IN THE MATTER OF ARBITRATION BETWEEN

	)	**BMS Case No. 13-PA 0789**
	)	
METRO TRANSIT	)	**Issue: Use of Excessive Force**
	)	
("Metro" or "Employer")	)	**Site: Minneapolis, Minnesota**
	)	
&	)	**Hearing Date: July 17, 2013**
	)	
AMALGAMATED TRANSIT UNION,	)	**Briefing Date: August 9, 2013**
LOCAL NO. 1005	)	
	)	**Award Date: August 23, 2013**
("Union" or "ATU")	)	
	)	**Arbitrator: Mario F. Bognanno**
	)	

JURISDICTION

The parties to the above-captioned matter are Metro Transit, which operates a public transportation system serving Minneapolis and St. Paul, Minnesota, and the Amalgamated Transit Union, Local No. 1005, the solo collective bargaining representative of employees with positions in a large variety of Metro job classifications. The parties are signatories to a Collective Bargaining Agreement ("CBA"), effective from August 1, 2012 through July 31, 2015. (Joint Exhibit 4)

Janv Ahavit is the Grievant in the present matter. On January 23, 2013, he was given a two-day suspension and Final Record of Warning (FROW), following an incident that occurred on the evening of January 22, 2013, while he was operating a Metro Transit bus.[1] On that evening, a rowdy and unruly female passenger, henceforth referred to by the initials SH, began to interfere with the Grievant's operation of the bus. Metro alleges that he responded with

[1] The Metro Transit employee discipline policy incorporates a three-step progressive discipline process: Step 1 is a Documented Verbal Warning, -- the employee's initial notice of deficient performance or rule infraction; Step 2 is a Record of Warning – the employee's second notice of deficient performance or rule infraction; and Step 3 is Final Record of Warning – the employee's final opportunity to improve performance or cease rule infraction. Serious offenses may warrant a higher level of discipline on first offense, up to and including discharge. (Joint Exhibit 17)

unnecessary force. He pushed her away and struck her in the face with his right arm and hand, respectively, in violation of Metro Transit policy and rules. Also, the Grievant failed to properly provide SH with requested route-transit information: Also a rule violation. (Joint Exhibit 14)

On February 12, 2013, the Union filed a Step 1 grievance, challenging the suspension and FROW. The grievance sought to "Remove all warnings and suspension pertaining to this incident from employers [sic] file. No diversity training or [sic] D.O.R." (Joint Exhibit 5) The grievance was not resolved at Step 1. (Joint Exhibit 6) On March 19, 2013, a Step 2 grievance meeting was held, with a similar result. (Joint Exhibit 7) Accordingly, the parties proceeded to the present Arbitration for a final resolution of the grievance. (Joint Exhibit 4, Article 3)

The undersigned Arbitrator heard the grievance on July 17, 2013, in Minneapolis, Minnesota. Appearing through their designated representatives, the parties were given a full and fair hearing. Witnesses were sworn and cross-examined. Exhibits were accepted into the record. The parties waived the provision in Article 13, of the CBA that requires an Award within thirty-days of the close of the proceeding. On August 9, 2013, the parties filed timely post-hearing briefs. Thereafter, the Arbitrator took the matter under advisement.

APPEARANCES

For the Employer:

Tony Brown	Labor Relations Specialist
Marcia Padden	Labor Relations Specialist
John Cook	Assistant Manager, Garage Operations
Jeff Wostrel	Manager, Operations, FTH Garage
Brian Funk	Assistant Director, Field Operations
Paula Crane	Program Technical Specialist

For the Union:

Timothy Louris	Attorney-at-Law
Janv Ahavit	Grievant
Mark Lawson	ATU, Local 1005 Rec. Secretary/Asst. BA

Michelle Sommers ATU, Local I005 President/BA

I RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 5
GRIEVANCE PROCEDURE

Section1. 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. (Joint Exhibit 4; emphasis added)

II. ISSUE

The parties jointly stipulated to the following statement of the Issue:

Are the Final Record of Warning (FROW) and 2-day unpaid suspension issued to the Grievant, Mr. Janv Ahavit, on January 23, 2013 just and merited? If not, what is an appropriate remedy?

III. FACTS & BACKGROUND

The Grievant began working as a part-time bus operator for Metro Transit on June 20, 2006. He became a full-time bus operator on February 23, 2009. During the Grievant's approximately seven years at the Metro Transit, his work record was unblemished.

