

BEFORE THE ARBITRATOR

In the Matter of the  
Arbitration between

AMALGMATED TRANSIT UNION  
LOCAL 1005  
MINNEAPOLIS AND ST. PAUL

And

Mahad Warsame  
Grievance  
BMS Case No. 12-PA-0720

METROPOLITAN COUNCIL  
METRO TRANSIT DIVISION

Appearances:

Attorneys Andrew Case, Miller, O'Brien Cummins PLLP, on behalf of ATU Local 1005.

Attorney Andrew Parker, Parker Rosen, on behalf of the Metro Transit.

**ARBITRATION AWARD**

The above-captioned parties, hereinafter referred to as Metro Transit or the Employer and the ATU or the Union 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 May 2, 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 discipline issued to Mahad Warsame 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 of this case are virtually undisputed. The grievant, Mahad Warsame was operating a bus on Hamline Avenue in St. Paul, Minnesota, on October 3, 2011. He was driving northbound and pulled into the bus stop at Hamline and Concordia Avenue. As he was leaving the bus stop, proceeding forward, the front mirror of the bus hit the post of the bus stop sign, pushing the mirror into the front door of the bus, cracking glass on the front door. The grievant stopped the bus immediately and promptly reported the accident. No one was injured and after taking two or three minutes to adjust the mirror, the grievant continued with his route.

Upon viewing the video and making an investigation, Metro Transit believed that the grievant had pulled up too close to the sign when he drove into the bus stop. It found this to be a "responsible" accident (one for which the employee is subject to discipline based upon the conclusion that it was preventable). Because the grievant had two previous "responsible" accidents within the one-year period and this was his third responsible accident, management issued him a Final Record of Warning based upon a safety infraction.

Metro Transit charges driver operators for "responsible" accidents where they hit immovable objects while operating the bus, with the exception of a long-established past practice exempting them from discipline where only the mirror is damaged. This practice, which the Employer adopted at the request of the Union, acknowledges that there are frequent minor mirror accidents where no damage results or the damage is limited to broken mirror glass. Under this very limited circumstance, the employee is not charged with a "responsible" accident. From the evidence adduced at the hearing, it is clear that, as the Union argues, the decision of whether or not an operator is charged with

a “responsible” accident and receives discipline for a minor mirror accident depends upon the damage to the bus. If solely the mirror is damaged, there will be no discipline, if more than the mirror glass or mirror itself is damaged, discipline will ensue. Moreover, as the Union points out, two operators who hit a sign with their mirror will not necessarily receive the same discipline based upon the extent of the damage to the bus.

Metro Transit had trained the grievant using its Safety Keys Program both prior to and after his previous accidents. After its investigation, it determined that in this instance, because the grievant damaged the door in addition to the mirror, he was disciplined. The Union filed a grievance contesting the imposition of the Final Record of Warning.

## **POSITION OF THE PARTIES:**

### **Metro Transit**

Metro Transit insists that the number one priority is safety. Because this is the case, the Employer invests significant resources and energy in training so that operators perform at the highest level. The grievant has been a full-time operator for less than a year but has had three “responsible” accidents in a ten month period of time. Prior to and after the accidents, he was provided with extensive training, receiving additional training after the first and second accident. Incurring three accidents within a ten month period of time is practically unheard of. At least ninety percent of the operators have no accidents for a ten-month period of time.

Metro Transit maintains that the arbitrator should limit herself to the following inquiry: Was there a policy in place? Was the operator aware of the policy? Did the operator have a “responsible” accident? And was there a fair investigation? Metro Transit’s position is that a clear policy was in place wherein operators are “responsible” for even minor accidents if they could have been prevented. It is unprecedented to overturn discipline where the Employer has followed its policy once the arbitrator has concluded that a “responsible” accident has occurred.

The grievant received safety training on the proper way of pulling in and out of a bus stop. Having been hired part-time on March 20, 2010 and full-time in November of 2010, his first responsible accident was on December 2, 1010 when he closed a passenger in the door and dragged the passenger. His second accident was in April of 2011 when he failed to secure a wheelchair properly.

On October 3, 2010, he pulled into the bus stop too close to the bus stop sign. When he pulled out, he drove straight through smashing the right mirror back into the door of the bus. Had he pulled into the bus stop properly, he would not have smashed the mirror into the bus door. He was clearly responsible for the accident.

Metro Transit concedes that it provides lee-way in accidents where the right mirror hits a fixed, inanimate object and only the glass on the mirror is broken. In this

limited circumstance, it has agreed not to find the operator “responsible.” According to Metro Transit, the Union is using this case to try to move the leniency policy line. The Union is not denying the accident and is not denying that the Employer followed its policy. Rather, it wants the arbitrator to re-write the policy, to re-draw the line for the parties. Here the Employer has a long policy which it has consistently and uniformly applied.

