IN THE MATTER OF ARBITRATION	**OPINION & AWARD**
-between-	**Grievance Arbitration**
AMALGAMATED TRANSIT UNION LOCAL NUMBER 1005	**Re: Employee Discipline**
	B.M.S. Case 13-PA-0638
-and-	
METRO TRANSIT (Div. of Metro Council) MINNEAPOLIS/ST.PAUL, MINNESOTA	**Before: Jay C. Fogelberg Neutral Arbitrator**

Representation-

For the Employer: Tony Brown, Labor Rel. Specialist

For the Union: Timothy J. Louris, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides, in Article 5, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the procedure. A formal complaint was submitted by the Local on behalf of the Grievant in early December 2012, and thereafter appealed to binding arbitration when the parties were unable to resolve the matter to their mutual satisfaction during discussions at the

intermittent steps. The undersigned was then selected as the Neutral Arbitrator to hear evidence and render a decision from a panel provided to the parties by the Minnesota Bureau of Mediation Services. Thereafter, a hearing was convened in Minneapolis on May 29, 2013. At that time, the parties were afforded the opportunity to present position statements, testimony and supportive documentation. Upon the conclusion of the proceedings, each side offered oral summary arguments, and thereafter the hearing was deemed officially closed. The parties have stipulated that all matters in dispute are properly before the Arbitrator for resolution based on their merits and that the following constitutes a fair description of the dispute.

The Issue-

Was the "Class – A" Violation and six month Record of Warning issued to the Grievant, Mohamed Elmi, on November 14, 2012, just and merited? If not, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The evidence placed into the record indicates that the Amalgamated Transit Union Local 1005 (hereafter "Union" or "Local")

represents the Bus and Train Operators, Dispatchers, Mechanics, Clerical, and other employees working for Metro Transit, a Division of the Metropolitan Council ("Employer," "Management," or "MT"). Together, they have executed a Collective Bargaining Agreement covering terms and conditions of employment for those working in the bargaining unit.

The Grievant, Mohamed Elmi, was first hired by MT in January of 2007 as a bus driver (Operator), and became a train operator in June of 2011. On November 14, 2012, Mr. Elmi was assigned to the night shift operating a light rail vehicle on the "Minnehaha Line" heading northbound toward downtown Minneapolis at approximately 2:30 a.m. On that trip, the Grievant made a routine stop at the Franklin Avenue station, allowing passengers to board or alight from the train. The Franklin Avenue stop is located just south of the Metro Transit Light Rail garage (a/k/a North Yard) where the incident in question took place. On that date, trains were being rerouted by the Rail Control Center ("RCC") along side the garage as construction was occurring on the main line.

While stopped at the Franklin Avenue Station, Elmi was in radio contact with the RCC as the detour he was about to take required several rail switches to be set in order that the train would properly switch off the main track and onto the detour. Prior to departing the station, the

Grievant was cleared to proceed by an RCC Supervisor, Catrina Baucher, who assured him that the switches were "lined" for the reroute.

Part of the Administration's expectations of Train Operators proceeding through such a detour is that they reduce their speed while traveling through several switches as a consequence of the reroute. Mr. Elmi slowed down to 5 m.p.h. while observing the switches as his train approached them – passing along the altered route in the North Yard - to make certain that they were aligned. However, when crossing switch #14, located just off the north east corner of the garage on the east escape, he felt a "slight vibration" of the train. The Grievant stopped the train and contacted RCC. Shortly thereafter it was discovered that he had crossed over the misaligned switch #14 ("trailed the switch").

Subsequently, Management conducted an investigation into the incident and discovered that after Ms. Baucher gave the operator permission to move ahead onto the detour, another RCC Supervisor (Mary Bitzen) being trained into the job at the time, took her place, and without first determining whether a train was traveling through the yard on detour, began cycling switches. The process is part of regular yard maintenance, and Switch #14 was one of those that was altered.

Ultimately, the Employer determined that, while Mr. Elmi was given

the authority to proceed from the main track at the Franklin Station into the North Yard via the East Escape, he nevertheless failed to recognize that Yard Switch 14 was not lined properly for his movement. Operator rules require that he stop the train short of a misaligned switch as is required (Joint Ex. 2). Consequently, he was issued a Class A Record of Warning for trailing a switch which was to remain in his record for six months.[1] A written grievance followed and was processed to binding arbitration when the parties were unable to resolve the dispute to their mutual satisfaction.

Relevant Contractual & Rules of Conduct-

From the Master Agreement:

> 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.

