

BEFORE THE ARBITRATOR

In the Matter of the  
Arbitration between

AMALGMATED TRANSIT UNION  
LOCAL 1005  
MINNEAPOLIS AND ST. PAUL

And

Norman Tiimmer  
Grievance  
BMS Case No. 12-PA-0301

METROPOLITAN COUNCIL  
METRO TRANSIT DIVISION

Appearances:

Attorneys Justin D. Cummins, Miller, O'Brien Cummins PLLP on behalf of ATU Local 1005.

Attorney Ann Bloodhart, on behalf of the Metro Transit.

**ARBITRATION AWARD**

The above-captioned parties, hereinafter referred to as Metro Transit and the ATU respectively, are parties to a collective bargaining agreement providing for final and binding arbitration. The undersigned was selected from a panel provided by the Minnesota Bureau of Mediation Services pursuant to said agreement. Hearing was held in Minneapolis, Minnesota on March 5, 2012. No stenographic transcript was made. No briefs were filed but the parties argued orally at the close of the hearing. All parties were given the opportunity to appear, present evidence and testimony, and to examine and cross-examine witnesses. Now, having considered the evidence, the positions of the parties, the contractual language and the record before her, the undersigned issues the following Award.

**ISSUE:**

The parties framed the issue as follows:

Whether the June 27, 2011 discipline of Norman Timmer was just and merited? If not, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS:****ARTICLE 5  
GRIEVANCE PROCEDURE**

Section 1. Metro Transit reserves to itself, and this Agreement shall not be construed as in any way interfering with or limiting, its right to discipline its employees, but Metro Transit agrees that such discipline shall be just and merited.

Section 2. ...When contemplating disciplinary action, Metro Transit shall not give consideration to adverse entries on an employee's disciplinary record involving incidents occurring more than thirty-six months prior to the date of the incident which gives rise to the contemplated discipline.

Section 3. Any dispute or controversy, between Metro Transit and an employee covered by this Agreement, or between Metro Transit and the ATU, regarding the application, interpretation or enforcement of any of the provisions of this Agreement, shall constitute a grievance.

**Background:**

The facts giving rise to the instant grievance are essentially undisputed. A customer filed a complaint about being caught in the front door of a bus driven by the grievant, Norman Timmer, on June 27, 2011 on Route 6. The customer claimed that the bus driver/operator slammed the door on his arms. Initially, when questioned about this, the grievant stated that he did not recall the incident. Upon being shown a copy of the bus video footage which the ATU management requested as part of their safety investigation, Timmer acknowledged that he had in fact closed the front door of the bus on the customer. The customer was unhurt by this action. Metro Transit, after conducting a safety investigation, found that the incident could have been prevented, that Timmer was responsible for the accident and the customer complaint was logged. As a result, he was issued a Record of Warning and Debit 1 under the Operating Policy for Safety, this being his 2<sup>nd</sup> responsible accident within a 36-month period. It is uncontested that on July 7, 2008, Timmer had a previous accident where his bus made contact with a car.

Additional facts are set forth in the discussion below.

**POSITION OF THE PARTIES:****Metro Transit**

MetroTransit argues that it made a fair and complete investigation including a review of the complaint, the accident report, the grievant's work and safety history, the video, and spoke with both the grievant and the customer. It believes that it has demonstrated that the accident was avoidable and preventable and that the grievant should be held responsible for the safety violation. Noting that it has an operating policy

wherein it penalizes accidents only within a rolling 3 year period, Metro Transit stresses that the record of warning was in effect for less than two weeks but that it should remain on his record although it has expired. In its view, safety is the most important consideration for any action by the bus operator. Here, the facts are clear. Timmer closed a passenger in the door of the bus. He had been trained to take precautions so that this would not occur. Timmer did not report that an incident or accident occurred. The Metro Transit needs operators to be vigilant so that this does not occur. Although the passenger was not injured, this is still an accident for which Timmer should be held responsible.

Addressing the ATU's argument that the grievant's vision of the door was blocked, Metro Transit insists that if Timmer's vision was blocked, he should not have closed the door. This action is what led to the conclusion that the incident or accident was preventable. It stresses that Timmer was aware of its operating policies and the safety rules, noting that its highest priority is the safety of passengers. In its view, the grievant could have prevented the accident by not closing the door until he could see the doorway clearly and for this reason the incident simply should not have occurred. Noting that it has given the operator strategies for viewing the doorway by "rocking and rolling" his or her body, Metro Transit argues that insuring that the doorway is clear before closing the door is a fundamental duty of the operator and a basic safety issue. There was no blind spot and a quick head count would have revealed another passenger. In concluding that the accident was avoidable, Metro Transit maintains that the written warning was just and merited.

