

**IN THE MATTER OF THE ARBITRATION BETWEEN:**

**Amalgamated Transit Union  
Local 1005**

**And**

**ARBITRATION OPINION  
AND AWARD**

**Metro Transit**

**BMS Case No. 10PA0412**

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**Arbitrator**

**Richard A. Beens**

**Appearances**

**For the Union:**

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One Financial Plaza, Suite 2400  
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**For the Employer:**

**Andrew Parker, Esq.  
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**Date of Award**

**May 2, 2011**

## **JURISDICTION**

This arbitration arises pursuant to a collective bargaining agreement (“CBA”)<sup>1</sup> between Metro Transit (“Employer”) and the Amalgamated Transit Union, Local 1005 (“Union”). Marla Rush (“Grievant”) was employed by Metro Transit and a member of Local 1005.

The undersigned neutral arbitrator was selected by the parties to conduct a hearing and render a binding arbitration award. The hearing was held on April 21, 2011 in Minneapolis, Minnesota. The parties stipulated that the matter is properly before the arbitrator. Both were afforded the opportunity for the examination and cross-examination of witnesses and for the introduction of exhibits. The record was then closed and the dispute deemed submitted.

## **ISSUE**

The parties stipulated to the following issue:

*Was Employer’s discharge of Grievant just and merited and, if not, what shall be the remedy?*

## **SYNOPSIS**

Grievant, a nine-year employee of Metro Transit, was terminated on August 27, 2010, based on her overall record and for having four chargeable accidents within a three year period.<sup>2</sup> She grieves the termination as not being “just and merited.” She further alleges that an incident of tardiness on April, 23, 2010, should be “non-chargeable” and

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<sup>1</sup> Joint Exhibit 1.

<sup>2</sup> Joint Exhibit 2.

that she was not responsible for the fourth accident occurring on July 28, 2010.<sup>3</sup>

## FACTUAL BACKGROUND

The Employer, a subdivision of the Metropolitan Council, is responsible for operation of the mass transit system in the Minneapolis/St. Paul metropolitan area. They employ 1300 to 1350 drivers for a fleet of 780 buses. The fleet includes two models, a 40-foot bus weighing 12 tons and a 60-foot, articulated bus weighing 16 tons. All drivers must learn how to operate both.

Employer's drivers are given extensive training. Operators, who are first hired on a part-time basis, receive approximately four weeks training. The regimen includes orientation in a classroom, practice maneuvering buses, and an extensive road check where an instructor accompanies the student driving actual bus routes. When promoted to full-time, operators are given an additional three to four weeks training.

As a mass transit agency, the Employer understandably stresses safety when training bus operators. Safe transport of the riding public is the primary goal. To this end, trainees receive and must become familiar with the Bus Operator's Rule Book & Guide.<sup>4</sup> This document sets forth a number of rules applicable to the present case. For instance, "right of way" is discussed as it relates to bus operation:

*Our vehicles must proceed only when it is safe to do so regardless of the right of way. Whether or not a vehicle has the right of way will not be accepted as an excuse for a collision with a pedestrian, a bicycle rider or another vehicle.<sup>5</sup>*

Similarly, the procedure for making turns is covered:

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<sup>3</sup> Joint Exhibit 4.

<sup>4</sup> Employer Exhibit 3.

<sup>5</sup> Employer Exhibit 3, Section 244.

*When making turns, position your bus in the appropriate turning lane to keep other vehicles or pedestrians from coming between your bus and the curb. When making at an intersection with multiple turn lanes, make your turn from the lane farthest to the right as legally permitted.<sup>6</sup>*

Operators are also cautioned to “*Clear mirrors before moving bus.*”<sup>7</sup>

Throughout training, drivers are urged to:

***Remember the Five Safety Keys:<sup>8</sup>***

- 1. Aim high in steering***
- 2. Get the big picture***
- 3. Keep your eyes moving***
- 4. Leave yourself an out***
- 5. Make sure they see you***

Grievant acknowledge receiving the Bus Operator’s Rule Book & Guide, her duty to know its contents, and to be governed by them.<sup>9</sup>

Following completion of training for both part-time and full-time drivers, they are given a Final Safety Review, a checklist which requires the trainee to read, understand and initial salient safety rules.<sup>10</sup> Among those rules are the following:

13. *Always use the proper lane on city streets to protect the right side of the bus. Avoid weaving and changing lanes while driving on the freeways. Double check mirrors before changing lanes. Allow yourself enough time and space to make a lane change to avoid cutting off other vehicle.*

14. *Make proper right and left hand turns by slowing down to a walking pace....Scan your mirrors constantly and look around blind spots...*

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<sup>6</sup> Employer Exhibit 3, Section 246.

