch in thickness. The blade has a mounting receptacle in the center of its upper edge for inserting the handle. The handle is made of hardwood and its length is approximately one foot to a foot and one-half long. The handle is approximately an inch and one-half in diameter. The ice scraper is stout.

After watching the second female run away, Grievant walked back to his seat and again called his control center. He was in the midst of reporting what happened when one of the smaller teenage males appeared on the sidewalk outside the open front door along with the second female. One or both of the teenagers cursed at Grievant but did not try to re-enter the bus. Nonetheless, Grievant dropped the phone and ran out of the bus after them. He was carrying the ice scraper in his right hand.

The ice scraper fell to the sidewalk almost immediately. Whether Grievant dropped it or the

second female knocked it from his hand cannot be determined from the video. The video shows the female swing her arm downward toward Grievant's right arm area. The ice scraper is then seen falling to the sidewalk. From its position as he rushed out of the bus, it does not appear it was dislodged by making inadvertent contact with the bus. Grievant continued charging after the two teenagers but he directed his charge at the male. Subsequent frames show what looks like Grievant taking a swing at the male and then kicking at him with his right leg. At this point, the female joined in. Eventually Grievant is grabbed on the left arm by the male and pulled out of meaningful range of the cameras. The other members of the group can be seen moving toward the altercation and glimpses of video here and there show most, if not all, join in the beating of Grievant. A voice is repeatedly heard yelling, "Stop! Stop!" Finally, the teenagers ran up Robert Street toward 5th Street. Shortly thereafter, Grievant staggered back into the camera view and, with the assistance of one of his former passengers, moved toward an approaching police squad car while pointing up the street in the direction of the fleeing teenagers. Grievant collapsed just in front of the squad car partially on the sidewalk and partially in the street. There he remained for more than ten minutes until an ambulance arrived and took him to nearby Regions Hospital.

Significant testimony at arbitration centered on the conduct of the various police officers who arrived on the scene. Perhaps inaction is a better word. No less than three squad cars responded. The first car left the scene almost immediately after Grievant collapsed in front of it. Careful scrutiny of the video, however, reveals a plausible scenario whereby the driver did not actually see Grievant collapse before he went off in pursuit of the teenagers. Shortly thereafter, two more squad cars arrive. Although they can be seen walking around, none of the officers rendered any assistance to Grievant nor does it appear that they even checked on his condition. This period of time lasted more than five minutes.

The presence of the ice scraper in Grievant's bus in the middle of July was the subject of considerable testimony. It was essentially undisputed that many bus operators objected to the Employer's planned removal of the tools at the end of the winter season. According to the testimony, they wanted the tools to remain onboard as a deterrent to possible passenger attacks. The Employer permitted them to remain rather than have to remove and store approximately 900 tools for the summer. The Employer, however, never did issue any instructions about whether or not they

could permissibly be used as a weapon or in self-defense; in essence, there was a void of guidance about their use for purposes other than clearing ice and snow. In the Employer's view, they had only deterrent value and could not be used for any purpose beyond blocking blows. In the Union's view, they could be used as needed for self-defensive purposes.

Grievant completed a written report of the incident on July 21, 2008 with the assistance of his wife. He had not viewed the video by that date. The following excerpt is from the report:

* * *

I could see the teens conspiring to do something in the back of the bus. When they got off two of the guys exited first and gave me the finger to distract me from the others. Then one of the girls spat in my face. As I wiped off the spit I felt two hits to the head one of which felt as if it was done with something metallic. I was knocked unconscious and fell off the chair. I stood up with the ice scraper and tried to push them off the bus but they pulled me off and then beat me. * * *

Grievant viewed the video two days later on July 25, 2008 in the company of one of the Employer's police officers. As he watched the video, he became angry, slammed the arm of the chair in which he was sitting and exclaimed, "I wish I would have hit her with the metal end."

