

IN RE ARBITRATION BETWEEN:

METROPOLITAN COUNCIL TRANSIT OPERATIONS, (MCTO)

and

AMALGAMATED TRANSIT UNION (ATU), Local 1005

DECISION AND AWARD OF ARBITRATOR

BMS Case # 10-PA-0868

JEFFREY W. JACOBS

ARBITRATOR

February 22, 2011

IN RE ARBITRATION BETWEEN:

MCTO,

and

ATU, #1005.

DECISION AND AWARD OF ARBITRATOR
BMS CASE #10-PA-0868
Terrance Williams Grievance

APPEARANCES:

FOR THE EMPLOYER:

Andrew Parker, Attorney for the Employer
Jeff Wostrel, Operations Manager
Christy Bailly, Dir. of Bus Operations

FOR THE UNION:

Roger Jensen, Attorney for the Union
Terrance Williams, grievant
Dan Abramowicz, Union Business Representative

PRELIMINARY STATEMENT

Hearings in the above matter were held on February 1 and 2, 2011 at the Law Offices of Parker Rosen in Minneapolis, MN. The parties presented oral and documentary evidence and the record was closed on February 2, 2011. The parties waived Post-Hearing Briefs.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated August 1, 2008 through July 31, 2010. Article 13 provides for binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. The parties stipulated that there were no procedural or substantive arbitrability issues and the matter was properly before the arbitrator.

ISSUE PRESENTED

Did the grievant violate the terms of the Last Chance Agreement dated 12-12-08? The terms of the Last Chance Agreement are clear that “failure of [the grievant] to comply with any term of this Agreement shall result in his immediate termination. Such termination shall be deemed just and merited as interpreted in Article 5, Section 1 of the labor Agreement between the parties.” The Agreement is further clear that “the arbitrator shall not have jurisdiction to modify the discharge penalty in the event such a violation is found.”

PRELIMINARY ISSUES

The MCTO operates a transit system in and around the Twin Cities area. They operate both buses and LRT trains and it is clear from the evidence that safety of the traveling public as well as the public in general is the company's number one priority. It is of course a common carrier and by common law held to a very high standard of care in the operation of its vehicles.

As noted above, this matter arises from a Last Chance Agreement, LCA, dated December 12, 2008. While the underlying incident giving rise to the LCA was not litigated, it was clear from the record that the grievant was fired for allegedly hitting an elderly woman's walker when making a right turn. The grievant disputed that he had in fact hit her walker but the fact remains that the LCA is in place and limits the arbitrator's jurisdiction.

The case is in fact three separate grievances in one. The Union has grieved the decision to "file" the three instances used to sustain the discharge under the terms of the LCA and, as will be discussed below, asserts that these instances should not have been filed but rather logged or simply used as further counseling or training for the grievant to improve. The parties generally agreed that the question before the arbitrator on this record is whether the grievant violated the terms of that LCA and whether the three incidents discussed herein, occurring on October 8, 2009, March 3, 2010 and September 16, 2010 should have been "filed" within the meaning of the LCA or whether they should have been treated differently and either simply "logged" or not made part of the grievant's record at all.

The LCA provides in relevant part as follows:

On December 3, 2008, Mr. Williams was discharged for a Pedestrian Accident on 11/28/2008 and Overall record. The Amalgamated Transit Union filed, on behalf of Mr. Williams, a grievance challenging the discharge.

Mr. Williams wishes to be remaining employed with the Council and the Council is willing to allow Mr. Williams a last-chance opportunity to continue as an employee with the Council as long as he agrees to and complies withal of the following conditions:

* * *

5. Mr. Williams agrees that within any rolling calendar year from the date of the agreement he cannot have more than two (2) filed customer complaints.

* * *

8. This agreement and the related discipline shall remain in the employee's personnel file for 36 (Thirty-six) months from the date of this Agreement.
9. Failure of Mr. Williams to comply with any term of this Agreement shall result in his immediate termination. Such termination shall be deemed just and merited as interpreted in Article 5, Section 1 of the Labor Agreement between the parties."
10. This Agreement shall not operate to restrict the Council's authority to terminate Mr. Williams for any reason not mentioned in this Agreement, if that reason would have been proper reason for Mr. Williams' termination in the absence of this Agreement.¹

* * *

8. [sic]² In the event Mr. Williams is discharged pursuant to the agreement, he may file a grievance only to challenge whether his conduct constituted a violation of any employer rules or regulations stipulated in this agreement. Mr. Williams specifically agrees that he may not challenge the propriety of the discharge penalty in any stage of the grievance procedure.
9. If Mr. Williams' grievance is submitted to arbitration, the jurisdiction of the arbitrator is limited to determining whether Mr. Williams was in violation of this agreement. All parties agree that the arbitrator shall not have jurisdiction to modify the discharge penalty in the event such a violation is found.

Prior to discussing the question of whether the grievant violated the LCA, it was necessary to discuss several preliminary issues raised during the hearing. This is a deviation of sorts from the "normal" format of such decisions but this is unique in that the LCA limits the issue and the arbitrator's jurisdiction.

Initially, the basis of the discharge was that the grievant violated the terms of the LCA, specifically that he had two filed customer complaints within a rolling calendar year. There was no question that the LCA is still in effect since it stays in effect for 36 months. Further, the instances relied upon by the Employer all occurred within a rolling calendar year, i.e. 10-8-09, 03-03-10 and 09-16-10. The issue was whether the three instances were appropriately "filed."

¹ The Employer did not assert that the other instances and the grievant's overall record formed the basis of his discharge in this instance. The grounds for his termination were limited to the LCA and the allegation that he violated its terms

² The next two paragraphs are listed as "8" and "9" but are actually the 12th and 13th paragraphs on the agreement.

The Employer introduced multiple documents from prior instances involving the grievant from both before and after the LCA and asserted that these were relevant to determine whether it was appropriate to file these three incidents. The Employer noted that the grievant's record is one of the worst in the entire MCTO operation of some 1400 drivers and that his history of customer complaints, missed pick-ups, safety violations and rudeness to the traveling public must be considered to determine the appropriateness of the filing of the three incidents. The Employer asserted that filing of these incidents was clearly called for, as opposed to simply logging them or ignoring them.

The Employer noted that many of the incidents could well have been filed but in order to give the grievant more chances and the benefit of the doubt and to attempt to train him to be a better driver, they were not. Further, the Employer introduced these incident reports and customer complaints, Employer exhibits 45, 44, 43, 42, 41, 24, 23, 21 and 10, for purposes of showing notice to the employee of exactly what he was being told not to do.

