

IN THE MATTER OF THE ARBITRATION BETWEEN:

METRO TRANSIT

and

**AMALGAMATED TRANSIT UNION LOCAL 1005
(Tashi Gangzey Grievance)**

DECISION AND AWARD OF THE ARBITRATOR

BMS Case No. : 10PA1174

**RICHARD A. BEENS
ARBITRATOR
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APPEARANCES:

FOR THE EMPLOYER:

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JURISDICTION

This arbitration arises pursuant to a collective bargaining agreement (“CBA”) between Metro Transit (“employer”) and Amalgamated Transit Union, Local 1005 (“union”). Tashi Gangzey (“Grievant”) was employed by Metro Transit and a member of Local 1005.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on May 24, 2010 in Minneapolis, Minnesota. The parties stipulated that the matter was properly before the arbitrator. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. Following oral closing arguments the record was closed and the dispute deemed submitted.

SYNOPSIS

On the morning of November 18, 2009, a 50 year old woman using a walker boarded a Metro Transit Route 7 bus driven by Grievant near Russell and Plymouth Avenues in North Minneapolis. She was traveling to the Fairview-University Medical Center on Riverside Avenue in Minneapolis for back surgery later that day. At the intersection of Riverside and 22nd Street, she asked if the bus stopped at the next light. Grievant responded, “I will if there’s a stop there.” She asked again a short time later and received the same response. There was no regular bus stop at the intersection of Riverside and 23rd Avenue. She became angry when he proceeded to the next regular bus stop at Riverside and 25th Avenue. Later that day, she called in a customer complaint against the Grievant. After a brief investigation, the employer “logged” the complaint

into Grievant's permanent record saying that his actions represented a violation of their Customer Relations policy. He now grieves the "logged" complaint and asks that it be removed from his record.

ISSUE

The parties stipulated that the issue before the arbitrator was:

Was the discipline imposed on grievant just and merited and, if not, what is the remedy.

BACKGROUND FACTS

Metro Transit is a service of the Metropolitan Council and has the primary mission of providing public transportation in the metropolitan area. Grievant emigrated from Tibet in 1992 and became an American citizen about four years later. After working for a time as an orderly at Abbott Hospital, he began working for employer as a bus operator in 1997. Training of new bus operators consists of a week of classroom work and about four weeks of hands on training in a bus. Grievant has continued to work for employer as a bus operator to the present.

The incident giving rise to this arbitration occurred on the morning of November 18, 2009. Grievant had been attending a company leadership program for the previous two months. November 18th was his first day back as a route driver. He was serving as an on-call driver, filling in for an absent operator who normally drove local bus route 7. The route starts at Wirth Park and ends on 34th Avenue South in the southeastern

quadrant of Minneapolis.¹ The incident giving rise to this arbitration happened in the approximate middle of the route where it follows Riverside Avenue from Cedar Avenue to 27th Avenue South. The large Fairview-University Riverside Medical Center campus is located on the north side of Riverside between 22nd and 25th Streets.² Grievant had not driven this route for several months and was not certain of where all marked bus stops were located.

The customer complaint was made by a 50 year old woman who had boarded the bus near the intersection of Russell and Plymouth Avenues in North Minneapolis. Suffering from back problems, she was traveling to Fairview-University Hospital for back surgery scheduled later that day. She was using a walker and needed to board the bus via a lift. After boarding, she took the first forward facing aisle seat on the passenger side. The trip was uneventful until the bus arrived at the traffic light for the 22nd Avenue intersection with Riverside Avenue. Several passengers were exiting when the grievant heard an inquiry from behind him. “Do you stop at the next light?” He answered, “If it is a stop, I will stop there.” As the bus was leaving the 22nd Street stop, he heard the same inquiry again and gave the same response. Up to this point, Grievant did not know who was asking the questions. He asserts he could not see the complainant. The angle of his interior rear-view mirror partially or totally blocked his view of the first row of forward facing passenger side seats.³ There is no marked bus stop at the 23rd Street intersection. As the bus passed through the intersection, Grievant first saw the complainant in his mirror. She stood up waving her arms and uttering abusive comments. For the first time,

¹ See Joint Exhibit 4 for a more detailed map of the route.

² Joint Exhibit 6.

³ Exhibit 9

she disclosed that she was scheduled for back surgery at the Fairview-University Hospital, and had wanted to get off at 23rd Street. She also told Grievant she was reporting him to management. Despite the continuing abusive language, Grievant proceed to the next stop at 25th Street where complainant exited, again using the lift.

Later the same day, the irate passenger lodged a phone complaint against Grievant.⁴ As recorded by another Metro Transit employee, it reads:

*Customer using a walker and going to surgery at Fairview and needed to get off and asked to get off and the driver did not know if there was a stop at the next one and then he started thrusting on the brake and gas peddle. Then he argued about using the ramp.*⁵

Grievant was contacted by his supervisor the following morning. The supervisor, John Cook, recorded Grievant's version of the incident as follows:

*Op states somebody kept asking him if he stops at the next light. He responds if it's a stop I stop there. Again somebody asks if he stops at the light and again he responds if it's a stop I stop there. He start to pull away from the light and hears verbal responses coming from the passengers seats and looks to see the woman in the walker cussing him out for not stopping at the light.*⁶

During their meeting Grievant requested that the bus's on-board video DVR be checked to verify his version of events. Although Cook had already requested the video record, it proved to be unavailable due to some unknown malfunction.

