

In Re the Arbitration Between

**Amalgamated Transit Union, Local 1005, Minneapolis and St. Paul, Union
and
Metropolitan Council, Metro Transit Division, Employer**

BMS Case 12 PA 1336

**Carol Berg O'Toole
Arbitrator**

2012

Representatives:

For the Employer:

Ann Bloodhart, Associate General Counsel

For the Union:

Tim Louris, Attorney, Amalgamated Transit Union

Appearances:

For the Employer:

Anthony Harris, Sr. Assistant Transit Manager (East Metro)

Steve McLaird, Associate Director, Garage Operations and Assistant Director Bus Operations

Marcia Padden, Labor Relations Operations

Sharon Tschide, Citizen Complainant (by phone)

For the Union:

Grievant

Michelle Sommers, President and Business Agent, Amalgamated Transit Union

Preliminary Statement

The hearing in the above matter commenced at 10:20 a.m., on September 24, 2012, at the Employer's facility at 725 North Seventh Street, Minneapolis, Minnesota. The parties involved are Metro Transit, (Employer) and Amalgamated Transit Union, Local 1005, (Union). The parties presented opening statements, oral testimony, oral argument and exhibits. The parties presented closing argument instead of post hearing briefs. The arbitrator closed the hearing on September 24, 2012.

Issue Presented

The parties agreed on the issues as follows: Was there just cause to discipline the Grievant? If so, was the penalty appropriate?

Contractual and Statutory Jurisdiction

The Union is the certified bargaining representative for Metro Transit bus drivers. The Employer and the Union are signatories to a collective bargaining agreement (Agreement) covering the period from August 1, 2010, to and including July 31, 2012. The Agreement provides in Article 5 that if the grievance is not settled in Step 2 of the grievance procedure, the parties will select an arbitrator to decide the grievance. The parties could not agree on a resolution through the grievance procedure; thus, the dispute is properly before the arbitrator.

Prior to opening arguments and the receipt of testimony, the parties agreed that phone testimony was permitted although the arbitrator was free to assess credibility of such witnesses, as with all others. The parties also agreed that there were no issues as to timeliness or any other procedural issue. The Union stipulated to all the Employer's exhibits, 1-22, with the exception of #2.

Issue Presented

The parties also agreed that the issue in dispute was whether the Employer had just cause to discipline the Grievant, and, if so, was the remedy imposed by the Employer proper. The parties agreed that the agreement's phrase, "just and merited" was the same standard as "just cause".

Opening Statements

The Employer's position is that there is just cause to discipline the Grievant. The Employer stated that they followed the Agreement when dealing with the three customer complaints against Grievant involving his driving prior to the St. Patrick's Day Parade in St. Paul. The Employer considered that the discipline was "just and merited", which met the standard for "just cause". The Employer indicated that the rule was reasonable, the Grievant received proper notification, the complaints were investigated thoroughly and the Grievant engaged in the conduct.

Grievant is one of 1400 drivers at Metro Transit, which operates 900 buses and provides 80 million rides. Metro Transit has five garages, including the East Metro, run by Steve Jaeger. The rule at issue with the Grievant is in the Bus Operators' Rulebook and Guide, Exhibit 3. It requires drivers to follow the decision-making procedures as outlined in a model with "safety" at the top, "best interests of customers", second, and "standard operating procedures" undergirding the other two. The Employer stated in its opening argument that the Employer had received three customer complaints. The Employer filed one and logged the two others for driving "too close to the curb on 5th Street" and administering too aggressive honking".

The Union's opening statement described the incident involving the three complaints as occurring on March 17, 2012, at 10:50 a.m. on Route 64. He said that people were waiting for the parade and had their legs in the street. The Union described how drivers were trained to use the horn and that the horn "caused people to move". The Union stated that people became irritated by honking, but that this is not something

people should be disciplined for. The Union stated that discipline should happen when a driver is going too fast and too close to the curb. The Union stated that the Grievant was going the same rate as the rest of the traffic, with buses in front of him and behind.

The Union stated that although the bus video was requested, it was never shown to the Union, thereby denying them a critical piece of evidence. The Union was informed of the complaints within three to four weeks and that the film was taped over by then. The Union described the process whereby complaints were verified and then filed and used for progressive discipline. Some complaints are just logged. In the instant dispute, two of the complaints were logged and one filed. The complaints were over the same incident and should have been characterized as one complaint. The Union stated that this amounted to be triple jeopardy. The Union asked that the grievance be sustained and all records be removed from the file.

