

IN RE ARBITRATION BETWEEN:

METROPOLITAN COUNCIL TRANSIT OPERATIONS, (MCTO)

and

AMALGAMATED TRANSIT UNION (ATU), Local 1005

DECISION AND AWARD OF ARBITRATOR

BMS Case # 12-PA-0410

JEFFREY W. JACOBS

ARBITRATOR

March 5, 2012

IN RE ARBITRATION BETWEEN:

MCTO,

and

ATU, #1005.

DECISION AND AWARD OF ARBITRATOR
BMS CASE #12-PA-0410
Anthony Andrews Grievance

APPEARANCES:

FOR THE EMPLOYER:

Sydnee Woods, Attorney for the employer
Jeff Wostrel, Garage Operations Manager
Brian Funk, Director of Field Operations
Marilyn Hood, Safety Specialist

FOR THE UNION:

Kelley Jeanetta, Attorney for the union
Anthony Andrews, grievant
Dorothy Maki, union Vice President

PRELIMINARY STATEMENT

Hearing in the above matter was held on February 14, 2012 at the Operations Center 725 North 7th St. in Minneapolis, MN. The parties presented oral and documentary evidence and the record was closed on February 14, 2012. The parties waived Post-Hearing Briefs.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement dated August 1, 2010 through July 31, 2012. 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

Was the notice of Final Record of Warning given the grievant on August 17, 2011 just and merited per the terms of the collective bargaining agreement?

PARTIES' POSITIONS

EMPLOYER'S POSITION

The MCTO took the position that the incident of August 11, 2012 warranted a final record of warning. 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 provided extensive training to its drivers and all its employees in safe operations of its vehicles of whatever kind.

2. The MCTO further noted that all their drivers, including the grievant, are extensively trained on the so-called Smith safety keys system and are taught to aim high in steering, get the big picture, keeping eyes moving, leave yourself an out and make sure "they", i.e. other motorists and pedestrians, see you. This is drummed into the drivers repeatedly to make sure they operate their buses safely and avoid accidents whenever possible by thinking and looking ahead.

3. The employer noted that the grievant has two prior instances where he struck fixed objects and was given warnings per Procedure 4-7d, See employer exhibit 2. The policy and longstanding practice is to give a final written warning for a third chargeable accident within a rolling three-year period.

4. The employer noted that the prior incidents, which occurred on August 21, 2008 when the grievant struck a motorcycle parked in the Heywood garage parking lot, and on February 5, 2010 when the grievant's bus hit a pole while accelerating up an icy hill. These incidents are on the grievant's record and were within the rolling three year period when the instant incident occurred on August 11, 2011

5. While not all of these safety keys were involved here, the accident which occurred on August 11, 2011 showed that the grievant failed on several of them, namely aiming high and getting the big picture, and was avoidable. The grievant struck a parked bus from the rear and did damage to his bus and to the AC cover door of the parked bus.

6. The employer asserted that virtually any time a driver hits a fixed object, with minor exceptions for perhaps hitting a mirror on a tree branch or the like while entering a stop, the driver is considered to be at fault and given a warning pursuant to Policy.

7. The employer asserted that the grievant failed to aim high and failed to get the big picture as he turned into the bays in the garage. He should have noticed that the back of bus 919 was different and that the AC cover was open and propped up and thus extended out from the back of the body of the bus several feet.

8. The employer asserted too that the grievant failed to see what was clearly right in front of him and that even though there was some glare as he entered the bay he was not blinded completely nor was there glare for the entire time he was driving toward the parked bus.

9. The employer made much of the fact that the Heywood garage is where the greatest number of accidents have occurred in the entire MCTO bus system over the course of several years and that the managers there have worked very hard to reduce accidents. The garage is very busy, space is somewhat cramped and the drivers are told over and over to be careful and extra vigilant while driving there to avoid hitting other buses that may be moving around, pedestrians who frequently walk from between busses and from behind other objects and for fixed objects. This is a clear message given to all drivers repeatedly in orientation and other training regarding safe bus operations.

10. Further, the grievant should have looked up and seen an open and obvious danger as he approached the bus in front of him. That bus was parked and striking can only mean that the accident was chargeable as a preventable accident. The MCTO defined "preventable" as an accident, which the driver could have avoided. Here he could have avoided the accident by stopping short of the parked bus and he could have maintained a more vigilant lookout and seen that the cover was open.

11. The employer further asserted that the investigation was fair and thorough and that even though safety personnel did not review the video of the incident prior to the determination, the admissions by the grievant and other evidence that was available clearly showed that this was a preventable and chargeable accident. Further, investigators viewed the scene and tried to recreate the glare issue that the union and grievant raised and still determined that the initial conclusion was correct. If they had found some mitigating set of circumstances that called for a different conclusion they would have and could have changed their determinations but they found no such evidence and stuck by their original call in this case.