On January 22, 2013, the Grievant was assigned the 8:00 p.m. to 3:00 a.m. shift on 16 Route: Downtown Minneapolis to downtown St. Paul. (Joint Exhibit 3) At approximately 9:45 p.m., SH – heavy set woman, wearing a dense winter jacket – boarded his bus, asking whether it went to "425 Grove Street" in St. Paul. The Grievant replied that the bus went to St. Paul, but not to Grove Street, and that she would have to take a different bus. Following a similar second reply to her repeated inquiry, the woman later remarked, "The fucker doesn't know what he's doing. "

Around 9:50 p.m., a young male passenger boarded the bus. At first, SH and the young man conversed in a friendly manner. Then, around 10:34 p.m., an angry and verbally-

threatening confrontation began between the two of them. (Grievant testimony; Joint Exhibits 11, 12 and 13) The Grievant testified there was something "wrong" between the two passengers, and indeed there was. The entire incident was captured on the five video cameras that were mounted on the bus, and their audio/video footage was converted to three DVDs, which appear in the record as Joint Exhibit 11. DVD #3 shows SH grabbing the male passenger's earphones and cord that were attached to his iPad, Blackberry or similar instrument. Her apparent motive being that he did not adequately answer her repeated questioning about the location of Grove Street. Subsequently, they engaged in a loud, angry and profanity-laced tirade that lasts for several minutes. (Joint Exhibit 11, #3)

At approximately 10:30 p.m., the Grievant tells the two passengers to calm down, or he'll call the police. The disruptive behavior continued, and around 10:35 p.m., the Grievant placed a call to the Transit Control Center. By this time, SH and the male passenger were standing near the front of the bus, and their argument had escalated to the physical level. The Grievant could see them "grappling" and "pushing." At the hearing, he stated that he feared the scene was "going to get ugly."

Around 10:38 p.m., as the male passenger was waiting to alight from the bus through the front doors, he asked the Grievant if he had called the police, observing that it was she, not he, who was the cause of the disturbance: She had taken his earphones. The Grievant did not answer. He testified that he believed both passengers saw him place the call. Still, he did not answer the male passenger, because SH was the trouble-maker and, if he had, it might have further upset her. Meanwhile, the altercation continued, with the male repeatedly asking female to let go of his earphones, and she refusing. Just prior to arriving at the man's stop, he

physically pushed SH from the front to the middle of the bus, trying to extricate his headset and cord, but to no avail. DVD #3 shows SH chasing the male passenger down the bus aisle toward the front doors, through which he exited. At 10:39:09 p.m., the Grievant closed the bus doors and proceeded to pull away from the curb, driving the bus forward. The Grievant testified that he then triggered the bus' "covert alarm," requesting immediate police assistance. The next incident to occur formed the gravamen of the present dispute. The parties' disagree about exactly what happened, but it is clear that a brouhaha ensued between SH and the Grievant.

DVD #3 shows that SH was at the front of the bus when the male passenger alighted from the bus. In fact, the two were exchanging insults when SH was chasing him off the bus, and each was threatening to duke it out when the bus' front doors closed, and it pulled away from the curb. At 10:39:39 p.m., SH addressed the Grievant, saying, "And you called the police, right?" The Grievant did not answer. "Hello," she said. Then she approached him as he drove, repeating, "You called the police, right?" Again, the Grievant did not respond. "Hello," she repeated. Then she said, "You act like you don't understand." The bus was moving, and the Grievant remained silent. He testified that if he had responded SH might have become even more aggressive. Then, she moved closer to the Grievant, yelling "HELLO," and then, bending toward him with her left hand on his right shoulder, she again shouted, "HELLO." (Joint Exhibit 11, DVD #3)

The Grievant stated that he moved SH back with his arm, hand opened, and that he did not intend to strike her in the face. He testified that the bus was moving and he "wanted her out of his area." Actually, DVD #3 shows the back of the Grievant's right hand striking SH's right cheek at 10:39:57 p.m. It also shows that SH stood her ground, raised her left arm and fisted

hand, as if to hit the Grievant, who was still seated. At that point, he pushed her back, while simultaneously braking to stop the bus. Then, SH stumbled near the bus front doors' stair well. Instantly, thereafter, the Grievant opened the front doors of the bus, got out of the driver's seat, and with his arms in front of his body, he grasped SH's wrists in an apparent attempt to defend himself and get her off the bus. (Joint Exhibits 10 & 11 (DVD #3)) However, SH evaded him and moments later she left the bus through its rear doors, following a boisterous dialog with other passengers. DVD #3 shows that at 10:41:10 p.m., the Grievant made another telephone call, again to the Traffic Control Center (i.e., to the police. (Joint Exhibit 11, #3)

Metro Transit police officers Eric Peot and David Lund arrived on scene at 10:43:49 p.m., finding SH "… near the front of the bus yelling very loudly. … stomping her feet, waving her arms." (Joint Exhibit 13; Officer Peot's written statement) She violently resisted both officers' attempts to restrain, subdue, and handcuff her. When both officers finally managed to restrain her, she again violently resisted being placed in their squad car, "… continuing to yell, scream, swear, cry, shriek, twist violently, kick her legs wildly, and try to pull away from us." (Joint Exhibit 12; Officer Lund's written statement)Officer Peot interviewed Austin Gay, a witness to the incidents. Officer Peot's reported the following witness account:

> [SH] and a male were arguing on the bus. The male exited the bus, and [SH] started yelling at the driver. She walked up to the driver as he was sitting in the driver's seat and was yelling at him. She was leaning over the fare box and waving her hands in the driver's face. The driver extended his right arm to prevent [SH] from getting any closer. His arm came in contact with [SH] and she started yelling, "He hit me." Gay stated that [SH] "lost it" and was, "acting all crazy, like she is now." … Gay stated that he saw [SH] swinging her arms at the driver with closed fists.