The Union objected vigorously to these and asserted that these should not be considered for purposes of determining whether the grievant violated the LCA. The Union further asserted that these documents do not pertain to the three instances that gave rise to the allegation that the grievant violated the LCA and should not be considered at all. The Union noted that the Employer did not rely upon the grievant's overall record, as it apparently had in 208, but instead limited the grounds for termination to the allegation that the grievant violated the LCA, specifically more than 2 filed customer complaints in a rolling calendar year. The Union asserted that the Employer's is attempting to poison the well by bringing up old and irrelevant instances of customer complaints in an effort to prejudice the arbitrator.

The parties argued long and hard at the hearing over the admissibility, relevance and probative value of these exhibits. These were reviewed along with the remainder of the evidence in this matter. Clearly, the grievant has a very poor record in terms of his customer relations and occasional lapses of judgment in several critical ways.

Clearly too he was not terminated for that history but rather for the limited three instances noted above. In most cases such history would be relevant to determine remedy but remedy is not at issue due to the terms of the LCA.

At the end of the day, on this record the question of whether these documents and other incidents both before and after the LCA need not be decided. The remainder of the record on these unique facts shows that the grievant had ample warning of the conduct complained of and what the Employer expected of him. He had ample training and that training and the documents pertaining to it were introduced without objection. It was only the documents related to the other incidents that were the subject of the Union's objection.

It should also be noted that the foundation and admissibility of the documents pertaining to training, i.e. Employer exhibits 40, 38, 37, 33, 32, 31, 25, 20, 15, 14 and 13, was clearly established and these documents were appropriately introduced on the record, any Union objections notwithstanding. Accordingly, while the Employer's documentation of the "other" incidents were reviewed they were not necessary on this record to determine the violation of the LCA. The evidence relative to the three instances alone was sufficient to demonstrate that the Employer's decision to file these was appropriate. Each of the three instances will be considered separately setting forth the parties' contentions on each with a determination of the appropriateness of the filing of them leading then to the ultimate conclusion of whether there was in fact a violation of the LCA.

PARTIES' POSITIONS

FIRST INCIDENT – OCTOBER 8, 2009

EMPLOYER'S POSITION

The MCTO took the position that the incident of October 8, 2009 was appropriately filed and should be counted toward one of the instances giving rise to the termination under the terms of the LCA. In support of this position, the MCTO made the following contentions:

1. The MCTO stated that its number one priority in all its operations is safety of its passengers and the public. It has drummed this into its drivers and all its employees that safe operations of its vehicles of whatever kind, whether they are transit vehicles or other types of vehicles is critical. This theme ran through all of the instances. The Employer emphasized too that it is in the business of picking up passengers, not leaving them in the dust at a bus stop, and treating them respectfully and courteously. Their funding and overall reputation depends on this.

2. The Employer noted that the grievant has a dismal record in this regard and has been counseled, warned, trained on multiple occasions. He has reviewed so-called safety key training as well as the 8 steps training on how to safely operate on the roads and safely enter and exit bus stops. All of these the grievant acknowledged receiving, yet he persists in disregarding them.

3. In addition, the grievant has a bad history of customer relations and has numerous complaints complaining of his rudeness and poor attitude. He has been counseled on this numerous times as well as been offered EAP to see if he can adjust his behavior and demeanor with customers.

4. The Employer asserted throughout this procedure, as alluded to above, that the context in which the three instances arose shows that the Employer has given the grievant more chances than he deserved by reducing certain violations from "filed" to "logged" or by logging them in the first place when they could and should have been filed and by simply discussing certain instances with him rather than taking any formal action. He has had his chances and the Employer has had it with him.

5. Turning to the October 8, 2009 incident the Employer presented a video for the bus cameras that it contended spoke volumes about the way in which the grievant operates. He is constantly in a rush even though he is not running late, a factor that also ran through all of the incidents. The Employer asserted most strenuously that even if he were running late, that would never be an excuse to treat passengers the way he did on this date.

6. The Employer pointed to a multitude of safety and rule violations he committed on this date. He allowed several passengers to board the bus at a stop on the 61 route. Contrary to policy he shut the door before all passengers had boarded. One passenger was in the stairwell of the bus, which is a clear violation of policy.

7. He further, began moving the bus before all passengers had cleared the area near the farebox and in fact started moving the bus less than a second after closing the door. He did not and could not have completed the 8 safety steps to make sure the bus could exit the stop safely.

8. As the video shows a passenger who had been at the stop walked toward the door and knocked on the door after it had closed. He exhibited no threatening gestures or tendencies before he got to the door. The video demonstrates no yelling or other obscene or threatening language he used. He simply walked to the door. At that moment, the grievant left; later slowed, appeared to stop to left the customer on only to drive off again as if this were some sort of sophomoric prank.

9. Apart from the transgression of leaving a passenger who clearly wanted to ride the bus, the grievant did not look to his right to determine if there were any last minute passengers. This was a safety violation and clearly against rules he had been trained on and warned about time and again.

10. He was specifically trained to watch for last minute passengers – he failed to do so. He was specifically trained to wait to move the bus until the passengers had cleared the farebox area – he failed to do so. The Employer asserted that the mirror is in place for the very reason shown on the video – so that the driver can see the doorway to determine if a passenger wants to get on.

11. The Employer asserted that the claim that the passenger was violent was bogus. Nothing can be heard on the video that suggests an obscenity. Moreover, even if the passenger had used an obscene word that would never be a reason to refuse to board him. MCTO drivers are trained to board the passenger and deal with behavior once on the bus. There was nothing to suggest that the passenger would have been disruptive or violent.

12. Most importantly, the sole reason the passenger was angry was that the grievant left him standing at the stop. He then raises his arms as if to say, "Why are you leaving?!" He does nothing further and there was nothing to suggest he would be a threat to anyone.

13. The Employer noted that the behavior of a passenger while off the bus is not the business of the operator. It is only after they board that the driver may deal with it. Here the passenger exhibited no behavior that would have warranted leaving him behind and the grievant should have boarded him and dealt with anything that arose, including apologizing to him for shutting the door in this face. Operators are specifically trained to diffuse difficult situations and this was no different.

14. Finally, the grievant's comments afterward are telling. The grievant seeks to use the customer's anger to defend against his violation of safety and customer service rules when he in fact created that anger. He blames the passenger for getting to the door too late, even though he had been standing at the stop all along. "I ain't in the mood," video at 10.25.26, was his terse statement about the passenger – and this is never appropriate behavior for a professional driver. He even argues with a passenger who suggested that he would have picked the passenger up. The grievant was in a rush for reasons unknown and wanted to punish the person for taking too long to approach the door.

