

IN THE MATTER OF ARBITRATION BETWEEN

Amalgamated Transit Union) OPINION AND AWARD
- Local 1005)
) Grievance Arbitration:
) Discharge (A. Diriye)
-and-)
) Arbitrator:
) John W. Boyer, Jr.
)
Metro Transit) BMS 07PA0912

APPEARANCES

For Amalgamated Transit Union - Local 1005

Roger Jensen, Attorney

JENSEN, BELL, CONVERSE & ERICKSON

Ahmed Diriye, Grievant

Scott Tollin, Business Agent

Gregory Witt, Driver of Auto in Accident (Testimony by Telephone)

For Metro Transit

Anthony G Edwards, Attorney

PARKER ROSEN

Ellen Jackson - Assistant Manager - South Garage

Sam L. Jacobs - Director Bus Transportation

Date of Hearing

July 26, 2007

Close of Hearing

July 26, 2007

STATEMENT OF JURISDICTION

Pursuant to the State of Minnesota Public Employment Labor Relations Act, as amended, and Article 13 - Arbitration Procedures of the Agreement, the Issue as determined by the Arbitrator and stated below was submitted to Arbitration.

At the Hearing each of the Parties presented testimony under Oath, was afforded full opportunity for examination and

cross-examination of witnesses, and submitted exhibits in support of their respective positions. The Parties elected to not submit post-Hearing briefs, and the Hearing was declared closed.

THE ISSUE

Was the Grievant discharged for sufficient just cause? If not, what shall be the appropriate remedy?

BACKGROUND

The dispute involves interpretation of the 2005-2008 Agreement, and some of the facts in the matter are in dispute.

The Employer provides mass transit for the Minneapolis/St. Paul Metropolitan area, and the Grievant had been employed as a bus driver since 1996. The Record indicates the Grievant had received numerous warnings for customer complaints, vehicle accidents and attendance for the duration of his employment.

The basis for the dispute are the events of January 15, 2007 when the Grievant was involved in a collision with an automobile while driving his bus during adverse snow and ice conditions. The Grievant reported the accident as involving a single automobile and no passenger(s) in the bus both verbally and in writing pursuant to Employer policy. Consequently the Employer considered the nature and seriousness of the incident, and the Grievant's prior record and concluded such was "chargeable" and imposed a ten (10) day disciplinary suspension.

Subsequently, the Employer received a copy of a routine police report relative to the incident that indicated the Grievant's bus had struck two (2) vehicles, not the one (1) as had been reported above. Accordingly, the Employer reviewed the video and audio tape from the bus interior and concluded the Grievant had collided with two (2) vehicles and had been

dishonest in reporting of the facts above. Further, the video tape clearly showed there was a single passenger on board at the time of the incident, and such had not been reported by the Grievant.

The Record indicates the Grievant contends he was extremely nervous and excited at the time of the incident, that he did not report the passenger because the passenger allegedly could not speak English, and consistently argued that only one (1) vehicle was involved in the collision.

Nevertheless, given the Employer's conclusion there had been two (2) vehicles involved in the collision, the Grievant had been dishonest in reporting of the facts, and failed to distribute "courtesy cards" to solicit and verify information from passengers as required by policy, the suspension was modified to discharge effective January 30, 2007. The specific basis for the discharge was falsification of an official document, falsification of information to a Manager's Inquiry, the accident and the Grievant's overall safety record.

Consequently, the Union submitted a grievance on behalf of the Grievant that provided in relevant part:

Statement of Grievance

The Grievant was not discharged for just cause.

Remedy Requested

The Grievant be reinstated to his former position and be made whole.

However, the Employer consistently denied the position and request of the Union on the basis the Grievant had been dishonest in his reporting of the facts of the incident, and such in combination with his poor past record constituted sufficient cause for discharge.

Therefore, given the Parties were unable to resolve the dispute and stipulate to an absence of procedural deficiency, the matter was reduced to writing in accordance with Article 13 - Arbitration Procedures and appealed to Arbitration.

