

**IN RE ARBITRATION BETWEEN:**

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**MET COUNCIL TRANSIT OPERATIONS**

**and**

**AMALGAMATED TRANSIT UNION (ATU), Local 1005**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS Case # 13-PA-0511**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**May 9, 2013**

IN RE ARBITRATION BETWEEN:

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Met Council Transit Operations,

and

ATU, #1005.

DECISION AND AWARD OF ARBITRATOR  
BMS CASE #13-PA-0511  
Eric Lowe Grievance

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**APPEARANCES:**

**FOR THE EMPLOYER:**

Sydnee Woods, Attorney for the employer  
Julie Johanson, Former Deputy Chief of Bus  
Operations  
Demetairs Bell, Supervisor  
Donovan Brown, Asst. Heywood Garage Manager  
Jeff Wostrel, Heywood Garage Manager

**FOR THE UNION:**

Tim Louris, Attorney for the union  
Eric Lowe, grievant  
Mark Lawson, steward

**PRELIMINARY STATEMENT**

Hearing in the above matter was held on April 22, 2013 at the Transit Control Center 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 termination of the grievant just and merited within the meaning of the parties CBA? If not what is the appropriate remedy?

## **PARTIES' POSITIONS**

### **EMPLOYER'S POSITION**

The employer took the position that the incident of October 30, 2012 warranted termination. In support of this position, the employer made the following contentions:

1. That the grievant is a short-term employee having been hired in January 2011, less than 2 years prior to the incident that led to his termination. He has also been amply trained on the need to be respectful to passengers and members of the public. See Employer exhibits 5 and 6 in which the grievant acknowledged receipt of the Operators Rule Book and Guide. The grievant was further trained repeatedly that if he needed help or felt he was unable for any reason to complete his route or was having trouble with passengers he should contact the Transit Control Center, TCC, and ask for assistance. Such assistance is readily available.

2. The grievant was assigned to drive a bus that is part of the program by which Minneapolis public school students ride Met Council buses rather than the typical yellow school buses. The employer asserted that it was crucial to maintain the relationship between the Met Council and the Minneapolis Schools that their drivers act appropriately with the students.

3. The employer also pointed to the training and memorandum he was given by his supervisors regarding the nature of the riders in the Minneapolis School program. See, employer exhibit 8 and 9, which specifically advises the drivers that "we're dealing with children that'll be full of energy particularly after school." Further, "bear in mind this is a new experience for some students so you may have to do more education about the system than usual."

4. The employer also pointed to procedure 4-6, Employer exhibit 4, which states as its purpose: "To assure all Metropolitan Council employees and their customers and clients that threats, violence, unethical and offensive behavior will not be tolerated."

5. Moreover, the Bus Operator's Rule Book and manual provides at various points as follows:

## Section 142 COURTEOUS CONDUCT

Employees must be courteous to others at all times. Patience and self-control must be used to avoid aggravating situations. In cases of misunderstanding arising from the enforcement of these rules, employees should politely and quietly request the person with whom they are dealing to discuss the issue away from customers or other employees so that the matter may be clarified without disrupting other persons or employees or Metro transit service.

## Section 143 SERIOUS OFFENSES UNDER THE RULES OF EMPLOYEE CONDUCT

... 3. Threatening a citizen, customer or other employee with bodily harm or causing a physical altercation on Metro Transit property or on a Metro Transit vehicle.

## Section 154 PHYSICAL ENCOUNTERS

Metro transit operators should avoid physical confrontations whenever possible. This means refraining from leaving the bus operator's seat to settle disputes unless it is necessary to defend yourself or customers from physical attack. It also means avoiding physical contact unless you or a customer is being attacked. If you are under direct physical attack, and you believe physical harm, serious injury, or death may result, use only enough force to subdue the attack and restore order. Once the attack ceases, do not pursue the assailant. If you use more force than necessary; you may be personally liable for having acted outside the scope of your employment.

6. The employer acknowledged that the grievant has no prior disciplinary history but focused on the events of October 30, 2012 when the grievant was involved in a physical altercation with a 15-year old female student at Edison High School while operating a bus scheduled to take the children home.