<sup>7</sup> Employer Exhibit 3, Section 520 A.

<sup>8</sup> Employer Exhibit 3, Section 510.

<sup>9</sup> Employer Exhibit 4.

<sup>10</sup> Employer Exhibits 5 and 6.

15. *Scan mirrors properly BEFORE moving bus...*

Grievant passed the Final Safety review at the end of her part-time training<sup>11</sup> and again following full-time driver training.<sup>12</sup> She also took and passed a Part-Time Driver Cumulative Final<sup>13</sup> and a Defensive Driving Quiz.<sup>14</sup> Among the questions Grievant correctly answered on the former was,

6. ***Which of the following definitions best describes an (Sic) “preventable” accident?***

*(Answer) A. An accident that could have been averted by employing the 5 Safety Keys.*

The Employer has also adopted an extensive and detailed progressive discipline policy.<sup>15</sup> Included is a discipline policy relating to safety and accidents.

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

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

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

Grievant acknowledged receiving a copy of the Employer’s discipline policy.<sup>16</sup>

Grievant was a nine-year employee of Metro Transit. While she had occasional

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<sup>11</sup> Employer Exhibit 5.

<sup>12</sup> Employer Exhibit 6.

<sup>13</sup> Employer Exhibit 7.

<sup>14</sup> Employer Exhibit 8.

<sup>15</sup> Employer Exhibit 1.

<sup>16</sup> Employer Exhibit 2.

attendance issues<sup>17</sup>, she also received seven customer commendations in the last two years.<sup>18</sup> However, her driving record was far more problematic. It was her fourth accident within a 20-month span that led to her termination.

The first accident occurred on December 16, 2008, when she closed a door on a passenger's arm.<sup>19</sup> Following the incident, Grievant had a safety conference and was given a ride check.<sup>20</sup> She was also warned that management deemed this a "*responsible accident*" and that, "*...further accidents could result in disciplinary action up to and including discharge.*"<sup>21</sup> Management's designation and warning were not grieved.

The second accident occurred on April 29, 2009. When making a left hand turn, the rear of Grievant's bus hit and broke the mirror of a truck in the lane to her right.<sup>22</sup> She was given a safety conference and required to, "*Attend Safety Keys to re-new observation skills and be able to consistently apply Safety Keys in your driving.*"<sup>23</sup> She was given a written warning that deemed the incident her second "responsible" accident. She was also warned, "*Another responsible accident within the warning period would result in a Final Record of Warning for Safety being issued.*" Although Grievant disclaimed responsibility and refused to sign the notice of discipline, she did not grieve the written warning.<sup>24</sup>

The third accident occurred on August 17, 2009, less than four months later.

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<sup>17</sup> Grievant's tardiness on 4/23/10 was determined to be non-chargeable during the grievance step process.

<sup>18</sup> Employer Exhibit 29.

<sup>19</sup> Employer Exhibit 14A.

<sup>20</sup> Employer Exhibits 14B and 14C.

<sup>21</sup> Employer Exhibit 14B.

<sup>22</sup> Employer Exhibit 15A.

<sup>23</sup> Employer Exhibits 15C and D.

<sup>24</sup> Employer Exhibit 15B.

While pulling away from a curb, Grievant's bus clipped and broke the left side mirror of another Metro Transit bus.<sup>25</sup> It had to be taken out of service for repairs.<sup>26</sup> Following the incident, Grievant was given six hours of one-on-one safety training.<sup>27</sup> Finally, she was given a Final Record of Warning which stated, "*Should Ms. Rush have another responsible accident during the warning period, her continued employment would be jeopardized.*"<sup>28</sup> Again, the Employer's disciplinary actions were not grieved.

The accident specifically at issue in this arbitration occurred on July 28, 2010. Grievant, driving a standard 40-foot long bus, was initially eastbound on Washington Avenue. Due to construction in the right lane, she turned right from the center lane of Washington to the left lane of southbound 4<sup>th</sup> Avenue South. After completing the turn, her bus drifted to the right, partially in the left and partially in the center lane of 4<sup>th</sup> Avenue. She intended to turn left into the Gateway Ramp entrance, which is mid-block between Washington and 3<sup>rd</sup> Street South. Without signaling, she began the left turn when she heard a horn and the noise of a collision. The bus had struck a car attempting to pass on the left side of the bus. Video cameras on board the bus recorded the entire sequence.<sup>29</sup> Significant damaged was done to the right front quarter of the vehicle.<sup>30</sup> \$5904.58 was spent on repairs to the car.<sup>31</sup> Significant damage was also incurred on the lower left side of the bus.<sup>32</sup> It cost \$4668.20 to repair.<sup>33</sup>

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<sup>25</sup> Employer Exhibit 16A.