At arbitration, Grievant described how his memory of the incident is like a dream. He did not claim to have any accurate recollection of the events and acknowledged what the video recordings depicted.

Photographs of the female Grievant hit with his ice scraper show that at least seven metal staple-like sutures were used to close the wound to the left rear quadrant of her head. A ruler held next to the sutured area shows the wound to have been approximately two inches in length.

Grievant's work record showed that he had been placed on a final record warning for three operating infractions that had occurred on February 7 and 16, 2006 and January 27, 2007. All of the infractions were more than one year old at the time of his discharge. As a result, the warning was no longer active. Claimant's record also reflected one chargeable accident in April of 2006. In addition, his record showed that he had received five commendations from customers in the three years prior to his discharge, one of which came on the date in question.

According to the testimony of a Transit Police officer, he was able to have six of the teenagers charged with criminal offenses ranging from riot, disorderly conduct, 5th degree assault, and felony interference. Three were charged as adults and three as juveniles. All of the juveniles

were older than thirteen. Grievant was not charged by the prosecuting authorities. However, there is no evidence that the prosecuting authorities were ever made aware of the details of his conduct.

The Union introduced evidence of the handling of eight prior disciplinary situations involving altercations between drivers and members of the public. Three dated from 2001. The other five occurred in the 2006-2008 time frame. The earlier three cases involved discipline less than discharge. The latter five were initially discharged but were returned to service pursuant to “last chance agreements.” The Employer introduced an arbitration award upholding the 2008 discharge of a bus operator for an altercation with a customer.

The record also contains evidence of Grievant’s financial situation. The Employer apparently denied workers compensation coverage for his medical expenses. As a result, Grievant had accumulated approximately \$24,000 of unpaid medical expenses.

Finally, Grievant’s medical records pertaining to his injuries, treatment, and prognosis were received in evidence over the Employer’s objections. According to a report dated October 16, 2008, Grievant was not able to perform any work but he had not reached maximum medical improvement.

OPINION AND FINDINGS

Certain comments about the issues for analysis are warranted at the outset. The Union’s overall position does not include a complete denial of culpability for Grievant’s conduct. It is recognized that Grievant did not comply with the Employer’s rules quoted previously herein or the associated training he received regarding courtesy, handling fare disputes, as well as de-escalating and defusing situations to avoid physical altercations. The central feature of the Unions’ position is that Grievant acted in self-defense. This mitigating factor should therefore operate to entitle him to a reinstatement to his previous employment in a manner consistent with the last chance agreements and reduced discipline received by other operators since 2001.

During the taking of arbitration testimony, it was also undisputed that the Employer made certain admissions during the steps of the parties’ grievance process. The admissions were essentially this: But for his use of the ice scraper in the manner he did, his other misconduct would not have warranted his discharge from employment.

Given the foregoing considerations, it can be seen that the assessment of the character of Grievant’s use of the ice scraper becomes the pivotal issue in the determination of the instant

grievance. Was it used reasonably in self-defense, as the Union contends, or was it used as an offensive weapon to strike a potentially deadly blow in retaliation as the Employer maintains?

The criticality of this usage issue has led to very close and repeated examination of the four camera recordings that captured the activities inside Grievant's bus during the time frame of the attack on him and the moments leading up to it.

As previously noted, the two females who attacked him were the only members of the teenage group that exited via the front door. They were also the last two persons lined up to use that door. All of the other members of the teenage group had already exited via the rear door or were in the process of doing so. No other passengers who remained on the bus were in the immediate vicinity of Grievant's location. The interior mirrors that Grievant had available to him would have allowed him a clear view of this status. Therefore, in the moments before the attack began, the video does not establish any other source of an attack threat to Grievant except the two females.

