

IN RE ARBITRATION BETWEEN:

METRO TRANSIT OPERATIONS, (MCTO)

and

AMALGAMATED TRANSIT UNION (ATU), Local 1005

DECISION AND AWARD OF ARBITRATOR

BMS Case # 13-PA-0462

JEFFREY W. JACOBS

ARBITRATOR

April 11, 2013

IN RE ARBITRATION BETWEEN:

Met Council Transit Operations,
and
ATU, #1005.

DECISION AND AWARD OF ARBITRATOR
BMS CASE #13-PA-0462
Russell Cage Grievance

APPEARANCES:

FOR THE EMPLOYER:

Tony Brown, Labor Relations Representative
Derrick Cain, Assistant Manager
John Humphrey, Director of Rail Operations

FOR THE UNION:

Tim Louris, Attorney for the union
Russell Cage, grievant
Dave Rogers, steward

PRELIMINARY STATEMENT

Hearing in the above matter was held on March 21, 2013 at the Operations Center 725 North 7th St. in Minneapolis, MN. The parties presented oral and documentary evidence and the record was closed. 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 Class A violation and Record of Warning issued to the grievant on August 19, 2012 just and merited? If not what is the appropriate remedy?

PARTIES' POSITIONS

EMPLOYER'S POSITION

The employer took the position that the incident of August 11, 2012 warranted a final record of warning. In support of this position, the employer made the following contentions:

1. That the grievant is an experienced Light Rail Transit, LRT, operator and thus is aware of the need to properly pre-check and prepare the train to make sure that the proper codes are programmed into the train. The employer asserted that it is undisputed that the grievant failed to properly enter the appropriate codes when he took an LRT northbound from the Mall of America even though there was ample time to do so.

2. The employer further asserted that the failure to enter the correct code caused the signal at the Lindberg Terminal stop to read yellow. A yellow signal alerts the operator that the next signal will be a red signal – and that all operators know that a red signal means that the operator must stop the train. He simply failed to notice the yellow signal at the Lindberg station.

3. More importantly, according to the employer, the grievant failed to notice a red/stop signal until he was almost on top of it and thus had to hit the “mushroom” or emergency stop button on the train in order to apply the maximum braking pressure on the vehicle. Since he failed to notice the stop sign until it was almost too late, he slid past the signal causing the RCC to notice a Red Signal Override, or RSO. The employer emphasized that the RSO is a serious safety violation that could in some circumstances be catastrophic.

4. The employer further asserted that it does not matter that the train went past the signal by a few feet or even a few inches. What matters is that it was an RSO and that “an RSO is an RSO” and is categorized as a “Class A,” or serious, violation. Even though the area in which this RSO occurred was not near an intersection or pedestrians that fact was merely fortuitous. The point is that it could have happened anywhere and that the grievant needed to both properly set up the vehicle and to pay close attention to signals.

5. The employer countered the claim that the grievant assumed there would be no red signal by noting that a red signal should immediately alert the operator to the potential of a problem and to be ready to stop the train. Instead the grievant missed the yellow and had to stop the train in an “emergency fashion” when he finally saw the red signal.

6. The employer also argued that the “default” time that a Class A violation is to remain on an operator’s record is one year from the date of the issuance of the violation unless there are mitigating circumstances of some sort that warrants a reduction in that period of time.

7. The employer noted that it reviewed the facts and circumstances of this case and determined that there were no facts warranting a reduction in the degree of violation or were there any facts that warranted a reduction in the amount of time the violation should stay in the grievant’s record. All of the events here were the result of the grievant’s actions or failure to act, as opposed to some factor outside of the grievant’s control that caused the events. The grievant’s failure to enter the correct code, even though he was on a layover at the Mall caused the signals to show yellow and red. He missed the yellow at the Lindberg Terminal and had to hit the mushroom/brake to get the train to stop. Accordingly, since the RSO is classified as a Class A violation it should remain a Class A violation given the undisputed facts. It should also remain on the grievant’s record for a year.