<sup>26</sup> Employer Exhibit 16E.

<sup>27</sup> Employer Exhibit 16F.

<sup>28</sup> Employer Exhibit 16D.

<sup>29</sup> Employer Exhibit 30.

<sup>30</sup> Employer Exhibits 21A, B and C.

<sup>31</sup> Employer Exhibit 23.

<sup>32</sup> Employers Exhibits 22A, B and C.

<sup>33</sup> Employer Exhibit 24.

At a subsequent safety conference, the Grievant admitted failing to make the proper observation through use of her left mirror as she was turning. The management safety specialist concluded, “*This is a responsible accident.*”<sup>34</sup>

Following an Investigative Hearing<sup>35</sup> and a Loudermill Hearing,<sup>36</sup> Grievant’s employment was terminated on August 27, 2010. The grounds for discharge were, “*Violation of Metropolitan Operating Policy*” and “*Overall Record.*”<sup>37</sup>

## **APPLICABLE CONTRACT PROVISION**

### **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.*

## **APPLICABLE OPERATING POLICY**

### **Appendix B**

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

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

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

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<sup>34</sup> Employer Exhibit 25.

<sup>35</sup> Employer Exhibit 26

<sup>36</sup> Employer Exhibit 28.

<sup>37</sup> Joint Exhibit 2.

## OPINION AND AWARD

The stipulated issue to be resolved is whether Employer's discharge of Grievant was just and merited and, if not, what remedy is appropriate. The parties CBA provides that all disciplinary actions must be, "...*just and merited.*"<sup>38</sup>

It is well established in labor arbitration that, where an employer's right to discharge or discipline an employee is limited by the requirement that any such action be for just cause, the Employer has the burden of proof. While there is a broad range of opinion regarding the nature of that burden, the majority of arbitrators apply a "preponderance of the evidence" standard. That standard will be applied here.

In determining the question of whether the Employer's action was "just and merited," the arbitrator is called upon to interpret the phrase as a term of art, which is unique to collective bargaining agreements. While the arbitrator may refer to sources other than the contract for enlightenment as to the meaning of the phrase, his essential role is to interpret the contract in determining whether or not a given action was proper.

A review of discipline for alleged employee misconduct requires an analysis of several factors. First, has the Employer relied on a reasonable rule or policy as the basis for the disciplinary action? Second, was there prior notice to the employee - express or implied - of the relevant rule or policy, and a warning about potential discipline? A third factor for analysis is whether the disciplinary investigation was thoroughly conducted.

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<sup>38</sup> Neither party indicated that the wording of their CBA, that discipline be "just and merited," differs from the more common phrase, "just cause." I cannot find any meaningful distinction between the two. In either case, the Employer cannot discharge based on mere whim or caprice. (See, *How Arbitration Works*, Elkouri & Elkouri, Sixth Edition (2003), Chapter 15.2.B.ii.

Were statements and facts fully and fairly gathered without a predetermined conclusion?

Fourth, did the employee engage in the actual misconduct as charged by the employer?

In this case, the Employer has a clearly enunciated policy of discharging an employee after four “responsible” accidents within a rolling three-year period. The parties disagree on the meaning of “responsible.” The Union would interpret “responsible accident” by using Minnesota’s comparative negligence law.<sup>39</sup> In other words, an employee could not be charged with a “responsible accident” unless he or she caused 51% or more of the total negligence leading to the accident. In this case, it was suggested that Grievant was only responsible for 33.3% of the negligence in the accident at issue. The remainder would be divided equally between the Employer for failing to have a parabolic mirror at the Gateway Ramp entrance and car driver for attempting to pass the bus on the left side.

The Employer’s concept of “responsible accident” is much broader. They equate “responsible” with “preventable.” Although “responsible accident” is undefined in Employer’s policy, their witnesses stated that any accident that was “preventable by using the 5 safety keys” is a “responsible accident.” In other words, if Grievant’s use of the 5 safety keys would have prevented the collision, she can be charged with a “responsible accident.”<sup>40</sup> This would be true even if her negligence were only a small portion of the total causing the accident. Even under the Union’s view, the 33.3% of negligence they attributed to Grievant would lead her to be charged with a “responsible accident.”