7. The employer had the video evidence of the entire incident in which the grievant is shown interacting with three specific students. The first involved a student talking loudly to a friend who was outside the bus and the grievant slammed the windows shut and told him to leave. The grievant alleged that he heard the student use an epithet but none can be heard on the audio portion of the tape. The employer alleged that the grievant was unnecessarily brusque with this student and that he could have simply asked the student to leave and speak to his friend until it was time to re-board the bus. Instead he summarily threw him off and was disrespectful to him

8. The second incident involved a student who has pulling the stop cord and causing the chime to ring in the front of the bus. The grievant also ejected him from the bus rather than simply asking him to stop pulling the cord. Again, the grievant's interactions according to the employer called into question his fitness and general demeanor with students.

9. The last and most serious interaction that day involved a young female student who asked when the bus would leave. She was heard to say simply, “can we leave,” and added, “F waiting.” The grievant snapped at her and said she did not get to ask questions and then ejected her from the bus as well. The employer pointed out that the grievant was in the doorway of the bus as the student was leaving and acknowledged that she pushed him out of the way as she passed by.

10. The operative fact though, according to the employer, was that instead of getting out of her way or simply scolding her, he turned and swung at her twice striking her at least once in the back of the head. He then attempted to pursue her as her boyfriend exited the bus and struck the grievant in the face. The employer noted that only when school administrators and law enforcement personnel arrived and held the grievant back did he stop the attack.

11. The employer based its decision to terminate on alleged violations of Rule 142, 153 and 154 set forth above and the provisions of Bulletin #67, outlining the operator responsibilities with respect to the Minneapolis High School pass program. The employer asserted that the act of punching a student even though she may have pushed him slightly was inexcusable and well beyond the expectations of defending oneself from a physical attack.

12. The employer countered the claim that the October 19<sup>th</sup> assault was in any way an excuse for his behavior. He never sought help nor did he call for assistance on October 30<sup>th</sup> even though he had been told many times, as are all operators, to contact TCC if they feel they need help or they feel there is some reason they cannot continue their route. Further, he never contacted anyone to complain about the actions of the students with whom he had had incidents in the past. While he claimed he knew the students involved in these incidents on the bus on the date in question, he never contacted anyone at the TCC or at the school about them.

13. The employer also countered the claim of disparate treatment and noted that the incidents relied upon by the union in support of reinstatement are quite old, occurred under a different manager and should be disregarded. The employer argued that since 2009, a new manager of bus operations has taken over and that it is generally known that incidents like the one that occurred here will not be tolerated.

14. Finally, the employer objected to the use of the medical records regarding the grievant's mental health treatment. The employer noted that these are well after the event in question and do not clearly link his behavior to the diagnosis of PTSD. The employer asserted that this evidence should be disregarded.

15. The essence of the employer's position is that the grievant struck a minor student twice and that this was completely unnecessary to defend himself and went well beyond the clear expectations of a bus operator, especially one called upon to transport high school age students.

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

## **UNION'S POSITION**

The union took the position that the October 30, 2012 incident is not the true beginning of this story and that it really started some 11 days before on October 19, 2012 when the grievant was assaulted and knocked unconscious when he was hit from behind by a group of teens. Further, the grievant's action did not rise to the level of a terminable offense. In support of this position the union made the following contentions:

1. The union and grievant did not dispute the events that occurred on October 30, 2012 since virtually all of the operative events that day were captured on tape. As noted above though the union urged the arbitrator to look backwards to October 19, 2012 when the grievant was assaulted without warning from behind by a group of what he believed were young teenaged men. He was walking to a portable toilet while on a layover on his #16 Route in St. Paul when he was struck in the head with some sort of object. He was knocked unconscious and badly injured.

2. As a result of the assault that night, the grievant missed 6 days of work and began having nightmares about the incident shortly thereafter. Moreover, the employer certainly knew about the October 19<sup>th</sup> events and even offered assistance if the grievant felt he needed it. He declined at the time because he simply was unaware of how the incident had affected him and what its lasting effects might be. The union asserted that it is against this backdrop of events that the incident of October 30, 2012 must be viewed.

3. The union also asserted that the grievant's history contains nothing that suggests he was a bad operator. To the contrary his history, while short, is quite good. He has no prior discipline or other incidents that would support a finding that he is a danger to the customers or that he has any tendency to be violent with riders or any member of the public. The union asserted that he has never in all his life been in a physical fight of any kind and that the events of October 30<sup>th</sup> were an outlier at best and not indicative of his general demeanor.

4. The union turned to the events of October 30, 2012 and noted too that the grievant had been on this route in the past and had a somewhat unpleasant history with several of these students. The grievant alleged that the ones that were removed from the bus for inappropriate behavior that day were all part of that group with whom he had had problems in the past.

