

**IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN**

METROPOLITAN COUNCIL D/B/A METRO TRANSIT )  
"EMPLOYER" )  
And )  
AMALGAMATED TRANSIT UNION LOCAL 1005 )  
"UNION" )  
BMS CASE NO. 09-PA-0951 )  
DECISION AND AWARD )  
RICHARD R. ANDERSON )  
ARBITRATOR )  
SEPTEMBER 4, 2009 )

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**JURISDICTION**

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson on August 28, 2009 in Minneapolis, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into evidence by both parties and received into the record. The hearing and record both closed on August 28, 2009, at which time the matter was taken under advisement.<sup>1</sup>

This matter is submitted to the undersigned Arbitrator pursuant to the terms of the parties' August 1, 2008 through July 31, 2010 collective bargaining agreement, hereinafter the Agreement.<sup>2</sup> The relevant language in Article 5 [GRIEVANCE PROCEDURE] and Article 13 [ARBITRATION PROCEDURE] provides for the arbitration of a grievance to resolve all grievance issues. The parties waived the contractual arbitration panel set forth in Article 13 and

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<sup>1</sup> Both parties waived the filing of post-hearing briefs.  
<sup>2</sup> Joint Exhibit No. 1.

stipulated that the instant grievance is properly before the undersigned Arbitrator for final and binding decision. The parties further stipulated that this matter does not involve contract arbitrability or any other procedural issues.

## **APPEARANCES**

### **For the Employer**

Anthony G. Edwards, Attorney  
Sam Jacobs, Director Bus Operation (Retired)  
Steve McLaird, Director Bus Operations (Acting)  
Barbara Keener, Assistant Transportation Manager  
Jon Uzpen, Safety Specialist  
Marcia Keown, Human Resources  
Brian Funk, Transportation Manager

### **For the Union:**

Roger A. Jensen, Attorney  
Walter Szymczak, Grievant and Bus Operator  
Daniel Abramowitz, Recording Secretary/Assistant Business Agent

## **THE ISSUE**

The parties stipulated to the following issue, *“Whether the Employer disciplined the Grievant Walter Szymczak for just cause pursuant to the collective bargaining agreement, and if not, what is an appropriate remedy?”*

## **BACKGROUND**

Metropolitan Council, hereinafter the Employer, is the regional planning agency serving the Twin Cities seven-county metropolitan area and providing essential services to the region including the operation of the region's largest bus and rail system known as Metro Transit. Amalgamated Transit Union Local No. 1005, hereinafter the Union, is the collective bargaining representative of approximately 2,500 employees that includes Bus Operators. The Union has represented this unit since the 1930's.

On January 23, 2009, the Grievant was issued a written Record Of Warning (ROW) by Nicollet Garage Assistant Transportation Manager Barbara Keener as a result of his being charged with the responsibility for an accident that occurred just after Midnight on December 31, 2008.<sup>3</sup> This was the second accident in a three-year rolling period where responsibility inured to the Grievant. Thus, according to Employer Policy, a ROW was in order. The Grievant then filed a grievance on January 30, 2009.<sup>4</sup> After a Step 2 meeting on January 30, 2009, Nicollet Garage Operations Manager Brian Funk denied the grievance in a written memorandum that issued on February 5, 2009, which was copied to the Union.<sup>5</sup> A Step 3 meeting was held on February 5, 2009 which resulted in Garage Operations Assistant Director Steve McLaird denying the grievance in a memorandum dated March 9, 2009 that was also copied to the Union.<sup>6</sup> Thereafter, the Union filed for arbitration. The undersigned Arbitrator was notified in writing on May 29, 2009 by Union Counsel Roger A. Jensen that I had been chosen as the neutral arbitrator in this matter.

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 5 GRIEVANCE PROCEDURE**

**Section 1.** *Metro Transit reserves to itself, and this Agreement shall not be construed as in any way interfering with or limiting, its right to discipline its employees, but Metro Transit agrees that such discipline shall be just and merited.*

**Section 2.** *No employee shall be suspended without pay or discharged until the employee's immediate superiors have made a full investigation of the charges against that employee and shall have obtained the approval of the applicable department head. No discipline, excepting discharge without reinstatement, shall be administered to any employee that shall permanently impair the employee's seniority rights. When contemplating disciplinary action, Metro Transit shall not give consideration to adverse entries on an employee's disciplinary record involving incidents occurring more than thirty-six (36) months prior to the date of the incident which gives rise to the contemplated discipline. Prior to a suspension of more than two (2) days, the ATU must be notified. If a case of discipline involves suspension or discharge of an employee, and such employee is not found sufficiently at fault to warrant such suspension or discharge, the employee shall then be restored to their former place in the service of Metro Transit*

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<sup>3</sup> Joint Exhibit No. 5

<sup>4</sup> Joint Exhibit No.10.

<sup>5</sup> Joint Exhibit No. 11.

<sup>6</sup> Joint Exhibit No. 12.

with continuous seniority rights and shall be paid for lost time at the regular rate of pay.