(Joint Exhibits 12 & 13; Officer Peot's written statement) The Grievant gave a statement to Officer Lund. Officer Lund reported the Grievant of having said:

> ... [SH] raised her left hand towards his face, and he felt sure that he was about to be assaulted. [Grievant] lifted his right arm and gave […] a firm push backward to protect himself.

(Joint Exhibit 12; Officer Lund's written statement)

SH was totally uncooperative while at the Ramsey County Jail. According to Officer Peot, during pre-booking, when placed in a holding cell, she would bang on the door and threatened to "pee on the floor." And during booking, she "… refused to obey commands from the jail staff and yell[ed] at them." SH was booked into Ramsey County Jail for interfering with a Transit Operator with Force, and for Ramsey County warrant #62UCR082580."(Joint Exhibit 12; Officer Peot's written statement)

On January 23, 2013, Sgt. Rick Grates of the Metro Transit Police reviewed the bus' video footage, and his description set forth on pages 9 - 11 of Joint Exhibit 12 is as follows:

> The video begins at approximately 22:25 hours. Suspect [SH] is on the bus talking to a male. She appears to show clues of intoxication in her behavior, actions and speech. During the bus ride she is antagonizing the male and picking arguments with him.
>
> At approximately 22:34 hours she takes a set of ear phones from the man and won't give them back [to] him. He is trying to get the ear phones back with no avail. [SH] is asking the man where Grove Street is.
>
> At approximately 22:36 hours the bus driver gives a warning for her to stop with her behavior.
>
> [SH] continues on with her behavior and will not relinquish the ear phones until the man tells her where Grove Street is. The driver is then on the radio phone calling in for police service. At 22:38 she threatens to rip the ear phones.
>
> At 22:39 she won't give the man his property back so he pushes her and they get into a physical struggle for the ear phones. She is able to retain the ear phones. The man exits the bus. The bus begins to go to the next bus stop.
>
> At 22:39:41 [SH] tells the bus driver to call the police. The bus driver does not respond to her and this obviously upsets [SH].

> The bus driver is giving her the "silent treatment". [SH] is stating "hello" to the bus driver. She begins to say it louder and louder without a response. She taps the bus driver on the shoulder with her finger and yells loudly, "HELLO!"
>
> The bus driver then punches [SH] in the face. The bus comes to a stop and […]tries to get a witness to what happened. The bus is holding with the doors open at that time.
>
> At 22:42 [SH] comes back in the bus and the bus driver continues to ignore her. At 22:43 hours, MTPD Officers arrive and take [SH] into custody and the driver makes a report that he was assaulted.

(Joint exhibit 12; Sgt. Grates' written statement) Ultimately, Sgt. Grates concluded that the female passenger's conduct did not appear to meet the elements of "Interference with a Transit Operator with Force under MSS 609s.855." Further, he reported that the woman did not press assault charges on the bus operator, and that the case was closed. (Joint Exhibit 12; Sgt. Grates' written statement)

On January 23, 2013, the Grievant completed an Accident/Incident Report. Therein he stated:

> A female rider, after getting into a fight with another rider (male) attacked me so I pushed her away. I stopped the bus, secured her 2 hands and pushed her against the time cover (right).

(Joint Exhibit 10)

Jeff Wostrel, Garage Operations Manager, testified that he first learned about the incident on January 23, 2013. Metro Transit police had reported it to him, and advised that he view the video recording. In addition, Mr. Wostrel testified that he reviewed Route 16's time/stop log, the Metro Transit Control Center's Incident Report, and the Grievant's Accident/Incident Report. (Respectively, Joint Exhibits 8, 9 & 10) Following this preliminary investigation, Mr. Wostrel concluded that the matter required further investigation: An assignment he delegated to John Cook, Assistant Manager for Garage Operations.

On January 29, 2013, Mr. Cook conducted a meeting with the Grievant and Union representative Bob Andres. The Grievant recited his version of the incident. However, when being questioned by Mr. Cook, the Union demurred, cancelling the remainder of the meeting, stating that it first wanted to view the video of the confrontation, and review the Metro Transit Police reports.