12. The employer asserted that the glare evidence on the video was not new – such glare can and does occur in the garage and that drivers need to be aware of it and take steps to either stop, move their eyes or take necessary actions to be able to see what’s in front of them to operate safely. Moreover, drivers are taught that it is the unexpected set of circumstances that – it is frequently what you do not see that causes the accident or the crash. As a result, drivers are taught to expect the unexpected and to take whatever actions are necessary to avoid accidents. Here the grievant failed to keep a proper lookout for all hazards – not just those below his eyes, but those above his line of vision as well and he failed to see that the AC door was open, as he should have.

13. The MCTO asserted that this accident was preventable and the grievant was responsible for it. There were insufficient mitigating circumstances that warranted changing the determinations made by the employer’s investigators and the employer asks that the warning remain in place.

The MCTO seeks an award denying the grievance in its entirety.

UNION’S POSITION

The union took the position that the August 11, 2011 incident should not have been filed and should not have been treated as a chargeable accident. In support of this position the union made the following contentions:

1. The union asserted that the grievant's actions were in keeping with his training and with the 5 safety keys but that mitigating circumstances of blinding glare and the fact that the bus in front of him had its AC door cover open, which has never in anyone's memory ever happened before mitigated this such that it should not have been charged as a preventable accident.

2. The union asserted that any such warning must be just and merited per the terms of the collective bargaining agreement and that this requires a determination of whether the grievant's actions violated any of the policies or training he received. The union asserted that when one views the video of this accident it is apparent that as the grievant turns the corner to pull into the bay, glare literally blots out the bus in front of him. Further, as noted above, for whatever reason, yet undetermined, the AC cover door on the back of the parked bus was left open, which has never happened before on a bus parked in a bay.

3. Moreover, the door was horizontal to the ground making it difficult if not impossible to see with the glare in his face. The grievant asserted too that as he turned the corner he applied safety keys training and aimed high but that at that very moment he was blinded by the sun and was not able to see that the door was open. Neither was he able to discern that the back of the bus looked different in that the engine compartment was visible. While most buses are painted white, many have advertisements wrapped around the back of the bus thus making it a darker color as well so that there was no obvious danger apparent.

4. As the grievant turned the corner the time to aim high and get the big picture was lost due to the sun. Further, he was "getting the big picture" by moving his eyes around looking for pedestrians and other moving vehicles in the garage. He was not focused on a horizontal door left open for some inexplicable reason that was over 10 feet off the ground. He was more properly focused on pulling the bus in tight to the bus in front, as he was trained, and to keep his wheels aligned on the yellow painted line on the left hand side of the parking bay, also as he was trained.

5. He was also making sure his bicycle rack did not hit the back of the bus in front of him and never noticed the door that had been left open. Simply stated, the union asserted that there was no reason for the grievant to ever assume there was a danger lurking 10 feet off the ground and several feet above his sight line and he was doing exactly what he should have been doing; driving slowly watching for pedestrians and other vehicles.

6. The union further assailed the investigative process and noted that the safety personnel made the decision that this was chargeable before ever viewing the video and before ever visiting the site to assess the glare or to view the actual location. While these witnesses testified that they might have changed their minds, the union asserted that once the decision is made it sets in motion a set of determinations that are hard if not impossible to stop or change. Here the investigation was not objective and lacked crucial elements of information – MCTO personnel simply assumed that it was a chargeable accident because there was a collision with a fixed object.

7. The union pointed to the very terms of Policy 4-7d which allows mitigating circumstances to be taken into account in determining if an accident was preventable and the driver was responsible. The union asserted that these mitigating circumstances were not even considered here and that this failure is a fatal flaw in the investigation. The union assailed the experiment that was run days after the incident since the employer observed the glare at 11:00 a.m. whereas this accident occurred at around 6:50 p.m. This can hardly be said to have been scientific or even objective.

8. The union pointed out that the notion that striking a fixed object is not set in stone and that it has long been the case that damaging a mirror by hitting a fixed object at a bus stop, i.e. a tree or the like, is generally not considered a chargeable accident. The union further asserted that the amount of the damage should not be the determinative factor either since a minor impact can cause considerable damage. The question is thus whether the driver's actions violated the safety keys or training in such a way as to justify giving him a warning for a chargeable accident. The union of course asserted that these facts do not support that finding.

9. The grievant further asserted in his testimony that this could have happened to virtually any other driver since they would also have been focused on the yellow line, the bike rack and the need to pull the bus in tight to the back of the parked bus in front. He acknowledged that while in some existential sense he may have been able to avoid the accident, the reality is that a driver in this setting is required to watch out hazards and that no one would ever have considered that an AC door would be left open in the manner it was. The union acknowledged too that it is the unknown factor that frequently causes accidents but that in this setting and on these limited facts, the grievant was allowed to make certain reasonable assumptions about what possible dangers and obstacles he would face and that this was not and should have never been one of them.

