

IN THE MATTER OF ARBITRATION BETWEEN

AMALGAMATED TRANSIT UNION)	OPINION AND AWARD
LOCAL 1005)	
Minneapolis and St. Paul)	
)	BMS 10-PA-1034
AND)	
)	
METRO TRANSIT)	
A Division of Metropolitan Council)	Grievance re: Discharge

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ARBITRATOR: Charlotte Neigh

HEARING: June 10, 2010

AWARD: July 9, 2010

REPRESENTATIVES

For the Union:

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JURISDICTION AND PROCEDURE

Pursuant to the parties' Collective Bargaining Agreement and the procedures of the Minnesota Bureau of Mediation Services, Charlotte Neigh was appointed to arbitrate this matter. A hearing was held in Minneapolis, Minnesota at which time both parties had a full opportunity to offer evidence. The parties made oral arguments and the record was closed.

ISSUE

Whether the Employer had just cause to discharge the Grievant. If not, what is the remedy?

PERTINENT AUTHORITY

COLLECTIVE BARGAINING AGREEMENT

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 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.

OPERATING POLICY - Effective 8/13/05

The Policy consists of three parts (1) Recognition, (2) Tools and (3) Discipline. . .

Tools for Improvements. The employee who does not meet job responsibilities may be offered a series of tools that can improve his/her skills in specific areas. Examples include training, re-training, and learning/development programs. The goal of the Tools is to assess and meet employees' needs. . .

Discipline. Employees who continually fail to meet the responsibilities of the job are disciplined through a 3-step progressive discipline process. . .

Thresholds for Warnings

Safety - within a rolling three (3) year period:

- 1st responsible accident - verbal warning
- 2nd responsible accident - written warning
- 3rd responsible accident - final written warning
- 4th responsible accident - termination

BUS OPERATOR ABSENTEEISM POLICY

IV. DEFINITION OF ABSENCE

A. For purposes of administering this policy, the following occurrences will be monitored and charged against the operator's record on a no-fault basis (reason for an occurrence will not be considered relevant):

1. Sickness/off-duty injury
2. Late - no work available - one minute or more late for plug-in time
3. No show
4. Any request off after 9:00 a.m. the day preceding the requested day

V - B. The steps of progressive discipline are as follows:

- Seven (7) occurrences in a rolling calendar year will result in a Record of Warning and a counseling session.
- Ten (10) occurrences in a rolling calendar year will result in a Final Record of Warning.
- Thirteen occurrences in a rolling calendar year may result in termination.

BACKGROUND

The Grievant was hired as a part-time bus operator in September 1997. In December 2009 the Grievant's employment was terminated based on: four accidents within a 36-month period for which he was deemed responsible; and his overall record, particularly absenteeism and tardiness.

The Union grieved the discharge and the parties were unable to resolve the dispute, which proceeded to arbitration.

SUMMARY OF THE PARTIES' ARGUMENTS

THE EMPLOYER ARGUES THAT:

- The discharge was based on safety violations and absenteeism. Although the 12/4/09 accident is at the heart of this case, it is not the only basis for the decision to discharge the Grievant.
- The Employer's safety policy expressly provides that an operator who is responsible for four accidents within a 36-month period is subject to discharge.
- The Employer followed its process for determining responsibility in all four of the Grievant's accidents and the Grievant was found to be responsible; the first three of these findings of responsibility were not grieved.
- On 1/3/07 the accident resulted in injury to two passengers and two unusable buses; the Grievant was found to have failed to properly check his right mirror.
- On 1/10/07 the Grievant hit a fixed object in the bus garage. This second accident resulted in a Record of Warning and remedial training.
- On 9/9/08 the Grievant hit the back of another bus with the bike rack that was improperly extended from the front of his bus. This resulted in a Final Record of Warning and a ride-check by a supervisor.
- On 12/4/09 the Grievant's bus collided with a Jeep on a downtown Minneapolis street, causing damage to the right side panels on the bus and the rear wheel well. A Safety Specialist conducted an investigation and determined that the Grievant was responsible for the collision.
- Safety is the overarching concern of the Employer, and operator training emphasizes safety first. Four responsible accidents within 36 months is extraordinary: only 0.6% of employees over a 4-year period had that many.
- The Grievant's attendance record over 36 months shows that he was constantly on the verge of discharge, receiving 9 warnings, including 6 final warnings. Absent operators, particularly tardy ones, cause problems with filling slots, operating on schedule, and leaving passengers stuck.