**Section 3.** Any dispute or controversy, between Metro Transit and an employee covered by this Agreement, or between Metro Transit and the ATU, regarding the application, interpretation or enforcement of any of the provisions of this Agreement, shall constitute a grievance.

## **ARTICLE 11 WORK RULES AND PRACTICES**

All practices and agreements governing employees enforced by Metro Transit or its predecessors on or after November 1, 1957, not in conflict with nor changed by the provisions of this Agreement, may be changed subject to the following conditions:

- (a) Work rules and/or practices may not be in conflict with the contract;
- (b) Metro Transit must meet and confer with the ATU prior to making any such changes or new work rules;
- (c) New work rules and/or practices must be reasonable;
- (d) The Metro Transit will furnish the ATU with a copy of all bulletins or orders changing any such rules, regulations and practices;
- (e) Work rules and/or practices are subject to the Grievance Procedure.

## **ARTICLE 13 ARBITRATION PROCEDURES**

In the event a dispute or controversy arises under this Agreement which cannot be settled by the parties within thirty (30) days after the dispute or controversy first arises, then Metro Transit or the ATU, whichever is applicable, in accordance with Article 2 or 5 hereof, may request in writing that the dispute or controversy be submitted to arbitration. Upon such request, each party shall, within ten (10) days, appoint one member of the Board of Arbitration and the two members thus appointed shall select a third member. Should the two members be unable to agree upon the selection of a third member within ten (10) days, either party may request the State Bureau of Mediation Services to furnish a list containing the names of seven (7) persons from which the third member shall be selected. Within five (5) days after receipt of such list, the parties shall determine by lot the order of elimination and thereafter each shall in the order alternately eliminate one name from the list until only one name remains. The person whose name remains shall be the third member and shall serve as Chairman of the Board of Arbitration. The arbitration hearing shall be held within forty-five (45) days from the date the chairman is selected.

In making such submission the issue to be arbitrated shall be clearly set forth in writing. The Board so constituted shall weigh all evidence and arguments on the points in dispute, and the written decision of a majority of the members of the Board of Arbitration shall be final, binding and conclusive and shall be rendered within forty-five (45) days from the date the arbitration hearing is completed.

In the event a member of the Board of Arbitration resigns or dies, the method used to obtain said member originally shall be employed to obtain a successor.

The parties thereto shall each pay the arbitrator of its own selection, and they shall jointly pay the third arbitrator. In any matter submitted to the Board of Arbitration, a stenographic record shall be made of the proceedings unless both parties otherwise agree, and the cost of the record shall be divided equally between Metro Transit and the ATU.

In the event either party fails to appoint its arbitrator within ten (10) days, exclusive of Saturdays, Sundays, and Holidays, after arbitration is requested, the party so failing shall forfeit its case.

## FACTS

The Grievant has been employed as a bus operator since July 2004. He was operating a bus on Route 21 in St. Paul, Minnesota going east just after Midnight on December 31, 2008. It had snowed most of the day. The Grievant could not remember whether the snow fall amount was as little as one inch or as much as six inches. [According to various weather reports, 1.8 to 2 inches of snow had fallen in St. Paul prior to Midnight on December 30, 2008 and 0 inches after Midnight.]<sup>7</sup> The eastern end of Route 21 culminates in a parking lot at the intersection of Kellogg and the overhead Lafayette Bridge.<sup>8</sup> This parking lot is on the south side of Kellogg and is designated as a terminal or layover, a place where routes terminate and begin. Buses approaching the parking lot from the east turn south into the parking lot and immediately execute a 90 degree turn to head in a westerly direction.<sup>9</sup>

Shortly after Midnight as the Grievant was going west after his 90 degree turn into the parking lot area, the bus slid causing it to strike one of a series of intermittent yellow poles that mark the south boundary of the bus driving area.<sup>10</sup> The Grievant called the Traffic Control Center (TCC) to report the accident. A Special Situation Report (SSR) was generated by the TCC operator on duty.<sup>11</sup> The SSR indicated the following,

*“Op (operator) indicates that the grate covering the radiator has fallen off the bus and is bent. Unknown if he hit something or if it was a pothole that bumped it off. John at Nicollet shop reports more damage to bus than op reported. Yellow paint is around the area of the damage. E Trower went to Nicollet to take pictures of the damage.”*

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<sup>7</sup> <http://www.weather.gov/climate/getclimate.php?date=&wfo=mpx&sid=msp&pil=CF6&recent=&specdate=2008-12-31+11%3A11%3A11> and <http://climate.umn.edu/HIDradius/radius.asp>

<sup>8</sup> There is a built-in layover time which allows operators to make up lost time if their route is delayed in order to start the western portion of their run on time or to use an on-site rest room facility.

<sup>9</sup> This is in reality a quick 180 degree turn from going east on Kellogg and then going west in the parking lot.

<sup>10</sup> There are also yellow poles that mark the north and south boundaries of the bus driving area.