5. The grievant further alleged that he had spoken with them about the very behaviors that caused their removal that day. Specifically, he had told the one young man who was removed for repeatedly pulling the stop cord that he was not to do that yet he did it anyway. Thus no more "warnings" were necessary – he had been told before not to do that. Indeed, when the young man pulled that cord the bus was stopped and he was obviously doing this to create an annoyance.

6. Further, the union asserted that the young man who was told to go outside to talk to his friend was talking quite loudly and was creating a disruption on the bus. The union pointed to Bulletin #67 which provides "these things may result in your [student's] pass being suspended: noise, profanity ..."

7. The union asserted that the boy was both being loud and when asked to leave the bus to talk to his friend he used a profanity toward the grievant. He did so under his breath but loud enough that the grievant heard it. Even though the grievant was subjected to this verbal abuse he nonetheless followed procedure and went to the front of the bus in case he needed the assistance of an administrator to remove the offending youth. At no time did the grievant continue the conversation nor did he escalate this or respond in kind when the boy swore at him.

8. The union asserted that the grievant acted entirely in accordance with his instructions in both these instances. He did not physically touch either of these two students but instead followed protocol and got an administrator to remove them from the bus. In both cases they left the bus without incident. The union asserted that these instances showed that the grievant followed procedure and never attempted to touch these two despite their rule violations.

9. With respect to the physical altercation that did occur, the union asserted that the grievant was assaulted by this girl on her way out the door. The union asserted that the video clearly shows her pushing her elbow into the grievant's back as he leaned out the door to get a school administrator and that she used her body weight and leveraged herself to push the grievant out the door. At that point he was unaware of who this was or whether he was being again attacked from behind with a weapon or perhaps by multiple attackers. The union repeatedly noted that unlike many cases where the operator was the aggressor or "started" the physical altercation, the grievant was assaulted first from behind and simply reacted in the same way any normal human might. The union reiterated that given the grievant's unpleasant experience on the 19<sup>th</sup>, it is more than understandable that he would have reacted quite suddenly to make sure that he was defending himself and getting this girl away from him.

10. The union also asserted that he simply reacted, as anyone might, to such an assault and spun quickly around and pushed the student away from him. The union characterized the "punch" as more of a push to get this girl away from him.

11. The union also asserted that the video also shows that he then backed away from her and did not attempt to pursue her at all when at that moment the girl's boyfriend jumped off the bus and struck the grievant in the face knocking his glasses off.

12. The union countered the claim that the grievant was "pursuing" the boy and asserted that he wanted to identify the boy for the school administrator who by then appeared on the scene so he knew which person had assaulted him.

13. The union also noted that there were several incidents involving operators who engaged in far worse conduct, some even with a weapon and some of whom chased people down the street to continue an assault that first occurred on the bus yet were not terminated. Many of these were not even initially fired but were rather given suspensions of varying lengths. Others were initially terminated but returned on last chance agreements. Some of these are working to this day even though these incidents took place several years ago.

14. In response to the claim that these are "old" cases, the union noted the policies under which those older cases were processed are still in place now – they have not changed. Further, even though they occurred under a different manager, there was no clear communication to the union or to the affected employees that anything had changed with respect to physical altercations. While the union did not condone assaults on customers, the union asserted that this was a case of self-defense after an assault by a rider on an operator. The union also pointed to Rule 153 (5), which clearly states that "defending yourself and your customer is permitted." Many drivers are trained to carry chemical sprays to ward off attackers and that this is a permitted activity by the employer.

15. The union and the grievant both indicated that he is and can remain a good driver and that this incident is a one-time event that should not ruin an otherwise good career. The grievant is now in treatment for the effects of the assault earlier in October 2012 and is recovering well from the effects of this and can be trusted to remain calm in situations like this and will do everything he can to assure the safety of his riders and the public.

The union seeks an award sustaining the grievance and reinstating the grievant to his former position with full back pay and benefits.

## **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 had been with the employer as an operator for approximately 21 months when the incident of October 30, 2012 occurred. There was no evidence of prior history of discipline or of complaints by riders or members of the public about the grievant's demeanor or actions while operating a bus.

There was no dispute that the grievant was assaulted on a #16 Route while on duty on October 19, 2012. The evidence showed that he was on a layover in St. Paul and while walking to a portable toilet he was suddenly struck on the head without warning or apparent reason. He was knocked to the ground and lost consciousness for an undetermined period. The grievant claimed that his hands were cold from the pavement so he might well have been out for a few minutes at least. Robbery was not the apparent motive since the grievant's cell phone and wallet were not taken after this attack.