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

UNION’S POSITION

The union took the position that the August 11, 2012 incident should not have been regarded as a Class A violation given the facts and circumstances of this particular incident. The union also argued that in the alternative, even if the arbitrator deems this a Class A violation, it should not remain on the grievant’s record for the full year under these unique facts. In support of this position the union made the following contentions:

1. The union acknowledged that there was a technical violation of the operator’s manual and policies here but noted too that the grievant is a long-term employee with a completely clean record and a record of excellent service. This record should have been taken into account here to reduce the violation or the length of time it is proposed to stay in the grievant’s record.

2. The union also noted that on the day in question, the grievant was actually called in to work overtime and that he frequently helps out whenever he can. On the date in question, the grievant was called in almost literally at the last minute, and on his day off, to come in to cover a shift. Otherwise transit operations might have been adversely affected or delayed due to the employer's inability to cover the shift the grievant took

3. The grievant indicated that he got to the station with very little time to spare given the lateness of the call and properly pre-tripped the LRT vehicle for a southbound run. When he got to the Mall of America however he had only 6 minutes of layover time and stopped to exit the train to smoke a cigarette and simply forgot to pre-trip the LRT for the trip northbound.

4. The union and the grievant asserted that the grievant is usually very attentive to signals but never assumed that there would be a red signal in the location where it was. The union introduced pictorial evidence of the actual location where the red signal was and asserted that it is not at an intersection or in a place where there is any pedestrian traffic nor is it anywhere near a station. The red signal in question is located in a place away from normal cross traffic of any kind and is there to control a relay type track between the main lines of travel. The union asserted that there is very little chance of a collision at this location.

5. The union acknowledged that the grievant did not see the red signal until the last minute and that when he did he immediately reacted appropriately to stop the train. He hit the "mushroom" button that applied the brakes but that the train simply slid past the signal indicator by perhaps 18 inches or so. The grievant asserted that he was still able to see the red signal from the operator's seat, which would have meant that the train could not have been past the signal by more than just a few inches. The union asserted that it was not the 10 feet that the employer indicated it was past the signal.

6. The union argued too that not all RSO's are equal and that certainly if this had occurred near a station it would have presented a very different scenario. The union noted that the purpose behind the designation of an RSO as a Class A violation was to prevent a collision between LRT's or with other vehicles or in the event of some issue with the track. While running a red signal can under different circumstances lead to a tragedy; these facts presented no such case.

7. The union also noted that the rule in Procedure 4-7e gives the supervisor discretion to both reduce the level of the violation and to reduce the "default" time the violation is to stay in the grievant's record. Here though the union argued that the employer simply applied to wooden an interpretation of the rule – stating that an RSO is an RSO – and that such an interpretation on these facts is not just and merited.

8. The union asserted too that there was no harm done here. No damage to the tracks or the train was reported. There was no indication of any injuries to passengers nor was there even a delay in service. The train stopped briefly and after a short conversation with the control center, proceeded to the next station and went on its way.

9. Finally, the union asserted that the rule gives such discretion to the supervisors, and therefore to the arbitrator, to determine if any particular penalty is "just and merited" as required by the CBA. All such discipline is subject to the "just and merited" standard and the union argued the arbitrator to take account of the totality of circumstances here and either reduce the level or to reduce the time it stays on the grievant's record.

The union seeks an award reducing the level of discipline and/or reducing the time it is to stay on the grievant's record and for such other relief as the arbitrator deems appropriate.

MEMORANDUM AND DISCUSSION

The Met Council 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. The employer is a common carrier and by common law held to a very high standard of care in the operation of its vehicles.

The grievant has been with the employer as an operator for approximately 9 years and has a clean disciplinary record. He is by all accounts a conscientious and dedicated employee. It was clear that on the date in question he was called in to work voluntary overtime, as he apparently frequently does, and came in quite near the beginning of the shift due to the lateness of the call and the difficulty the employer had in finding someone to cover the shift the grievant eventually took.

When he initially arrived at the LRT train, the grievant pre-tripped the vehicle and entered the codes. When he returned to the Mall of America station however he had a short layover of some 6 minutes or so and took a short smoking break outside the train.¹ The evidence showed that he neglected to change the codes for a return run. There was evidence to show that this failure caused the signals to show yellow at the Lindberg Station (which is located at the Minneapolis/St. Paul Airport.) There was a yellow signal there and the grievant failed to notice that. The yellow signal would have alerted him to the fact that there was a red signal at the next signal light. Whether the light is "frequently" yellow there or not the evidence was clear that he should have at least been aware of the possibility of something going on at the next signal light that might cause there to be a red signal there.