Employer Arguments (continued)

- The evidence that the Grievant caused the accident on 12/4/09 is overwhelming.
- The Grievant's testimony at the arbitration hearing was different from his previous version, is implausible, makes no sense, and conflicts with the physical evidence of damage to the bus. Soon after the accident the Grievant told an entirely different story; this inconsistency causes doubt about the Grievant's credibility.
- The version told by the driver of the Jeep was credible: he was familiar with the route; had no incentive to be untruthful; never made a claim against Metro Transit; was subpoenaed to testify; and told the same version that he told the supervisor at the scene of the accident.
- The Grievant has repeatedly minimized the seriousness of his accidents and his responsibility for them. The accidents show a recurring problem: failure to properly use the right mirror.
- There is no excuse for the Grievant's attendance record: he kept up his pattern over three years despite 9 warnings, including 6 final warnings. There is no reason to expect him to change his ways if he is reinstated.
- Although the Grievant was personable and liked by the customers, he did not meet his responsibilities for safety and reliability. The Employer had just cause to discharge him.

THE UNION ARGUES THAT:

- The Grievant didn't grieve the findings of responsibility for the first three accidents and so they are part of his record, but he vigorously denies responsibility for the fourth accident on 12/4/09, where the other driver was at fault.
- The Employer's witnesses have acknowledged that without the fourth accident, the Grievant would not have been discharged, so responsibility for this accident is the critical question.
- The Grievant's absentee record should not be considered: at the time of his discharge he had not reached final warning status; it serves only to prejudice the arbitrator, which is the Employer's motivation. Although the Grievant does not have a great attendance record, he will deal with it when he is reinstated and it should not be considered as a factor in the decision whether to reinstate him.
- The Employer has not met its burden of proving that the 12/4/09 accident was the responsibility of the Grievant. Facts surrounding the occurrence are not clear and the Employer is relying on speculation.
- The driver of the Jeep wouldn't want to admit that he foolishly caused the accident; perhaps he didn't file a claim because he didn't want to have to prove it. The Jeep tried to zip around the bus by passing it on the right; the bus' lane moved to the right and the Jeep got pinched, causing the collision.

Union Arguments (continued)

- The Grievant's explanation of how the collision occurred is just as plausible as the other driver's and there is no reason to prefer the other driver's unless it is concluded that the Grievant has perjured himself. The Grievant's character and employment history show that he would not commit perjury.
- The street supervisor's report from the accident scene is not inconsistent with the Grievant's testimony; the Employer did not produce the supervisor to testify and be cross-examined.
- Although one ride-along report criticized the Grievant's use of mirrors, another one said that he demonstrated good use of the mirrors.
- The Employer failed to consider the numerous commendations the Grievant received from customers over 36 months. He is a good bus driver and a good representative to the public, and he should be retained in this position.
- The Grievant intended to work until he could retire from this job; it is unfair to terminate his employment for this. It should be considered that two of the four accidents occurred early in 2007 and would have fallen off the Grievant's tally only 36 days after 12/4/09.
- Even if the 12/4/09 accident was the Grievant's responsibility, it is not mandatory to terminate an operator for four accidents; the Employer had discretion to give the Grievant another chance, and so does an arbitrator standing in management's shoes. Weight should be given to the ten commendations and the Grievant's outstanding record with the public, rather than minimizing them as the Employer has done.
- The Grievant was not minimizing the first three accidents, but explaining the circumstances and the possibility that the people claiming to be injured were exaggerating. These three accidents were not serious, compared to others where pedestrians are run over or cars are smashed.
- It should be found that the Grievant was not responsible for the 12/4/09 accident, or in the alternative, if he was responsible, discretion regarding the penalty should result in reinstatement.
- The Grievant should be reinstated with full backpay less interim earnings.