Cook then recorded the following Supervisor Action:

*I asked op if he looked in the mirror to see who was asking the questions and he said he did not do that because he would not be able to see who it is because of how he adjusts his interior mirror. Instructed op to be more responsive and aware of who is asking the questions. **Logged.***⁷ (emphasis added)

The employer's Operating Policy distinguishes between "logged" and "filed"

⁴ Joint Exhibit 1

⁵ Joint Exhibit 1

⁶ Joint Exhibit 1

⁷ Joint Exhibit 1

customer complaints. While the former do not lead to progressive discipline, they may be used as evidence in any disciplinary proceeding against the employee. “Filed” complaints do lead to a schedule of progressive discipline. However, the employees have the right to grieve both “logged” and “filed” customer complaints.⁸

Grievant asks that the complaint logged into his customer service file following the November 18, 2009 incident be removed.

APPLICABLE CONTRACT AND POLICY PROVISIONS

ARTICLE 5⁹

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.*

Appendix B¹⁰

METRO TRANSIT

2005 OPERATING POLICY

...Management will notify the employee of any verified customer service complaint and allow the employee to sign their work history in TIS. Management may either file a verified customer service complaint or place the verified complaint on a log consisting of non-filed verified complaints. Management may use any verified complaint, whether filed or on the employee’s customer service log, as evidence in any disciplinary proceeding. The employee may grieve any filed complaint or complaint placed on their customer service log.

A “verified complaint” is a complaint which has either been confirmed by Customer Relations staff using SMARTCoM or confirmed by management staff through communication with the customer complainant and/or other witnesses by phone, in person, or by electronic mail. The complaint investigation process will include listening to the operator for his/her side of the story....

⁸ Joint Exhibit 3

⁹ Joint Exhibit 5, the collective bargaining agreement between the parties.

¹⁰ Exerted from Joint Exhibit 3

831-836 CUSTOMER RELATIONS; USING THE LIFT¹¹

831 COURTEST/SENSITIVITY

Bus operators are expected to be courteous to all customers. Greater awareness of and sensitivity to the needs of lift-assisted riders using accessible buses will be required. Bus operators are expected to ask customers how they can help, then provide the required assistance. This includes leaving the bus operator's seat when required. ..."

EMPLOYER'S POSITION

First, the employer notes that this is a "low level" grievance over an incident that does not lead to progressive discipline. Metro Transit argues that Grievant's admission that he did not ask complainant where she wanted to be let off after twice asking, "Do you stop at the next light," is a violation of their Customer Service policy. They assert Grievant must be especially aware of the needs of disabled customers. Upon hearing the inquiry, he should have immediately pinpointed its source, realized her disability and ascertained her needs. His failure to do so was properly "logged" into his customer service record.

UNION POSITION

The Union contends management has not met their burden of proof. First, because the DVR evidence was not available, there should be a presumption that it would have been favorable to Grievant. Second, the customer complaint as logged is inconsistent with the hearing testimony and, therefore, unreliable. Last, Grievant could not see complainant in his mirror, responded truthfully to complainant's inquiries and received no indication of her desired stop until after it was passed. He should not be disciplined under these facts.

¹¹ Employer Exhibit 7

DISCUSSION

The subject matter of this grievance, a single customer complaint logged into an employee's file, does not represent disciplinary action *per se*. However, it certainly can serve as a precursor to or be weighed as a factor in considering the severity of later disciplinary action. The employer's policies specifically state that management may use a verified logged complaint, "*...as evidence in any disciplinary proceeding.*"¹² The same policy also allows any complaint logged into an employee's customer service file to be grieved.

Despite being acknowledged by both parties as a "low level" infraction, it must be treated and analyzed as any other disciplinary action. Consequently, the employer has the burden of proof. While some arbitrators differ on the quantum of proof required, the vast majority use a "preponderance of the evidence" standard. That standard will be applied here.

A review of discipline for alleged employee misconduct requires an analysis of several factors. First, has the employer relied on a reasonable rule or policy as the basis for disciplinary action? Second, was there prior notice to the employee - express or implied - of the relevant rule or policy. A third factor for analysis is whether the disciplinary investigation was thoroughly conducted. Were statements and facts fully and fairly gathered, without a predetermined conclusion? Fourth, did the employee engage in the actual misconduct as charged by the employer? In this regard, many cases turn on credibility determinations.