On February 1, 2013, Metro notified the Grievant of his "Loudermill" hearing date, stating that it intended to terminate his employment for striking a passenger, and that Metro's investigation revealed that he "… used un-necessary (sic) force in stopping a disturbance" in contravention of Metropolitan Council policy, and sections of the Bus Operator's Book and Guide. (Joint Exhibit 14) The Loudermill hearing was held February 5, 2013. Following the Employer's presentation of the policy and rules allegedly violated, the Union countered that Metro was being unreasonable, and that the Grievant was justified in moving the passenger away from him; that all his actions were defensive in the face of a belligerent and aggressive passenger. The Grievant declined an offer to comment. (Joint Exhibit 15)

Following the Loudermill hearing, Mr. Wostrel testified that he and Mr. Cook again reviewed the evidence, and, thereafter, he decided that to discharge the Grievant for proven wrongdoings would be too severe, and that a more proportionate level of discipline would be the two-day suspension and FROW, which were ultimately issued. (Joint Exhibits 2 & 3) The Grievant's primary error, Mr. Wostrel stated on cross-examination, was his failure to deescalate the situation by answering SH's repeated questioning about whether he had called the police: By answering this question, the Grievant would have pacified her, removing the cause for their physical altercation. Brian Funk, Assistant Director, Metro Transit Field Operations, testified

that the Grievant's non-response to SH's questioning about whether he called the police only served to aggravate the situation: He corroborated Mr. Wostrel's opinion that to have answered her question, would have resolved the situation.

Mr. Cook cited the following violations in the FROW letter he authored:[2]

> … a passenger had been struck in the face by an operator. In reviewing the tape, it confirms the incident did take place without provocation. The Metropolitan Council expects all employees while in the performance of Council-related business to: abide by all laws; treat all people with respect and courtesy; adhere to high professional standards and moral principles; and provide high standards of public service.[3]
> He also was in violation of the Metro Transit Bus Operator's Rule book and guide Rules of Employee's Conduct, specifically section 4, providing information,[4] section 138, employee conduct,[5] section 143, #3 serious offenses,[6] section 154 physical encounters.[7]
> …
>
> In addition had Mr. Ahavit followed the guidelines also stated in section 142 that states: "Employees must be courteous to others at all times. Patience and self-control must be

[2] The footnotes are not in the original.

[3] Metropolitan Council, Policy – Employee Conduct. (Joint Exhibit 16)

[4] Bus Operator's Rule Book and Guide, 4 PROVIDIDNG INFORMATION TO CUSTOMERS, states in part: "Pocket schedules provide the most commonly requested customer information. . . It is recommended that you carry at least one pocket schedule for each of the routes that intersect with your route as well. Make every effort to answer customer questions courteously and correctly. Don't guess. If you cannot answer a customer's question, call the TCC for help or refer the customer to the Transit Information Center . . ." (Joint Exhibit 17)

[5] Bus Operator's Rule Book and Guide, 138 EMPLOYEE RESPONSIBILITY: "All employees are responsible for obeying the rules of employee conduct. Ignorance of these rules or of any other special rules, bulletins, and instructions issued by the agency of the Transportation Division will not be accepted as an excuse for failure to comply." (Joint Exhibit 17)

[6] Bus Operator's Rule Book and Guide, 143 SERIOUS OFFENSES UNDER THE RULES OF EMPLOYEE CONDUCT, 3. States: "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." (Joint Exhibit 17)

[7] Bus Operator's Rule Book and Guide, 154 PHYSICAL ENCOURNTERS, states in part: "Metro Transit bus operators should avoid physical confrontations wherever possible. This means refraining from leaving the bus operator's seat to settle disputes unless it is necessary to do so to defend yourself or customers from physical attacks. 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." (Joint Exhibit 17)

> used to avoid aggravating situations, etc." By taking the action Mr. Ahavit chose, he exhibited a lack of professionalism and self-control. …

(Joint Exhibit 2)

IV. THE EMPLOYER'S POSITION

The Employer contends that the Grievant's aggressive physical response toward SH, in and of itself, warranted severe discipline. Specifically, the Employer continues, the Grievant's "aggressive move" with his right hand and arm, striking the passenger, causing her to lose her balance, and fall into the fare box and card reader was a violation of the Metropolitan Council's employee conduct policy, and of several sections of the Bus Operator's Rule Book and Guide. Moreover, the Employer observes that Sgt. Grates had concluded that the Grievant "punched" the female passenger. In addition, during the course of the melee, the bus was moving; the Grievant's eyes were not on the road; both of the Grievant's hands were not on the steering wheel.