[1] The ROW was removed after six months, during the time this grievance was being processed.

From the Metro Transit's Rail Operations Rule Book (6th ed.):

* * *

Safety

We provide a safe and secure environment for our customers, community and employees through consistent training, enforcement and allocation of resources.

* * *

Commitment to Safety

* * *

2. Compliance with rules, procedures and policies is absolutely mandatory.

* * *

General & Administrative

* * *

R2312 – Employees must expect switches in the Yard to be lined against their movement. The must observe the alignment of Yard track switches and the switch point indicators before proceeding.

* * *

R4091 – When a train is required to move at Restricted Speed, the movement must be made at a speed that allows the train to come to a complete stop using good train handling, within one-half range of vision short of:

* * *

A derail or an improperly lined switch

* * *

> R8022 – Except to avoid an accident, the RCC will not change a permissive signal for an approaching train unless the approaching train has confirmed that the train can comply with that change.

Position of the Parties-

The **EMPLOYER** takes the position in this matter that their decision to issue a Class A Record of Warning to the Grievant in November of last year was just and merited. In support of their claim, Management points out there are important policies and rules in place shared with members of the bargaining unit which clearly mandate that Rail Operators must always be observant when it comes to approaching and passing through switches on the tracks. Particularly significant is R2312 which requires them expect switches in the yard to be lined against their movement. In this regard the same rule mandates that Operators observe the alignment of yard track switches and switch point indicators before proceeding, and when they do move forward that it is at a speed that allows the train to come to a stop, "within one-half range of vision" short of an improperly lined switch. In Management's view, Mr. Elmi failed to follow these directives on the day in question. MT concedes that a supervisor gave him permission to proceed into the yard that day, representing that the switches were

aligned, when ultimately #14 was not. However, this was taken into consideration when determining the proper level of discipline. Nevertheless, this fact alone does not excuse Mr. Elmi's misconduct that day as he was still responsible for observing each of the switches as he approached them, consistent with the published rules and policies. In light of the electronic data recorded concerning the morning's events on November 14, 2012, it was determined that the Grievant's train had ample time to stop had he observed the misaligned switch as was his responsibility. Finally, they assert that the modified Class A Violation with a Record of Warning took into account aggravating and mitigating factors which caused Management to reduce the time it remained in Mr. Elmi's file from six to three months. Accordingly, the Employer asks that the grievance be denied in its entirety.

Conversely, the **UNION** takes the position that the discipline received by Mr. Elmi's was neither just nor merited. In support, the Local urges that Management cannot meet their assigned burden of proof in this instance as the Grievant performed his duties precisely in the manner he had been trained. After receiving the signal to proceed into the yard and the attendant assurance from the RCC supervisor, Mr. Elmi passed into the yard checking each switch along the way as is required of every Rail

Operator. While conceding that the Grievant may have misread Switch 14, the Union asserts that it was just as probable that the data gathering system (SCADA), was inaccurate at the time the event occurred. Indeed, it has since been replaced by more sophisticated and reliable computer software. Therefore, the Local reasons, it is equally plausible that Elmi checked #14 as he has consistently maintained, and found it to be aligned properly just seconds prior to passing over it. The Union charges that the supervisor was cycling switches in the yard when RCC received a trailed switch alarm for Switch 14. This indicates that, in all probability, the supervisor was cycling the switches at the same time #14 was trailed, and that the Grievant had no opportunity to stop in advance. Further, the Local maintains that even if it is determined that Mr. Elmi was not observing the misaligned switch, the discipline imposed was not merited in light of all the relevant circumstances. The evidence here is uncontroverted that the supervisor acted negligently for cycling the switches while a train was passing through the yard and after giving the Grievant permission to proceed. The Class A warning was simply not warranted under these circumstances – particularly when Mr. Elmi's otherwise excellent work record is taken into consideration. For all these reasons then, they ask that

the grievance be sustained and that the discipline be expunged from the Grievant's record.

Analysis of the Evidence-

The approach taken when considering a disciplinary dispute such as this, is normally two-pronged. First, the employer must establish wrong-doing on the part of the accused, and then if that obligation is satisfied through clear and convincing evidence, then they must demonstrate that the resulting discipline is fair and just when all relevant factors have been considered.

In this instance, I find the weight of the evidence adequately demonstrates that Management has met their initial obligation.