ANALYSIS AND DISCUSSION

The Union correctly asserts that if it were not for the fourth accident the Grievant would not have been discharged, so it is necessary to examine whether the Employer properly determined that the Grievant was responsible for the 12/4/09 accident.

District Supervisor's Report from the Scene

Shortly after the accident the Grievant reported it to the Transit Control Center, which sent a district supervisor (DS) to the scene. His report stated that the Grievant told him: while he was stopped for a red light in the second lane from the right, there was a truck parked in the right lane and a black SUV behind the bus; he saw the SUV try to move into the right lane but the driver saw the parked truck and stopped at an angle next to the passenger side of the bus; as the bus moved forward the right rear wheel guard caught the left front side of the SUV's fender.

The DS reported that the driver of the SUV, a black Jeep, told him: his vehicle was stopped in the right lane next to the bus; as the bus moved forward, its side scraped his left front fender. The DS reported observing minor damage to the right rear wheel guard on the bus, and minor scratches to the Jeep's front fender. He took photographs of the damage to both vehicles. There was no video recording system on this bus.

Grievant's Accident Report

In a handwritten statement dated 12/4/09 the Grievant said: when the light turned green he started moving forward and heard a sound from the right rear of the bus and so stopped; a Jeep on his right moved past, crossed the intersection, and parked. There are three pages to this statement: the first one is a form headed "Additional Information-Accident/Incident Report" and is dated 12/4/09 by the Grievant's signature; the second page contains no printing or lines but identifies the Grievant at the top, along with the date 12/4/09; the third page is unsigned and undated and recounts an encounter the Grievant had with the Garage Manager when he returned the bus to the garage. It is noted that the investigating Safety Specialist reported that the Grievant took the accident form home to complete it on 12/4/09 and turned it in on 12/7/09. So it is not clear when the Grievant wrote which parts of this report, but it could have been up to three days after the accident.

Safety Specialists' Report

Two Safety Specialists (SSs) interviewed the Grievant while one was training the other. The handwritten notes from the safety-conference interview on 12/7/09 state that the Grievant was "not able to identify the car location" and "he went back & forth on this subject". The typed SS report dated 12/9/09 covers the 12/7/09 interview, a 12/8/09 site inspection, and another meeting with the Grievant on 12/8/09. It states that on 12/7/09: the Grievant said he did not see the Jeep and it must have been behind the bus; the Grievant also said the Jeep was in the right turning lane where the truck was stopped earlier, with the front end of the Jeep occupying part of the lane the bus was in; and the Jeep did not have its headlights on until after the accident.

Safety Specialists' Report (continued)

The Grievant also said this was a high-risk intersection with lots of pedestrians walking against the traffic light, and cars had previously used the right-turn lane to pass on his right side and cut in front of the bus, an "ongoing routine". The Grievant also said that the right-turn lane narrows before the turn and he believed the Jeep struck the bus.

The SS report states that the photos of the damage to the vehicles were shown to the Grievant and the SS said that the rear mudflap was pushed backward but if the Jeep had made the initial contact, it would have been pushed forward; the Grievant did not respond. The Grievant was asked whether he checked his right mirror prior to accelerating and he replied "So much goes on you can't catch everything". The Grievant also said that he was first aware of the contact when he heard a sound after moving the bus about 5 feet, then he stopped. The SS pointed out that there was damage for 20-25 feet on the side of the bus, which was inconsistent with stopping after five feet. The SS mentioned being trained to keep eyes moving, get the big picture, and check mirrors, to which the Grievant replied: "Yes, I was trained that way you can't see everything that goes on". Regarding how the Grievant could have prevented the accident, the SS noted: "check along the side of the bus, use the right mirror before departing especially if there is adequate spacing (risk); while sitting at the traffic light scans mirrors and intersections; never assume the coast is clear; you had prior knowledge regarding unsafe situation in this high risk area."