<sup>11</sup> Joint Exhibit No. 2

The Grievant also filled out an Accident/Incident Report better known as the Operator Accident Report (OAR) which Nicollet Garage Safety Specialist Jon Uzpen received along with the SSR from the TCC operator when he arrived for work at 6:00 a.m. that same morning. In his OAR, the Grievant stated that,<sup>12</sup>

*“While driving bus #838 east on Kellogg Blvd, I signaled and turned right into the driveway to the parking lot. When turning again westward toward the terminal, I turned the vehicle sharply as I slowly turned. As I straightened out the bus, the back wheels started sliding on some ice patch. I felt the back end of the bus sliding sideways. I heard a noise as the bus slid. I straightened out the bus and pulled toward the terminal. I looked at the side view mirror to see where the bus was at. It appeared that the bus was a few feet from a pile of snow and a yellow pole. I pulled ahead to the terminal and parked. Plows were plowing the lot and when one came near the bus I pulled more forward to get out of the way. I again parked the bus and went into the restroom before I left the terminal. When I came out of the restroom, I looked toward the back of the lot and saw something lying in the snow. I started walking toward the object and saw that it was the radiator grill from my bus. I called TCC and spoke to #33. I asked to have a supervisor sent to the scene but was told to start my next trip. I went back, picked up the grill, placed it on the bus and started the trip.”*

Uzpen testified that he subsequently held a safety conference with the Grievant wherein the Grievant pretty much reiterated what he had stated in his OAR. Uzpen also indicated that the Grievant informed him that a lone individual on the bus had accompanied him to the layover (terminal) instead of getting off the bus. Uzpen further indicated that the Grievant informed him that this individual bothered him; however, he could not remember why. After the interview, Uzpen generated a Safety Conference Report (SCR) that was forwarded to Nicollet Garage Assistant Transportation Manager Keener.<sup>13</sup> Uzpen stated in his report that *“an operator must be aware of road conditions”*, that an *“operator should always keep his/her bus under control at all times”* and concluded that the Grievant was responsible for the accident.

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<sup>12</sup> Joint Exhibit No. 3

<sup>13</sup> Joint Exhibit No. 4

Uzpen testified that he has been an employee for 36 years. He was a bus operator for 14 years, nine of which were as a bus operator trainer. Uzpen has been a Safety Specialist for the last 23 years during which time he has investigated over 4,000 accidents. His accident investigation includes reviewing the SSR and OAR forms. He would also review any supervisory and police reports along with customer (rider) comment cards and interview the customer if necessary. Uzpen testified that he would also review any bus videos associated with the accident and may even go to the scene of the accident if he felt it was necessary.

Uzpen stated there were no supervisor or police reports involved in the Grievant's accident nor did he go to the scene of the accident. There also was no customer card generated by the lone passenger riding the bus at the time of the accident. A video from the Grievant's bus was retrieved; however, it appeared that it was mishandled. Apparently, the wrong time frame for retrieval was listed on the SSR, and the video was recorded over before this mistake was discovered according to the testimony of Director of Bus Operations Sam Jacobs.

Uzpen testified that he is not involved in disciplinary decisions. Rather, this is left up to Keener. Keener testified that she did not conduct an independent investigation; rather, she determined that the Grievant was responsible for the accident based solely on Uzpen's report. She testified that she issued the Grievant a ROW consistent with the Employer's disciplinary policy involving a safety issue. The Employer's policy is spelled out in its Operating Policy (Procedure 7-d) (effective August 13, 2005).<sup>14</sup> The Policy

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<sup>14</sup> Joint Exhibit No. 6.

states that the following discipline applies for a safety violation within a three-year rolling period.<sup>15</sup>

- 1<sup>st</sup> responsible accident — verbal warning*
- 2<sup>nd</sup> responsible accident — written warning*
- 3<sup>rd</sup> responsible accident — final written warning*
- 4<sup>th</sup> responsible accident — termination*

*This policy will continue the practice of the safety guidelines, including the practice of taking mitigating circumstances into account in determining whether to issue a warning for minor accidents.*

The written ROW that Keener issued to the Grievant on January 23, 2009 stated that it was being issued because the Grievant had been involved in two chargeable accidents within a rolling three-year period.<sup>16</sup> On January 22, 2006, the Grievant had previously received a verbal ROW for being responsible for an accident resulting from hitting a parked car as he was pulling into a bus stop.<sup>17</sup>

As stated earlier, there was a 1<sup>st</sup> Step grievance meeting on January 30, 2009. The results of the meeting wherein the Employer denied the grievance are contained in Nicollet Garage Operations Manager Funk's February 5, 2009 memorandum. A summary of the memorandum is as follows,<sup>18</sup>

***Position of Management:*** *Ms. Keener opened on behalf of Management. She stated that Mr. Szymczak was involved in an accident on 12/30/2008 and was held responsible by the Safety Specialist, Jon Uzpen. Mr. Szymczak had a previous accident (01/22/2006) and Ms. Keener issued a Record of Warning under the guidelines of the Operating Policy. She noted that the responsibility is not her decision, she was simply following guidelines by issuing the written warning. The Record of Warning remains in Mr. Szymczak's record for 3 years. When Ms. Keener met with Mr. Szymczak, they discussed the tools available to assist him. At the time of the meeting, there was no re-training initiated.*

*Mr. Uzpen also provided information related to the accident. He stated that the accident took place while Mr. Szymczak was working on the route 21, at the*

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<sup>15</sup> Id. p. 6.