The evidence showed that there was indeed a red signal at the next signal light and that the grievant did not see that until the train was quite close to it. When he saw it he immediately stopped the train by pushing the "mushroom" button. That button applies maximum braking pressure to the train and effectively takes over control of the train at that point.

¹ The evidence showed that the employer prohibits smoking on the LRT's themselves so the grievant had to exit the train in order to smoke.

There was no dispute that the train slid past the signal indicator which alerted the Radio Control Center, RCC, that there had been an RSO. The RCC immediately contacted the grievant and instructed him to stop the train. The informed them that the train was already stopped and asked for instructions. RCC told him to proceed slowly to the next station, which he did. After that the run went on as normal.

There was no report of damage to the tracks, the train or the signal or anything on the tracks. There was no report of injuries to passengers. The employer indicated that this was likely a “hard” stop and that passengers could have been injured or at least jostled as the train came to such an immediate stop. He employer also indicated that it is possible to damage the wheels of the train by such a stop as the wheels slide across the tracks. This can create a flat spot on the wheel which causes vibrations and may even necessitate the replacement of the wheel. There was no actual evidence of that on this record and without such evidence no conclusion can be made as to damages or injuries.

The essence of the employer’s case is that an RSO is an RSO – by a few feet or a great deal more – it matters not by how much. It further does not matter whether there was actual damage. The rule is there to assure that operator’s pay very close attention to the signals to prevent damage or tragedy resulting in loss of life or bodily injury. The employer noted too that there was nothing wrong with the equipment nor any factors outside of the grievant’s control that caused this. The reason the RSO occurred was twofold: the grievant did not properly pre-trip the LRT and enter the correct codes and he failed to notice the signals and take appropriate action in a timely fashion.

The employer cited the matrix in the Operator’s Performance Policy 4-7e that clearly sets forth that an RSO is a Class A violation. It further sets forth that the Class A violations stay on the operator’s record for a rolling calendar year. The employer acknowledged that the warning will “roll off” the grievant’s record as of August 19, 2013 but asserted that it should remain there for the full prescribed time. There was no evidence of any other violations or warnings on this grievant’s record other than the one issued on August 19, 2012.

The union acknowledged that there was an RSO but the essence of the union's case is that not all RSO's are created equal. An RSO that causes damages or injuries or one that occurs at a station or near an area where there could be cross traffic or pedestrians² is much different than one at this location where no such traffic is present. The union also noted the terms of the rules themselves which give discretion to the supervisors to either reduce the level (indeed the step grievance decision noted that the "real" reason for this incident was the improper pre-tripping of the train, which is in itself only a B violation). The union asserted that the arbitrator should take into account the totality of circumstances here and reduce the level or the time or both.

The union cited the portion of the employer's Procedure 4-7e – Operator Performance – Light Rail Operations as follows:

Manager Discretion. The Operating policy is designed to promote consistency and equal treatment. Managers have discretion to depart from the Policy to take into account mitigating and aggravating factors. The Drug and alcohol Policy, Sexual harassment and Inappropriate Behavior Policy, Falsification to a Manager's Inquiry or an official Document, pedestrian accidents, serious safety infractions or customer service complaints, etc. are representative of situations which would be dealt with outside of this Operators Policy. In some situations, termination may be justified on the first offense.

Arbitrators should be hesitant to simply substitute their judgment for that of the employer in applying the appropriate penalty for an acknowledged violation. To use the words of the US Supreme Court in the famous Steelworkers Trilogy, it is not appropriate for an arbitrator to dispense their own brand of industrial justice in rendering decisions. See, e.g., *Steelworkers v Warrior and Gulf Navigation Co.*, 363 U.S. 574, 580, 46 LRRM 2416 (1960).

Clearly, the purpose of the rule is to prevent accidents and there is clear evidence that the RSO can lead to very real damage. Thus, with respect to the union's initial assertion that the arbitrator should reduce the level of discipline, this argument must be rejected.

