

BEFORE THE ARBITRATOR

In the Matter of the Arbitration Between

METRO TRANSIT

and

AMALGAMATED TRANSIT UNION, LOCAL 1005

BMS Case No. 10-PA-1037

Grievant:

Arbitrator: Sharon K. Imes

APPEARANCES:

Parker Rosen, by **Anthony G. Edwards**, appearing on behalf of the Metro Transit.

Miller O'Brien Cummins, by **Roger Jensen**, appearing on behalf of Amalgamated Transit Union, Local 1005 and the Grievant.

JURISDICTION:

Metro Transit, referred to herein as the Employer, and the Amalgamated Transit Union, Local 1005, referred to herein as the Union or the ATU, were parties to a collective bargaining agreement effective August 1, 2008 to and including July 31, 2010 and from year to year thereafter unless changed, revised or amended in accord with Article 2 of the collective bargaining agreement. Under this agreement, Article 13 provides that the parties shall appoint a three-member panel to decide disputes, one of which is a neutral. In this dispute, a three member panel was not appointed but parties stipulated that this dispute is arbitrable and that the undersigned has authority to decide the dispute. Hearing was held on July 20, 2010 in Minneapolis, Minnesota. The parties, both present, were afforded full opportunity to be heard and the hearing was closed with oral arguments. The dispute is now ready to be decided.

STATEMENT OF THE ISSUE:

Was the Grievant responsible for the accident? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

**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.

...

**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, . . . appoint one member of the Board of Arbitration and the two members thus appointed shall select a third member. . . . the third member . . . shall serve as Chairman of the Board of Arbitration. . . .

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.

....

BACKGROUND AND FACTS:

On August 27, 2009, a 2004 Chrysler Town and Country van, parked on the frontage road for Highway 110, was struck and the front fender and the driver's door were damaged. When the owner of the vehicle returned to her car, she observed the damage and when she tried to open the door was unable to do so. A man grilling in front of her car told her that a bus had hit her car and that he had left a note on her windshield. The note, according to this woman, stated that Metro Transit bus 559 had struck her car at 6:47 p.m. This note was turned over to the Mendota Heights Police whom she called to report the accident. When the police investigated the accident, the man who told the vehicle's owner that he had observed the accident told the police that he had observed the bus strike the parked van and leave the scene. He did not give his name to the police, however, and stated that he did want to get involved.

After investigating the accident, the police advised Metro Transit of the accident who identified the bus as that driven by the Grievant and asked him to fill out an accident form. The Grievant states that he was on the frontage road; that while on that road he was stopped by a man who had yelled at him to stop and who told him that he had stuck a vehicle. He also states that he stopped the bus; got out and looked at the parked vehicles; saw no damage that might be caused by an accident; returned to his bus and drove away.

The video produced by the equipment on the bus confirms that the Grievant was on the frontage road; that a man yelled at him and told him to stop and that the Grievant did stop. All of this occurred at approximately 6:40 p.m. It also confirms that the man must have said the Grievant had hit a car since the Grievant got out to look and another passenger went to the door of the bus and also looked. Finally, it confirms that the Grievant returned to the bus door; looked down the line of the bus and the parked cars; got back on the bus and drove away.

As follow up to the police report, Metro Transit inspected the bus for damage and pulled the video produced by the video equipment on the bus. When the bus was inspected some damage was noted but the safety specialist indicated in an e-mail dated September 3 to a Metro Transit Risk Management employee that he didn't "see any new damage in these photos" to which that employee responded that it "does not appear that there is any new damage to bus 559." Nonetheless, after reading the Grievant's report and the report prepared by Metro Transit, the safety specialist concluded that the Grievant was responsible for the accident.¹

The finding that the Grievant was responsible for the accident was grieved on October 7, 2009. The grievance was considered and denied at all three steps of the grievance process and, subsequently, appealed to arbitration.

The record does not clearly establish how management arrived at its conclusion that the Grievant was responsible for the accident. The responses given by management in its denial of the grievance at Steps 1 and 2, however, establish the basis upon which management reached its conclusion.

At Step 1 of the grievance procedure, the bus operations manager said that the "video

is inconclusive" and that "there is no visual or audio indicating contact" but also concluded that the Grievant was responsible for the accident. According to the manager, he reached this conclusion based upon the fact there was a witness to the accident; the fact that the bus was at the location at the time the witness said he had observed the accident, and the fact that there was damage to both the vehicle and the bus which is consistent with a sideswipe accident. He also stated that the fact that the police documented damage to the vehicle and that the rear bumper on the Grievant's bus was replaced cannot be ignored. At Step 2 of the grievance procedure, the assistant director of garage operations, denied the grievance and advanced the theory that the accident occurred when the Grievant created a tail swing by moving the bus to the left to gain clearance from the parked vehicles on the right as he pulled away from the scene.