Continuing, the Employer argues that if the Grievant had complied with section 4 – Providing Information to Customers – in the Bus Operator's Rule Book and Guide, his confrontation with SH might not have happened. Amplifying, Mr. Funk testified that the Grievant should have given SH a bus schedule, but did not. Further, if the Grievant did not know the location of 425 Grove Street, he should have called the Transit Control Center where he would have been directed to have SH transfer to the Route 64 bus at the intersection of 5th Street and Minnesota Avenue in St. Paul. This, the Employer asserts would have solved SH's "problem" early on, when she first boarded the Grievant's bus, and twice asked the Grievant for directions. Even the male passenger, the Employer points out, told the Grievant that SH was annoyed at him because he could not answer her Grove Street question, which was the

Grievant's job to have performed. The Employer concludes that the Grievant's failure to assist SH partially caused the altercation between him and SH.

Although discharge was initially contemplated as appropriate sanction, the Employer stated that after further review of the video evidence, taking into account the arguments raised by the Union at the Grievant's Laudermill hearing, and the Grievant account, it decided that a reduced level of discipline was in order. This decision, the Employer acknowledges, was related to the following facts: the Grievant tried to "diffuse" the situation by twice telling the two passengers to calm down, or he would call the police; the Grievant acted correctly in calling the Transit Control Center; and SH was a "difficult passenger who invaded the Grievant's space while he was operating the bus. Nevertheless, the Employer continues, even in the face of these attenuating circumstances, discipline was warranted, and, specifically, the reduced discipline of a two-day suspension and FROW.

Anticipating the Union's defenses, the Employer notes that between 9:46 p.m. and 9:48 p.m., SH approached the Grievant twice, in both cases asking him about the 425 Grove Street address. The Grievant gave her "very short incomplete answers." In the final seconds just prior to the altercation between SH and the Grievant, she again approached the Grievant, asking if he had called the police. Not getting an answer, she "appear[ed] to get louder and closer to the Grievant because he is ignoring her and her question." The "silent treatment" did not work, the Employer avers. Further, although section 153 in the Guide states that "Defending yourself and your customers is permitted," as Sgt. Grates stated, "She taps the bus driver on the shoulder with her finger and yells loudly, HELLO;" and "The bus driver then punches [SH] in the face."

SH's "taps" preceding the Grievant's "punch," the Employer contends, were not grounds for a "self-defense" response, as implied by section 153.

Refuting the Union's claim that Metro does not offer effective training on how bus operators are to handle obstructive and difficult, alcohol or drug-impaired passengers, the Employer maintains that in fact it does offer training and has rules, policies and guidelines on how to deal with customers. Thus, the Employer continues, bus operators are required to supply passengers with good customer service and inform them of bus routes and times; to engage the customer early on and give them complete, accurate answers, and to use only enough force to gain control of the situation. Rather than comply with these guidelines, the Employer contends that the Grievant failed to give good customer service, and he used unnecessary force in handling the incident. For these reasons, the Employer urges that the level of discipline administered in this case was just and merited, and that the grievance should be denied.

V. THE UNION'S POSITION

The Union contends that the Grievant participated in all of the standard training required of all bus operators. Further, Michelle Sommers, President, ATU, Local 1005, testified that the Employer's training about real-life, on-the-job dangers amount to little more than advising bus operators to follow the rules, and to use their best judgment.

Next, the Union points out that when SH boarded the bus, she asked the Grievant, "You go to, uh, 425 Grove Street, right?" St Paul? He responded that he goes to St. Paul. Thereafter, the Grievant stayed on the bus and indicated, "Don't worry about it, I'll pay attention." Nevertheless, a few minutes later, this scenario was repeated. As the record plainly shows, the

Union observes, SH was intoxicated.

Several minutes after the bus proceeded along its route, SH began to argue loudly with a male passenger, and the Grievant warned them to calm down. Their spat continued, and, as he warned he would do, he called Metro Traffic Control to report the disturbance. Nevertheless, the inter-passenger argument escalated, and a scuffle ensued. Thereupon, the Grievant testified, he increased the priority of his Metro Transit Control call to an "emergency" level. Moments later the male passenger alighted from the bus, while SH stayed aboard, and the Grievant proceeded to close the front doors of the bus, separating the opponents, in an effort to diffuse the situation. Regarding this summary of events, the Union calls attention to the fact that at the arbitration hearing, Mr. Wostrel testified that up to this point the Grievant handled the situation well.

The facts leading to the altercation between SH and the Grievant began when she asked, "Did you call the police?" The Grievant, as he testified, chose not to respond because he felt that any response would have caused her to become even more agitated and unstable. The Grievant's non-response, the Union argues, was, to a great extent, the basis for the discipline the Employer subsequently meted out. The Grievant articulated his justification for not responding, but, the Employer, engaged in a bit of "Monday-morning quarterbacking," when it averred that the Grievant should have answered her "Did you call the police?" question to calm her down. Hindsight, the Union urges, is not a reliable basis for finding just cause to discipline the Grievant. Indeed, the Union reminds, the Grievant has no history of violence of any kind.