<sup>16</sup> Supra.

<sup>17</sup> Joint Exhibit No. 9.

<sup>18</sup> Supra

*Kellogg/Lafayette layover. It had been snowing during the afternoon of 12/30 and into the evening. Mr. Szymczak turned into the layover/parking lot and while navigating the lot, he struck a post along the operator side of the bus near the radiator grill at the rear. Mr. Szymczak was honest about what happened and there was little damage to the bus. However, Mr. Uzpen noted that almost 100% of the time, if something is hit that doesn't move, it will be classified as a responsible accident. Mr. Uzpen also noted that it was the only accident at that location on that workday.*

**Position of the Union:** Mr. Bolden began on behalf of the Grievant. He stated that it was an unfortunate situation and that Mr. Szymczak is a good employee with no other problems. Mr. Bolden stated that the lot was being snow-plowed and they believe that had something to do with it. Apparently Mr. Szymczak needed to move his bus for the snow-plow and that is when the accident took place. Mr. Bolden asks that management consider the timing (late night) and conditions (snow) to remove the responsibility. Mr. Szymczak stated that he would be willing to go to Safety Keys training but that he did not want the negative marks on his record. Ms. Keener agreed to arrange the training at the next offering.

**Analysis and Conclusion:** *Metro Transit expects that our operators will drive their bus "according to the conditions". Extra caution needs to be taken when operating on snow and ice, especially if a maneuver is made that is out of the ordinary. If an operator believes that they cannot safely guide the bus due to the conditions, a radio call to the TCC needs to be made so that assistance can be sent.*

*I believe that Mr. Szymczak was appropriately held responsible for the accident and the associated discipline was handled properly. If the subject of this grievance is not considered, Mr. Szymczak has an excellent work history record and it should be noted that the first accident considered in the Record of Warning has since expired, leaving him with only one responsible accident in the past 36 months. I am happy that Mr. Szymczak will attend Safety Keys and I believe that it will improve his skills as an operator.*

After the 2<sup>nd</sup> Step grievance meeting on February 25, 2009, the Employer again denied the grievance. A summary of that meeting is contained in Garage Operations Assistant Director McLaird' March 9, 2009 memorandum as follows,<sup>19</sup>

**Position of Management:** *On 12/30/08, Mr. Szymczak was assigned to the route 21. Mr. Szymczak was eastbound on the route 21 entering the layover at Kellogg and Lafayette just after midnight. The left rear of the bus struck a pole in the lot as he was turning.*

*There were snow plow trucks in the lot at the time clearing the freshly fallen snow. Weather conditions were adverse, but Mr. Szymczak has the responsibility to be attentive and drive to the conditions.*

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<sup>19</sup> Supra.

**Position of the Union:** *Mr. Szymczak is a 10 hour run operator and on this day was working the route 12 most of the day. He had one round trip on the route 21 to end his day. Snow had fallen most of the day and there were vehicles plowing the lot at the East End Layover.*

*Mr. Szymczak did a hook turn to pull into the lot and set up for the hairpin turn to reach the layover point. When he made the hairpin turn the bus slid two to three feet to the left and struck a pylon. Mr. Szymczak took as much precaution as he could to safely enter the lot, but he hit ice and fresh snow.*

*The turn from Kellogg into the layover is difficult and you cannot drive fast even under good conditions. The snow caused the driveway to narrow considerably. This combined with the plows clearing down to the ice in the lot created a situation where Mr. Szymczak should not be held responsible due to adverse conditions and factors out of his control.*

*If an accident occurs on a right turn there is usually damage to the right side of the bus. Damage to the right side is a responsible accident; damage to the left side due to ice should not.*

**Analysis and Conclusion:** *The video received from Risk Management did not show the timeframe of the accident. Pictures received from Risk Management document more damage than a scrape or minor dent I would expect to see from a bus sliding on ice at slow speed.*

*The radiator access door is considerably bent and the frame area around the access door is significantly damaged. The Maintenance Division documents the repair cost at \$3,577.28 for the damage.*

*While the weather was marginal and the day was long for Mr. Szymczak, I feel he failed to safely navigate the entrance to the East End Layover resulting in contact with a fixed object.*

A 3<sup>rd</sup> Step grievance meeting was held on March 26, 2009 after which Director of Bus Operations Jacobs generated a memorandum of this meeting dated April 14, 2009.<sup>20</sup> Jacobs testified to its veracity. The Grievant's accident was discussed along with another accident involving an articulated bus that occurred in the north metro area wherein the back end of the bus slid to the left striking a parked car while the bus was turning onto a cross street. The memorandum stated,

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<sup>20</sup> Supra.