ARGUMENTS OF THE PARTIES:

The Employer argues the evidence establishes there is no other plausible answer for how the parked van was damaged other than that the Grievant's bus collided with the van on August 27, 2009. Further, it argues that based upon this preponderance of the evidence it can only be concluded that the Grievant was responsible for the accident and his grievance should be denied.

As proof of its assertion, the Employer states that the evidence shows that the Grievant's bus was on the frontage road at 6:46 p.m.; that a witness to the accident left a note on the vehicle stating that the Grievant's bus had collided with the van within one minute of the time when the bus was there; and that since the damage to the vehicle is consistent with the trim and smudges on the Grievant's bus, the only conclusion that can be reached is that the damage was caused by a bus. It adds that the Grievant admits that he was there; admits he was close to the cars, and admits that someone called out to him to stop the bus saying that he had hit a vehicle. It also states that video produced by the video equipment on the bus shows a classic tail swing and that this was what caused the accident.

The Union, however, charges that the Employer has failed to prove that the Grievant was responsible for the accident since it based its finding solely upon a statement made by a

¹ It is not clear that the safety specialist also viewed the video before concluding the Grievant was responsible for the accident. During the hearing he testified only that he "saw it at some point".

witness who did not testify at the hearing and whom the Union could not cross examine. It continues that the Grievant's testimony under oath must be given more weight than the hearsay statement of a person who never came forward to testify.

The Union also declares that even if the witness' statement were to be considered, it is inconsistent with the theory management now advances since the witness stated the accident occurred before he yelled at the bus to stop and management's theory has the accident occurring as the Grievant left the scene after stopping. Further, it asserts that it is reasonably possible that the vehicle was struck by another bus and that management cannot prove there were no other buses on that road.

DISCUSSION:

The record establishes that a vehicle was damaged on August 27, 2009 between 6:00 and 8:00 p.m. while parked on a frontage road for Highway 110. It also establishes that a man grilling immediately in front of the damaged vehicle alleged that a Metro Transit bus driven by the Grievant struck the vehicle at 6:47 p.m.; that the witness refused to give his name to the police who investigated the accident; that he did not testify at this hearing, and that there is no other direct evidence which proves that the Grievant was responsible for the accident. Nonetheless, based upon this allegation and the fact that the bus was on the frontage road during the time period when the car was parked there; photos of damage done to the van, and the fact that the rear bumper was replaced on the bus following the accident, the Employer concluded that the Grievant was responsible for the accident.² This evidence, however, is not sufficient to prove the Employer's finding.

At hearing, the Union strenuously objected to the admission of evidence relating to the statement made by the man who alleged the Grievant had struck the vehicle since it was hearsay evidence. Although this type of evidence is less reliable than the direct testimony of the person making the statement, arbitrators generally admit such statements subject to a determination as to how much weight the statement should be given.³ In this case, the statement is clearly hearsay which should be given little weight since the Grievant was not

² See Joint Exhibits 6, 7 and 8 and testimony of the Director of Bus Operations.

³ See **The Common Law of the Workplace, The Views of Arbitrators**, Second Edition, National Academy of Arbitrators, The Bureau of National Affairs, Washington, DC., 2005, pgs. 36-37.

allowed to cross examine the witness; since the submitted evidence fails to corroborate the statement and since it appears that the statement is incorrect.

According to the owner of the vehicle and the police report detailing its investigation into the accident, the witness left a note on the window of the van stating that the Grievant's bus struck the vehicle at 6:47 p.m. and told both the owner and the police that he had observed the accident at that time. The video produced by the video equipment on the bus suggests a different scenario. On the video, one can hear the witness yell at the Grievant to stop and that the Grievant did. The time, however, was at 6:40 p.m. and the video shows that the Grievant was long gone before 6:47 p.m. rolled around. The video also shows that the Grievant got off the bus, apparently after the witness alleged he had struck a vehicle, and went back to check on whether he had hit the vehicle. It also shows that one of the passengers on the bus went to the door, looked down the way toward the Grievant to see if there was a problem and said "it's tight", a statement that suggests the vehicles were close to each other but not that the bus had struck one of the parked cars. And, finally, the video shows the Grievant returned to the door of the bus, re-boarded it and drove off without either of the two passengers aboard the bus questioning the Grievant or his actions. While this video does not conclusively establish that the bus did not strike a parked vehicle prior to the time the Grievant stopped on the frontage road, it strongly indicates that neither the Grievant nor the passengers on the bus thought an accident had occurred at the time the bus stopped on the frontage road and one can only guess why the man grilling would have stopped the Grievant and alleged that the Grievant had hit the vehicle. Further, one must question why the Employer would have relied upon the statement made by this witness as proof that the Grievant was responsible for striking the vehicle since the video does establish that the statement made by the alleged witness was inaccurate and since the Employer now argues that the accident most likely occurred as the Grievant was pulling away from the parked vehicle and not before he had stopped, a finding that contradicts the witness' statement.

