

**IN THE MATTER OF THE ARBITRATION BETWEEN**

**Amalgamated Transit Union Local 1005, )  
the Union. )  
)  
-and- )  
)  
Metro Transit Commission, )  
the Employer. )**

**ARBITRATION AWARD**

**BMS Case No. 06-PA-658**

Arbitrator: Barbara C. Holmes

Hearing Date: March 6, 2006

Date of Decision: April 26, 2006

Appearances:

For the Union: Roger A. Jensen, Attorney at Law  
Jensen, Bell, Converse & Erickson  
St. Paul, Minnesota

For the Employer: Andrew Parker, Esq.  
Parker Rosen  
Minneapolis, Minnesota

**INTRODUCTION**

The Amalgamated Transit Union Local 1005 (herein “the Union”), as the exclusive representative of Grievant Tom Campbell, brings this grievance asserting that the Employer has violated the parties’ collective bargaining agreement. The Metro Transit Commission (herein “the Employer”) contends that it did not violate the agreement. An arbitration hearing was held at which both parties had a full opportunity to present evidence through the testimony of witnesses and the introduction of exhibits. The parties chose to make oral closing arguments in lieu of the submission of post-hearing briefs.

## **ISSUE**

Has the Employer violated the collective bargaining contract or past practice by failing to post ridership goals since mid-2001?

## **CONTRACT LANGUAGE**

### **ARTICLE 10 – MUTUAL COOPERATION**

**Section 2.** The ATU agrees to require all of its members to comply with the provisions of this Agreement, and Metro Transit agrees to cooperate with the ATU in its efforts to enforce compliance by its members with the provisions of this Agreement.

### **ARTICLE 11 – WORK RULES AND PRACTICES**

All practices and agreements governing employees enforced by Metro Transit or its predecessors on or after November 1, 1957, 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;
- (b) Metro Transit must meet and confer with the ATU prior to making any such changes or new work rules;
- (c) New work rules and/or practices must be reasonable;
- (d) The Metro Transit will furnish the ATU with a copy of all bulletins or orders changing any such rules, regulations and practices;
- (e) Work rules and/or practices are subject to the Grievance Procedure.

### **ARTICLE 38 – RECOGNITION PROGRAM**

All recognition programs shall be continued. However, these programs will be modified if necessary by July 1, 1998, to ensure that they are performance based programs.

Departments which do not have recognition programs shall implement performance-based programs by January 1, 1998.

The union and the employer agree to jointly develop these programs.

## **FACTUAL BACKGROUND**

The Employer provides public transit services via bus and light-rail operations throughout the Twin Cities metropolitan area. The Grievant is one of approximately 400 employees who work in the Employer's mechanical department where buses are maintained and cleaned.

During contract negotiations in the late 1990's, the parties discussed revising an existing Maintenance Recognition Program that awarded 4 hours of extra vacation time to employees with perfect attendance records. The Union wanted a recognition program that rewarded employees when ridership goals were met. The Employer wanted a program that rewarded employees based upon road maintenance calls. The parties eventually agreed to the language set forth in Article 38 of the contract that requires them to "jointly develop" a "performance based" recognition program.

In late 1999, the Grievant and Ron Lloyd (the President of the Union) met with the Employer's representatives William Porter and Greg Jones and agreed to the details of the new recognition program. A document entitled "Maintenance Recognition Program" was drafted by the Employer and approved by the Union. It stated, in part, as follows:

The Maintenance Recognition Program is a program that rewards the employees for reaching or surpassing ridership goals. Employees with a chargeable driving accident, written disciplinary counseling or any record of warning given within the quarter, would not be eligible for recognition in that quarter. In every instance the goal will enhance the service that the maintenance department provides to our customers.

The Metro Transit's ridership goal will be set by the General Manager annually.

When the quarterly goal is reached, all qualified employees of the garage or shop will benefit, and will receive 4 hours of employee recognition time off. The time can be used at their discretion. Prior supervisory approval is necessary to take accrued time off. The use of this leave must comply with the policies that exist in the employees' work area. Leave may be taken in ½ hour increments.