10. The union asserted that this entire scenario cries out for a different result based on its limited facts and on what is reasonable under these circumstances. Several mitigating factors should be considered to warrant a finding that a warning was not just and merited here.

The union seeks an award overturning the decision to file this incident as a chargeable accident and that the final record of warning should be removed from the grievant's record.

MEMORANDUM AND DISCUSSION

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

The MCTO provides training to its drivers and emphasizes the Smith 5 Safety Key system to ensure that drivers are alert and aware of their surroundings and to avoid hazards whenever possible. These keys are as follows: aim high in steering, get the big picture, keeping your eyes moving, leave yourself an out and make sure others see you. Some of these safety keys are involved in this matter, as set forth below.

The evidence showed that the grievant was given these safety keys training on several occasions, including a refresher course after a chargeable accident in February 2010. See employer exhibits 12 and 14. The evidence further showed that the grievant has two prior collisions with fixed objects while driving his bus. The first one occurred on August 21, 2008 when he struck a motorcycle while moving around the garage. The second occurred on February 15, 2010 when his bus skidded while going up a hill and hit a pole. The grievant was forthright about these incidents and indicated that he agreed that he was at fault for those and was appropriately warned pursuant to Policy 4-7d.

That policy provides as follows:

“Safety – within a rolling three-year period

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

The 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.”

The grievant is a driver and has been with the employer since August 7, 2006. He has two prior accidents and pursuant to the policy was given a first and second warnings for those. They are not at issue in this matter and are provided only to set the stage for the final written warning he received for the accident involved in this case. The parties were in general agreement that the issue here is whether the grievant should be charged with a third responsible accident for the August 11, 2011 accident.¹ The other question is whether there were sufficient mitigating circumstances determined on these limited facts to warrant sustaining the grievance and deleting this accident from the grievant’s responsible accident record.

¹ There was no evidence on this but the clear terms of the policy seem to dictate that the first incident in August 2008 has now “rolled off” the grievant’s record since more than 3 years has elapsed. That was not at issue though in this matter. The question is whether this accident should be counted as a responsible accident.

Obviously there was a collision. The video was quite clear in that regard and shows the grievant's bus entering the garage, stopping to have the fare box emptied, proceeding down the bay and eventually hitting the back of bus #919.

The video was reviewed in some detail at various speeds.² It shows the grievant entering the garage at 18:46:18 and proceeding to the area where other workers emptied his fare box. He arrived there at 18:46:51 and chats briefly with the person responsible for the fare box change. He then proceeds to the bay area and makes a left turn into the bay to park his bus at 18:47:38:95.³

As the grievant turns the corner there is a glare that several witnesses described accurately as a fireball. That glare appears at 18:47:39:61 and does not fade until 18:47:46:94. There is still considerable glare at 18:47:46:19 and the glare does not disappear entirely until 18:47:48:90. The impact 18:47:54:16, some 5 seconds or so later.

It is of some significance that the glare literally blinds the viewer for several second obscuring the parked bus and much of what is around it for several seconds. There was some evidence that the time to aim high was almost precisely when the grievant was blinded by that glare. The grievant testified credibly that he could not see the open door as he first entered the bay and the video corroborated that story. Once he had gotten closer to the bus he further testified credibly that his focus was below eye level and that he never saw the AC cover open nor did he ever imagine it would be. There was considerable evidence to suggest that no one had ever seen an AC cover door open on a bus in the parking bays and that there was no reason to assume it would be left open.

² It should be noted too that the video in this matter was quite good quality. There is real time, color video from several different angles and clear audio as well. The bus in which the grievant was driving that day had 4 camera angles, including one directly out the front window.

³ The video has a second counter on it and these times are as close as possible given the ability to stop and start the video.

While there was approximately 4 to 5 seconds between the time the glare eventually fades away there was some evidence to suggest that the grievant's eyes had not quite adjusted to the difference in light. The speed limit within the garage is 10 MPH and there was further no evidence that the grievant was speeding or that he doing anything irresponsible with his bus. Further, by the time the grievant got to approximately one bus length of the parked bus it was clear that he was focused on the yellow line to the left of the parking bay making sure his tires were aligned with that and on the bike rack on the front of the bus, making sure not to hit the bus in front of him.

He reported the accident right away and was interviewed by safety personnel shortly thereafter. He admitted hitting the bus during the interview and asserted immediately that he never saw the open door and had no reason to believe it would be left open. It was clear that the safety investigator assumed that he was at fault based solely on the fact that he hit a fixed object parked directly in front of him. See employer exhibit 6.

