

IN THE MATTER OF ARBITRATION BETWEEN

AMALGAMATED TRANSIT UNION)	OPINION AND AWARD
LOCAL 1005)	
AND)	BMS 13-PA-0639
)	
METROPOLITAN COUNCIL)	Grievance re:
METRO TRANSIT DIVISION)	Accident/Discharge

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ARBITRATOR: Charlotte Neigh

HEARING: July 10, 2013

NO POSTHEARING BRIEFS

AWARD: August 3, 2013

REPRESENTATIVES

For the Union:

Timothy J. Louris, Esq.
Miller O'Brien Jensen, P.A.
120 South Sixth St. - #2400
Minneapolis, Minnesota 55402

For the Employer:

Sydnee Woods, Assoc. Gen. Counsel
Metropolitan Council
390 Robert St. North
St. Paul, Minnesota 55101

JURISDICTION AND PROCEDURE

Pursuant to the parties' collective bargaining agreement and the procedures of the Minnesota Bureau of Mediation Services, Charlotte Neigh was appointed to arbitrate this matter. A hearing was held in Minneapolis, at which time both parties had a full opportunity to offer evidence and argument, and the record was closed.

ISSUE

Whether the discipline was just and merited and, if not, what is the proper remedy.

PERTINENT AUTHORITY

AGREEMENT

ARTICLE 5 - GRIEVANCE PROCEDURE

Section 1. Metro Transit reserves . . . its right to discipline its employees, but . . . such discipline shall be just and merited.

ARTICLE 11 - WORK RULES AND PRACTICES

All practices and agreements governing employees . . . not in conflict with nor changed by the provisions of this Agreement, may be changed subject to the following conditions:

(a) Work rules and or practices may not be in conflict with the contract . . .

BUS OPERATOR’S RULE BOOK & GUIDE

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Safety should always be the most important consideration for any decision. . . .

14 - 22 SAFE OPERATIONS; GENERAL PRINCIPLES

14 SAFETY IS THE FIRST PRIORITY

Remember the Five Safety Keys. Following these driving rules at all times will give you the “space cushion” you need for operating buses safely in all conditions.

1. Aim high in steering.
2. Get the big picture.
3. Keep your eyes moving
4. Leave yourself an out.
5. Make sure they see you.

17 RIGHT OF WAY

Although Minnesota law requires operators of other vehicles to yield to a transit bus leaving the curb or authorized shoulder lane, this in no way relieves you as an operator from your responsibility to check traffic and leave the curb or shoulder only when traffic conditions permit.

Our vehicles must proceed only when it is safe to do so regardless of the right of way. Whether or not a vehicle has the right of way will not be accepted as an excuse for a collision with a pedestrian, a bicycle rider or another vehicle.

PROCEDURE 4-7d BUS OPERATING POLICY

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The Operating Policy is a Bus Operator tracking tool and is the primary policy for employee assessment. . . .

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. . . . In some situations, termination may be justified on the first offense.

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Discipline Employees who continually fail to meet the responsibilities of the job are disciplined through a 3-step progressive discipline process. . .

APPENDIX B THRESHOLDS FOR WARNINGS

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Safety - within a rolling three (3) year period:

- 1st responsible accident - verbal warning
- 2nd responsible accident - written warning
- 3rd responsible accident - final written warning
- 4th responsible accident - termination

This policy will continue the practice of the safety guidelines, including the practice of taking mitigating circumstances into account in determining whether to issue a warning for minor accidents.

OPERATOR TRAINING MANUAL

11.1 Accidents, Incidents, and Emergencies

An accident is an unplanned and unwanted event. These events are considered accidents:

- Collisions or contact with other vehicles
- Collisions or contact with objects
- Collisions or contact with pedestrians
- Passenger falls or injuries on bus

Chargeable Accident

An accident will be considered chargeable if the accident could have been prevented by the operator. Chargeable accidents are recorded on the operator's safety record.

Non-Chargeable Accident

A non-chargeable accident is one that was unavoidable, due to events beyond the operator's control.