The MCTO seeks an award sustained the decision to file this incident and denying the grievance in its entirety.

UNION'S POSITION

The Union took the position that the October 8, 2009 incident should not have been filed. In support of this position the Union made the following contentions:

1. The Union's position throughout was that the Employer's case was vastly overstated. The grievant is a 10-year operator who has been named a Master Driver by the MCTO in recognition of his skills as a bus operator. This is an honor reserved for 10% to 20% of the approximately 1400 drivers in the entire operation. The grievant, according to the Union, is in fact is an excellent driver who occasionally makes an error, like any driver might.

2. The passenger in question in this incident did not indicate that he wanted the bus. He was seen standing talking to other people even though the bus was there and made no attempt to walk toward the door until the very last minute – after the door was shut and the bus about to leave. The grievant had no idea he wanted to board until it was too late.

3. The Union pointed to the video of the incident and argued that the grievant made a judgment that the person who approached the door was possibly violent and used obscene language.

4. The Union noted that there have been many instances where drivers have been assaulted, spit on, yelled at and even shot or knifed by passengers. The grievant believed in good faith that this particular passenger was a threat to the passengers and to the overall safety of the bus. The Union noted that the MCTO claims to place safety at the top of its priority list yet will not support a driver who makes a judgment call about keeping the bus safe from a possibly violent passenger.

5. The Union also asserted that even though the obscenity cannot be heard clearly on the video, the grievant clearly did hear it. His then is the only competent evidence on that issue and it must therefore be assumed that the passenger did use foul language and was exhibiting threatening tendencies even before getting on board.

6. The Union acknowledged that the grievant should not have shut the door with the passenger still on the steps but that the grievant was not fully aware of where that passenger was. This was his only “mistake” on this incident and he should not lose his job over such a minor misstep.

7. The Union also defended the comments made by the grievant after the incident and noted that the grievant often engages in conversation with his passengers. This is expected and even encouraged by the MCTO in order to build rapport with the customers. Often too, they ask questions to find out why something happened. The grievant was simply explaining to the passenger near the front of the bus why he left that person. That passenger even acknowledged that the person who was left behind was “talking stupid,” thus supporting the grievant's assertion of foul language and the perception of a threat to the safety of the other passengers.

8. The Union argued that the grievant must be given the benefit of the doubt in this incident because he was the sole eyewitness to the event and because the other passengers seem to have heard that comment as well. The MCTO should not be allowed to second-guess an otherwise good driver and take away his livelihood.

9. The Union asserted throughout the case that this is an extremely important case and that the Union very strongly opposed the use of a record of any incident other than the three that formed the basis of the claimed violation of the LCA and that the arbitrator should not be persuaded by the Employer's obvious attempt to use other incidents to attempt to prove the grievant's guilt of a violation of the rules on this particular incident. The Union's claim here is that the passenger showed signs of possible violence and that the grievant, acting in good faith to protect himself and his passengers, decided not to board a potentially violent and angry passenger.

The Union seeks an award overturning the decision to file this incident and requests an order reducing the incident to simply "logged."

MEMORANDUM AND DISCUSSION OF THE OCTOBER 8, 2009 INCIDENT

The grievant has undergone multiple training sessions and has been counseled and trained on the need to slow down, not rush and watch for passengers, especially last minute passengers who might want to board the bus at the last minute. He has further been trained many times on the need to utilize the so-called 8 steps and safety keys to make sure the bus can enter and exit a stop safely.

As noted above, the Employer introduced multiple instances it alleged were similar in nature – i.e. passing up passengers, rushing and running early causing people to miss the bus, safety violations and customer complaints dealing with rudeness and brusque behavior. These were not considered in this matter largely because they were not needed. The evidence on the video was enough, especially in light of the grievant's training both as part of his normal training and as part of the ongoing counseling he has received over time to provide ample support for the Employer's decision to file this incident.

The video was the operative piece of evidence here, as it was frankly on all these incidents. The video was reviewed several times both in regular time and frame by frame to see exactly when certain things happened.³

The event itself takes place over a very short period of time. At 10:24:38 of the video two passengers are seen entering the bus and walking up the stairs. Even though the second passenger is still in the stair well of the bus the grievant closes the door. It was a clear violation of the Bus Stop Leaving Procedure, see Employer Exhibits 13, 14, and 15. He should not have closed the door so soon. Within less than one second, he begins moving the bus even though there are still passengers near the farebox paying their fares. This too is a clear violation of the procedure and is a safety violation.

There was clear evidence that the proper procedure for exiting a stop is to make sure there are no last minute passengers who want the bus and may be near it as it starts moving. The operator must therefore be able to see the door, and is required to look down the stairwell at approximately knee level so the operator can assure that no one is standing near the door. The Employer's witnesses testified credibly that the risk is that someone may be running for the bus and possibly fall under the wheel and be injured or killed. It was clear that incidents like this have happened and the Employer specifically trains operators to avoid it. This too was a procedure the grievant failed to observe.

At this point it was clear that the grievant had violated several procedures but it was also clear, despite his testimony to the contrary, that he failed to perform the proper steps to look around the bus, i.e. the Safety Keys, the 8 step rock and roll procedure, to make sure no one was around the bus, there were no last minute passengers approaching the bus and to make sure he could leave the area safely. Indeed, if he had, the incident that occurred at this stop would not have happened.

³ The grievant asserted that it is not necessarily fair to review the videos frame by frame and in slow motion multiple times. He of course had but one "run" through this incident and had to make a snap judgment without the luxury of being able to go back and re-run the tape. His point was well taken but when watching the tape in regular time the full flavor of the incident comes through amply well even without the frame-by-frame and slo-mo review.

The operative facts occurred within an instant of his closing the door. A person who had been standing at the stop and who clearly moved toward the bus just as the grievant closed the door (an action he should not have done so quickly as discussed above) stood next to the door as the grievant started exiting the bus. The video shows that the grievant made no effort whatsoever to stop the bus and let this passenger on. The passenger actually knocked on the door but the grievant ignored him and drove on.

At no point did the passenger exhibit any violent or threatening behavior before walking toward the door. There was therefore no credible evidence that this passenger was dangerous or that he would have been disruptive.

The Union asserted that the only competent evidence on the record is the grievant's testimony that he heard an obscenity and made a judgment that the passenger should not be let on because of it. The grievant claimed that he heard the passenger yell an obscenity and that he felt the passenger should not be let on the bus. This frankly did not ring true.