I find the Employer’s interpretation far more persuasive, particularly in the

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<sup>39</sup> Minnesota Statutes, Section 604.01

<sup>40</sup> This interpretation is corroborated by Question 6 on Employer’s Exhibit 7, a question Grievant answered correctly at the time.

context of a public mass transit carrier. The public demands and the Employer expects the highest level of professionalism from bus operators. A “but for” test encourages constant cognizance of the driver’s extensive safety training. If an accident would not have occurred “but for” violation of a Safety Key, they will be held accountable. In the interest of public safety, bus drivers must be ever vigilant of the accident risks that surround them. The 5 Safety Keys are designed to do just that. Awareness of the “big picture,” “keeping eyes moving,” “always leaving an out,” and “making sure they see you” are all common-sense accident prevention techniques.

On the other hand, strict application of the comparative negligence law would allow a driver who is 49% negligent to escape disciplinary consequences. That is an unacceptable standard for a public carrier.

I find the Employer policy to be reasonable. In particular, I find equating “preventable accident” with “responsible accident” reasonable, especially for a mass transit carrier.

There can be little doubt that the Employer fulfilled the second requirement. Grievant acknowledged receipt of the Employer’s disciplinary rules.<sup>41</sup> She was counseled on the 5 Safety Keys after each of her first three accidents. She was given check rides and one-on-one safety training. She was repeatedly warned that additional accidents could lead to further disciplinary actions. She was given a Final Record of Warning following the third accident.<sup>42</sup> Last, Grievant testified that she was well aware that her job was in jeopardy before the final collision.

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<sup>41</sup> Employer Exhibit 2.

<sup>42</sup> Employer Exhibit 16D.

As for the third element, the Employer conducted a thorough investigation. Metro Transit Police filed an accident report.<sup>43</sup> A supervisor interviewed Grievant the day following the accident.<sup>44</sup> A Safety Specialist interviewed her on August 16, 2010. She admitted fault at that time and he concluded that it was a “responsible accident.”<sup>45</sup> Another investigative hearing was held a day later.<sup>46</sup> A Loudermill Hearing was held a week after that.<sup>47</sup> At each stage, Grievant was allowed to express her view of the facts. Most importantly, the bus’s onboard video cameras recorded the entire incident. Both the Employer and Grievant had the opportunity to view it before the termination. I find that the investigation was thorough and fair. Grievant was accorded due process at all stages.

Finally, was it appropriate for the Employer to charge the July 28 collision as Grievant’s fourth “responsible accident?” The bus’s onboard video system provides the greatest assistance in answering this question.<sup>48</sup> As Grievant’s bus approaches the 4<sup>th</sup> Avenue intersection one sees both the right lane of Washington Avenue and the right lane of 4<sup>th</sup> Avenue blocked by construction. Consequently, Grievant turns from the center lane of Washington to the left lane of 4<sup>th</sup> Avenue. Immediately after straightening, the bus gradually moves to the right and straddles the line between the left and center lanes of 4<sup>th</sup> Avenue. In less than half a block, the bus begins a wide left turn into the Gateway Ramp entrance. Shortly after beginning the left turn, first a horn and then sounds of the collision can be heard. The left side of the bus, a few feet behind the front wheel, hit the right

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<sup>43</sup> Employer Exhibits 19 and 20.

<sup>44</sup> Employer Exhibit 18.

<sup>45</sup> Employer Exhibit 25.

<sup>46</sup> Employer Exhibit 26.

<sup>47</sup> Employer Exhibit 28.

<sup>48</sup> Employer Exhibit 30.

front corner of a car that was attempting to pass on the bus's left. The automobile was in the area nearest the left curb. Although this was a No Parking zone, it was in what might normally be regarded as a parking lane. The video also provides a timeline to the nearest hundredth of a second and Event Data, which indicates precisely when turn signals or brakes are being used. An examination of the timeline is instructive:

- 11:48:41:15<sup>49</sup> Bus begins turn from Washington to 4<sup>th</sup> Ave., Right turn signal on.
- 11:48:46:22 Turn completed to left lane of 4<sup>th</sup> Ave. Right turn signal on. Bus begins drifting to right.
- 11:48:50:50 Bus straddles line between left and center lane, Right signal on.
- 11:48:50:89 Auto first visible from front to rear bus camera. No turn signal.
- 11:48:51:42 Bus starts left turn. Auto visible to left of bus. No turn signal.
- 11:48:52:36 Auto horn sounds followed by collision. No turn signal.
- 11:48:56:59 Collision sounds cease as bus enters Gateway Ramp.