BACKGROUND AND UNDISPUTED FACTS

The Grievant was hired as a full-time operator in 2007. He was charged with a "responsible accident" occurring on 2/8/10, when his bus rear-ended a car that stopped at an intersection. Grievant reported that the bus slid into the rear of the car. Following established procedure, a Safety Specialist (SS) investigated the event and determined that the operator could have prevented the accident. The Grievant's manager issued a warning for a safety violation, and scheduled refresher training in the Safety Keys to "assist him in again being able to operate a transit vehicle accident free".

The Grievant was charged with a second responsible accident occurring on 4/16/12, when he was pulling out of a bus stop and side-swiped a car on the left side of the bus moving in the same direction. Grievant claimed that the car speeded up to overtake the bus and the car struck the bus. The Metro Transit Police incident report stated that a witness reported that both drivers appeared to see each other and both appeared to be attempting to get ahead of the other. After an investigation that included reviewing the video tapes from the bus cameras, the SS determined that: the car pulled up beside the bus stopped at the traffic signal; the bus lane was blocked by a parked car; the bus veered to the left and struck the car traveling beside it. The SS concluded that by properly checking his mirror, the Grievant could have waited for the car to pass before entering that lane, and so he was responsible for the accident. The SS recommended one-on-one remedial training.

The Grievant's manager issued a record of warning, noting that this was the second responsible accident within a three-year period, and that his performance was dangerous and unacceptable. The Grievant refused to sign an acknowledgement of receiving a copy of the warning and grieved it through the second step of the grievance procedure, maintaining that the accident had not been preventable. The grievance was denied and dropped. On 6/1/12 the Grievant received one-on-one remedial training; the instructor noted that the Grievant needs to "stay in mirror more when doing lane changes" and that they worked on "being more patience" (*sic*).

The Grievant was charged with a third responsible accident occurring on 9/11/12, when his bus rear-ended a vehicle on I-94. The Grievant reported that the driver cut him off and slammed on her brakes, and he stopped quickly and just barely touched the rear end of the vehicle with the bike rack. The SS concluded that a 4-second following distance would have prevented this accident, and that by looking ahead the Grievant could have seen that traffic was stopping.

Background and Undisputed Facts (continued)

The Grievant's manager issued a final record of warning for a third responsible accident within three years, noting that "this operating performance cannot continue", and informing the Grievant that another responsible accident within 6-7 months would be cause for possible termination. The Grievant received Safety Keys training on 10/16/12.

The Grievant was charged with a fourth responsible accident occurring on 11/2/12 when he was attempting to merge onto Interstate 94 heading east from the Jackson Street entrance in St. Paul. The Grievant first reported that a garbage truck rear-ended the bus. A district supervisor on the scene reported that: the Grievant claimed that he was in the right lane and the truck was changing from the middle lane to the right lane and hit the back of the bus; and the truck driver stated that he was going about 55 mph in the right lane and the bus came down the ramp and moved into his lane, hitting the right front corner of the truck with the left rear corner of the bus. The SS reported that during the safety conference the Grievant stated "I misjudge the distance from the bus to the truck for clearance", and the truck driver "drove his truck right into the driver's side of my bus". The SS noted that: the Grievant "neglected to utilize his left turn signal while merging left onto the highway"; he "should drop back to avoid traveling in the blind spot to avoid a collision"; and it was his "responsibility to merge safely into traffic".

An investigative hearing to determine what action to take was held where the Grievant had Union representation. The Grievant stated that he saw the truck to his left as he was coming down the ramp and as he was merging the truck backed off to allow him to merge but he miscalculated the distance and got over to the left lane too quickly. The Grievant was notified of the employer's intent to terminate his employment and invited to a meeting to hear the evidence against him and to offer any information supporting why he should not be discharged. At this meeting the Grievant admitted that he "made a mistake" and asked for "mercy . . . any punishment" that would allow him to keep his job. He also stated: "When I'm out there driving I have a hard time not allowing the schedule to influence my driving and I'm not using it as an excuse. I need someone to help to deal with making my schedule second so I can become a safe driver . . .". The Grievant was discharged effective 12/7/12 and a grievance was promptly filed asking that he be returned to work and made whole.