The grievant suffered serious injuries as the result of this assault and was out of work for 6 days following the attack. He was offered the opportunity to consult with DOR and Associates, the employer's employee assistance personnel, but declined it. He testified credibly that he was not fully or immediately aware of the mental effects this attack had on him until sometime later.

The grievant testified that he began having nightmares after this attack and became very apprehensive of people approaching him from behind. It should be noted that there was insufficient evidence that he suffered a true PTSD from this or what the lasting effects of this were given the paucity of medical evidence in this matter. On this record however, the question of whether he had PTSD or whether that led to his actions on October 30, 2012 were not determinative of the outcome.

Turing now to the events of October 30, 2012 the evidence was quite clear and for the most part undisputed. The grievant was assigned to take students home from Edison High School in Minneapolis. Recently the Minneapolis School District contracted with Met Council Transit to transport some Minneapolis Public School students on their buses rather than the standard yellow school bus. The Minneapolis School Pass program allows students to take Met Council buses to and from school. The evidence showed that this was a relatively new program.

There is a clear video of the incidents and this was reviewed in detail several times. At approximately 15:04.52 a boy is seen near the rear door of the bus talking to a friend outside the bus. The friend is wearing a light blue jacket. He is talking loudly but not so loud when compared to the rest of the children on the bus, who are of course quite exuberant. At approximately 15:05.08 the grievant approaches the rear of the bus, slams the windows shut and instructs the young man to leave the bus to talk to his friend. The video has relatively decent audio as well and despite the background noise the grievant can be heard talking to the young man who indicates that “OK, I’m leaving.” There was no profanity heard or any disrespectful behavior by the young man. He is seen shortly thereafter exiting the bus. While the grievant’s demeanor during this limited encounter was somewhat terse there was some evidence that the grievant knew this young man and had had some interactions with him in the recent past and that he knew he had to be firm with him in order to get him to comply with instructions.<sup>1</sup>

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<sup>1</sup> The grievant’s demeanor during this entire incident was somewhat troubling. It is difficult to imagine a driver being this terse with adult riders on a regular route. While these are high school aged children there was little evidence that he needed to bark at them the way he did. This was a factor taken into account on the overall record here.

The next interaction was with a boy who was pulling the stop cord. The boy who is wearing a black hat with a red stripe on it is seen taking his seat at approximately 15:05:30 and sits quietly for a few minutes. The grievant testified credibly that he had previously counseled this young man not to pull the cord and that he had warned him about this behavior.

The boy pulls the cord several times between 15:07.56 and 15:08.00. The grievant then gets up from his seat at 15:08.03 and tells the boy at least three times to “get off.” The boy retorts, “For what?” and refuses to move. Rather than continue to argue with the boy the grievant then walks toward the front of the bus and gets a school administrator to escort the kid off the bus. The grievant taps the horn several times at 15:08.20 to get the attention of the administrator.

The administrator appears on the bus at 15:08 31 and the grievant instructs him as to which boy was causing the trouble. The boy is then escorted off the bus without further incident. He is seen leaving the bus at approximately 15:08 40 and admits he was “pulling the thing.” There was little question that the grievant acted appropriately in these two prior instances and that neither of these incidents would have resulted in discipline. He followed procedure and when the second boy was somewhat insolent about leaving the bus even though he quite obviously pulled the stop cord several times the grievant followed procedure.

The incident that led to his discharge begins at approximately 15:12.12 when a girl in the front seat asks, “can we leave?” She is then heard immediately to say “F waiting.” At 15:12.17 the grievant then says, “What! Get off the bus.” The girl argues and says, “I was just asking a question.” The grievant then tells her “you don’t ask no questions. Get off the bus.” She then asks, “for real?”

The grievant then goes to the door to get an administrator as it was apparent that he believed she was not going to get off the bus voluntarily. While she is seen leaning outside the door but standing on the step, the girl does get up and announces that “he just pissed me off.”