*Mr. Szymczak is a 10 hour operator and had spent most of his day on route 12. This was his first trip on route 21 and consequently his first trip to the East End layover. On the day in question, the streets were icy and there were conditions of black ice where an operator had no control.*

*The East End terminal is under Highway 52, which can be negatively impacted from the snow removal of the highway. There was also a snow removal crew in the layover lot on the day in question.*

*Mr. Szymczak saw the snow plow and was moving at a very slow speed.*

*The ATU finds it suspiciously coincidental that the DVR download for both this accident and the Chris Taylor accident were not available or were for the wrong time.*

*It is the ATU's position that all accidents caused by a swing out of the rear of our buses on very snowy days should not be held against the operator.*

*Mr. Szymczak testified that he slowed down to enter the parking lot and was not accelerating. He admitted that the bus was partially accelerating under its own power. Mr. Szymczak indicated that the following conditions played a part in this accident.*

*The bridge structure it's self creates a shadow even in broad daylight.*

*The lot is poorly lit. There is not a street lamp in the general area.*

*It is a tight maneuver between the posts.*

*The plows had diverted his attention and had partially plowed a narrow clearance between the posts.*

*On a separate occasion on University Avenue, snow plows were clearing the sidewalk and backed up unexpectedly creating a potential hazard, resulting in Mr. Szymczak being wary of snow plows.*

*A customer boarded downtown and chose to ride with him to the terminal. He was sitting in the peanut row and was constantly staring at Mr. Szymczak.*

*I asked Mr. Szymczak what the normal clearance was between the posts. He indicated approximately 20 feet and that on the day in question it had been reduced to 15. It is his belief that his bus slid to the left approximately two to five feet.*

*I visited the site on April 9, 2009. The distance between the posts is 37 feet. The distance between the post to the right of the bus and the bus only lane marker is 19 feet. I also understand that a path had been plowed to the right of the post, on the left side of the bus, forcing the operator to move out of the bus lane.*

*The operator in reporting the missing radiator panel to the TCC insinuated that it may have simply fallen off. When asked specifically if his bus made contact with another object he indicated he wasn't sure. It is my belief that Mr. Szymczak knew his bus made contact with the pole and was deceptive regarding how the damage occurred.*

*The facts in this matter have not convinced me that this accident happened as a result of the weather conditions. Based on the ambiguity of how this incident was reported,*

*and the clearance between the posts, I have concluded the operator was rightly held responsible for this accident.*

Director of Bus Operations Jacobs testified that he reviewed the safety investigation that Uzpen conducted and concluded that it was done appropriately. There were approximately 700 buses in service during the December 30, 2008 snow storm and only six accidents including the Grievant's were reported. Three accidents involved vehicles hitting a bus. One involved a bus jack knifing in a parking lot causing no damage. The other accident involved a turning bus sliding into a stopped vehicle waiting for a red light at an intersection.

Jacobs testified that he denied the grievance because he believed that the Grievant's reasons for the accident were disingenuous. The Grievant claimed the accident area was in shadows caused by the overhead Lafayette Bridge and the parking lot being dimly lit. It is common for buses to operate in shadowy or dimly lit areas all the time, adding that is what headlights are for. This is not a legitimate excuse for an accident.

The Grievant also claimed that it was a tight maneuver between the yellow poles. Jacobs said that he measured the distance between the poles and determined it was 37 feet, not the 20 feet the Grievant had indicated. This is an area four times wider than a bus that measures eight and one half feet. Even if there was a plowed path that the Grievant chose to follow, he could have driven in the unplowed area. Other buses used that layover area and reported no accidents or problems. This is also not a legitimate excuse for an accident.

In addition, the Grievant claimed that the snow plows in the area distracted him. Snow plows are a fact of life in Minnesota that drivers have to deal with all the time, and it is no

excuse for an accident. Finally, a customer staring at a driver without any hostile or threatening intent is not a legitimate excuse for an accident.

The Grievant testified that as he headed east on Kellogg to the parking lot that served as his turn around or layover area, he had one passenger on the bus who was sitting on a “peanut seat”, which is closest to the bus door on the opposite of the driver seat.<sup>21</sup> The passenger had boarded the bus between Minnesota Street and Robert Street and was the only passenger who rode the bus from that location to the layover parking lot.<sup>22</sup> The Grievant described the passenger as being in a confused state not knowing where he was going. He appeared to be either drunk or high on drugs. The Grievant further testified that he had concerns about this passenger and wondered why he would want to ride with him in the middle of the night to the layover area. In fact, the Grievant stated that this passenger stared at him during the entire time that he rode the bus.

The Grievant testified from a diagram that he recently drew which he furnished to the Union that was then introduced it as an Exhibit and is attached as Appendix A.<sup>23</sup> The diagram shows the parking lot at the intersection of East Kellogg Blvd. & Lafayette Bridge in St. Paul, Minnesota. The Lafayette Bridge is suspended a considerable distance over the parking lot that serves as a terminal or layover area for buses that finish their eastern route and turn around to head back west. The bridge abutments show where the overhead bridge crosses the parking lot. The Grievant stated that as he approached the entrance he slowed down to approximately 0-5 mph to make the sharp right turn into the parking lot area. The entrance area extending south to the normal turn area had been plowed. The Grievant could not remember if this entire area had been plowed. He did

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<sup>21</sup> A seat that runs horizontal with the bus aisle.