² The facts here showed that while it was possible that someone could have been on these tracks either because of construction or maintenance in this area or if someone was trespassing, it was clear that this is not usually a location where pedestrians or people walking around the tracks would normally be.

The fact that nothing happened in this instance was certainly a good thing but had little to do with the grievant's actions. The simple fact is that everybody got lucky here that this did not happen in a different location. One could certainly go through a parade of horrors to show that something could have been very different if it had. A train goes through a signal by 18 inches but kills a pedestrian. A train goes through a signal by 18 inches and collides with another train causing damage or injury, etc. One need not analyze the reason for the rule much further than that to understand why it is there and why it makes sense. Thus, the union's request that the level of violation be reduced must be rejected.

The decision in *Metropolitan Council and ATU 1005*, BMS # 11-PA-0623 (McCoy 2011) was reviewed in some detail as well. The facts of that matter are indeed different but presented many similar arguments to those presented here. There was an RSO there as well, although it appeared to have occurred in a far different location and presented a different risk factor. There was also the clear fact there that it was the third such violation and involved the demotion of an operator.

Arbitrator McCoy correctly, in my view, ruled that the distance the train slides past the signal is not determinative. Further, he ruled that the fact that no one was injured or damage caused is also not determinative. He stated as follows; "One of the fundamental duties of the operator is to understand and obey the traffic signals. The Grievant simply failed to carry out a critical responsibility of his position." Slip op at p. 10. Much the same occurred here. The main problem is that the grievant missed the yellow signal at Lindberg which would have alerted him to the fact that the next signal would be red. This coupled with the failure to properly pre-trip the LRT vehicle when he had the chance earlier in the run created the Class A violation. Accordingly, there was no basis on which to reduce the disciplinary level.

The union also asserted that the amount of time should be reduced given the facts of this case. The basis of this is similar to the assertions above; i.e. that there was no harm and thus should be no, or less, foul. Some consideration was given to this argument as it had a somewhat stronger appeal, at least initially.

Certainly, the terms of the policy set forth above gives managers the discretion to consider mitigating or aggravating factors in determining both the level of discipline as well as the length of time it should remain on the record. This also grants to the arbitrator the discretion to determine the appropriate penalty as well. The notion of “just and merited” allows an arbitrator to review the penalty posed and potentially amend it under appropriate circumstances. Such discretion is part and parcel of a just cause analysis of employee discipline. Having said that though, arbitrators must be cautious about changing discipline without some basis for doing so and be wary of the imposition of their own brand of industrial justice in the place of the managers who presumably know more about the operation and why the rules exist than any arbitrator does. The question thus is whether there were such mitigating factors present on these facts that provided an adequate basis to alter the length of time the discipline stays on the record.

The record reveals that the managers did look carefully and objectively at the facts of this case and made a good faith determination regarding the level of discipline. While there was some dispute about how far the train slid past the signal, i.e. 18 inches or so versus a few feet, that would not have changed the result here either way. Further, the manager was aware of the location where this occurred and that no damage or injuries were reported. Thus there can be no argument that the employer’s action or determination was based on inaccurate facts or invalid assumptions.

On these facts, while there was no damage or harm done, the assertion by the union has to do with the *consequences* of the RSO rather than the *causes* of the RSO. In other words had there been mitigating circumstances that created the RSO beyond the grievant’s control the union’s argument would have had far greater appeal. Here though the sole reasons for the RSO were due to the errors both in failing to pre-trip the vehicle and, more importantly, missing the yellow signal.³

³ It should be noted that the union argued in the McCoy decision referenced above that the RCC was partially at fault for the RSO which occurred in that case for failing to return the system to automatic, which led to the grievant’s assumption that he could proceed. Arbitrator McCoy rightly rejected that argument there noting that the operator always has the responsibility to watch the signals and obey them. Much the same can be said here.

Accordingly, it was determined that the Class A disciplinary notice issued in this matter should remain on the grievant's record for a period of one year after its issuance and that the grievance is denied.

AWARD

The grievance is DENIED.

Dated: April 11, 2013
MCTO and ATU Cage award.doc

Jeffrey W. Jacobs, arbitrator