Employer's Position

The first witness for the Employer was Anthony Harris, the Assistant Transportation Manager. He has thirteen years with Metro Transit. He is the Grievant's direct supervisor. Harris testified that Grievant received a copy of the Bus Operator's Rulebook & Guide, on August 8, 2004. Employer's Exhibit 3 and 4. Harris testified that safety is the number one issue for bus drivers and that "serving the public" referenced on page 3 of Exhibit 3 relates to people not on the bus, and the "space cushion". Harris pointed to page 8 and 9 of the manual and the five safety keys. He also testified that the Grievant took the safety keys training, Employer's Exhibit 6, and was trained in defensive driving, Employer Exhibit 7. Harris stated that the two most important considerations were: giving yourself an "out"; getting the "big picture". He stated that the space cushion would include changing normal procedures to adjust to circumstances. Harris pointed to Procedure 4-7d, Appendix B, p. 5 of Employer's Exhibit 8 and the Grievant's receipt of it, Employer's Exhibit 22. Harris testified that when a complaint is received, the Employer can do nothing, log it, file it, or review the

policy . Harris said that because he felt the complaint was very serious, it was filed. Harris testified that Employer's Exhibit 5 was the sign-in sheet that showed Grievant was trained. Harris also identified Grievant's badge. Harris testified that he attended the training session also.

Harris identified the Customer Service Feedback Forms and indicated that the driver is given a copy of the customer feedback as soon as "we get it". Derek Anderson was named as the first complainant, Employer Exhibit 12. Harris indicated that the complainant supplied the bus number and that he talked to Mr. Anderson. Harris identified Sharon Tschida as the second complainant, Employer Exhibit 13. Tom Schultz was identified as the third complainant, Employer Exhibit 14. Harris stated that the Schultz written complaint was consistent with what Schultz told customer service.

Harris testified that they were unable to provide the Grievant with the video of the incident. Harris said that Mr. Jaeger made the decision about disciplining the Grievant and that Jaeger had watched the playback sequence. Jaeger concluded that the Grievant had aggressively used three to four second blasts of his horn which he termed "very aggressive". On cross examination, Harris recognized that Exhibit 14 did not show that that Harris or Jaeger talked to the complainant. Harris was asked about the speed of the bus and acknowledged that the electronic records showed the bus not exceeding the speed limit and traveling at 30 miles per hour. Harris stated that he did not look at the playback of the other buses, which Grievant said were ahead of him and behind him. Those videos had been pulled for another incident. Harris denied waiting three to four weeks before notifying the Grievant of the complaint. Harris acknowledged that Grievant had at least three years without accidents. Harris testified that he relied on the statements of the complainants which were made on March 20 and 21, 2012. Harris stated that he did not believe that the Grievant was "lying" about the incident, thought the Grievant was an honest person, and that on a previous customer complaint the video had been pulled and exonerated the Grievant.

The Employer's second witness appeared via phone. She described arriving early on the day of the parade at 10 or 10:30 a.m. She stated that the bus swerved into the lane where they were sitting, indicated that she felt in danger of being hit, and that the situation was "quite scary". Tschida stated that after the bus went by, her brother ran down to the corner to catch the bus number. She described talking to the police who advised her to file a complaint. She described the other two buses as going half the speed and that she called the complaint in immediately from her cell phone. She described the Grievant as "having no regard for anyone there" during cross examination. She also stated that she had no way to know how fast the bus was going, but this bus was "not even close to the speed of the other two. Tshida indicated in her testimony that she did not know Schultz, one of the other complainants.

Steve McLaird, Assistant Director of Garage Operations, was the last witness for the Employer. McLaird oversees five garages and the Training Center. He has been in the position for five years and at Metro Transit for eighteen, starting out as a bus operator. McLaird identified Exhibit 3 and 4, and discussed the tapping of the horn. He indicated that he did not base his decision to discipline on how fast the bus was going and that it was not a prerequisite to discipline that the Employer verify the misconduct by looking at the video. McLaird also stated that he had no "first-hand evidence" about the incident