### ATU

ATU concedes that the customer was caught in the door. However, it asserts that the disciplinary warning remaining on the grievant's record for three years in this case is extreme. In the ATU's view, Metro Transit is disciplining the grievant for performing as trained. That particular route was plagued by significant time problems. Timmer was expected to keep to the schedule and he was pushed to the limit by the running time problems on this particular route. Timmer admittedly missed seeing the customer in the doorway.

The bus which he was operating has nine mirrors for the operator to check and the mirror over the front steps is not effective. The customer was out of view when Timmers approached the stop and when he looked at the mirror, the customer was not visible behind another customer who was at the farebox. Timmer's view was completely concealed. Although the video made it seem that the customer could clearly be seen, that is not the case.

This is a case of hurt feelings, not an accident. Timmer may have made a mistake in the customer service realm, but his actions in closing the door were not intentional. He apologized for unintentionally closing the bus door on the customer, but the customer may not have heard him. It was a one-time occurrence with no injury and no property

damage. He has received commendations for outstanding safety in the past. Furthermore Metro Transit continues to have confidence in Timmer's ability to operate a bus safely.

ATU argues that closing the bus doors on a customer in this instance was not an "accident" within the meaning of the employer's policy. It cites an award by Arbitrator Wallins in another bargaining unit wherein he concluded that the discipline should be vacated because no injury or property damage occurred.

According to the ATU, Metro Transit's position is that an unintentional, inadvertent incident where no property was damaged and no one was injured is the functional equivalent of a bus collision where someone was injured or property was damaged. This incident should not result in a finding of a responsible accident that remains in an employee's work record for 3 years. The warning of record was unduly harsh for a 13 year employee with a good operating record. The Union requests that the grievance be sustained.

#### **DISCUSSION:**

There is really no dispute about the underlying facts. The video makes it clear that Timmers closed the door on a customer. Although this is clear from the video, the video is not shot from the same perspective as that of the bus operator. Timmer's testimony at the hearing was slightly inconsistent and different from that which he gave during the investigation. During the investigation he maintained that he did not report the incident because he was unaware that it occurred prior to being shown the video. Obviously, upon being shown the video, he acknowledged that he had closed the door on the customer.

At the hearing, Timmer maintained that he was feeling pressure to maintain the schedule with no time to waste and that it was a hot, muggy day wherein he was running the air conditioner and fans which sometimes makes it difficult to hear the customers. He insisted that he did not have time to look for people at the bus stop until he had brought the bus up to the curb for a complete stop. He was not focusing on customers about to board and was not able to recall where exactly he was looking as customers were boarding because he was monitoring the bus cards and transactions at the farebox. As other customers were boarding, Timmer claimed that he did not have a clear path of vision to see the customer as he was entering and was unable to see the customer who was closed in the door. He stated that "there was a different sound to the door as it closed." At one point in his testimony Timmer did acknowledge that he actually saw the customer for the first time when the door closed on him and was in complete shock about this. In his words he "couldn't believe it happened." At another point, he stated that he was not sure that he had closed the door on the customer until the man brought it up as he passed by him. Then he thought the customer probably "got caught in the door." Still later, he alleged that he was not sure until he saw that video more than a week later.

Timmer's testimony regarding his response to the customer was also vague. In the video, the sound component indicates that the customer asked him whether or not he

was going to apologize for closing the door on him. There is no indication that Timmer said anything to the customer in response on the video. At the hearing, Timmer maintained that when he opened the door to admit the customer, he said "sorry." Admittedly, Timmer is a soft spoken person, but the video does not support his version of the interaction with the customer.

Dorothy Maki, another witness on the grievant's behalf, did a very good job of explaining the comprehensive functions of the bus driver and the various safety concerns which he must keep in mind while driving that particular route. She convincingly explained how the customer who got caught in the door was really not visible to the operator even if he had rocked and rolled because the other passenger would have blocked the operator's view. Maki testified that the upper mirror was ineffective because it would not have shown the customer until he was actually caught in the door. Maki testified that Timmer did clear the door, although the customer was still out of his view. She contended that it is not reasonable that everything runs perfectly and that this incident be considered the same as if an operator struck a pedestrian in a cross-walk.