Pertinent Provisions of:

A) THE AGREEMENT (Excerpts Only)

ARTICLE 4 - MANAGEMENT PREROGATIVES

The ATU recognizes that all matters pertaining to the conduct and operation of the business are vested in Metro Transit and agrees that the following matters specifically mentioned are a function of the management of the business, including, without intent to exclude things of a similar nature not specified, the type and amount of equipment, machinery and other facilities to be used; the number of employees required on any work in any department; the routes and schedules of its buses; the standard of ability, performance and physical fitness of its employees and rules and regulations requisite to safety. Metro Transit shall not be required to submit such matters to the Board of Arbitration provided by Article 13.

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.

Section 2. No employee shall be suspended without pay or discharged until the employee's immediate superiors have made a full investigation of the charges against that employee and shall have obtained the approval of the applicable department head. No discipline, excepting discharge without reinstatement, shall be administered to any employee that shall permanently impair the employee's seniority rights. When contemplating disciplinary action, Metro Transit shall not give consideration to adverse entries on an employee's disciplinary record involving incidents occurring more than thirty-six (36) months prior to the date of the incident which gives rise to the contemplated discipline. Prior to a suspension of more than two (2) days, the ATU must be notified. If a case of discipline involves suspension or discharge of an employee,

and such employee is not found sufficiently at fault to warrant such suspension or discharge, the employee shall then be restored to their former place in the service of Metro Transit with continuous seniority rights and shall be paid for lost time at the regular rate of pay.

Section 3. Any dispute or controversy, between Metro Transit and an employee covered by this Agreement, or between Metro Transit and the ATU, regarding the application, interpretation or enforcement of any of the provisions of this Agreement, shall constitute a grievance.

B) EMPLOYER'S RULE BOOK & GUIDE (Excerpts Only)

471 DISHONESTY - THEFT (Class A)

Bus operators shall not falsify any statement or official document, misappropriate money or property belonging to the agency to another employee, or to a customer.

497 SERIOUS OFFENSES UNDER THE RULES OF EMPLOYEE CONDUCT

The following are some of the offenses which are considered serious. Violations may result in severe disciplinary action, including but not limited to suspension or discharge.

b. Falsification of any statement or record.

521 IN CASE OF AN ACCIDENT/INCIDENT

Report any accident/incident involving your bus, no matter how slight. This includes on-board injuries or incident (e.g. disturbances, ejections, sick customers, etc.) If the bus does not have a working radio, call the Transit Control Center (TCC) by telephone (612-332-8560 or 612-349-7317).

If your bus is involved in an accident, take the following steps:

1. Inquire about injuries to your customers and others involved, and check the level of damage.
2. Give as much assistance to injured persons as circumstances and your ability permit. Do not move injured persons unless they are in imminent danger of further harm or injury.
3. Write down the license number, make and color of any other vehicle involved.
4. Call the TCC by priority call. (See Radio System section of this book.) Announce you have been involved

- in an accident. Describe what assistance is required - ambulance, police, district/street supervisor, etc.
5. Follow instructions given by the TCC supervisor. Stay at the accident scene unless instructed differently by a Transit Control Center supervisor or police officer.
 6. Note: You must hand out and collect courtesy cards from all customers and possible witnesses (both inside and outside the bus). These must be in the handwriting of the persons named on the cards.
 7. When the accident scene has been cleared and a police officer, Transit Control Center supervisor or Metro Transit claims representative instructs you to proceed, call the TCC by priority call (or telephone at 332-8560 or 349-7317 if your radio is not working) and request instructions.

525 DOCUMENTING THE ACCIDENT (OR CRIME INCIDENT)

Collect all information necessary to make your written report. Use your operator emergency kit as a guide in securing the facts. Courtesy cards should be obtained from all customers or bystanders.

POSITION OF THE PARTIES

The position and requests of the Parties were outlined by their representatives and supported by a variety of documents and testimony as follows:

THE EMPLOYER

- 1) The Grievant was discharged for sufficient just cause.
- 2) The Grievant was dishonest in the manner of reporting the facts of the incident, and had a very poor employment record that placed him close to discharge.
- 3) The Grievant's record includes prior incidents of dishonesty such as his denial of an incident involving the closure of his bus door on a customer's hand.
- 4) The police report clearly indicates that two (2) vehicles were involved in the incident, not the one (1) repeatedly cited by the Grievant.