Moreover, the Union continues, as the Grievant was driving, SH leaned over the bus' fare box, screaming at the Grievant. He testified that "he wanted her out of that area." The

Union maintains that the Grievant felt threatened, and, without looking at her, and in an "unquestionable act of self-defense," he used his right arm with an open hand to "get her out of my face." The Grievant testified that he did not intend to make contact with her face. The Grievant's physical tactic worked, the Union argues: SH moved away from the Grievant; he was able to stop the bus and stand up out of his seat; and he was able to hold SH's wrists so that she could not attack any further. The Grievant, the Union maintains, was the victim in this case, and Guide's section 154 provides that a bus operator may defend himself and his customers. Further, he was not charged with any crime; whereas, she was arrested and charged on several counts. Moreover, the Union notes that after being interviewed by the police, the Grievant completed his route.

The Union next faults the Employer's initial investigation of the matter, contending that Mr. Cook reviewed only the few seconds of the video depicting the altercation between the Grievant and SH. As of February 1, 2013, the Union claims, the Employer still had not reviewed the entire video or the police reports, but, nonetheless, Mr. Wostrel unilaterally determined that termination was appropriate because the case appeared to be "consistent with other assault cases" that had resulted in termination. It was only after the Loudermill hearing, and after Mr. Wostrel watched additional video footage, that he changed his mind about the discharge. The Grievant acted in self-defense, and he did not violate the Guide's section 154, the Union argues. In fact, Mr. Wostrel testified that "there's no argument that operators have a right to defend themselves and she invaded his space."

By leaning over the bus' fare box, and screaming in the Grievant's face, the Union claims that SH risked being pushed back, or being hit by the Grievant, even though unintentionally.

She was the aggressor, and in light of her on-board demonstrated propensity for violence against the male passenger, it is no wonder that the Grievant reacted defensively. In this vein, the Union denies that following the incident at the fare box, the Grievant hit the woman a second time, as the Employer initially claimed. On point, Mr. Wostrel admitted that this accusation was false, yet this false assertion was twice raised by the Employer during the grievance adjustment meetings.

Critically, the Union stresses, SH was an intoxicated, out of control passenger who advised those on the bus that she was "not fuckin' scared of no-fucking-body." Thus, while threatening the Grievant by her hands-on verbal attack, SH was also endangering all of the passengers on the bus. Accordingly, the Union argues, the Grievant used his hand to defensively push SH away, and he should not be punished for having done so: It was a natural self-defense, passenger-defense response.

Nevertheless, the Union argues, the Arbitrator need not address the issue of self-defense, since the evidence adduced at the hearing indicates that the Employer's discipline was based on the Grievant's non-response to SH's questioning: "Did you call the police?" On the one hand, the Union maintains that the Grievant's decision to ignore the questioning was reasonable because he believed that, under specific circumstances, a response would have caused her to become even more upset: His silence was intended to deescalate the situation. On the other hand, Metro claims that to have responded to SH's questioning would have pacified her, removing the cause for their physical altercation: The Grievant mishandled the situation and discipline was warranted.

The Union disagrees with the Employer, urging that its justification for disciplining the

Grievant is simply "hindsight bias," and that Metro did not evaluate the Grievant's (in)action based on the time the decision was actually made. Moreover, the Union disputes the Employer's premise that if the Grievant had responded to SH, the altercation would not have occurred. Rather, it reasons that it is just as likely that a response to her police-related questioning would have caused her to become even more upset, and could have led to an even worse outcome: SH was not a rational person as her conduct made clear, while she was on the bus, while the arresting officers attempted to place her in the squad car, and, most especially, while at the Ramsey County jail.

Notwithstanding the Employer's reduced level of discipline, the Union argues against any discipline at all for the Grievant. In summing the facts, the Union disputes any contention that the Employer demonstrated leniency by reducing its initial termination decision to a two-day suspension and FROW:

> Metro Transit imposed discipline on an operator because he chose not to respond to an intoxicated, agitated, out-of-control, "not fuckin' scared of no-fucking body!" passenger that had just stolen another passenger's headphones, gotten into a fight, and then started yelling at the operator about whether he called the cops. She knew he called the cops. Getting an answer was not her objective. She was looking for the next fight, and nothing Mr. Ahavit did or did not do would have changed that fact. Punishing Mr. Ahavit for [SN's] behavior makes no sense at all.

Finally, the Union contends that the punishment imposed is wholly disproportionate to any alleged rule infraction. The appropriate penalty, should the Arbitrator find that any discipline was warranted, would be a non-disciplinary training course, or a very low level of discipline such as verbal counseling. It requests that the Arbitrator sustain the grievance, and remove all references to the FROW and two-day suspension from the Grievant's personnel file, award back pay and benefits for the unpaid suspension.