Less than 1.5 seconds elapse from the time when the first female spits at Grievant (21:17:53.60) until Grievant's ice scraper makes contact with the head of the second female (21:17:55.07). The last frame that shows the right hand of the second female poised to strike Grievant also shows she did not have a closed fist. Her fingers are curled but the palm is clearly seen (21:17:54.26). The next frame shows the end of her swing, but Grievant is not visible. He is out of view at the bottom of the frame and so is much her right hand. Thus, it cannot be determined if or where she actually made contact with Grievant's person (21:17:54.53). From the bend of her right wrist and the movement of her arm from the previous frame, it appears her strike was more like a rap on the top of Grievant's head. This same frame also shows that Grievant has already begun to swing the ice scraper back at her. The next frame (21:17:54.66) shows his right arm further in the arc of his swing and the handle of the ice scraper is visible. The head of the female is turning away and looking toward the door. She does not swing at him a second time as Grievant wrote in his report. In the next two frames (21:17:54.79 and .92), the female continues to turn away from Grievant and move toward the exit door. She also begins to duck down and raise her left shoulder to block the oncoming ice scraper. Grievant has come into view and his head is looking in her direction. The next two frames shows the ice scraper handle striking her head in the left rear quadrant (21:17:55.07 and .20). The video does not show any attempt by Grievant to check his

swing of the ice scraper as a baseball batter does when he misreads a pitch. Subsequent frames show him raise the ice scraper and reach out to strike her again as she steps out of the bus. He swings but misses. She is too far away.

In its post-hearing brief, the Union contended that the head injury sustained by the second female may not have been caused by Grievant but, instead, may have been received in the melee outside the bus when Grievant was beaten. Careful review of the video, however, does not provide any credible support for this contention.

The video also showed that Grievant was wearing glasses or sunglasses during the attack. They do not appear to have been dislodged at all by the blow from the second female. In the many frames that recorded his activities right after the attack, Grievant does not re-position the eye wear. He also appears to move normally as he walked to the door, actually stepped down to the sidewalk with one foot saying, "Come on, bitch," and then walked back to his seat to begin his call to central control. In addition, he deftly reversed his grip on the ice scraper with just the fingers of his right hand before transferring it to his left hand. The inference drawn here is that Grievant's movements did not reflect any grogginess or disorientation as would be expected of a person who had just been struck by a forceful blow to his head. Recall that his written report claimed that he had been knocked unconscious.

Given the foregoing considerations, the weight of the evidence is found to support the Employer's determination that Grievant was not acting in justifiable self-defense when he struck the second female in the head with the handle of his ice scraper.

The evidence concerning the disciplinary handling of prior physical altercations has also been carefully considered. Although each example portrays some similarities, they all differ significantly in that none of them involved the use of a potentially deadly weapon to inflict a serious injury. An ice scraper as a potential weapon was mentioned in only one of the examples that dated from 2001. However, the record does not establish that the ice scraper was actually used as a weapon in that instance beyond being brandished by the bus operator. Moreover, the latter examples beginning in 2006 are entirely consistent with the more serious treatment of physical altercations that the Employer began in that time frame. The Employer did so to prevent the creation of a perception in the public eye that its bus operators were vigilantes. All of the latter five examples since then

resulted in the initial imposition of the discharge penalty regardless of the degree of the physical altercation. Finally, the penalty of discharge was upheld in the most recent arbitration award to review the appropriateness of that penalty for a physical altercation. In light of these considerations, the weight of the evidence does not support the contention that Grievant's discharge constituted disparate discipline by the Employer.

The actions of the Transit Police, the extent of Grievant's injuries and current medical condition as well as his financial situation have all received due consideration. After careful review of the overall circumstances, it is clear that these factors either directly resulted from Grievant's misconduct or occurred after his course of misconduct was entirely completed. Therefore, these factors do not serve to mitigate the seriousness of Grievant's misconduct.

AWARD

The Employer's discharge of Grievant Sherif Mohamed by notice dated August 5, 2008 was for just cause. As a result, his discipline was just and merited within the meaning of Agreement Article 5, Section 1. Accordingly, the grievance is denied.



Gerald E. Wallin, Esq.
Arbitrator

February 7, 2009