5) The audio-tape from the bus clearly indicates two (2) "thuds" or crashes. The tape also includes the Grievant's statement that "a second car hit me".

6) The Record indicates the bus hit the second automobile "head on" in the other lane, and such could not fail to be noticed by the Grievant as driver.

7) The Grievant falsely reported there were no passengers on the bus at the time of the incident.

8) The Grievant failed to exchange relevant information with the other drivers.

9) The Grievant's acts of dishonesty and poor prior record constitute sufficient cause for the discharge.

10) Requested the Arbitrator to deny the grievance of the Union in its entirety.

THE UNION

1) The Employer lacked sufficient cause for the discharge.

2) The Grievant was not dishonest with the Employer given he believed there was only one (1) automobile involved in the incident even though two (2) "thuds" were heard on the audio tape.

3) The Grievant is still uncertain if a second automobile was involved, and whether such collided with the front or the back of his bus.

4) The Grievant was very excited at the time of the incident and did not recall all of the details. Accordingly, the Grievant's report of the incident was honestly structured, but less than accurate.

5) That if a second automobile was involved, any damage to such was very minimal and not reported.

6) There is no reason why the Grievant would intentionally lie about or fail to disclose that a second vehicle had been involved in the incident.

7) The audio tape references only "the vehicle" two (2) or three (3) times.

8) The Employer had already imposed a ten (10) day disciplinary suspension for the incident.

9) That should the Arbitrator elect to reinstate the Grievant, all prior warnings in his employment record would still be applicable.

10) Requested the Arbitrator to sustain the grievance and direct the Grievant be reinstated either with or without back pay.

OPINION AND AWARD

On the basis of the evaluation of all documents, testimony and arguments presented by the Parties, the decision of the Arbitrator is to deny the grievance of the Union. The basic reasons for the Award are the following:

1) Initially, the Arbitrator can readily empathize with the mutual concerns and apparent frustration inherent in the disparate position of the Parties when confronted with the emotion-laden matter of the discharge of an exceptionally personable, articulate and apparently well-educated Somalia born bus driver for alleged dishonesty, relative to his reporting of the facts involved in a bus-automobile collision, that necessitated adjudication through these proceedings.

Therefore, the Award shall not be interpreted as reflecting upon the integrity of the principals given the behavior of each exhibited at the Hearing could be characterized as an open, reserved, and sincere attempt to provide convincing

argumentation supportive of their positions. Nevertheless, the Award was predicated upon well documented standards of contract interpretation recognized by both the principals in a dispute and neutrals alike.

2) The primary basis for the Award is the Arbitrator's conclusion premised upon the totality of the Record the Grievant was dishonest in his reporting of the multiple facts of the collision incident as contended by the Employer, and such in combination with his extensive prior employment/disciplinary record constituted sufficient cause for the discharge. The most significant conclusions that compel the finding are the following:

A) The Arbitrator was compelled by the explicit clarity of the police report prepared by the Officer at the scene of the incident that incontrovertibly states there were two (2) vehicles hit by the Grievant's bus. Further, the report explicitly states the second vehicle was struck "head on" when the Grievant's bus swerved/entered the on-coming traffic lane after striking the first automobile. Finally, such also states there had been a passenger on the bus at the time of the incident.

Therefore, while the Police Officer failed to respond to the Union's request to clarify specific facts, and did not appear to testify, the report must be construed as objectively and factually construed, prepared, and totally credible given his professional and routine training in such matters, and total absence of any explicit and/or implicit basis for a contention of bias and/or reason to be construed as less than accurate.

B) After repeated viewing and listening to the CD of the bus audio-video tape, the Arbitrator is compelled to conclude there were two (2) distinct "thuds" and the single male passenger can be readily observed to "lurch" slightly forward

following each in a manner totally indicative of the relatively low speed two (2) vehicle collisions contention of the Employer, and equally inconsistent with the one (1) vehicle contention of the Grievant. Further, while that second vehicle is not visible or otherwise described, the Grievant's recorded statements suggest he was aware of the second collision.