¹² Joint Exhibit 3, p. 5

Despite the breadth of the original complaint -- unsafe acceleration and braking, not knowing where the next stop was located, and arguing about use of the ramp -- the employer ultimately logged the complaint for a single act, Grievant's failure to be "*..more responsive and aware of who is asking the questions.*"¹³ This was cited as a violation of Section 831 of the Metro Transit Bus Operator's Rule Book and Guide.¹⁴

There can be no question that courtesy and sensitivity to passenger needs is a reasonable and even essential employer policy. The general concept is embodied in Section 831 of the Operator's Rule Book¹⁵ and highlighted throughout the employee training process. Section 831 contains broad guidelines. "*Bus operators are expected to be courteous to all customers. Greater awareness of and sensitivity to the needs of lift-assisted riders using accessible buses will be required. Bus operators are expected to ask customers how they can help.*" However, application of the guidelines in a specific factual context can, like beauty, be in the eye of the beholder.

Management's investigation was short and cursory, but not fatally so. I would expect little more for a relatively minor customer complaint. Nevertheless a follow-up call to complainant might have revealed some of the inconsistencies that later came up in her hearing testimony. After obtaining Grievant's version, the allegations regarding braking, acceleration and ramp usage were disregarded. Instead, the supervisor focused on Grievant's response to complainant's inquires about the next stop. Management faults Grievant for failing to immediately recognize that the inquiry came from a disabled person who wanted to get off "at the next light." They assert he should have been more

¹³ Joint Exhibit 1, p. 2

¹⁴ Employer Exhibit 7

¹⁵ Employer Exhibit 7

aware of and sensitive to the needs of a passenger with using a walker. Management concluded Grievant's inaction violated Section 831. That is an easy judgment to make in the abstract. In a disciplinary context, a closer examination of the event is required.

Unfortunately, the best evidence of the incident is unavailable. The bus's on-board DVR video could not be downloaded due to unspecified technical difficulties. However, lacking any evidence that the employer intentionally caused the problem, I draw no adverse inference from its absence. It is noteworthy that Grievant requested examination of the video to support his case. He clearly believed it would be helpful to his cause. What are the facts?

Complainant, who was in a great deal of pain and taking oxycodone the morning of the incident, was traveling to Riverside Hospital for back surgery. She had boarded the bus using a walker via the handicap lift at Plymouth and Russell Avenues in North Minneapolis. Complainant was seated in the first forward facing aisle seat on the passenger side. She never told the operator where she wanted to get off or that she was headed for surgery until after her desired stop was passed. Due the adjustment of his rear view mirror, Grievant could not see the complainant. When the bus was at or leaving the bus stop at Riverside and 22nd Avenue, She twice asked if the bus "stopped at the next light." Grievant twice replied, "If it's a stop I will stop there." The next light is at the intersection of Riverside and 23rd Avenue. There is no bus stop at that intersection. Grievant could not determine who asked the questions. Further, there was no evidence that she had spoken to Grievant before the first inquiry -- making voice identification impossible. Complainant became verbally abusive when he didn't make a non-scheduled stop at 23rd Avenue. For the first time, Grievant could view complainant as she stood up

waving her hands. That was when he first realized the inquires had come from a disabled passenger. She got off the bus, again using the handicap lift, at the bus stop on Riverside and 25th Avenue. Complainant's tirade caused another passenger to ask Grievant if he was, "OK." Later that day, she called Metro Transit to complain. Grievant was on his first shift as a substitute driver on a less than familiar route after spending two months in a leadership course. While little evidence was presented regarding time frame, Grievant testified, "It all happened in the flicker of an eye."

The scenario started while the bus was heading southeasterly on Riverside and stopped or just leaving the 22nd Avenue South light. Based on a long term familiarity with the area, I will take arbitral notice that the next light is located where 23rd Avenue South exits the Riverside Campus -- no more than a third of a block later.¹⁶ Given the unusually short distance involved, Grievant's testimony that it happened in "the flicker of an eye," is credible. She never told the him where she want to get off or that she was headed for surgery until after her desired stop was passed. The time lapse between her initial inquiry and passing 23rd Avenue was never presented, but had to be a matter of seconds. Requiring Grievant to navigate traffic on an unfamiliar route, identify complainant as disabled, divine complainant's real intent, and to respond "sensitively" in so short a time is problematic.

While I do not fault management's good faith desire to foster sensitivity to disabled passengers, resort to the disciplinary process under these facts seems unduly harsh. The "teaching moment" could have been accomplished with a simple discussion.

¹⁶ Joint Exhibit 6

More telling is the fact that Grievant's supervisor decided to log rather than file the complaint, because "*..both parties were probably a little at fault.*" I could not agree more. However, for discipline to be "*...just and merited,*" the guideline violation must be proven by a preponderance of the evidence. In my view, equal fault does not satisfy this burden. There is no evidence that Grievant intentionally irritated the passenger. He truthfully answered anonymous (to him) inquires about the next stop. Perhaps Grievant could have been more cognizant of his disabled passenger. However, she never told him where she wanted to get off or that she was headed for surgery until after her unscheduled stop was passed.

Based on the testimony and exhibits before me, I find the employer has not sustained its burden of proof.

AWARD

The grievance is SUSTAINED. The employer is directed to remove the logged complaint from Grievant's customer service file.

DATED June 3, 2010

/s/ Richard A. Beens

Richard A. Beens, Arbitrator