VI. DISCUSSION AND OPINION

The Grievant in this case is a Metro bus operator with about seven years of seniority. His work record was void of prior discipline, and there was no record evidence to indicate that he is prone to violence. However, on January 23, 2013, all of this changed. Metro gave him a two-day suspension and FROW, alleging, first, that on two occasions he did not take *remedial steps* to remove the cause of SH's aggressive anger, and, second, that he used *unnecessary force* to defend against her aggression. Consequently, for a period of three years, until January 23, 2016, the Grievant is and will be at the last step of Metro's progressive discipline policy, which means that further infraction by the Grievant could result in his summary dismissal. (Joint Exhibits 2 & 17)

In the performance of their duties, the Employer expects its bus drivers to: abide by all laws; treat all people with respect and courtesy; adhere to professional standards and moral principles; and provide high standards of public service. (Joint Exhibit 16) To augment this four-part statement of policy, the Employer has in place a Bus Operator's Rule Book and Guide that details bus driver rules. (Joint Exhibit 17) Section 4 of the Guide directs operators to make every effort to answer customer questions about routes, courteously and correctly. The record evidence shows that the Grievant did not respond to SH's question about routing to 425 Grove Street, St. Paul, as completely as possible. However, there is no suggestion that he was being discourteous. It is just that he was not as fully responsive as he could have been to her question. For this, the Grievant's performance was deficient. Technically, he violated section 4 of the Guide, as well as section 138, which states that employees must obey Employer rules, and, thus, he might have been given a Documented Verbal Warning, but certainly nothing more

given the nature of the offense and his clean work record .

Metro argued that if the Grievant had been proactive, and provided her with the requested location information, then his subsequent altercation with SH might not have taken place because SH's dispute with the male passenger might not have occurred, and, therefore, the Grievant would not have needed to call the police. This is the nub of the Grievant's first *remedial misstep*, according to the Employer. However, arbitral notice is made of the fact that SH had been drinking before boarding the bus, and while onboard, she was speaking in a loud and profane tone of voice. She even had referred to the Grievant as a "fucker." Yes, she grabbed the male passenger's earphones and cord because she was not satisfied with his response to her question about the 425 Grove Street location: A response the Grievant should have provided. However, in consideration of all facts and circumstances – for example, SH's intoxication, her profanity-laced aggressiveness toward the male passenger, her altercation with the Grievant, her tirade when arrested by officers Peot and Lund, and her pre-booking tantrum, including her threat to "pee on the floor" – her fighting disposition might have manifested for some other unfathomable reason. Indeed, when the final dispute between SH and the Grievant arose, it was over an entirely different subject, namely, whether he had called the police to report her misbehavior. Nevertheless, the Employer's backward-linking analysis about the Grievant's conduct is not without appeal.

In a similar vein, Metro argued that if the Grievant had answered SH's "Did you call the police?" question, then she might not have become obnoxiously loud, aggressive, and encroached on his space, thus, obviating his felt need to push her back and strike her face. This, the Employer argued, was the Grievant's second *remedial misstep*, or missed opportunity to

have deftly avoided the altercation in question. Metro Transit policy requires drivers to respond courteously to customer requests, which the Grievant did not do in this case. Too, the Employer charged the Grievant with not adhering to section 154 in the Guide, which requires bus operators to "… avoid physical confrontations wherever possible…" (Joint Exhibit 7)

The Union argued that the Employer's logic on point is fallacious. The circumstances making up the Grievant's real life situation, led him to believe that to have answered her question might have elevated her level of aggression, and putting himself and the other bus passengers in danger. The Union persuasively argued that the Employer is wrongly accusing the Grievant of wrong-doing based on "morning-after quarterbacking." In retrospect, the Grievant's non-responsiveness admittedly did not pacify SH. To have answered her question might have made matters worse, as he reasoned, contradicting Metro's theory. The Union makes a good point. How SH might have reacted to the Grievant's answer to her question is an empirical question, *lacking empirical support one way or the other.*

The undersigned concludes that whether the discipline in question was "just and merited," depends principally on the physical encounter between SH and the Grievant. The Arbitrator is mindful of the fact that section 154 in the Guide, states, *inter alia*, if a bus operator believes "… physical harm, serious injury, or death may result, use only enough force to subdue the attack and restore order." (Joint Exhibit 17) With this fact in mind, first, consider the following facets of the Grievant's hearing-room testimony, which were credible in the undersigned's opinion. The Arbitrator's annotations are underlined in what follows.

1. When SH boarded the bus, he assumed that she had been drinking, but that he did not smell alcohol.

2. When SH and the male passenger began to argue loudly, curse, and struggle over his headset and cord, *he became concerned and threatened to call the police* if they did not calm down: A deft balancing of the rules in section 143.3 of the Guide, which prohibits the threatening of customers, and section 154, which, in part, obliges drivers to defend Metro customers from physical attack, while avoiding physical confrontations.