<sup>22</sup> This distance is approximately .6 miles.

<sup>23</sup> Union Exhibit No. 1.

testify, however, that once he turned west there was only a single plowed lane in the area closest to the south yellow pole that he struck. He estimated this plowed area to be 10-15 feet. There is a center line with arrows in the entrance area of the parking lot that extends all the way to the western end of the parking lot. The Grievant could not recall if it was visible that evening. In order to safely negotiate the turn from the right lane on Kellogg requires that the bus enter on the east side of the entrance because of the sharp turn. Once you make the 90 degree turn the distance between the north and south yellow poles marking the driving area is 37 feet.<sup>24</sup> The roadway is divided into two lanes with the right (north) portion (19 feet) designated for buses only. According to the Grievant, he routinely makes his 90 degree turn using the left (south) driving lane rather than the bus lane because of the sharpness of the turn and in order to clear the right side of the bus; however, if the roadway was clear he might start to move toward the bus lane sooner.

The Grievant further testified that he did not slide when he turned into the parking lot. After entering, he immediately had to turn 90 degrees to the west. When he performed this maneuver, he saw two or three trucks with plows at the far end (west) of the lot, an area at the far right of the diagram or in an area not showing on the diagram. After he made this turn at approximately 10 mph, he felt it was safe to accelerate.

At this point he was in the non-bus lane following a path that had been plowed. As he accelerated, the back end of the bus slid approximately 2-5 feet and there was a noise. The Grievant looked in his rear view mirror and saw that he was approximately 2 feet from the south yellow boundary pole adjacent to the abutment. He then proceeded another 50-100 feet west and stopped between the shelter and the bathroom. The Grievant then left

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<sup>24</sup> The Grievant during the grievance meetings estimated this distance to be 20 feet. The Grievant was unable to give an exact distance between the north and south yellow poles. He testified, however, that the entrance is not as wide as the distance (37 feet) between the two poles.

his driver's seat and sat in the handicap seat pondering what he would do next—go to the bathroom or inspect the bus.

There were trucks plowing the parking lot area that were getting close to him so he got back in the driver seat and moved the bus another 50 feet further west, which put him past the bathroom building. He then exited to use the bathroom. After exiting the bathroom, he noticed an object sitting in the snow by the yellow pole where he had slid. The plows had finished plowing by this time and had left the area. He then decided that he should go see what the object was in the snow. He discovered that it was the radiator grill to a bus. He left the grill lying there, went back to the bus to call TCC. As he passed by the bus he noticed that the grill was missing on the left rear of the bus and a hinge that had held the grill was bent. He then went into the bus and called the TCC and explained that he had lost the grill on his bus and requested a supervisor to the scene. The Grievant stated that he was told to pick up the grill and finish his route.

The Grievant did not have the customer fill out a customer comment card that is usually passed out to passengers and other witnesses to an accident. He testified that the TCC operator never told him to do this. Also, when he discovered the damage, the passenger was “passed out” in a back seat of the bus.

The Grievant further testified that there is a light pole on the north side between the shelter and the yellow pole that he struck; however, there was no light when the accident happened. He also testified that when he went to the accident scene to draw a diagram, he noticed that there were drain holes on the Lafayette Bridge directly above the yellow pole area that allowed water drainage unto the parking lot.

The Grievant testified that a number of factors were present that contributed to the accident. He cited the lack of light in the area that prevented him from seeing the icy

parking lot conditions that caused the rear end of the bus to slide when he accelerated, which may have been caused by the snow or water draining off the Lafayette Bridge.

The passenger on the bus made him uneasy because of his staring. The Grievant stated that the passenger never threatened him or caused any problems; however, he was leery of him because he had been assaulted by a passenger on two different occasions while he was driving in July 2008. In the first situation, a passenger after getting off the bus threw a rock that hit him. In the second situation that happened a day later, a passenger had been causing a disturbance that he reported to the TCC. By the time TCC responded, this passenger had moved to the front of the bus and overheard TCC's response. The passenger then exited the bus, picked up a rock and threw it breaking a window and injuring him. This resulted in the Grievant having to go to the hospital for treatment.

The Grievant also testified that he was distracted by the snow plows while he was making his 90 degree turn to the west. He is wary of snow plows and generally tries to stay as far away from them as possible. Recently, he experienced a situation where a snow plow that had been plowing a sidewalk hurriedly backed up and almost struck his bus.

The Grievant further testified that he has been a safe driver and received a number of outstanding bus operator awards. He received three awards in the eighteen-month period immediately preceding the accident. Had he not been charged with this accident, he would have probably received another outstanding bus driver award that carries with it a day off with pay. He also wants the chargeable accident removed from his driving record even though the ROF that he received on January 23, 2009 ceased to be effective the

day before.<sup>25</sup> This chargeable accident remains on his record which can then be used for progressive discipline purposes in the event he receives more safety violations in the three-year rolling period after December 31, 2008.