The SS report states that at the conclusion of the meeting the Grievant asked him to look at the location of the accident, which he did on 12/8/09. Although the Grievant had said that the right-turn lane narrows, the SS found that it was the second lane that narrows. The SS met again with the Grievant on 12/8/09 and informed him that he disagreed about the narrowing of the lanes. The Grievant said: he didn't know what happened; the Jeep was behind him; the Jeep was in the right lane with its front pointing at the side of the bus and when the light changed the Jeep ran into the side of the bus. The SS report concluded that the photos showed that the bus made the initial contact and the Grievant was responsible for the accident.

Hearing Testimony - Jeep Driver

At the arbitration hearing, the driver of the Jeep, who had been subpoenaed by the Employer, testified that: he was familiar with the route after driving it for several years at the same time to go to work; he intended to pull into a parking ramp on the right side of the street one block after crossing the intersection where the accident occurred; he had his headlights on since he left home early on that winter morning; he saw a truck parked in the right-turn lane; he was in the lane to the left of the truck, one of the three driving lanes in addition to the right-turn lane; the parked truck was extending into his driving lane and so he needed to switch to his left; he stopped short of the truck, centered in his lane, to wait for traffic in the lane to his left to move; a bus was passing him on his left and when it was about half-way past it made contact with his left front fender and continued moving so that the contact was from the middle of the bus, causing a streak of black paint and damage to the back wheel well; the Jeep never moved until after the bus moved on; and the bus crossed the intersection and the Jeep driver pulled over and spoke to the bus driver, who said that the Jeep had crossed into his lane, which the Jeep driver disputed. Although the Jeep driver called Metro Transit and received a claim form, he never filled it out because the damage was negligible, just a little scratch of paint.

Jeep Driver (continued)

On cross-examination the Jeep driver said that: there were cars stopped at the light in front of the bus and the front of the bus was farther back than the Jeep; he was waiting for the bus to move ahead so he could move left into that lane; he was stopped so the bus must have moved into his lane. After the bus crossed the intersection it pulled over to the right curb and stopped and the Jeep driver pulled in behind it.

It is noted that the DS's report says that when he arrived the Jeep was parked along the right curb and the bus was stopped in the lane next to it; this discrepancy was not explored with the Jeep driver. The DS's report is consistent with the Grievant's testimony in this regard.

Hearing Testimony - Safety Specialist

The SS who was training the other one testified that: he has been an SS for 23 years and the trainee had SS experience with a previous employer; they followed his usual process for investigating this accident; he is not involved in decisions regarding discipline; he is not pressured by management to tailor his conclusions; and he was not biased against the Grievant.

This SS had also investigated the Grievant's 1/3/07 accident; his 1/4/07 report stated that the Grievant told him that he should have paid attention to his right mirror. The SS concluded that monitoring the right mirror for clearance was one of the things the Grievant could have done to avoid that accident.

Regarding the 12/4/09 accident the SS recalled that, at the interview, the Grievant said that a truck was parked in the right-turn lane and the bus was so close to it that the Grievant could have reached out and touched it, which made the SS wonder how a vehicle could get in there. The SS recalled that the Grievant couldn't say where the Jeep was at various times before the contact. The Grievant said the bus was in the through lane farthest to the right. When the Grievant speculated that the Jeep came from behind the bus, he couldn't explain his failure to see it in his mirror. The SS testified that, even if the Jeep had attempted to pass on the right and cut in front of the bus, the Grievant should have checked his mirrors to be sure he was clear to move, and if not, don't move. The SS's conclusion was that if the Grievant had properly checked his mirrors before moving he would have seen the Jeep and should have chosen not to move if he couldn't avoid hitting it.