The grievant is still leaning outside the door trying to get the attention of the administrator as she passes by him on her way out. He tells one student who was about to enter to “wait a minute” as he goes to the door. Video at 15:12.30. At 15:12.37 he is seen calling to the administrator. He claimed that he did not know she was coming but from the video it is not possible to determine whether he in fact saw her as she approached the door. Her hair is bright pink and at one point the grievant glances slightly inside the bus just before she got to him. Video 15:12.38.61. He may well have known it was her but there was no way he could have known she would push him out the door by placing her elbow into his back and using her body to leverage herself to push past the grievant.<sup>2</sup>

The incident in question takes place over the course of less than 3 seconds and starts when the girl pushes the grievant out the door as she passes by him. The grievant loses his balance and is clearly forced out the door. He turns quickly and pushes her away with his right hand. At this point the video shows that he is simply trying to get her away from him since he is still leaning into him.

Within an instant though he hits her in the back of the head with his left hand. It is not possible to determine if he did so with a closed fist but what is clear is that he did hit her. The employer argued understandably that this was inexcusable and that he tried to pursue the girl after the initial exchange. The evidence showed however that once the grievant got the girl away from him he made no further attempt to pursue her or continue any further physical interaction.

The next thing that occurs is the young man who was with the girl exits the bus and hits the grievant on the face knocking off his glasses. The grievant stumbled but did not fall down. At this point, the administrator arrives and gets between the grievant and the students who were gathered by the front of the door. Contrary to the assertions by the employer, the grievant is not seen trying to get at the students but is rather attempting to point out which student had just struck him in the face.

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<sup>2</sup> The grievant is of course much older and larger than this girl but was leaning out the door and had only a loose hold on the rail on the bus door. The girl clearly was angered by being removed from the bus and may well have decided to give the grievant a shove as she passed by him. Even though she was smaller in stature she clearly used the left side of the doorway to push the grievant out the door.

The tape out the front window shows the boy posturing in the street and there is no evidence that the grievant was attempting to pursue the young man or to continue the physical altercation. The grievant testified credibly that his glasses were gone and he needed to get close to identify the student who had assaulted him. The question thus is whether the grievant's action in striking the girl the second time was enough to result in his termination.

Frankly if the record had ended at this point, given the grievant's short-term employment with the employer the result here might well have been different. On this record however, the union pointed out that there have been multiple instances of operators using far more force and engaging in far more egregious conduct, some involving far more time to think about whether to pursue their attackers than was the case here. The evidence also showed that even though there was a new manager of operations in place as of 2009 there was no clear warning that the type of behavior in which the grievant engaged would be treated differently than they had been in the past. Indeed the policies relied upon by the employer have been in place for several years prior to 2009.

The evidence showed that going back a dozen or so years there have been multiple instances of operators who have assaulted customers and members of the public who were not terminated. These will be discussed in general.

In January 2008 an operator was terminated for leaving the operator's seat and assaulting a passenger. He was reinstated on a Last Chance Agreement, LCA, and was subject to that for 3 years. See union exhibit 13. The details of this revealed a somewhat more aggressive action by that driver than was undertaken by the grievant.

In 2001 another operator was given a suspension for pushing a customer out the front exit window of a bus after a confrontation regarding a bus pass. That case revealed that the operator pushed the customer and had both his hands on him for a short time but longer than the physical altercation in this instance. There was also evidence in that case that the driver pushed the customer out the window. This could well have resulted in serious injury.

While this was from 2001 and was under a different Director of Bus Operations, as noted above, there was insufficient evidence of a clear notice to the drivers or to the union that any sort of physical assault will result in termination under the new management to warrant termination for the grievant under these facts. Indeed, drivers are now allowed to carry chemical sprays to protect themselves in the event of an assault.<sup>3</sup> Drivers are also specifically told both to avoid physical assaults but that they are entitled to defend themselves if they or customers are subject to physical assault. See Rule 153 set forth above.

Union exhibit 16 refers to an incident in 2007 involving a driver who physically assaulted his girlfriend while on a bus and while apparently in uniform. He too was returned on a LCA and required to undergo certain anger management treatment. The LCA was for a period of 3 years.

Union exhibit 17 referred to an incident in 2008 for a relatively short term, i.e. 4 year, employee who pushed a customer out the front door. The LCA was for a period of 3 years and resulted in no back pay for the operator in that case.

Union exhibit 18 referred to an incident in 2006 that occurred between an operator and a passenger. This started as a verbal altercation but ended up as a physical fight between the two. The operator had been employed for much longer, 18+ years but was also allowed to explain certain issues in his personal life that may have led to this and was also allowed to return to work after he assured management that with the assistance of DOR and Associates he would be able to resist such activities in the future.