There was also the audio from the bus cameras. There was nothing on that audio to suggest that the passenger used an obscenity. Reasonable inferences can be drawn from available evidence and here the most reasonable inference is that the passenger, while clearly upset by the grievant's actions, did not use an obscenity that was even loud enough to be picked up on the audio portion of the tape.

Moreover, as the Employer suggests, the grievant cannot use that anger as a defense to his actions since his actions caused the anger. More to the point, even if the passenger had shouted something inappropriate this was not a reason to pass him up. Initially, his conduct outside the bus is not necessarily a reflection of how he would conduct himself once on the bus. He raised his hands as if to say, "why are you leaving me here," but there was nothing to suggest he was violent. There was no weapon; no raised fists or any other action that would lead a reasonable person to believe he would have been assaultive. A simple apology would likely have entirely diffused the situation. As discussed below, the grievant was hardly in an apologetic mood that day.

Second, and most importantly, the totality of the evidence shows conclusively that even if that passenger was angry it was because the grievant slammed the door in his face and drove off even though he had knocked on the door and clearly indicated he wanted on the bus. He got there well within a reasonable time to get on and had every reason to expect that he would be allowed on the bus. For the grievant to shut the door in his face and drive off would certainly have been seen as a major affront and a clear violation of the MCTO's stated reason for existence – to pick up the public and transport them courteously and safely. There was no question that did not happen in this instance.

Further, the grievant then moved the bus a few feet and then slowed down as if to send a message that he was going to stop. The passenger outside began moving toward the front door when the grievant then sped away. This action smacked of a high school prank frankly and was again a demonstration of the grievant's tendency to be in a hurry, even though he was not running late that day.⁴ The Employer also made a clear point that it must present itself through its employees, especially the operators, who deal with masses of the general public every day, as a safe and courteous operation. Leaving a passenger standing at the curb in this manner sent a very negative message not only to him but to every passenger on that bus and the several people standing at the same stop apparently waiting for other busses.

Finally, the grievant's demeanor and actions after he left were quite telling. He engaged a passenger near the front of the bus in a conversation about what had just happened. That passenger was obviously somewhat surprised by it and made a comment about how it was lucky he was not the driver. His words were somewhat obscured but it was clear he was shocked by the grievant's actions in leaving the man standing there.

⁴ The MCTO witnesses also gave very clear testimony and the documents bear this out, that running late is never a reason to compromise safety or customer relations. The number one goal is safety of the public. The grievant's actions here and indeed in both of the other incidents involved show a clear disregard for safety and customer relations.

It appears that the passenger on the bus was arguing with the grievant over the wisdom and propriety of leaving the man standing at the stop noting that the man had already turned around and was at the door. The grievant would hear none of it though and it was clear that he was offended by it but was not going to engage the grievant who was already exhibiting an aggressive and fairly strident attitude in a verbal battle over it.

It was inappropriate to engage in this type of conversation in the first place and again gave the impression that if someone dawdles, even for one or two seconds, and is not standing at the door when it meets the grievant's pleasure they will be left standing by the wayside. Frankly, the grievant is there to serve the public, not the other way around and the clear policy and training is that he is to wait until it is clear that no one else wants the bus and that he can leave the stop safely. That did not happen here.

Moreover, his comments can clearly be heard on the video and after some discussion about "talking stupid" the grievant can be heard to say, "I ain't in the mood for it." In the mood for it or not he had an obligation to stop for that passenger, to follow the safety and customer service rules as set forth in the policy manuals and extensive training he received and to make sure he operated that bus in such a way as to serve the traveling public and to do so safely. There is no question whatsoever that this incident was properly filed.

SECOND INCIDENT – MARCH 3, 2010

EMPLOYER'S POSITION

The MCTO took the position that the incident of March 3, 2010 was also appropriately filed and should be counted toward one of the instances giving rise to the termination under the terms of the LCA. In support of this position, the MCTO made the following contentions:

1. The Employer reiterated all of the training the grievant has had and emphasized that even between the first filed incident and this one he had several other issues that arose that were of great concern. Some of these might have been legitimately filed but in an effort to once again give the grievant the benefits of the doubt and to try, again, to get him to amend his behavior, the MCTO chose not to file them but to train the employee and counsel him on how to improve his customer relations, adhere to safety rules most of all – to slow down and take the time to make sure there are no passengers waiting to get on the bus and to make sure he is operating safely. Once again however, the Employer argued, as the video of this incident shows, the training fell on deaf ears.

2. The Employer turned to the video and noted that once again it shows the grievant in a heated rush for some reason, violating safety rules, closing the door too early, moving the bus in clear violation of policy while a passenger was standing in the farebox area, failing to maintain a proper lookout and to perform the 8 steps and safety keys by looking to his left before moving the bus and nearly hitting a pedestrian as a result and, again, failing to notice a person standing at the door who clearly wanted on and leaving him there. He further indicated that he had “left the stop” before noticing the person standing by the door but the video does not bear that out – he was actually still in the stop but decided he was going to go anyway and make that person wait 30 minutes for the next bus.

3. The Employer noted that when viewing the tap it is apparent that the grievant may have grown impatient because so many people were in line to get on. Further one passenger was taking a long time to pay his fare and was using small denomination coins to pay. It matters not however how long someone takes to pay – that is never an excuse to violate or ignore safety rules nor is it a reason to fail to adhere to the 8-step procedure or to apply safety keys before moving the bus. There are ways to tell a passenger to have a seat, get their fare ready and pay later.

4. The Employer emphasized that it is dangerous to move the bus while a person is standing in front of the “standee line,” which is a brightly colored yellow line near the front of the bus. There are no handholds there and it is difficult for a person standing to steady themselves. They could fall if the bus lurches or stops and could be injured.

5. The Employer noted that the grievant moved the bus while a person was standing in front of this line and that what happened is exactly what the rule is designed to prevent – the man fell into the front window of the bus and it is lucky he did not fall backwards down the stairwell.

6. The Employer then noted that a person is seen out the left side camera of the bus. He is clearly visible coming out from between two parked cars on the opposite side of the Street, where the bus was, and is seen crossing the street. This person is first seen at 12.39.24 of the video and the grievant closes the doors at 12.40.22.10. He is actually off the brake of the bus at 12.39.22 as well. The pedestrian is seen crossing the street literally right next to the driver’s side of the bus, approximately 4 to 6 feet from the driver, approximately 4 seconds before the bus moves and nearly this the pedestrian, who is at that point at the corner of the bus.