### **EMPLOYER POSITION**

The Employer's position is that it had just cause to discipline the Grievant for his accident on January 31, 2008. The Employer argues that the Union does not have a good faith argument that the Grievant was not responsible for the accident. Further, there are no mitigating circumstances that support the Union's position.

There is no question that it was snowing that evening and the Employer has no evidence to dispute that the parking lot was slippery or that black ice was present. All indications point to slippery conditions that evening. The Grievant had a great deal of experience driving under slippery conditions. He is a native Minnesotan who has had a driver's license for 31 years and has been a bus operator through five plus winters.

Even though the Grievant was encountering slippery conditions that night, he admittedly was traveling 10 mph when he made the 90 degree turn and then accelerated causing the bus to slide. According to all of the Employer's witnesses, this is an excessive speed for maneuvering under these conditions. Other bus operators entering the parking lot did so without any problems. So neither the weather, nor the slick conditions nor the black ice are acceptable excuses for what happened.

The Grievant's other explanations for the accident also have no merit. The Grievant claims that it was dark in the parking lot which affected his visibility. It could not have been that dark since the Grievant was able to detect the grill at a distance of 150 feet. It

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<sup>25</sup> There was a delay by Keener in issuing the ROF that in reality made it moot before it was actually issued.

is incredible to believe that the area was so dark that it caused the accident. Moreover, other buses had not encountered any problems in this area.

The Grievant claims that the snow plows operating in the parking area distracted him. Even assuming the Grievant had a previous encounter with a snow plow and was wary of them, the Grievant testified that the snow plows were at the other end of the parking lot, a distance greater than 150 feet. This excuse is totally implausible and inconsistent with what the Employer expects of its bus operators. If a snow plow 150 feet away creates such a distraction, one might wonder how the Grievant could drive at all.

Even accepting the fact that the lone passenger on his bus was creepy or even freaky or that the Grievant may have felt at ease with him on the bus, this is no excuse. Rather, this is the nature of the job. The Grievant did not provide any evidence that this individual made a threat to him or committed any act of violence toward him or did anything other than be a drunk who eventually passed out in the bus. This could hardly cause an accident if one were driving safely.

Finally, the Grievant's actions immediately after the accident raise serious credibility problems. The Grievant did not stop the bus immediately to find out if he had hit something. Once stopped, he did not check the bus for damage. He also did not check for damage when he moved the bus ahead because of the snow plows, instead he goes to the bathroom. Even when he gets out of the bathroom, he does not immediately check the bus for damage. It is not until he finds the radiator grill by the yellow pole that he inspects the bus for damage. He then calls TCC. According to the SRR, the Grievant said the grill fell off the bus, and he must have hit a pothole or something that caused it to fall off.

The Grievant's actions were contrary to the Employer's procedure requiring an operator to check the bus immediately if they are in an accident. Also, the Grievant failed to get a courtesy card filled out by the passenger. Rather, he expected the TCC operator to tell him to do so. Both actions are contrary to acceptable procedures.

Finally, the Employer argues that it is not trying to impugn the Grievant, adding that he is a good employee. The fact remains that he did have an accident for which he was responsible. Under the Employer's policy, where safety is first, the discipline was appropriate.

### **UNION POSITION**

The Union's position is that the Employer did not have just cause to discipline the Grievant. The Union argues that: the Grievant should not have been charged with the responsibility for the December 31, 2008 accident and, therefore, the Employer should not have charged the Grievant with this accident or issued him the January 23, 2009 ROW.

The Employer failed to abide by its policy in Operating Policy (Procedure 7-d) that the Employer introduced into evidence as Exhibit No. 6. Page six of this policy states that, *"This policy will continue the practice of the safety guidelines, including the practice of taking mitigating circumstances into account in determining whether to issue a warning for minor accidents"*.

The Employer failed to take into consideration the following set of circumstances that attributed to the accident. The events that came together resulted in the "perfect storm" that produced the accident. The area that the accident occurred in was unique. The Grievant had to immediately execute a sharp 90 degree in a narrow turning area once he entered the parking lot. This turning area was under a bridge that had drainage holes which allowed liquid from the melting snow to spill onto the accident area. This and the

fallen snow created an icy area that the Grievant was not aware of when he drove into the parking lot.

In entering the parking lot and immediately having to make a 90 degree turn, the Grievant had a dimly lit narrow area to maneuver in. There were also snow plows operating in the parking lot that distracted the Grievant. The Grievant was further distracted by the freaky, creepy, doped up drunken passenger sitting close to and staring at him. The Union does not believe that every slide out accident should not be the responsibility of the bus operator. It does believe, however, that the unique set of circumstances at the accident scene together with the distractions of the snow plows and the bus passenger created mitigating circumstances that should have been considered in determining the Grievant's responsibility for the accident. It is for these reasons that the grievance should be sustained.