Union's Position

The Union's first witness was the Grievant. He testified that he has been a bus operator for eight years, a commercial driver for eleven years, and had no accidents. He described himself as an excellent, safe driver. The Grievant testified that on March 17, 2012, he was driving two blocks ahead of another bus and there was limited bus service overall. He stated that the buses were lined up "two behind me" and one ahead. The Grievant testified that, contrary to the complainant's testimony that cars lined the street, there were no parked cars. People were sitting on the curb with their legs

hanging over. When a “guy stepped off the curb” he “held the horn”. He didn’t see any people startled or in any danger. He stated that it was “safe enough to handle the bus.” The Grievant stated he was operating his bus safely about one and one-half feet from the curb and in complete control. The Grievant reported that “if people are in the street not paying attention...I conduct my bus in a safe manner and never consider the passenger at fault”. The Grievant testified that he had requested the video right after the complaints and that Harris was upset. He had already filed the complaints as separate complaints. When he was told that they were unable to download the video, the Grievant asked for the video for the other two buses behind him and a statement from the other bus drivers. None was forthcoming.

The second witness for the Union was Michelle Sommers, the local’s president for seven years and the business agent. She testified that Employer’s Exhibit 8, Procedure 4-7d, Appendix B, reads, “When more than one customer service complaint addressing the same incident is received and verified, they will be filed as one.”

Closing Arguments

The Union stated in the closing argument that “honking” is doing what the driver is trained to do and that it is better that citizens are annoyed than hit by a bus. The three complaints arising out of the same incident should have been considered as one.

The Employer argued that the Grievant wasn’t driving for the conditions and was driving faster than the other buses. He termed the lack of a video as a red herring that should be disregarded.

Discussion At issue in this arbitration is the cause standard for discipline. Elkouri and Elkouri’s *How Arbitration Works* (Ruben 2003) is illuminating in determining whether the Employer has met the “just cause” standard for discipline and the requisite burden and quantum of proof. Once the matter of who did what is determined, the question remaining is whether the punishment assessed by the Employer should be upheld or modified. To determine if a penalty is appropriate, a number of factors are typically

considered: nature of the offense; due process; past record; length of service; and, knowledge of the rules. In the instant case, Grievant was given due process, his past record mitigates in his favor, his length of service is substantial and the Employer proved he had knowledge of the rules. The nature of the offense is at issue here.

There is no doubt that the three complaints arising out of a single incident on March 17, 2012, exist and that Grievant was the bus driver about whom the complaints were made. There is no disagreement that the Employer's Exhibit 4-7d requires that when more than one complaint is received about the same incident they will be filed as one.

That is where the clarity ends. The complainant who testified by phone as an eye witness stated the bus was being driven fast, too close to the curb and that the horn was used inappropriately. On the opposite side, we have the electronic record of the bus's speed which showed that the bus was going thirty miles per hour and the testimony of the Grievant who says he was driving at the same speed as the buses in front and back of him and at a safe distance from the curb. The electronic record is the most credible piece of evidence here. And, I find the testimony of the Grievant more credible than that of the complainant. I find the bus was being driven at a safe speed and a safe distance from the curb.

The complainant who testified by phone stated that the horn was used inappropriately with long blasts instead of short taps. The difference between three to four second blasts and short taps on the horn borders *de minimus non curat lex*. The rule holds that trifling or immaterial matters will not be taken into account. City of Wilmington, Del., 111LA 1159, 1165 (Collins, 1998), as cited by Elkouri at 1214. I think a driver's record should not be besmirched by such a small distinction. The bottom line is, the horn worked. The individuals with legs in the street moved back. No one was hurt. The complainant who testified by phone permitted her kids to sit on the curb with

feet in the street before the parade started during the midst of normal Saturday morning traffic. Surely the complainant has a responsibility here also.

The Employer is to be commended for its attention to customers. I have no doubt that all three of these complainant would have been satisfied with a call from the Employer thanking each for filing the complaint and indicating that the driver had been shown the complaint and talked to about customer service.

This award should not be construed to require a video as verification for every customer complaint, nor should it be construed to negate the role of customer complaints. The latter are critical, but management needs to make an independent judgment as to the weight and credibility given to such complaints and to eye witness accounts in general. In the days of easily made cell phone complaints by individuals who take little personal responsibility, the mere receipt of a complaint should not result in automatic discipline.

Award

The grievance is sustained in its entirety. The complaints filed and logged shall removed from the Grievant's record.

Submitted this 27th day of November , 2012

Carol Berg O'Toole