

BARBARA C. HOLMES, ARBITRATOR

In the Matter of the Arbitration of:

**Amalgamated Transit Union,
Local 1005,**

AWARD

and

**BMS Case No. 09-PA-0845
Re: Taylor Final Record of Warning**

**Metro Transit,
the Employer.**

Date of Hearing **June 4, 2009**
Date of Award: **June 22, 2009**

Appearances:

For the Union: **Roger Jensen
Jensen, Bell, Converse & Erickson
St. Paul, Minnesota**

For the Employer: **Anthony Edwards
Parker Rosen
Minneapolis, Minnesota**

INTRODUCTION

Amalgamated Transit Union, Local 1005 (herein the Union), as the exclusive representative, has appealed the decision of Metro Transit (herein the Employer) to issue a Record of Final Warning to its member Christopher Taylor (herein the Grievant). An arbitration hearing was held at which both parties had a full opportunity to present evidence through the

testimony of witnesses, the introduction of exhibits, and the presentation of oral closing statements.

ISSUES

Did Metro Transit have just cause to issue a Final Record of Warning to the Grievant for the bus accident that occurred on December 30, 2008?

FACTUAL BACKGROUND

The Employer provides public bus transportation in the metropolitan area of Minneapolis and Saint Paul, Minnesota. The Union represents bus drivers employed by the Employer. The Grievant has been employed as a part-time bus driver for the Employer for approximately 8 ½ years.

On December 30, 2008, the Grievant was driving an articulated bus on his usual route. He had completed his route and was driving back to the bus garage. When the Grievant attempted to stop at an intersection, the rear end of the articulated bus slid into the lane to the left of the bus and hit a passenger automobile that was stopped at the intersection. Both the bus and the passenger vehicle were dented at the point of impact. There were no injuries to the driver of the passenger vehicle or the bus driver. No passengers were on the bus when the accident occurred.

The Employer investigated the accident and determined that the Grievant had been driving too fast for the road conditions. Because the Grievant had been involved in two accidents in the past thirty-six months, the Employer issued the Grievant a Final Record of Warning.

The Grievant filed a grievance which proceeded unsuccessfully through the Employer's Grievance Step procedure. Ultimately, the grievance was appealed to arbitration.

POSITIONS OF THE PARTIES

Employer: The Employer believes that it was fair to hold the Grievant responsible for the accident. It argues that one of the most important duties of a bus driver is to drive safely on roads that are made unsafe by winter weather conditions.

The Employer contends that the conclusion of the safety inspector that the accident was the Grievant's fault is supported by his findings. Furthermore, the Employer claims that no other buses driving during that time period were involved in accidents.

The Employer argues that the Grievant's testimony that he was travelling at 10 m.p.h. for two blocks with his foot on the brake is not possible. Neither does the Employer believe that the Grievant could be watching the speedometer closely while he was moving into the right turn lane and slowing to a stop.

The Employer asserts that other possible causes of the accident have been eliminated. Regarding any mechanical problems with the bus, the Employer notes that the Grievant testified that he had not experienced any problems with the bus during his shift. Regarding the driver of the car that was struck by the bus, the Employer argues that there is no evidence to suggest he was at fault.

Union: The Union argues that the Employer failed to prove by a preponderance of the evidence that the Defendant's actions caused the accident. It points out that the Employer's experts who reviewed the accident investigation stated that the accident could not have occurred unless the Grievant had been driving faster than 10 m.p.h. The Union argues that because there is no evidence that proves the Grievant was in fact driving more than 10 miles per hour, the accident was caused by the road conditions and not the Grievant's speed.

The Union also argues that the Employer failed to conduct a mechanical inspection of the bus after the accident, to rule out other potential causes. It also points out that the Employer did not inspect the road conditions at the intersection at the time of the accident nor interview the driver of the passenger vehicle.

DISCUSSION

I. Did the Grievant engage in the misconduct alleged by the Employer?

The Employer must have just cause to discipline the Grievant. The analysis to determine whether or not just cause exists typically involves two distinct steps. The first step is to determine whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If the alleged misconduct is established by a preponderance of the evidence, the next step is to determine whether the level of discipline imposed is appropriate, taking into account all of the relevant circumstances. See Elkouri & Elkouri, HOW ARBITRATION WORKS 905 (5th ed. 1997).

A. Did the Employer prove by a preponderance of the evidence that the Grievant engaged in misconduct? The Grievant was required to complete an accident report for the Employer. In that report the Grievant stated that the accident occurred at 6:14 p.m., that the road conditions were snowy and icy and that it was dark. He also stated that he was travelling at 10 m.p.h. at the time of the accident and at 5 m.p.h. at the time of contact with the passenger vehicle. His description of the accident is as follows:

Exiting 252 onto 66th when passing a vehicle. Applied brakes. Bus did not respond. I then turned my wheel and bus started to slide to the right and the rear of the bus made contact with the vehicle.

At the arbitration hearing the Grievant testified that he did everything that he was trained to do to drive the bus properly, but because of the snow and ice the bus failed to stop.

In arriving at its decision to discipline the Grievant, the Employer relied on an accident investigation conducted by Safety Specialist Dennis Dodge. Mr. Dodge had been employed by the Employer for 11 years as a bus driver, 12 years as a bus driver instructor and 3 years as a Safety Specialist. His job duties included conducting bus accident investigations and determining the cause of these accidents. Mr. Dodge testified that he reviewed the accident report filed by the Grievant, inspected the damaged bus and interviewed the Grievant.