Both parties agree that in determining whether or not the warning as discipline was warranted, whether or not Timmer apologized to the customer is irrelevant. He was disciplined for a safety violation not for failing to deal with the customer appropriately. The undersigned would go even further and find that Timmer's lack of frankness with respect to when he knew he had closed the door on the customer and how he did or did not react to this fact is also not controlling in this matter.

Having heard the testimony of all of the witnesses, the decision comes down to just three determinations. First, was the accident or incident preventable as Metro Transit argues? Second, even if this is the case, where, as here, no physical harm occurred and there was no property damage, do the facts even justify concluding that this was an accident or incident governed by the Metro Transits operating policy and rulebook? Finally, assuming that the operating policy and rules apply, does the discipline fit the infraction?

The undersigned accepts Maki's explanation of all the variables that go into driving the route in question and her conclusion that Timmer could not have reasonably seen the passenger because his view was blocked by the preceding passenger. Nevertheless, in spite of this lack of view, Metro Transit is correct in its contention that he should not have closed the door if his view was blocked and that doing so when his vision was blocked resulted in an accident or incident which was avoidable or preventable. He was under an obligation not to close the door until he could make sure that no one was in the doorway. He was under an obligation not to close the door until he could make sure that no one was in the doorway.

The Bus Operator's Rule Book upon which Metro Transit relies states that operators are to "Report any accident/incident involving your bus. No matter how slight. This includes onboard injuries or incidents (e.g. disturbances, ejections, sick customers, passenger falls etc.)" The Metro Transit 2005 Operating Policy with respect to

Thresholds for Warnings - Appendix B sets forth the discipline for safety infractions no matter how minor within a rolling three (3) year period. Said policy notes that it "will continue the practice of taking mitigating circumstances into account in determining whether to issue a warning for minor accidents." It is true that the customer suffered no physical harm nor was there property damage. He was, however, upset and he could have suffered physical injury from being closed in the door. The Operating Procedures require notification of management for any accident or incident no matter how slight. This accident/incident, although not resulting in serious injury, comes within this mandate.

The ATU cites an award by Arbitrator Wallin with respect to a situation involving a bus maintenance employee wherein it was alleged that he failed to report an accident. It is significant that for those employees, the standard operating procedure defines an accident differently than that contained in the bus operator's procedure. For a bus maintenance employee, an accident is defined as "any impact between a vehicle (car, truck or van) or equipment (forklift, sweeper, bay-cart, etc.) and any fixed or movable object that causes any damage. This includes any accident on Council property or any accident involving a Council vehicle or equipment." The arbitrator ruled that that employee did not fail to report an accident when he failed to report that he got a bus stuck by unnecessarily plowing snow with it noting that the employer did not prove that he had caused damage to the bus. The instant case is distinguishable based upon the differences in the definitions of accident/incident in the Bus Operator's Rule Book and Guide from those of the Bus Maintenance Employees Operating Procedures. Here a customer was closed in the bus with the potential for damage to his person being at least a "slight" accident or incident which Timmer should have reported.

The final issue to be addressed is whether the discipline imposed fits the infraction. The undersigned concurs with the ATU when it asserts that Metro Transit wants to place this minor accident in the same category as a serious accident involving serious passenger injury. Its own policy reserves its right to consider taking mitigating circumstances into consideration for discipline under the point system for minor accidents. Here, the discipline imposed was a written warning which remained in effect for approximately two weeks when Timmer's first infraction fell off. In looking at the potential for harm to a passenger that could have resulted from having the door closed on him, the undersigned finds that a written warning is not excessive under these circumstances. Had the discipline been more severe, a different conclusion might have been reached in light of the fact that there was no physical injury or property damage as a result of Timmer's negligence.

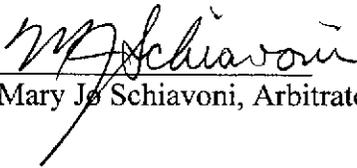
Accordingly, it is my decision and

### **AWARD**

1. That the June 27, 2011 discipline of Norman Timmer was just and merited.

2. The grievance is denied and dismissed in its entirety.

Dated this 29<sup>th</sup> day of March, 2012, in Madison, Wisconsin.

By   
Mary Jo Schiavoni, Arbitrator