There is no dispute but that Mr. Elmi trailed Switch #14 on November 14th last year as his train passed along the detour route in the North Yard. Indeed, the Grievant has never denied this charge. Nor does the Local take issue with the fact that, pursuant to established rules and policies of MT, operators are required to be vigilant at all times while their train is in service. This includes visually checking each switch as they are approached. This is particularly so when passing through the yard. As previously noted, R2312 states, "Employees must expect switches in the

Yard to be lined *against their movement*," and are to observe their alignment on the yard tracks before proceeding" (*infra*, emphasis added). This evidence then, when braided together, constitutes a *prima facie* demonstration of wrongdoing on the part of the Grievant.

The Local maintains however, notwithstanding the fact that the Grievant trailed the switch that morning, there are other mitigating factors that must be considered bearing directly upon the outcome of this dispute. First and foremost, is the culpability of the RCC Supervisor who gave him clearance at the Franklin Street station to proceed, representing to Mr. Elmi that all the switches in the yard were properly aligned. This fact alone however, does not altogether exonerate the Grievant in light of R2312. He was still obligated to make certain each switch was properly aligned as he approached them. Indeed, Mr. Elmi himself testified that a train operator, "….has to visually inspect *all* switches" (emphasis added).

The Grievant has further alleged that he had checked Switch 14 when he was approximately 100 to 150 feet in front of it. He believes that the supervisor in Rail Control cycled the switch only seconds before he crossed over it. The Employer's electronic data, which records the movements of all trains in operation ("SCADA") as well as the Vital Processing for Interlocking ("VPI") indicate otherwise (Metro Transit's Exs. 15

& 16). The measurements taken reveal that Switch 14 was last moved some 35 seconds before the train Mr. Elmi was operating arrived there. This, according to the testimony of the Employer's Director of Light Rail Operations, John Humphrey, would place the train some 420 feet from Y14 when it was misaligned, giving the operator ample time to make his observation and stop the train before it trailed the switch.

The Union counters that historically, Metro Transit's SCADA system has been less than reliable ("glitchy") and therefore cannot be used as a basis for demonstrating any negligence in this instance. I cannot, however, agree. There was no hard evidence offered to support the claim, and no dispute but that it was being used routinely by the Employer to record the movement of its trains at the time the incident occurred.

A more convincing argument has been advanced by the Local in connection with the severity of the discipline imposed. When evaluating the propriety of any penalty administered against an employee, their work record is almost always taken into account. See: Fairweather, *Practice and Procedure in Labor Arbitration,* 2nd Edition, p.301-302; Hill and Sinicroppi, *Evidence in Arbitration*, p. 34, BNA 1980; Elkouri and Elkouri, *How Arbitration Works* p 983, BNA 6th Ed.; Brand, *Discipline and Discharge in Arbitration*, BNA 2nd Ed. p. 498. The theory consistently has been applied

that a particular offense may be mitigated by a good work record or, conversely, aggravated by a poor one. Either way, an employee's past record is normally a major factor in the determination of the proper penalty for any offense.

Applying this principle to the instant case, I conclude that the penalty imposed by Management was not appropriate in this particular dispute.

It is undisputed that Mr. Elmi had an excellent work record prior to November 14, 2012. He had never been disciplined before, and moreover had been the recipient of no fewer than six awards from Metro Transit since 2008 for his outstanding job performance (Union's Ex. 1).

I am further persuaded by the desperate treatment accorded the Grievant versus the supervisor who negligently cycled the yard switches as the train was passing along the detour route. She received no discipline. The incident was simply "documented" in her file.[2]

Finally, it is notable that MT's own policies call for the application of progressive discipline for "Employees who *continually fail to meet the responsibilities of the job*….." (Joint Ex. 7; emphasis added). There is no

[2] The Employer notes that Ms. Bitzen was a member of a different bargaining unit at the time, and consequently under a different contract than Mr. Elmi. The disparity of the discipline meted out for her misconduct relative to the Grievant's, however, appears to be less than reasonable.

evidence present in the record to indicate that the Grievant has exhibited continued difficulties in the performance of his duties. To the contrary, by all accounts he has excelled as a train operator.

Award-

Based upon the foregoing analysis I conclude that the Union's grievance is denied in part, and sustained in part. To the extent that Mr. Elmi's conduct on the morning in question constituted operator negligence, the Employer's decision to discipline him is justified. At the same time however, I find the Union has advanced a convincing argument that the penalty administered was excessive and therefore not merited under the circumstances. Accordingly, the Class A Record of Warning, is to be forthwith expunged from the Grievant's personnel file and replaced with a Class B Warning.

Respectfully submitted this 10th day of June, 2013.

/s/
Jay C. Fogelberg, Neutral Arbitrator