To be sure, any time a driver hits a fixed object parked right in front of him the presumption is that the driver is at fault for that collision. However, each case must be examined on its own unique facts and on a case-by-case basis.

Here several things conspired to render this not a responsible accident. First, the glare was significant and even though it abates a few seconds prior to the impact, the grievant testified credibly and persuasively that by the time he got to the back of the bus he was focused on what was frankly more important – i.e. the back of the parked bus, the bike rack, watching for any pedestrians or other moving targets and not something 10+ feet off the ground.

Second, there was no reason whatsoever to assume that the back of the bus was open. It was clearly a different color than the “normal” rear of a bus but again by the time he would have seen that it was literally too late. He was by that time quite properly focused on other more important matters, all of which were things he was required to watch for.

Further, the employer asserted that the grievant should have noticed the difference in color on the back of the bus. There was some evidence that some buses are dark on the back, at least darker than one without any advertisements or other paint on them and that the back of bus 919 was not so different as to raise a “red flag” in the grievant’s mind.

Moreover, this has never apparently happened before. While there was some merit to the employer’s assertion that one must be alert to the unexpected and that accidents occur when they are least expected on this record the question was whether the grievant had a “reasonable opportunity to avoid the accident but failed to do so.” See employer exhibit 6.

Third, it was clear that he was focused on the yellow line and the bike rack and it was reasonable to make sure the bus was tucked in tightly as he had been directed to do. There was some merit to the grievant’s assertion that one cannot be aware of everything and while it is critical to watch out for all possible hazards on this admittedly limited set of facts, it was reasonable for him to focus on those possible issues that he could reasonably assume were present. An open door some 10 feet off the ground was not one of those, at least not on this unique record.

Lastly, there was some merit to the union’s assertion that the investigation demonstrated a certain bias toward making this a chargeable accident without adequate facts. While it was certainly understandable that the investigators assumed that the driver was probably at fault, since this was a collision with a fixed object. Still though, the policy contemplates that there may be circumstances involving mitigating factors that take it out of that milieu.

Further, it is incumbent on the employer that in order to establish just cause, here “just and merited,” it must show that the decision was made after a thorough review of the facts. That requires that all relevant facts must be considered before the decision to discipline is made

The fact that the decision was made before there was a review of the video was somewhat troubling. Further, the decision was also apparently made before visiting the site of the accident and before the employer ran an experiment of sorts to recreate the accident site. Again, there was some concern that this was done after the initial decision.⁴

There were also flaws in the experiment run by the employer in walking around the bays to determine what sort of glare there may have been at the time the grievant entered it. For one thing, it was done at a different time of day. For another the person doing it was on foot rather than driving a bus. Overall, these concerns added support to the union's arguments here.

Generally, the employer's argument that the drivers must expect the unexpected to avoid accidents would normally have had considerable merit. It is the accident we don't see that is the accident that can and all too frequently does occur. Seeing the problem coming is the best way to avoid the problem in the first place. Once there was a glare of that magnitude the grievant should perhaps have slowed until he could see better. In some circumstances those would have been more persuasive arguments. Here though, the question was whether the grievant's actions were reasonable given the facts he was faced with at that moment.

On this record, his actions were not unreasonable and what occurred could indeed have happened to anyone. It was akin to hitting one's head on an object that is certainly "right there" but occurs when the person is focused on avoiding other possible hazards on the ground and which pose a far greater concern. One simply cannot have eyes everywhere and can only operate within a known set of assumptions about what hazards are being faced. Moreover, the policy contemplates taking mitigating factors into account

⁴ The employer's witnesses indicated that they would have and could have changed their decision if they had seen something that caused them to change their minds. That concern misses the point however. The notion of proving just and merited cause involves the idea of due process. Once the initial decision was made it frequently sets in motion a chain of events that is difficult if not impossible to change and it is further sometimes easy to say that the decision could have been changed but even more frequently difficult or impossible to actually change such a decision once the die has been cast.

Here the glare, coupled with the fact that the AC cover door was open and never should have been countered the fact that the back of the bus may have looked slightly different. Arbitrators should be very cautious in cases like this not to simply substitute their judgment for the employer's and become a sort of "instant replay" to change an employer's call. Here though the arbitrator is charged with the duty of determining whether discipline in the form of this final warning was just and merited and that calls for a review of all of the underlying facts and whether the grievant's actions were unreasonable.

On this record, and it should be emphasized that this decision is indeed limited to this unique record, the facts showed that this particular accident should not be charged as a responsible accident. Accordingly the grievance is sustained and the employer is directed to remove the record of final warning for the grievant's file.

AWARD

The grievance is SUSTAINED. The grievant's record shall be amended to delete the reference to a chargeable accident for the incident of August 11, 2011 as set forth herein.

Dated: March 5, 2012

MCTO and ATU – Andrews award.doc

Jeffrey W. Jacobs, arbitrator