At the first step of the grievance procedure, the presiding management official concluded that the Grievant had been "coached and counseled by management and garage instructors numerous times to improve his mirror use and making safe lane changes", but had "not shown any sustained . . . improvement in his ability to safely perform his duties". In her second-step grievance response the Director of Bus Operations (DBO) reviewed the four responsible accidents and the remedial training efforts. She noted the Union representative's argument that: the Grievant needed a visit to the employee assistance program (EAP) to help him handle the stresses of the job and how to prioritize when the schedule is an issue; and the Grievant "doesn't remember the mention of" the employee assistance program when receiving the warnings. The second-step response noted that reference to the EAP and its telephone number were included on every warning notice the Grievant received.

Background and Undisputed Facts (continued)

At the second-step hearing the Union also argued that the Grievant was willing to work under a last-chance agreement; and his accidents “aren’t horrendous”, but “all fairly minor in nature”. The DBO reported having reviewed the video recordings of three of the accidents and finding no mitigating circumstances. She noted “a common theme of changing stories” in the Grievant’s descriptions of his accidents. She also noted that: the Grievant had not been running significantly late during three of the four accidents; he had been trained in the Safety Keys five times during five years, along with one-on-one training and a safety ride check; and although he was aware of the five Safety Keys, he was unable to put them into practice to avoid these four accidents. She concluded that his safety record was not acceptable, given that safety is the number one priority for this common carrier with a higher legal duty to protect the public.

SUMMARY OF THE PARTIES’ ARGUMENTS

THE EMPLOYER ARGUES THAT:

- Progressive discipline for responsible accidents is important to upholding safety standards, which is the primary focus of the operation. The rule regarding four accidents within three years is reasonable; the Grievant was given notice about it; fair investigations were conducted; and there is no dispute that the Grievant had four responsible accidents as charged, including three within a seven-month period.
- The decision to discharge was not based solely on the four accidents but also the lack of improvement despite extensive retraining. Management liked the Grievant but he could not do the job of operating a bus without accidents. Also, the Grievant’s explanations for how the accidents occurred did not match the evidence.
- The Union’s argument that the damage was only minor comes up repeatedly in charging responsibility for accidents but the amount of the damage is irrelevant, as confirmed by an arbitrator in another case between these parties in 2012.
- The parties have agreed to treat a once-per-year collision of a side mirror with a stationary object as minor and the Grievant’s accidents are not minor according to this standard. It is not necessary for an accident to be “horrendous” for a driver to be held accountable.
- Although the Union argues that other drivers with four accidents in a three-year period have not been discharged, it offered no specifics so that the cases could be compared. The Grievant was not treated differently than another employee whose discharge was upheld by an arbitrator in 2011 for accidents under similar circumstances.
- The Union’s argument about the legal right of way has no bearing: drivers are trained that they do not have the right of way and need to yield in every situation; if the Grievant had followed this rule on 4/6/12 there would have been no contact with the car.
- The grievance should be denied.

THE UNION ARGUES THAT:

- Although there is no dispute that the 11/2/12 accident occurred, it was very minor, not making discharge just and merited as required by the contract. The policy regarding four accidents within three years was imposed unilaterally by the Employer. The other cases cited by the Employer differ from the facts of this case and should not count as precedential.
- The policy requires assessing the severity of an accident in determining what disciplinary action is warranted but at no point did any manager consider this factor. The contact between the bus and the truck was so slight that it could be detected only by sound and the damage was slight. The Grievant saw the truck and reasonably presumed when the truck was backing off that it was letting him into the lane.
- All of the previous accidents were very minor, with no or slight damage, including a vehicle that should have relinquished the right of way.
- Only 50% of current operators have gone three years without an accident; it is inevitable that buses will be bumping into things.
- The Grievant has been an excellent employee with no other issues and the three-year period for counting the accidents was almost up. The Grievant has an outstanding record of working extra shifts, reporting on time, several customer commendations, and no other disciplinary actions.
- The discipline should be tailored to the individual to correct the behavior rather than punish it. The penalty of discharge was too severe in these circumstances and an arbitrator has the authority to modify the penalty. Even if the Grievant is found to have some culpability a less severe penalty, such as a suspension or a last-chance agreement is warranted.