William Porter sent a copy of the new "Maintenance Recognition Program" document to the various maintenance garages. He also drafted a memorandum dated

December 28, 1999, that was sent along with the document. This memorandum stated as follows:

To: All Maintenance Employees  
From: Bill Porter  
Date: December 28, 1999  
Subject: Change in the Maintenance Recognition Program

Beginning on January 1, 2000, a new Maintenance Recognition Program will go into effect. The new program will replace the old Perfect Attendance Recognition Program. This change in the Recognition Program is over due. During the last contract negotiations, it was agreed that the program must be performance based. The new plan is based on Metro Transit reaching its ridership goal each quarter, as well as the employee not having a driving accident, a written disciplinary counseling, or any record of warning in the quarter.

The new plan will go into effect the first quarter of 2000. A copy of the plan will be posted on your bulletin boards.

If you have questions about the new plan, talk to your Supervisor or to the Manager in your garage, or give me a call on extension 5001.

We will begin to publish the ridership goal at each garage for each quarter.

We believe that the ridership is driven by the quality of the service that we provide. When a customer has a bus that is reliable, comfortable, attractive, and clean, they will ride.

In January of 2000, William Porter posted the ridership goal for that period at all of the maintenance garages. Sharon Reich, a maintenance department clerk, was responsible for administering the Maintenance Recognition Program. At the end of the first quarter of 2000, she obtained the actual ridership numbers and the ridership goal. Because the ridership goal had been met, she contacted the individual maintenance garages to obtain the names of the employees who were not eligible for the Maintenance Recognition Program because of a driving accident, written discipline, or record of warning. She then sent a worksheet to each garage that listed the names of all of the employees that had received the reward of 4-hours time-off . This worksheet was posted

on the employee bulletin boards. Ms. Reich followed this process through the 2<sup>nd</sup> quarter of 2001. From the 3<sup>rd</sup> quarter of 2001 through the last quarter of 2005, ridership goals were not met. Ms. Reich stop sending the worksheets to the individual garages after the end of 2001 because “everyone knew that ridership was down.”

William Porter testified that although he stated in his memorandum of December 29,1999, that the Employer would “begin to publish the ridership goal at each garage for each quarter,” he posted the numbers only for the 1st quarter of 2000. He stated that he initially intended to post the goals quarterly, but did not believe he was obligated to do so. Ms. Reich testified that she was never asked to post the specific ridership goals.

During contract negotiations in 2003, the parties discussed the Maintenance Recognition Program. Because ridership goals were not being met, the Employer believed that the program should be based upon some other attainable measure. However, the Union wanted the program to remain unchanged. The parties also met in July of 2004 to discuss the Maintenance Recognition Program. Again, no changes were made. During these meetings, the Union did not raise any concerns about the ridership goals not being posted by the Employer.

Around the time that the new Maintenance Recognition Program was created, the state legislature made a 1999-2001 biennial bonus appropriation contingent on the Employer reaching specific ridership goals. To inform the employees of these goals and gain their assistance in attaining them, the Employer undertook a large-scale internal marketing campaign. During this biennial period, large displays comparing the actual ridership numbers with the goals were prominently displayed throughout the Employer’s various facilities, including the maintenance garages.

In September of 2005, the Grievant initiated a grievance alleging that the Employer has violated the parties’ collective bargaining contract by failing to post the ridership goals as required by the Maintenance Recognition Program. The specific articles that the grievance claims have been violated are: Article 10-Mutual Cooperation; Article 11-Work Rules and Practices; and Article 38-Recognition Program. The Employer denied the grievance at Steps 1, 2 and 3 and the Union appealed the matter to arbitration.

The remedy initially requested by the Union was for each mechanic to receive 4 hours of recognition time for each quarter since January of 2000 that the Employer has failed to post ridership goals. At the hearing, the Union suggested an alternative remedy of each mechanic receiving 4 hours of recognition time for each quarter that the Employer has failed to post ridership goals since the grievance was initiated – namely, the 3<sup>rd</sup> and 4<sup>th</sup> quarters of 2005.

### **POSITION OF THE PARTIES**

**Union:** The Union argues that the language in Article 38, the document entitled “Maintenance Recognition Program” and the cover memorandum written and sent by William Porter must be read as a whole. It believes that the sentence in the cover memorandum that reads “[w]e will begin to publish the ridership goal at each garage for each quarter,” is a contractually binding obligation that the Employer has failed to perform, thus violating the collective bargaining agreement. The Union also points to the testimony of the Grievant regarding Ron Lloyd’s statements in 1999 during contract negotiations that he wanted the ridership goals posted as a part of the Maintenance Recognition Program.