In this instance, the grievant did not follow his training, and given his previous accident record, the discipline is not unduly harsh. Even given extensive one-on-one training, the grievant has failed to follow the training on three occasions. The arbitrator should not degrade the safety standards that the Employer is imposing by overturning the discipline. To suggest that it is not appropriate to discipline the grievant under the circumstances ignores the interest of the public in operating the bus system safely.

Management requests that the grievance be denied in its entirety.

### ATU

The ATU points out that the accident was minor and that no one was injured. It maintains that it was more an “error in judgment,” than a “responsible” accident. According to the ATU, a fundamental principle of just cause is that discipline should be consistent and evenly imposed. The Metro Transit operating policy also confirms that its discipline is designed to promote consistency and equal treatment.

Metro Transit’s issuance of discipline in this case demonstrates that its policy regarding certain accidents where mirrors make contact with a sign does not result in consistency or equal treatment of operators. When it comes to mirror accidents, the determination of whether or not the operator is to receive discipline does not depend on the conduct of the operator, but instead, upon the results of the accident. In this case, the grievant was unlucky enough to have something besides the mirror glass break as a result of contact with the sign, therefore, receiving discipline. The discipline was received for the same conduct which would have gone unpunished had only the mirror glass broken.

It is the ATU’s position that Metro Transit cannot meet its burden in establishing that the discipline here was just and merited. Metro Transit acknowledges that these types of minor accidents are common and do not inherently warrant discipline by not consistently disciplining all employees who have this type of an accident. Because the accident only involved the grievant’s mirror striking a sign, the accident should not be considered “responsible” and does not warrant discipline.

The grievant points out that he was new to that particular route. He maintained that he had learned from this incident and would be more cautious and careful of clearance when leaving stops. The ATU requests that the grievance be sustained and the accident be removed from his record.

**DISCUSSION:**

As noted previously, the facts in this case are essentially undisputed. While the grievant testified regarding the circumstances surrounding the first two disciplines, they were addressed previously in the grievance procedure and it is inappropriate to re-litigate the penalties imposed. It is, however, appropriate to note the earnestness of the grievant regarding his testimony at the hearing with regard to his desire to address the safety concerns presented by these safety accidents and to keep his position with the Employer.

This being understood, the real issue presented to the undersigned is that pointed out by Metro Transit, whether it is appropriate for the arbitrator to re-draw the line on “responsible” accidents involving mirrors and stationary objects. ATU argues that this is necessary because the ATU’s treatment of affected operators is disparate based strictly on the amount of damage incurred. This disparate and uneven treatment, it stresses, fails to meet the just and merited standard required by the collective bargaining agreement. Based upon a review of the evidence adduced at hearing, this argument must be rejected.

The Employer has established that it has a reasonable and consistently applied policy with regard to determinations of “responsibility” when it comes to minor mirror accidents with stationary objects. It has made the one exception which acts to the benefit of employees at the request of the ATU where only the mirror glass is broken. The evidence established that this is a long-standing past practice and a reasonable accommodation to the conflicting interests presented with respect to employee culpability and discipline with regard to these types of accidents. Granting a single reasonable exception based upon an easily ascertainable indicator of damage, i.e., only mirror glass breakage, does not make all determinations by Metro Transit where mirrors are damaged or cause additional damage arbitrary and capricious. Furthermore, the extent of damage caused by an accident has normally been a factor taken into consideration when imposing any discipline for safety infractions by all employers.

Here, Metro Transit is to be commended for making such a reasonable distinction. It is axiomatic that arbitrators will not normally substitute their judgment for that of the employer where the employer can prove that it acted reasonably and consistently. This is the case even if the arbitrator would have made a different determination on initial consideration. Given the evidence of the long-standing practice and the consistent application of this practice insofar as mirror accidents are concerned, the arbitrator will not substitute her judgment for that of the Employer in this case under these circumstances.

There is another reason to find the grievance is not merited. Arbitrators will typically not give to one party through arbitration that which it could not or did not achieve through bargaining. If the ATU believes that the line with regard to mirror accidents should be re-drawn, it must accomplish this at the bargaining table and not through arbitration.

Based upon the totality of the facts presented to the undersigned, it cannot be concluded that the discipline imposed was not just and warranted. The grievant incurred three “responsible” accidents within a ten-month period. At least with respect to this last accident, he had difficulty in applying the Safety Keys Training which the Employer had provided by not leaving a way out when he pulled in too close to the bus stop sign. His testimony that he thought he could pull directly away from the bus stop without doing damage to the mirror because he did not think the bus was too close demonstrates a problem with his judgment regarding operating the bus on this occasion. He was “responsible” for the damage to the mirror and the bus door because the damage could have been prevented.

Accordingly, it is my decision and

### **AWARD**

1. That the discipline issued on October 20, 2011, to the grievant, Mahad Warsame, for an accident occurring on October 3, 2011, was just and merited.
2. The grievance is denied and dismissed in its entirety.

Dated this 24<sup>th</sup> day of May, 2012, in Madison, Wisconsin.

By /s/MJ Schiavoni  
Mary Jo Schiavoni, Arbitrator