One must also question why the Employer relied upon repair to the damaged bus as proof that the bus was involved in an accident. Not only did the safety specialist and a Metro Transit Risk Management employee conclude immediately after the alleged accident occurred that the bus had no new damage but they concluded that the damage that was there was

similar to the damage done to the bus when it was involved in a June 24, 2009 accident.⁴ Further, their conclusions seem to be confirmed by photos taken of the damage done to the bus after the June 24, 2009 accident and photos taken of the damage to the bus taken after the alleged August 27, 2009 accident. Since the photos indicate the damage to the bus on June 24th and August 27th appears to be the same and since there was no other direct evidence available to support a finding that the bus had been involved in a second accident, one can only conclude that the safety specialist found the Grievant responsible for an accident on August 27th based on the fact that maintenance decided to replace the bumper on the bus after inspecting the damage to the bus following the August 27th incident. This evidence is circumstantial, at best, and, though admissible, is not persuasive proof that the Grievant was either involved in an accident or that he was responsible for one.

The Employer's most persuasive argument is that the tail swing of the bus caused the bus to collide with the parked vehicle when the bus moved to the left as it pulled away from the scene after stopping and that it is likely that the Grievant did not know he had struck the vehicle. This argument, however, also lacks sufficient evidence to prove the Employer's finding that the Grievant was responsible for an accident that occurred on August 27, 2009.

As proof, the Employer relies upon the shadow movement recorded on the video equipment within the bus and measurements and photos it took showing tail swing. While the video does show a shadow movement as the bus began to move after stopping on the road, the video shows that same shadowy movement several times throughout the recording. Consequently, while it is possible that the shadow movement reflects the bus turning to the left, there is no proof that the Grievant actually turned to the left as the bus started to move. Further, even if one were to conclude that it did indicate that the Grievant turned to the left as the bus started to move, the shadow does not establish how far to the left the Grievant might have turned the bus nor how much tail swing might have occurred. Without such proof, one cannot conclude that tail swing from the bus caused the bus to strike the damaged vehicle. Further mitigating against such a conclusion is the fact that the video does not show either passenger reacting as though the bus might have struck the vehicle as it again started to move and management's finding that the video is "inconclusive" and that "there is no visual or audio

⁴ See Joint Exhibit 2.

indicating contact" with the vehicle. Given the damage done to the vehicle, it is hard to believe that there would be no audio on the video suggesting an accident or that either passenger would not have felt or heard the collision and reacted.

Further, the photos management provided as proof that the vehicle was side swiped by the Grievant's bus are inconclusive. Management asserts that it compared the height of the trim and bumper on a bus similar to the one it alleges was involved in the accident with a vehicle that was similar to the van that was damaged and found that the potential for damage was consistent with the damage found on the parked vehicle which could have been caused by the trim and bumper of the Grievant's bus. This finding, however, is mere speculation since management relies only upon photos of the damaged vehicle and not actual measurements establishing where the damage occurred on the parked vehicle to arrive at its conclusion. Eyeballing it, particularly on a photo, is not proof. Circumstantial evidence must lead to inferences and factual conclusions that give rise to more than speculation. Since this evidence does not do that it is not sufficient to find that the Employer's conclusion is a reasonable probability.⁵

In summary, based upon the record, the arguments advanced by the parties and the discussion above, it is concluded that the Employer failed to prove that the Grievant was responsible for an accident that occurred on August 27, 2009. Accordingly, the following award is issued:

AWARD

The grievance is sustained.



By: _____
Sharon K. Imes, Arbitrator

August 24, 2010
SKI

⁵ See **Problems of Proof in Arbitration: Proceedings of the Nineteenth Annual Meeting, National Academy of Arbitrators**, The Bureau of National Affairs, Inc., Washington, DC 1966, pgs. 191-92; 210-11; and 256.