The Union argues that the Maintenance Recognition Program is meaningless if the Employer is not required to post the ridership goals. It believes that if the employees do not know what the ridership goal is, they cannot perform their work in a manner that is aimed at reaching the goal and thus qualifying for the reward of 4 hours time-off per quarter.

The Union also asserts that the Employer posted ridership goals for several years after the Maintenance Recognition Program was created thereby establishing a past practice that it has since violated.

The Union does not believe a timeliness issue regarding the filing of the grievance exists because each quarter the Employer failed to post the ridership goals constitutes a continuing violation of the contract. At the very least, the Union believes that a remedy should address the two quarters that have past since the filing of the grievance in September of 2005.

During the grievance process and at the arbitration hearing the Union also argued that the ridership numbers used for the Maintenance Recognition Program should include light-rail ridership numbers in addition to bus ridership numbers. At the end of the arbitration hearing, the Union stated that it did not want this Arbitrator to rule on the issue.

**Employer:** The Employer argues that it is not obligated to post ridership goals because the cover memorandum sent with the Maintenance Recognition Program document is not part of the collective bargaining agreement. It differentiates the cover memorandum from the Maintenance Recognition Program document by arguing that the latter was reviewed and approved by the Union while the cover memorandum was written by William Porter but not reviewed and approved by the Union. For that reason, the Employer asserts that the sentence in the cover memorandum that states “[w]e will begin to publish the ridership goal at each garage for each quarter” is not a contractual obligation. It also notes that nothing in the Maintenance Recognition Program document requires it to post ridership goals.

The Employer does not believe that any past practice of posting ridership goals for the Maintenance Recognition Program exists. It argues that the posting of ridership goals during the 1999-2001 legislative biennium was part of an organization-wide internal marketing program aimed at achieving a state legislative mandate. It states that the only time it posted anything related to the Maintenance Recognition Program was when ridership goals were posted on maintenance garage bulletin boards for the 1<sup>st</sup> quarter of 2000 and when quarterly worksheets were posted listing the employees who qualified for the 4 hours of time-off.

The Employer also notes that the Union did not raise any issue regarding the posting of ridership goals when the parties discussed the Maintenance Recognition Program during contract negotiations in 2003 nor during a meeting in 2004. It believes this is further proof that the parties did not intend for the Employer to be contractually obligated to post ridership goals.

The Employer also points out that ridership goals have not been met since the 2<sup>nd</sup> quarter of 2001. It argues that even if it is found to be contractually obligated to post ridership goals, its failure to do so is a *de minimus* violation of the contract as no

maintenance employee has been eligible for the reward available under the Maintenance Recognition Program since that time.

The Employer does not believe that light rail ridership numbers should be used to determine the ridership numbers under the Maintenance Recognition Program. It points out that there is no mention of light rail ridership in the Maintenance Recognition Program document nor was the issue discussed when the program was negotiated. It also argues that the Maintenance Recognition Program was designed to recognize bus mechanics for the work they did on buses. Although the Union requested at the end of the arbitration hearing that this issue be withdrawn from consideration, the Employer specifically requested that this Arbitrator make a ruling on the matter.

## **DISCUSSION AND OPINION**

**1. Has the express language of Article 38 been violated?** The first issue to be resolved in this arbitration is whether the Employer violated the collective bargaining contract by failing to post ridership goals since the 2<sup>nd</sup> quarter of 2000. The language that the Union relies upon to support its position is the sentence in William Porter's December 28, 1999, cover memorandum that states "[w]e will begin to publish the ridership goal at each garage for each quarter."

I find that this cover memorandum is not a part of the parties' collective bargaining agreement. The credible testimony revealed that the document entitled "Maintenance Recognition Program" was drafted by the Employer and then reviewed and approved by the Union. It is clearly part of the contract by virtue of Article 38 which requires the parties to "jointly develop" the program. After the Union's approval of the Maintenance Recognition Program document, William Porter drafted the cover memorandum to accompany the transmittal of the document to the individual maintenance garages. Porter did not have the Union review and approve the cover memorandum because he did not intend it to become part of the Maintenance Recognition Program. Therefore his statement in the cover memorandum that "[w]e will begin to publish the ridership goal at each garage for each quarter" is not an express part of the contract.

At the hearing, the Grievant testified that Union President Ron Lloyd specifically requested during negotiations that the Employer post ridership goals as a part of the Maintenance Recognition Program. However, this testimony constituted uncorroborated hearsay evidence and is therefore not persuasive.