7. The Employer asserted that there was no way given these times and the position of the pedestrian that the grievant could have performed the safety checks to make sure he could exit the stop safely. He again was obviously in a rush, even though again he was not late, and started to move the bus while people were near the farebox and he could not see around them to check for last minute riders. The pedestrian crosses right in front of the bus and clearly starts to turn toward the door. Without even looking, the grievant started pulling out of the stop when the pedestrian knocks on the door, similar to what happened in the last incident.

8. The Employer asserted that the grievant's claim that he had "already left the stop" was bogus and that the video did not bear that out. He had not left the stop and had moved perhaps 5 feet and was within an arms length of the curb because the pedestrian reached out a knocked on the door.

9. The Employer further claimed that the grievant's story simply falls apart. He claimed he did not hear the knock even though it is clearly audible on the video. The Employer noted that it was "ironic" that the grievant not hear that loud bang on the door in this incident yet claimed he heard swearing from the passenger in the October 8, 2009 incident above even though nobody else could hear it. The knock on the door is quite loud and the passenger can again heard to shout at the grievant who simply drives away.

10. Again the Employer pointed to the grievant's inappropriate comments once he left the passenger behind. He made statements to the effect of "see what happens when you cross in front of my bus," "I won't walk in front of anything bigger than me," and "not allowing him to commit suicide on my watch," or words to that effect. He then made a statement that the person could catch the next bus, even though there was no other bus for 30 minutes.

11. The Employer made the same sort of argument again with regard to this incident as the one before. The grievant was in an unnecessary hurry, did not check for last minute passengers, closed the door too early, moved the bus too early, violated several critical safety rules, did not perform the 8 safety checks, did not check to see if anyone was on his left (because if he had he would have seen the pedestrian who was less than feet from him at that point), nearly hit a pedestrian, pulled out from a stop while people were standing at the farebox causing one of them to stumble into the front window and again left a passenger who clearly wanted the bus standing in the dust. The Employer asserted that these facts even standing alone, but especially when viewed in context, clearly support the decision to file this incident.

The MCTO seeks an award sustained the decision to file this incident and denying the grievance in its entirety on this issue.

UNION'S POSITION

The Union took the position that the March 3, 2010 incident should not have been filed. In support of this position the Union made the following contentions:

1. The Union pointed out that the grievant is not and cannot be responsible for the unlawful and dangerous behavior of the public. Here the man who was supposedly asking for the bus had just jaywalked across several lanes of traffic, dodged cars and literally came from behind the grievant and ran in front of a bus that was about to leave a stop.

2. The Union further noted that there is a blind spot near the driver's window that prevents the driver from seeing a person who may be coming from behind. The Union noted that the video clearly shows that the pedestrian came from behind the driver and would have been exactly in that blind spot at the exact moment the grievant began to move.

3. The Union further asserted that the grievant did follow the 8-step procedure and that when he started moving he did not see the pedestrian. When he did he immediately stopped the bus thereby preventing a tragedy. The Union claimed that the grievant should have been given a commendation for avoiding a bus pedestrian accident that had very real potential for horrible consequences. Instead the Employer seeks to punish him for maintaining a watchful eye and a keen lookout.

4. The Union further asserted that the grievant had no idea the man who had just jaywalked in front of his bus in fact wanted to get on. The video shows him walking slowly in front of the bus but he made no motion that he wanted on nor did he make eye contact with the grievant or give the grievant any other sort of indication that he may have wanted on the bus.

5. The grievant and the Union both asserted that after the man had safely crossed the street and was on the curb the grievant then looked to his left to make sure there was no traffic and began to move the bus. He does not have eyes in the back of his head and while he was looking to his left to check for oncoming traffic he did not and could have seen the man turning toward the door.

6. By the time the pedestrian knocked on the door the bus was already in a lane of traffic and was moving out into the lanes. By that time, even though the grievant did hear the knock on the door, it was too late to stop. In fact it would have been dangerous to do so since that would have meant stopping the bus in the middle of the road. MCTO policy prohibits picking up passengers in that scenario and the grievant acknowledged that in his training has was specifically taught not to stop again once he had already left the stop. He followed procedure to the letter here and decided not to stop again once he had committed to a lane of traffic.

7. Further, while the Union acknowledged that the grievant probably should have allowed the person who was paying his fare to exit that area before moving the bus but noted that the grievant was not written up for that. Rather he was written up for passing up the pedestrian who had just jaywalked and ran in front of a bus. The grievant argued that he did not know he many wanted the bus until it was too late and that even though he heard the knock and knew he wanted the bus he had already left.

8. Moreover, the Union asserted that if he had stopped it might have caused an accident because the grievant had no way to know if someone was behind him and a sudden stop could well have led to a rear-end collision.

9. Finally, the Union again defend the comments the grievant made was simply an attempt to explain to other passengers on the bus what had happened and to allay their concerns if any about the near miss and the knock on the door. The grievant was not in an extraordinary rush and reacted to a man who ran in front of a moving bus and how extremely dangerous that was and to let the other passengers know no to do that as they might be injured.

10. The essence of the Union's claim here is that the grievant had no way of knowing the man was there until he was literally right next to the bus and no way to know he wanted to board the bus until he was out into traffic and on his way. To have stopped under those circumstances might well have created an even greater problem since the grievant is so committed to safety he decided to

take the safe route and continue without putting his bus, other car and the pedestrian himself in any danger.

The Union seeks an award overturning the decision to file this incident and requests an order reducing the incident to simply “logged.”

MEMORANDUM AND DISCUSSION OF THE SECOND INCIDENT – MARCH 3, 2010

Again the videotaped evidence was crucial in determining what actually happened here. That video shows that virtually nothing about the grievant's story was as he suggested.

The tape shows that a long line of passengers boarded the bus at the stop in question and that near the end of the line was a man who attempted to pay his fare with small coins. He had some difficulty getting them out of his pocket and took some time paying. The grievant suggested that the passengers behind him swipe their fare cards on the electronic reader near the farebox and board the bus. They did so and, as in the last incident, the grievant immediately shut the door behind the last passenger even though there were clearly still people in front of the standee line and on the stairwell. He had been counseled and trained not to do this countless times yet the tape shows again that he was in a hurry for reasons still unknown and unexplained on this record and shuts the door.

More importantly, he attempts to move the bus even though a man is still standing by the farebox and who stumbles because of it. The other view of the camera shows that one of the other passengers also stumbles as he is walking down the aisle and is obviously somewhat startled by the fact that the bus has started moving even though he does not have a seat nor a firm grip on anything.