On cross-examination the SS said that the second time they talked to the Grievant he said that the truck to his right had moved, but even if that happened and cleared space for the Jeep, the Grievant should have seen it there and stopped.

Hearing Testimony - Grievant

The Grievant testified that:

- There were no cars in front of the bus when it stopped for the red light;
- All five lanes (one left-turn, three through lanes and one right-turn) had vehicles stopped at the intersection;
- He could have reached out and touched the truck to his right from the bus step;
- He couldn't see behind the truck;
- He couldn't see behind the bus;
- He didn't see the Jeep;
- When the light turned green, the truck turned right and the bus started moving into the intersection;
- The Grievant was watching traffic on his left because he needed to move in that direction to set up for his turn in the next block;
- The lane he was in curved 5 to 10 degrees to the right as he was moving forward;
- He heard a sound and stopped and looked in the mirror and saw the Jeep near the rear of the bus on the right side;
- The Jeep crossed the intersection and parked, and the bus pulled up in the travel lane alongside;
- The Jeep was jettling around to get ahead of the bus, which happens all the time;
- If he had spotted him he would have let it go;
- The Jeep driver said that the bus hit him.

Regarding the DS's report, the Grievant said: "I gave him a conjecture on what I thought the Jeep was doing. He had to come from behind the bus because he was blocked by the bus and the truck." The Grievant "speculated" that when the truck turned right, the Jeep attempted to zip around the bus on the right side.

Regarding his statements to the SSs, the Grievant testified: he tried to stick with the same version throughout; he told it as best as he could recall; they wanted absolutes; and they were trying to show that he had been inattentive. The Grievant testified that he believes he was not responsible for that accident; the Jeep driver tried to maneuver and ran out of space.

On cross-examination the Grievant testified that when the light turned green he saw the truck turn right; he couldn't explain how the truck could turn the corner while the bus moved only about 20 feet. In response to a question about why he did not check his mirrors again when the truck moved out of the way, the Grievant said that: he expects a vehicle in a turn lane to turn; and he was concentrating on his left side because he was "under the impression that his right side was relatively secure". Regarding the damage to the rear wheel well, the Grievant said he didn't know if the Jeep pulled it off, although he had not discovered it during his pre-route check of the bus.

In response to a question as to why he told the DS at the scene that the Jeep had been behind the bus, the Grievant said that he had told the District Supervisor "maybe" it happened that way, not an "absolute".

Analysis and Discussion - Responsibility for Collision

Although the Grievant claims that his explanations of how the collision occurred were conjecture and speculation, he did not make that clear early on and the Employer understandably concluded that his contradictory statements were intended to obfuscate what had happened and/or to exculpate himself. It is troubling that he twice reported that the truck was parked in the right-turn lane before saying that it executed a right turn. It is also troubling that he twice claimed that it was common for vehicles to try to zip around the right side of the bus at that spot, and then contradicted himself by saying that he expected a vehicle in that right-turn lane to turn right. It is also troubling that the Grievant tried to suggest that the damage to the rear wheel well might not have been caused by the collision with the Jeep, apparently in an effort to discredit the physical evidence. These inconsistencies undermine the credibility of the Grievant.

Whether the Jeep started behind the bus and moved to the right, or started in the lane to the right of the bus and tried to move left, it is most likely that the Grievant really didn't see the Jeep prior to hearing the sound from the contact. However, he was reluctant to admit this because it would lead to the conclusion that he had not properly checked his right mirror before moving forward. In fact, his replies to the SSs and his testimony on cross-examination suggest that he did not properly check his right mirror, because: he couldn't do everything; and he was focused on looking for an opening to move to his left.