**2. Is the language of the Maintenance Recognition Program document ambiguous, thereby necessitating interpretation by the Arbitrator?** The Union argues that the employees cannot perform their work in a manner that is aimed at reaching the ridership goals unless they are made aware of these goals. The Union suggests that the Maintenance Recognition Program does not make sense unless the statement in William Porter's cover memorandum is used to clarify that the Employer agreed to post the ridership goals. I interpret the Union's argument to mean that it believes the language in the Maintenance Recognition Program is ambiguous. Arbitrators are frequently called upon to interpret ambiguous contract language. However, there must usually be a word or phrase in the contractual language that is the basis for the arbitrator's interpretation. I find that rather than being ambiguous, the Maintenance Recognition Program document is completely *silent* on the issue of how ridership goals are to be communicated to the employees. While the Union is accurate in stating that the employees need to be made aware of the ridership goals in order to achieve them, it does not necessarily follow that the Employer is required to post this information. There are several ways that information regarding ridership goals could have been communicated to the employees. For instance - the Union could obtain the information and post it for the employees or the employees could go to other sources for this public information. Because the Maintenance Recognition Program document is silent on the issue, it is beyond the jurisdiction of this Arbitrator to determine how the employees are to obtain information on ridership goals.

**3. Has the Employer violated Article 11 by failing to follow a past practice of posting ridership goals for Maintenance Recognition Program?** Both parties have asserted a past practice argument to support their respective positions. The Union claims that the Employer posted ridership goals for several years after the Maintenance Recognition Program was created thereby establishing a past practice that it has since violated. The Employer argues that it posted ridership goals during the 1999-2001 state

legislative biennium in order to obtain a bonus appropriation, not as part of the Maintenance Recognition Program.

*In Hubbard County Heritage Living Center and Minnesota Teamsters Public and Law Enforcement Employees Union, Local 320, BMS Case No. 96-PA-1887 (1996), Arbitrator Richard John Miller set forth the criteria that must be met in order to find that a past practice is binding:*

[I]t must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

The Employer posted ridership goals on the maintenance garage bulletin boards for the first quarter of 2000. It also posted ridership goals throughout the organization for the two-year biennial period of 1999-2001. When this grievance was initiated in September of 2005, over 4 years had passed during which no ridership goals had been posted by the Employer. Clearly, no “fixed and established practice” exists.

**4. Has the Employer violated Article 10 by failing to cooperate with the Union?** I find that the Union’s claim that the Employer has violated Article 10 of the collective bargaining agreement by refusing to cooperate to be without merit. Collective bargaining agreements typically do not address every detail of how a particular contract provision is to be carried out. It is assumed that the parties will address some matters in the course of their day-to-day working relationship. The weight of the evidence shows that at no time has the Employer refused to provide ridership goal information to the Union.

**5. Is the issue regarding the use of light rail ridership numbers properly before the Arbitrator?** Throughout the grievance process and at the arbitration hearing both parties have addressed the matter of whether light rail ridership numbers should be used in addition to bus ridership numbers to determine if goals under the Maintenance Recognition Program have been met. However, at the conclusion of the hearing the Union asserted that it was not necessary for this Arbitrator to rule on the issue while the Employer strongly urged this Arbitrator to rule on the issue.

Clearly, the paramount issue of this grievance is whether the Employer had a contractual obligation to post ridership goals. Less clear is the nature of the discussions

concerning the use of light rail ridership numbers. Both parties discussed the subject matter during the grievance process and elicited testimony from several witnesses regarding it. However, when both parties were asked for the “statement of the issue” at the commencement of the hearing, neither party identified the use of light rail ridership numbers as a formal “issue.” Neither did the parties’ make any mention of the use of light rail ridership numbers in their opening statements.

Quite frequently in the grievance process and/or at arbitration hearings disputes arise regarding matters that are related to the maintain issue but not the true subject of the grievance. In an attempt to be thorough, advocates for each party pursue these tangential issues in more detail than is necessary to resolve the primary issue. It is beyond the jurisdiction of an arbitrator to rule on a matter that has not been clearly identified by both parties as the issue for disposition. I find that to be the situation in this case regarding the use of light rail ridership numbers and therefore decline to make any ruling in that regard.

**AWARD**

The grievance is denied.

**DATED:** \_\_\_\_\_

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**Barbara C. Holmes**  
**Arbitrator**