The Union suggested at the hearing that the man in the front of the bus was simply taking too long to pay and that may have somehow justified the grievant's actions. The evidence was completely to the contrary. The clear policy and the unmistakable training the grievant got is that it does not matter how long someone takes to pay – you do not move the bus while someone is standing there or what might happen is exactly what did happen. Someone could easily lose their balance and fall. Here no one fell but the man is seen stumbling into the front of the bus.

Once again, the grievant did not make sure the area was clear so he could see if last minute passengers were waiting to board. His view of the door was obscured by the man at the farebox yet it was clear from running the video in both real time and slow motion that he intended to get underway no matter what and started to move almost the second the door closed again.

It was at that moment that the “other” part of this scenario and the grievant’s actions came together. The camera facing the window directly behind the driver shows a man waiting to cross the street. He is carrying packages and is waiting for cars to move out of the way so he can cross.

On this record it was entirely plausible that the grievant did not see him at the moment he entered the street as it was apparent that he was focusing on the boarding passengers. Further, the man crossing the street was slightly behind and to the left of the grievant at that moment. After that however, the remainder of the grievant’s story begins to disintegrate.

A close review of the video shows that the man disappears from view out the left window of the bus that is immediately behind the driver’s seat. The stanchion holding the barrier between the driver’s seat and the seat behind it is visible in that view so it is apparent that the man would have come into the grievant’s view had he looked for him and was literally right next to the grievant while he walked past the bus.

At the point at which the person crossing the street leaves that scene the bus is not yet moving. It is approximately 4 seconds from that point until the man appears again in the front window of the bus for the camera facing forward. It is important to note that the front facing camera does not show the window immediately in front of the driver but rather the window to his immediate right. This means that the man would have likely appeared well within the grievant’s view well before he is seen coming into view from the forward facing camera. If, that is, the grievant had been looking for him and paying attention to what was to his left.

The grievant noted that there is a blind spot that prevents him from seeing certain actions to his rear. The Union provided no actual evidence of that other than the grievant's statement to that effect but on this record it would not have mattered. First, the bus company and presumably the manufacturers of the bus have taken the notion of blind spots and the inescapable fact that people do not have eyes in the backs of their heads not account and provided mirrors for that very purpose. If one looks into such a device objects behind you are visible.

Second, the MCTO has trained its operators and this grievant specifically in the so-called rock-and-roll procedure, which requires that the operator move his body to look around such known blind spots to make sure nothing and no one is in the way. This too would have required adherence to the policy.

Finally, while there was much ado made about the possibility of a blind spot on the type of bus the grievant was driving that day one thing percolates above all others: whether there was a blind spot on that bus or not – it isn't out the front window. It was abundantly clear that the man in the street would have come so close to the bus by the time the grievant decided to move it he would likely have been in view. At best he would have been right next to the grievant out the left window and likely within 4 to 6 feet of the grievant. It was impossible for him to miss the grievant if he had looked to his left as he claimed he did and as the policy requires.

As the man walks in front of the bus the grievant moves it, sees him and immediately hits the brakes. The man standing next to the farebox falls forward and into the front of the bus. Fortunately he was not hurt. The man standing in the aisle also is taken by surprise and staggers a bit as well. Fortunately too, neither was he.

The man in the street moves across the front of the bus and he does not raise his hands – because he is carrying packages and cannot. Immediately as he steps onto the curb the grievant begins moving the bus. He claimed that he was in the intersection before he heard the man knock on the door but the tape also belies that assertion.

The bus has moved perhaps 4 to 6 feet before the man knocks on the door. The bus was moving a very slow speed and could easily have been stopped to pick this passenger up. The assertion that the bus was into the intersection is simply not borne out by the video. It is not in a lane of traffic and there was no reasonable basis to leave this passenger behind- under any circumstances. Here the next bus was not due for 30 minutes, which only exacerbates the situation.

The failures in this instance are almost too many to list but start with the fact that the grievant did not wait to check if there were passengers waiting to board at the last minute and failed to wait until the person at the farebox had left that area. Had he adhered to that policy he would have seen the man walking across the street well before he moved and the near miss incident when the man walked in front of the bus. Had the grievant looked as he claimed he did he would certainly have seen this person and presumably would not have moved the bus at all. Had he stopped for him this incident would likely not have occurred but he did not.

Once again the grievant's comments after the bus left the stop are telling as to his attitude and his demeanor. He is heard to comment about not walking in front of anything bigger than he is and not committing suicide on his watch, etc. These comments make it clear that again the grievant was in a rush for some reason and did not want to be bothered with the needs of the traveling public or the requirements of safety. Apparently he was not in the mood for that either on this day. Accordingly, the Employer was justified in filing this incident as well and the grievance on his question is denied.

THIRD INCIDENT – SEPTEMBER 16, 2010

EMPLOYER'S POSITION

The MCTO took the position that the incident of September 16, 2010 was also appropriately filed and should be counted toward one of the instances giving rise to the termination under the terms of the LCA. In support of this position, the MCTO made the following contentions:

1. The Employer asserted that this instance was, quite contrary to the Union's assertions here, the “worst” of any of the three at issue in this case since it placed pedestrians, other vehicles and everyone on the bus in imminent danger, once again due to the grievant’s penchant for rushing around with the bus and failed to follow safety procedures.

2. The Employer made the point that it responded to several accidents, some of which resulted in fatalities, involving buses making left turns and striking pedestrians and implemented the Look and See campaign. The grievant was given this training, along with all the other specialized training he received as a result of the other instances listed above and was clearly aware of the need to maintain an extra special careful lookout when making a left turn.

3. That training also emphasized “leaving yourself an out,” do not make assumptions about pedestrians and that pedestrians always have the right of way. The Employer noted that it does not matter where they are or what they are doing, buses must yield to pedestrians. They may be distracted, talking on phones looking down, distracted by other vehicles and may not see a bus. It is the professional bus operator’s job and duty to watch out of them – not the other way around.

4. In this instance the Employer asserted that the grievant’s apparent tendency to rush caused hi again to violet these very clear policies. It used the video evidence of this incident as well.

5. The video shows the grievant's bus driving west on Washington Avenue in Minneapolis. At 4th Street, the grievant made a left turn in front of oncoming traffic in an apparent attempt to “beat” the traffic and make his turn in front of them rather than waiting for the traffic to clear.

6. Again, the Employer asserted, he failed to maintain a proper lookout for pedestrians. Two men are clearly seen on the video, and would also have been seen by the grievant walking north on 4th and approach the intersection of Washington. They then turn to their right and walk in the marked crosswalk with a green light and walk signal when the grievant makes his turn.