I draw several conclusions from this sequence:

- Grievant kept the right turn signal on for over 4.5 seconds after completing her right turn. All the while, she was steering the bus to a position straddling the left and center lane marker on 4<sup>th</sup> Avenue.
- Grievant never turned on her left turn signal.
- The automobile was visible to the left of the bus before she started her left turn.
- Grievant did not check that the area to her left was clear prior to making the turn.

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<sup>49</sup> Times are record in Hours: Minutes: Seconds: Hundredths of a Second.

The Union argues that the auto was speeding and inappropriately passing in a parking lane. Even if true, and it may be, this does not obviate Grievant's duty to check her mirrors prior to turning and, most importantly, to properly signal her turns. The Union also argues that Grievant's attention was diverted to the dark ramp interior in order to avoid striking pedestrians or vehicles within. Further, the Union claims this diversion of attention was necessitated by Metro Transit's failure to replace a missing parabolic mirror at the ramp entrance. Again, even if true, it would not obviate Grievant's duty to engage her turn signal and check her left mirror before starting the turn.

Based on these observations, I find that this accident could have been prevented had Grievant properly used her left turn signal and checked her left rearview mirror before commencing the left turn. The Employer's designation of this as a "responsible accident" was proper. Consequently, it is "just and merited" that Grievant be disciplined.

Finally, the Union argues that termination is an unduly harsh punishment given the overall circumstances of this case. While an arbitrator has the power to determine whether or not an employee's conduct warrants discipline, his discretion to substitute his or her own judgment regarding the appropriate penalty from management's is not unlimited. Rather, if an arbitrator is persuaded that the discipline imposed was within the bounds of reasonableness, he or she should not impose a lesser penalty. This is true even if the arbitrator would likely have imposed a different penalty in the first instance. On the other hand, if an arbitrator is persuaded the punishment imposed by management is beyond the bounds of reasonableness, he or she must conclude that the employer exceeded its managerial prerogatives and impose a reduced penalty. In reviewing the

discipline imposed on an employee, an arbitrator must consider and weigh all relevant factors.

Grievant presents a sympathetic picture. She is a nine-year employee who had great relations with riders - as evidenced by seven customer commendations in the last two years. She appears to have enjoyed her job. There is no evidence of malice or ill will toward management. I also understand that termination may have a significant financial impact on her and her family. However, these attributes must be weighed against application of the Employer's discipline policy.

As a public carrier, Metro Transit has the duty to transport its riders in the safest manner possible. The Employer operational policy uses a classic sequence of progressive discipline. Termination of drivers after four "responsible accidents" in a three-year period is clearly designed to motivate safe driving. Equating "preventable accidents" with "responsible accidents" does the same. Employees are given fair warning of consequences and ample opportunity to grieve. When weighed against the public interest in safe mass transit, Grievant's positive personal attributes, however glowing, do not justify an arbitrator overriding Employer's disciplinary policy and actions in this case.

The Union next contends that Grievant's first three "responsible accidents" were minor and should not be held against her. There is no question they are less serious than the final accident. However, in each case Grievant was made aware that they were going into her record as "responsible accidents." Yet, she failed to grieve any of the Employer's prior determinations. It is hornbook arbitration law that an arbitrator must accept adverse actions on their face where a grievant had notice of the action, had the opportunity to file

a grievance, but failed to do so.<sup>50</sup> Consequently, the first three “responsible accidents” will not be re-litigated here. Time limits in grievance policies serve an important purpose. They provide certainty for both sides. The employee knows precisely how long he or she has to grieve a management action. If no grievance is filed within the prescribed time, management rightfully assumes the employee has acquiesced to their action. The issue is laid to rest with finality. So it is with Grievant’s first three “responsible accidents.” They stand as adverse marks on Grievant’s driving record. Further, four “responsible accidents” within a 20-month period flag a pattern of operator inattention inconsistent with professional driver standards. This remains true even if three were relatively minor.

In summary, I find both the Employer’s underlying policy and its application in this instance to be reasonable.

**AWARD**

The grievance is DENIED.

Dated: May 2, 2011

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Richard A. Beens, Arbitrator

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<sup>50</sup> *How Arbitration Works*, Elkouri & Elkouri, Sixth Edition (2003), Chapter 15.3.F.vii