### **OPINION**

The issue before the undersigned is, whether the Grievant should have been charged for the December 31, 2008 accident which resulted in him receiving the January 23, 2009 ROW. The ROW is no longer operative and has already been removed from his file so the issue for this Arbitrator to determine is whether the Grievant was responsible for the December 31, 2008 accident. If he was responsible the chargeable accident remains on his record for a three-year rolling period; and if not, the chargeable accident will be removed. In addressing this issue, mitigating circumstances pursuant to the Employer's policy (Exhibit No. 6) will be examined.

There is no question that it was snowing that day which undoubtedly affected bus operating conditions. The Grievant could not remember how much snow was on the ground in the parking lot not even whether it was one inch or six inches. Weather records

for St. Paul indicate that it was approximately 2 inches. It also appears that it was not snowing at the time the accident occurred.

There is no evidence to rebut the Grievance testimony that he encountered an icy area in the parking lot while he was executing a sharp 90 degree turn immediately after entering the parking lot. There is also no evidence to rebut the Grievant's testimony that there was only a single plowed lane close to the yellow pole that he struck.

The Employer argues that the Grievant should have been aware of snowy/icy conditions in the parking lot. It is the bus operators' responsibility to operate the bus safely in all weather conditions. The Employer also argued that the Grievant was experienced in driving in snowy/icy conditions. The Grievant knew he was driving on a snowy roadway and should have taken extra appropriate precautions. He should have been more cautious and slowed down rather than accelerate during his turning maneuver. Also, other bus operators entered the same area and executed the same hairpin turn and encountered no problems.

Safety Specialist Uzpen, who has investigated over 4,000 accidents in a 23 year period, supported this conclusion in his initial Safety Conference Report and during his testimony. Uzpen determined after his investigation that the Grievant was executing his turn too fast under the snowy or icy conditions present, adding that 10 mph was not a safe speed for that turning maneuver. Various management representatives also agreed with his conclusion and upheld his finding

I agree. The Grievant admitted staying left in a plowed lane and accelerating to 10 mph while executing the turn causing the bus to slide. Obviously, the Grievant was driving too fast for the road conditions he was driving in. In addition, he made the wrong decision in deciding to stay in the plowed portion of the driving area bringing him into

closer proximity to the yellow pole rather than move further away from this hazard. The minimal snow depth in the parking lot would have little effect on the bus' ability to traverse the route that he normally took in his turning maneuver.<sup>26</sup>

There is also no evidence to rebut the Grievant's evidence that the area was dimly lit, which contributed to the accident. The Employer states that this is not a legitimate excuse. The bus has headlights so the bus can operate in dimly lit or unlit areas.

I agree. If the parking lot was so dimly lit and there were shadows, the Grievant should have been more cautious and slowed down rather than accelerate through his turning maneuver. In addition, the Grievant never mentioned that the lighting in the parking lot contributing to his accident in his OAR.

There is also no evidence to rebut his testimony that there were snow plows operating in the parking lot that distracted the Grievant during the time he entered the turn. The Employer rejected the argument that this was a distracting factor that contributed to the accident. The Employer argues that bus operators constantly face situations where they have to deal with snow plows, adding that it was very unlikely that snow plows operating over 150 feet away from the bus would affect his driving.

I agree. If anything the Grievant should have slowed down rather than accelerate after completing his turning maneuver. Further, the Grievant mentioned in his OAR that there were plows in the area, but failed to mention that it affected his driving while he was making his turn.

There is also no evidence to rebut the Grievant's testimony that there was a freaky, creepy, and drunken or doped up passenger who sat in the "peanut seat" constantly staring at him and causing him to be distracted. The Employer argues that this is the

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<sup>26</sup> Keeping a greater distance from the pole during the turn.

nature of the job, adding that there was no evidence that the passenger threatened the Grievant.

I agree. There was also no evidence that this passenger was unruly or otherwise interfered in any manner with the Grievant's operation of the bus especially during the critical time frame herein when the accident occurred. In addition, the Grievant's narrative comment in his OAR fails to mention a passenger much less him contributing to the accident. If the passenger was bothering the Grievant and affecting the operation of the bus, he once again should have been slowing down rather than accelerating during his turning maneuver.

The Employer raises an issue of the Grievant's disingenuous reporting of the accident as a factor in rejecting the Grievant's mitigating arguments. I am also bothered by the Grievant's actions immediately following the accident. However, I need not address this argument since the alleged mitigating circumstances are not dispositive, either singularly or jointly in relieving the Grievant of his responsibility for the accident.

In view of the foregoing, I conclude that the Grievant was responsible for the December 31, 2009 accident, and that there were no mitigating circumstances to alleviate this responsibility. For these reasons, I find that the Employer was justified in holding the Grievant responsible for the December 31, 2008 accident and appropriately issued the January 23, 2009 ROW. I will, therefore, dismiss the grievance in its entirety.

**AWARD**

IT IS HEREBY ORDERED that the grievance be and hereby is dismissed.

**Dated: September 4, 2009**

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**Richard R. Anderson, Arbitrator**