7. The grievant then hits his horn and “scatters” the two men. One runs forward and the other stops and backs up suddenly to avoid being hit. The grievant then barreled through the intersection even though one of the men points to the green light and walk sign. The grievant once again is heard saying the word “dumbass” on the tape and exhibiting a callous attitude toward these pedestrians. He can also clearly be heard by the other passengers on the bus.

8. The Employer asserted that the grievant has always tried to blame someone else for the mistakes he makes and then attempts to persuade the passengers on the bus of the propriety of his actions, as he did here.

9. The Employer noted that the grievant has indicated a desire to be an instructor yet was extremely evasive about whether he would train people to perform the maneuver he undertook that day in the same way. The Employer asserted that a negative inference can and should be drawn from his answer; or more specifically, his lack of an answer.

10. The Employer also pointed to the statements made by the grievant and by the Union throughout this procedure in the grievance steps. Here, even the Union acknowledged that the maneuver executed was inappropriate, See Joint Exhibit 6.

11. Even the grievant acknowledged that he “won’t defend what he has done.” See Joint exhibit 6, and admitted in those steps that he failed to adhere to the policy on pedestrians. The Employer asserted that the history of this grievant and these three instances shows that he will not “fix” the problem. He has been given multiple chances to conform his behavior and has not.

12. The Employer pointed to several missteps in this instance. First, there was no reason to try to rush through the intersection. He could have waited for the cars to clear and then proceeded. Second, he obviously did not see the pedestrians or assumed, contrary to his training, that they were going somewhere else. He has been specifically trained not to make that assumption. Third, it was clear even before he had committed to making the turn that these men were in the intersection, in a marked crosswalk with the walk sign.

13. MCTO employees researched the intersection and how long the lights stay green etc. Their information showed that the “Walk” sign is on for 40 seconds. In the video that light can be seen changing as the bus proceeds down Washington and that it is less than 40 seconds from that point until the grievant makes his turn. Thus, the pedestrians were in the crosswalk with the “Walk” sign. The Employer further noted that it would not have mattered if the “Don’t walk” sign had been flashing. There is never an excuse to fail to yield to pedestrians.

14. More to the point, the Employer asserted that the grievant left his bus in a most precarious position once he started that turn. Even though he tapped his horn that did not guarantee that the men would scatter and run out of the way. Had they frozen or were not able to get out of the way - or had fallen, the grievant would have been left with the Hobson’s choice of either slamming on the brakes and running the risk of having the oncoming cars hit him or continuing on and possibly hitting the pedestrians. There was no “out” for him and while sometimes split second decisions must be made this was no on of those time. He had time and could have waited yet he chose to blast through the intersection and hope against hope that anybody in his way would get out of the way.

The MCTO seeks an award sustained the decision to file this incident and denying the grievance in its entirety on this issue.

UNION’S POSITION

1. The Union characterizes this incident as the weakest part of the Employer’s case and asserted that it should never even have been logged let alone filed and thereby form the basis of the loss of the grievant's job. The Union asserted that the grievant literally did nothing wrong here and should again have been praised for his actions in making sure he followed procedure to warn the pedestrians of the danger.

2. The Union further asserted that the grievant followed all appropriate procedures in making this turn. He maintained a proper lookout and made sure he could clear the intersection well in front of any oncoming traffic. The grievant noted that the cars coming toward him were speeding and that he should not be held responsible for their bad driving behavior.

3. The grievant further noted that he was not sure where the pedestrians were going. They could have continued on their northward route across Washington when the light changed or gone to their left and proceeded along Washington Avenue.

4. The grievant asserted that he had committed to his turn when the men entered the intersection and that he was already well into the intersection when they committed to walking across the intersection. At that point he had to complete the turn; if he had stopped he would have run the risk that the oncoming cars might not have stopped and hit him. He argued that he could not be held responsible for their bad driving actions in that instance.

5. The Union pointed to Employer Exhibit 40 – the power point presentation and used as the basis of the training and upon which the Employer relied so heavily and noted that one of the slides shows almost this exact scenario. There is a picture of two pedestrians walking across an intersection in almost the exact same position as the two pedestrians are shown on the video. The instructions to the drivers are to 1) tap the horn – he did; 2) make eye contact – he did that as well. The Union asserted that he did exactly what he had been trained to do and should not be held accountable for the fact that these pedestrians may have entered the intersection late and may also have done so after the “don’t walk” sign began to flash.

6. The Union noted that the grievant’s actions saved an accident here. No one was hurt, the men got out of the way without apparent injury or mishap and the cars cleared the intersection without incident. Once again he should be praised for his quick thinking and evasive driving actions here. He was at all times in control of the bus and could have stopped if had been forced to.

7. The Union argued that these men may have entered the intersection on the “Don’t walk” sign and should not have been there at that point. The grievant had no way of knowing they would break the law and start walking when they were not supposed to. He was in a classic Catch-22 situation – if he stopped the other cars would have had to stop for him as he was in control of the intersection at that point so then had to do what he had been trained to do to make sure the pedestrians saw him and got out of they way.

The Union contended that this incident should not have even been logged and should certainly not have been filed and requests an order expunging it for his record entirely.

MEMORANDUM AND DISCUSSION OF THE THIRD INCIDENT – SEPTEMBER 16, 2010

The main difference between this instance and the two described above is that in the first two the grievant’s actions left people at a bus stop, whereas here the grievant’s actions could potentially have left people lying in the street.

The video of this incident provides ample evidence that the grievant was once again rushing and that he failed to adhere to the safety rules in place to prevent scenarios just like this. He failed to follow the training given to him in the “Look and See” campaign, See Employer Exhibit 40. That exhibit goes through a scenario almost identical to the one presented on this video and trains the drives to aim high in steering so they can see “who is waiting to cross the street,” “where is the other traffic,” and whether there are “pedestrians or bicyclists approaching the intersection.” The drivers are taught to look ahead at least 15 seconds.

They are further taught to perform the Rock and Roll procedure and to look around so they know where pedestrians and other vehicles are – don’t assume it, know it. The Employer countered the claim by the Union that Exhibit 40 allowed the grievant to do what he did simply by tapping the horn and pushing through the intersection. Indeed there is a picture shown on the exhibit that shows two pedestrians crossing at approximately the same place that the two men in the video in the September 16, 2010 incident were when the grievant approached them.

Several things are clear though from this evidence. First, the point of the picture and the training was to demonstrate that people may not be watching; they could be distracted by cell phones, weather or other matters. It is the operator's job to watch for them.