3. When SH and the male passenger continued their harangue, *he called the Traffic Control*, later, after the male passenger pushed SH down the bus' aisle and then fled, as she chased him off the bus, *he triggered the bus' "covert alarm,"* elevating the harangue's level of emergency, and later still, after his encounter with SH, *he again called Traffic Control*: Manifested adherence to guidance nested in section 154 of the Guide.

4. When the male passenger asked him if he had called the police, the Grievant did not answer, fearing that the tirade would escalate, which is the same reason he gave for not answering SH's "Did you call the police?" question: Neither of these decisions falls under the ambit of the Guide's section 4.

5. When the male passenger alighted from the bus, he closed the front doors of the bus to separate the disputants, but SH still had the male passenger's headphones in her possession: A prudent decision designed to prevent physical contact between passengers per the Guide's section 154 directives.

6. When SH began her "Did you call the police?" and "Hello" series, he stated that she was:

> at my side, yelling, as I was moving away from the curb, as I was looking out of the bus' left side rear-view mirror, and she was right there. I wanted her out of my area. I moved her back with my arm and open hand. She came back, and I kept my arm up. It happened fast! I had no intention of hitting her face. I just wanted to get her out of the fare box area. (Grievant's testimony)

7. After the police arrived, he was "shaken," but he completed his route.

8. Regarding the investigatory phase, he stated that he did not threaten SH; that he did not intend to strike her; that his action was an instantaneous "reaction;" that he did not strike SH twice, as the Employer alleged.

Second, the foregoing list-narrative does not conjure up the vision of a bus driver who necessarily acted out of fear that he might be physically harmed or seriously injured, *a la* section 154 of the Guide, as the Union urged. However, because he was dealing with an intoxicated, agitated, out-of-control "not fuckin' scared of no-fucking body!" passenger who

had just had a pushing and shoving altercation with another passenger, chasing him off the bus, it certainly makes sense that he would want her away from the bus' fare box area, *in the interest of practical carefulness* or caution. Of course, he also wanted her away because she was yelling at him, she was being obnoxiously rude, and she had touched him. Therefore, acting out of caution and comfort, as he did, "Was the force the Grievance used to move her away and to restore order excessive or *unnecessary force*, as Metro Transit had determined?" The answer to this question is based on the Grievant's testimony and on the undersigned's repeated, frame-by-frame study of DVD #3.

What the video revealed follows. Sgt. Grates' January 23, 2013 written description of what he saw on the video was inaccurate and, unfortunately, prejudicial to the Grievant. Sgt. Grates' report states: "The bus driver then punched [SN] in the face." (Joint Exhibit 12) The Oxford Dictionary's first definition of the verb "to punch," is "strike with the fist." The Grievant did not "punch" SH in the face. Rather, with measured force, his right arm came into contact with her chest, and the *back of his open right hand struck her right cheek*. She momentarily fell back onto her haunches – not only from the force of his blow, but also because she was surprised to have been struck, and because the bus was moving. Otherwise, she stood her ground, and instantly came back at him with her left arm raised over her head, and her left hand closed into a fist, as if she were going to hit him. Then, the Grievant swept her back with his right arm, but not striking her in the face for a second time, as initially and incorrectly asserted by the Employer. As he pushed her back with his right arm, he applied the brakes, bringing the bus to a stop, and that is what caused SH to stumble in the stair well near the bus' front doors. Next, he came up out of his seat and proceeded to subdue SH by grabbing her

wrists, which he released momentarily thereafter, as she walked toward the rear of the bus, exiting through its rear doors.

In all, based on his viewing of DVD #3, the Arbitrator concludes that the Grievant used force to remove SH from the fare box area of the bus, restoring order. However, he did not use *unnecessary force*. It was not as though SH was bloodied or bruised. Indeed, there was no physical evidence whatsoever that the Grievant had struck her on the face with the back of his hand. Such evidence surely would have brought on an assault charge and none was filed. In sum, the undersigned finds that the Grievant used measured, restrained force to restore his unencumbered control of the bus.

VII. AWARD

The Grievant's 2-days of unpaid suspension and FROW were not just and merited, but a lesser level of discipline is merited. The Grievant failed to provide SH with the Grove Street information she had requested: A section 4 violation of the Guide. Moreover, Metro did not prove that the Grievant used *unnecessary force* to move SH out of the bus' fare box area and to secure said area. As remedies: (1) the referenced FROW shall be removed from the Grievant's personnel file and replaced with a Documented Verbal Warning for violating the Guide's section 4; and (2) the Grievant's two-days of unpaid suspension is revoked and he is awarded 2-days of back pay and shall be made whole for any associated benefit losses.

To monitor enforcement of the foregoing remedies, the undersigned shall retain jurisdiction over this matter until 12:00 o'clock noon on September 23, 2013.

Issued and ordered this 23rd day of August, 2013, in Tucson, Arizona.

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Mario F. Bognanno, Arbitrator & Professor Emeritus