ANALYSIS AND DISCUSSION

The reasonableness of the policy of discharging an employee for four chargeable accidents within a three-year period has been upheld by various arbitrators over the years, making irrelevant the fact that it was originally imposed unilaterally. It is undisputed that: the Grievant had notice of this policy; fair investigations were held; the Grievant had four chargeable accidents within a three-year period; and he was warned at each step of progressive discipline that his employment could be in jeopardy. The Union's claim that other employees have been treated more leniently under the policy was not supported by any evidence regarding the specifics of such cases or that they were comparable to the Grievant's situation.

Although at the first step of the grievance procedure the Union's representative characterized the Grievant's accidents as "not horrendous" and as "fairly minor in nature", there is no evidence that at any time prior to the hearing the Union cited the provision regarding "the practice of taking mitigating circumstances into account in determining whether to issue a warning for minor accidents". This language suggests that the contemplated procedure would: first determine whether an accident was chargeable because it could have been prevented by the operator; then determine whether the accident was minor; and then determine whether there were mitigating circumstances to justify not issuing a warning.

The testimony regarding this practice was confusing: the Assistant Operations Manager (AOP) who issued the warnings to the Grievant did not consider this a determination that could be made at his level; and the DBO thought that this question would be raised by the AOP with his Manager, when warranted by circumstances, in determining whether to issue a warning. Her testimony also revealed that treating a simple damaged mirror as minor is being handled at the level of the Safety Specialist, who assigns it a special code. Presumably, this results in finding that the accident was "non-chargeable", resulting in no need for a decision about whether to issue a warning. This seems to be different from the practice contemplated by the language but neither party offered any other explanation of how it has been or should be applied, or any other definition or examples of "minor".

The Union argues that the Grievant's accidents should be regarded as minor and that management failed to consider severity as a factor in deciding to discharge the Grievant. The Union's argument rested largely on an assumption that the accidents did not result in significant damage amounts. However, the Union did not demonstrate what monetary amount should be considered insignificant and the Employer showed that the costs of bus repairs and claims by other involved vehicles were not insubstantial. The Union did not refute the testimony of the DBO that the amount of damage is never considered when making a disciplinary decision. Furthermore, as an arbitrator ruled in another case between these parties in 2012: the Employer's exception, which benefits the employees, was made at the request of the Union, and applies only to broken mirror glass; the Employer has applied this "reasonable distinction" consistently; and it is not for an arbitrator to redraw the line on "responsible" accidents.

Analysis and Discussion (continued)

The DBO stated in her Step 2 response and testified that she had reviewed the Grievant's accidents and found no mitigating circumstances. In her opinion the repeated failure to yield the right of way, and collisions with other vehicles could lead to serious consequences and could not be deemed minor. The Employer persuasively argues that considering a broken mirror as minor sets a standard exceeded by the Grievant's accidents.

The Grievant not only had four accidents within a three-year period, but three accidents within a seven-month period, despite being retrained and cautioned on the same problem that caused his fourth accident - failing to adequately check that the lane to his left was open and available before moving into it. The DBO considered these factors and reasonably concluded that the Grievant was incapable of driving safely. She also reasonably considered "a common theme of changing stories" in the Grievant's descriptions of his accidents, which she found to count against lenient treatment. It is noted that: if the Grievant's inaccurate reports about how his accidents occurred were a sincere failure to comprehend what happened, it demonstrates worrisome incompetence; if they were meant to mislead in order to avoid the consequences, it demonstrates dishonesty. In either case, the DBO was justified in considering it as a factor in her decision to uphold the discharge.

CONCLUSION

The discharge of the Grievant was just and merited.

AWARD

The grievance is denied.

August 3, 2013

Charlotte Neigh, Arbitrator