Second, the training did not teach the drivers to simply tap the horn and go through – just the opposite. Drivers are taught to tap the horn and make eye contact to get their attention but do so in time to be sure they and the bus can go through the intersection safely. Finally, the Employer noted that while the picture advises the drivers to tap the horn and make eye contact, it goes a step further and admonishes the drivers not to make assumptions about where the pedestrians are going.

The Employer asserted that the grievant failed to follow the steps he had been specifically taught regarding left turn safety and placed his bus and those pedestrians in potentially grave danger.

The video is very telling in this regard. It shows the bus proceeding west on Washington Avenue. One can see the light at 4th Street turn green on the video. The bus proceeds toward that intersection and the two men who eventually cross the street can be seen approaching the intersection along 4th. The video clearly shows them entering the intersection well before 40 seconds had elapsed. The preponderance of the evidence is thus that they entered the intersection on a green light with the "Walk" sign on. They were thus completely legally and appropriately in the intersection at all times material to this discussion.⁵

The other piece of the Look and See training, and indeed the general training operators receive is to leave themselves an out. Here too the grievant failed to follow that simple driving rule. The bus approaches the intersection of 4th and Washington and does not slow down much if at all. It is apparent from the tape that the grievant was attempting to beat oncoming traffic across the intersection.

⁵ It should be noted too that it would not have mattered to this discussion even if they had entered the intersection on a "don't walk" flashing sign on. While this may or may not have constituted a jaywalking offense that is a matter for the Minneapolis Police Department not the grievant. His job was to yield to those pedestrians. Whether they entered the intersection on a "walk" sign or not, their presence there did not make them targets – they were pedestrians to whom the grievant must yield. Clearly he was not going to let that happen and ran between them forcing them to run out of the way or be run down by a moving bus. He had been trained to do so many times and in many ways, not just the Look and See presentation but in trainings and counseling for years.

The video shows several cars approaching from the opposite direction and that the grievant had a short window of opportunity within which to cross the intersection or he would have had to wait a few more precious seconds to allow traffic to pass. Had he done so this incident might never have occurred since by that time the pedestrians would likely have crossed and been well out of harm's way when the grievant proceeded. That of course is conjecture since that is not what happened.

The grievant entered the intersection without slowing even though at the point at which he enters it, the two pedestrians are already clearly committed to crossing the street in front of the grievant's bus. He could have stopped short of that intersection and allowed traffic and the pedestrians to pass in front of him.

As the bus enters the intersection, the vehicles coming toward him are increasing their speed as well. They less than ¼ of a block away when the grievant taps the horn to get the pedestrians' attention. At that point he had no "out" He was indeed committed to the intersection and his bus was blocking several lanes of traffic. Fortunately for everyone concerned the pedestrians scattered – one running forward while the other stops in a somewhat startled fashion and steps backward abruptly to avoid getting hit by the bus. Had they not so the grievant claimed he could have stopped. Perhaps he could have, perhaps not, but what is clear is that if he had stopped the bus then there was a very real risk of a collision with the oncoming cars on Washington than were already bearing down on him.

The Union contended that this incident was the weakest of the bunch and that it should never have been filed at all. The Union contends that it shows the grievant adhering to all the appropriate safety procedures and that he acted quickly and decisively to avoid hitting the pedestrians. The Union argue that once he was in the intersection he found himself in a Catch-22 situation where he could not go back, ran a risk of collision if he stopped and so tapped his horn and made eye contact to let the pedestrians know he was there.

That however is exactly the point. The problem with this argument is that the grievant never should have entered the intersection the way he did in the first place. It is apparent that he was rushing to get through the intersection to beat the traffic and either did not see the two men at the corner or improperly made assumptions about where they were going.

The Union is correct – the grievant did not know where those men were going as he approached the intersection – and therein lies the problem. It was just as likely that they *would* enter the intersection as that they would *not* and the grievant’s assumptions about it made this scenario possible. Had he waited as he was supposed to; had he made sure where those pedestrians were going before he started the turn; had he waited for the incoming traffic to clear rather than trying to pullout in front of them; had he waited just a few seconds, none of this would have happened.

Once again the grievant’s comments after the incident are telling as to his demeanor and attitude.⁶ He is heard to comment about the pedestrians in a demeaning and insulting way. Other passengers could clearly hear this and could well have been offended by those words and the grievant’s cavalier attitude about what they had done.

Most telling of all though were the comments he made at the third step grievance meeting. He indicated here that he would not defend what he had done and acknowledged that his actions were inappropriate. Both he and the Union argued that the grievant should be given just one more chance and allowed to learn from these mistakes and be allowed to continue driving and hopefully improving. It should be noted that the decision here does not necessarily mean that the grievant is beyond redemption or that he could not learn from these incidents. Clearly he has had plenty of chances and so far his actions do not appear to be changed much but on this record no decision can be made on that issue because of the terms of the LCA.

⁶ It should also be noted that shortly before the incident the video shows the grievant running a red light that had been red for perhaps 50 yards before he ran through the intersection. Who he managed to avoid getting hit there and why he was not disciplined for that was a mystery that remained unexplained. It was a very telling piece of evidence however and goes directly to the grievant’s tendency to rush and gloss over important safety steps.

As both parties noted, the arbitrator has no jurisdiction to determine the remedy pursuant to the terms of the LCA. The sole question was whether these incidents were appropriately filed; whether the grievant can learn from them or get better is not within that purview. The September 16, 2010 was certainly a serious violation of safety training and once again showed that the grievant failed to apply the lessons he was given to slow down, take the time necessary to make sure that he can enter an intersection safely and watch out for pedestrians. The fact that “nobody got killed” does not excuse what happened here. The September 16, 2010 incident was clearly appropriately filed.

CONCLUSION

The Union acknowledged that its hands were tied by the terms of the LCA and that there is no discretion to reduce the penalty here. The Union asserted that the arbitrator had the discretion to reduce the instances listed above from “filed” to “logged” or to expunge them altogether. Under the terms of the LCA that is true and the question set forth above makes it clear that each of these instances needed to be reviewed to determine if the Employer’s actions were unreasonable in filing these. As noted herein, they were not and each of the instances were appropriately filed. Under the terms of the LCA if there are more than 2 filed customer complaints he is to be terminated under the clear terms of the LCA. “More than two” means in this instance at least three. Here there were and they fell within a rolling calendar year within the terms of the LCA. There is no discretion at all under those facts. The termination must be upheld. Accordingly the grievance is denied.

AWARD

The grievances are DENIED. Pursuant to the terms of the LCA the grievant was appropriately discharged

Dated: February 22, 2011
MCTO and ATU – Williams award.doc

Jeffrey W. Jacobs, arbitrator