Finally the union introduced an arbitration award Union exhibit 21, *In re ATU #1005 and Metropolitan Council*, BMS # 09-PA-1066 (Befort 2009) that involved a driver who was already on a LCA for other offenses and who then became embroiled in a dispute with a passenger over the alleged failure to stop the bus.

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<sup>3</sup> The 2001 incident resulted in a suspension initially and it was clear that other drivers have been terminated only to be brought back to work either by arbitration or through an LCA. The 2001 incident was not given much weight here in light

The passenger was verbally abusive towards the driver in that case. There were various verbal exchanges over the course of several minutes in that case when the driver picked up an ice scraper and threatened the passenger with it. The passenger eventually lunged at the driver, poked him in the eye and ran off the bus. The driver, rather than staying with the bus or calling for assistance, ran off the bus chasing the passenger with the ice scraper after the passenger punched him.

The employer took a similar position in that matter as it took here and asserted that the driver's actions were in clear violation of policy and that even if the arbitrator did not consider this incident a violation of the LCA in place in that matter, the driver's actions still warranted discharge. The arbitrator reinstated the driver without back pay relying in large part on the same claims of disparate treatment made by the union in this matter. Arbitrator Befort compared this case to one in which the driver was terminated but who actually hit the customer with an ice scraper causing severe injuries requiring stitches. He further directed the parties to negotiate another LCA and retained jurisdiction for 60 days.

Obviously each case is different and claims of disparate or similar treatment are subject to a review of each set of facts to determine if one or the other type of case is similar enough to warrant meriting such a claim. Here the grievant's actions cannot be condoned – he struck a young girl in the back of the head after she pushed him out of the doorway in a somewhat aggressive manner. There should be no question that the actions the grievant took were subject to discipline and that the employer had cause to discipline him for that.

It was also apparent on this unique record that the grievant's state of mind must be taken into account as well and the fact that the grievant was assaulted only a few days prior to this incident and missed 6 days of work because of it was taken into consideration. While the issue of PTSD was not given much evidentiary weight on this record either way, the grievant's actions were taken in a split second when he was pushed out of the doorway.

Also significant was the fact that since 2009 there was no clear communication to the union or the drivers that the rules had somehow “changed” so significantly that such actions would automatically result in termination.<sup>4</sup> Finally, contrary to the employer’s assertions, the grievant did not pursue his attackers. He broke away from the girl once he had pushed her away and was not seen trying to pursue or grab her again. While there was only another split second before he was hit again by the boyfriend his actions did not demonstrate the sort of aggressive actions as are discussed in some of the other cases where drivers had literally chased people down the street or off the bus.

Considerable thought was given to the appropriate remedy here in light of the totality of circumstances. Militating against the grievant was of course the clear fact that he struck someone who had just pushed him. Mitigating in his favor was the fact that he was physically assaulted first and reacted in a split second, albeit ill advisedly. He did not seek to chase either of these students even after he was punched in the face by one of them.

One concern was the grievant’s somewhat caustic demeanor towards the kids on the bus before the physical assault. This was a very real concern and gave the arbitrator some pause as to whether the grievant can conduct himself in a respectful way while dealing with passengers of any age or how he might react to another similar situation. Here though he did follow procedure prior to this even though he was quite terse with these students. As noted above though, there was an apparent history whereby he had warned them not to engage in certain conduct in the past yet they persisted in doing so again.

At the end of the day, the grievant deserves one more chance to prove that he is capable of operating a bus for the employer and will conduct himself consistent with the expectations of bus operators for the Metropolitan Council.

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somewhat “worse” than these. See also Union exhibit 19 which also referred to a 2001 incident.

<sup>4</sup> See generally Elkouri and Elkouri, *How arbitration Works*, 7<sup>th</sup> Ed at 15.3.Fxii, 15-75. While that is a discussion of lax enforcement and there is no allegation that these rules have been loosely enforced there is a general discussion there on the question of notice to the employees that a rule once enforced one way will now be enforced in some other stricter fashion.

After due consideration, the appropriate remedy on this record is to order that the grievant be reinstated to his former position within 10 days of this Award but without any back pay or contractual benefits and subject of a Final Notice of Warning which shall remain on his record for a period of three (3) years. Arbitrators should refrain from requiring the parties to “negotiate” a LCA and that is not ordered in this case.

## **AWARD**

The grievance is SUSTAINED IN PART AND DENIED IN PART as set forth above.

Dated: May 9, 2013

MCTO and ATU Lowe award.doc

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Jeffrey W. Jacobs, arbitrator