It appears that the Jeep driver's version may not have been entirely accurate; perhaps the Jeep did cross the intersection before the bus did and stopped at the right curb before the bus stopped alongside, as the Grievant claims and as the DS found them. However, even if the Jeep did attempt to illegally pass on the right side of the bus, the SSs reasonably concluded that: based on the damage to the bus, it was the bus that was moving when it made contact with the Jeep; and if the Grievant had properly checked his right mirror he would have seen the Jeep and should have stopped if he couldn't avoid hitting it.

The Grievant's failure to properly use his right mirror was a long-standing concern. It was cited as a factor in his first responsible accident in January 2007 and was addressed in a 6-hour refresher training on 1/12/07. The training instructor reported: he drives with his seat backrest at a backward angle; it looked like he was not able to see the complete right mirror; that explained why he moved his back away from the seatback when he was taking corners, to sit up straight so he could see the right mirror; he wasn't seeing what he needed to see as he attempted to park in a ramp; she demonstrated to him that he had failed to see a pillar behind the bus that should have been visible in his right mirror; he objected to moving his seatback upright because it was uncomfortable; he tends not to move his head so that his nose points toward the right mirror, revealing he's not using it often enough; and she coached him on using the mirrors more frequently.

Another instructor conducted a ride-check with the Grievant on his route on 11/8/07 and among the areas she noted as needing attention were: defensive driving - check one or more of your mirrors every 5-8 seconds; bus stops - use 8-count door and mirror check before moving from bus stop; and turns - backscan opposite mirror. The instructor noted that the Grievant had been checking his mirrors at intervals of 15, 23, 9 and 16 seconds rather than the recommended 5-8 seconds.

Analysis and Discussion (continued)

The evidence supports the Employer's conclusion that the Grievant, by properly checking his right mirror, could have avoided the collision on 12/4/09 and so was responsible for the accident. The Grievant had been properly warned after each of his three prior accidents, and had the benefit of retraining and coaching to improve his driving, particularly using the right mirror. He undisputedly had three prior responsible accidents within a 36-month period and this fourth one made him subject to discharge.

The Employer asserts correctly that the specified timeframe is 36 months and it makes no difference that the look-back time for the two earliest accidents would have expired a little more than a month after the fourth accident. The Employer's statistics show that of the 1032 operators who were in service for the entire four-year period between January 2006 and December 2009, only 0.6% had four accidents for which they were found responsible. This extraordinarily bad safety record understandably caused the Employer to consider discharging the Grievant.

The Union argues that the Grievant should have been given another chance and correctly points out that the Employer had the discretion to do that. However, unfortunately for the Grievant, this is where his attendance record came into play. The Employer's witnesses testified persuasively regarding the disruption to the system when a driver does not report on time to start a scheduled route. Not only can it cause additional expense because of overtime pay, it can cause buses and customers to run behind schedule, or leave customers stranded at bus stops. The Employer especially objected to the Grievant's large number of occurrences of reporting late for work, which he ought to be able to avoid. The Employer reasonably determined that the commendations the Grievant received from customers did not outweigh his failure to provide reliable service and follow safety procedures.

Where just cause for discharge has been established, an arbitrator's judgment should not be substituted for management's regarding the level of discipline unless there is some showing of lack of due process, or unfairness or inconsistency compared to other similarly situated employees. That has not been shown in this case.

SUMMARY OF CONCLUSIONS

1. The Employer reasonably determined that the Grievant was responsible for the accident on 12/4/09.
2. That constituted the fourth accident within 36 months for which the Grievant was responsible.
3. The Operating Manual expressly makes these safety violations grounds for terminating the Grievant's employment.
4. The Employer was under no obligation to treat the Grievant leniently, and reasonably considered his poor attendance record in reaching the decision to discharge him.
5. The Employer had just cause to discharge the Grievant.

AWARD

The grievance is denied.

July 9, 2010

Charlotte Neigh, Arbitrator