Dodge concluded that the Grievant was driving too fast for the conditions and was responsible for the accident. Dodge's report states, in part, as follows:

Christopher stated that he was in the right turn lane on Hwy 252 approaching 66 St. to make a right turn. As he applied the brakes, he began to slide, he turned the wheel to the right and as he did so the left rear of bus #3124 hit the right rear of a 2003 Chevy van.

We discussed what could have been done avoid (sic) this accident:

- Slow down in adverse conditions

Dan Abramowciz [Grievant's Union representative] was in attendance at this Safety Conference.

...

I inspected bus #3124 ... and discovered damage to the street side rear bumper of bus #3124. (See pictures)

CONCLUSION: Responsible

WHAT COULD THIS OPERATOR DO DIFFERENTLY TO AVOID THIS ACCIDENT.

- 1) Slow down in adverse conditions
- 2) Apply brakes slowly and evenly.

The evidence shows that the road conditions were snowy and icy. The evidence also shows that the Grievant applied the brakes to slow down in preparation to make a right hand turn at a red light. When the bus did not stop the Grievant turned his steering wheel to the right. Then the rear end of the bus slid to the left and struck a passenger vehicle stopped in an adjacent lane. The cause of the accident was undoubtedly a combination of the Grievant's actions and the road conditions. If the road had been clear and dry the bus would not have slid. Similarly, if the Grievant had not taken the actions he took, the bus would not have slid. The issue to be resolved is whether the Employer has shown by a preponderance of the evidence that Grievant's *improper* actions were the primary cause of the accident. Clearly, it was not improper for the Grievant to apply the brakes as he was approaching a stop light. The issue is whether or not the speed at which the Grievant was driving the bus during these maneuvers was excessive for the snowy and icy conditions.

Safety Specialist Dodge testified that turns made by an articulated bus should be made at a speed of 3 – 5 m.p.h. and "even slower in snowy conditions." The Transportation Manager of the Grievant's bus garage testified that driving 5 – 10 m.p.h. at the intersection the Grievant

was approaching in snowy conditions was “way too fast” and that a “walking speed” of 3 – 5 m.p.h. would be more appropriate.

The Employer had its other Safety Specialists review the accident report. They concluded that the Grievant had to be driving more than 10 m.p.h. for this accident to occur. The Employer argued that the other Safety Specialists’ conclusion supports its position that the Grievant was driving too fast for the conditions. The Union argues that this testimony supports its conclusion that it was the road conditions that caused the accident since the Grievant has stated that he was driving 5-10 m.p.h. Because I find both the Employer’s and the Union’s position about these other Safety Specialists’ opinions to be reasonable, these opinions are of no help in resolving the issue of the role of the Grievant’s speed in causing the accident.

The evidence that is most persuasive in determining whether the Grievant’s driving speed caused the accident is the review of all of the buses that passed through the same intersection at the approximate time of the accident. The Grievant is recorded as being at the intersection at 6:01 p.m. Between 5:32 p.m. and 6:44 p.m. 30 other buses passed through the intersection, all without incident. Of those 30 buses, 17 made a right turn at the stoplight. Of those 17, 12 were articulated buses of the type the Grievant was driving.

The Union quite properly pointed out other potential causes for the accident – malfunctioning breaks, worn tires, snow-packed roads, narrowed driving lanes due to plowed snow, the other driver’s actions and other mechanical malfunctions. But in order to overcome the prima facie showing made by the Employer, the Union must actually prove the existence of another cause not merely speculate as to potential causes.

I find that the Employer has shown by a preponderance of the evidence that the Grievant was driving too fast for the road conditions for the following reasons:

- 1) One of the most important duties of a bus driver is to drive his bus safely in poor weather conditions; bus drivers receive extensive training in this regard.
- 2) The Grievant was aware of the road conditions at the time of the accident having just completed his route.
- 3) The Grievant was familiar with the intersection where the accident occurred as he had driven the route many times.

4) The Grievant testified that he was travelling 5 – 10 m.p.h on his approach to the stop light.

5) The Employer has provided testimony from experienced bus drivers and instructors that the Grievant should have been travelling no faster than 3 – 5 m.p.h. when approaching the red light and preparing to stop.

6) Out of 30 other bus drivers who passed through the intersection during the same time frame, not a single one experienced difficulty in operating their bus safely.

B. Was the issuance of a Final Record of Warning the appropriate level of discipline?

Under the Employer’s Operating Policies, if a bus driver is found responsible for an accident he is given a verbal warning. If within 36 months of the 1st accident a bus driver is found responsible for a 2nd accident he is given a “Record of Warning”, for a 3rd accident he is given a “Final Record of Warning” and for a 4th accident he can be further disciplined or discharged.

Testimony of the Employer’s witnesses explained that Safety Specialist Dennis Dodge had no input as to whether the Grievant should be issued a Final Record of Warning for the accident. Rather, the Management Team reviewed the report and made the final decision. Since there was no dispute that the Grievant had been held responsible for two accidents in the previous 36 months, I find that the issuance of the Final Record of Warning was appropriate.

AWARD

The grievance is denied.

DATED: June 22, 2009

Barbara C. Holmes, Arbitrator