C) The Record also indicates the Grievant has previously acted to falsely deny behavior/incidents in a manner totally consistent with the Employer position in the instant matter. Specifically, in June 2006 the Grievant consistently denied an allegation that he had closed the bus door on the hand of a customer attempting to board the bus, contending the passenger was not correct and the door had never "touched him". However, such was clearly inconsistent with the clarity of the on-board video camera that captured the details of the incident and were clearly supportive of the passenger's complaint. Indeed, the report clearly indicates the passenger was "screaming" at the Grievant to "stop" while the door was closed on his hand.

Therefore, given the similarity of the findings above, the Arbitrator is compelled to conclude the Grievant has elected to deny inappropriate behavior in the past, when he incontrovertibly ought to have been aware such was less than honest and inconsistent with Employer policy.

Accordingly, the Arbitrator is compelled by the Record to conclude the Grievant's behavior could clearly be construed as dishonest for the following:

a) The police report clearly substantiates the involvement of a second vehicle,

b) The on-board audio-video tape indicates the Grievant was aware of the second collision despite his contention at the Hearing that he had merely "slammed" his hands on the steering wheel in an act of frustration after the single collision, and

such constituted the basis for the second "thud" sound on the tape. Indeed, the tape indicates he struck one (1) automobile at the front and the other at the back,

c) The videotape clearly confirms the presence of a single unidentified passenger on the bus at the time of the incident and the Grievant both incorrectly denied his presence and subsequently failed to provide/collect the necessary "courtesy card" information required by Employer policy. Further, the Arbitrator is compelled to characterize the Grievant's belated and singular explanation the passenger was "Mexican" and the two (2) were not able to speak the "same language" as a less than credible and/or sufficient basis for failure to comply with a clearly understood Employer policy relative to information exchange. Again, the tape clearly shows the Grievant and passenger off the bus and the Grievant motioning the passenger to re-enter, yet the required "courtesy cards" were neither distributed or collected.

d) The tape also clearly indicates the second vehicle was "hit" or "hit" the bus after the bus crossed the center line of the road, and such clearly ought to have been very apparent and visible to the Grievant as driver in direct contrast to his belated contention of a possible second vehicle "rear end" collision with his bus, and

e) The Record indicates the Grievant elected not to exchange any of the required information with the driver(s) of the other vehicle(s) involved, and/or the passenger as cited above.

Here, the Record is less than incontrovertibly clear, but a combination of the police report and on-board audio-video tape portray the Grievant's total failure to comply with Employer policy, and directives of the police and the Employer's Control Center. The "Operator's Rule Book and Guide" explicitly and

simply provides the specifics of the Grievant's responsibility in Rule 521 - "In Case of an Accident/Incident" as cited above. Such explicitly directs the driver to contact "TCC by priority call", to comply with directives of the Supervisor, to hand out and collect "courtesy cards" for all customers and possible witnesses, and to contact the Control Center for instructions prior to leaving the scene. However, the Record indicates the Grievant arguably failed to timely comply with any such directives.

Further, while such may appear minute, the real and/or potential for Employer liability is a readily understandable basis for the perceived urgency of such duties.

Similarly, while the Grievant consistently denied the existence of a second vehicle, such was cited by both the driver of the first automobile (Witt) and police report, and that second driver has allegedly subsequently submitted a claim for damages pursuant to the incident.

Finally, the combination of the Grievant's totally less than accurate/complete account of the incident, his contention of a non-conversant passenger who allegedly left the scene without receiving a "courtesy card", and failure to comply with policy and supervisory directives were construed as "dishonesty", that is, in submission of his written report of the incident the Grievant engaged in "falsifying any statement or official document" as defined in Rule 471 above, and such must be construed as sufficient cause.

3) The Arbitrator is also compelled to characterize the Union's explicit and/or implicit contention the discharge constitutes "double jeopardy" as less than compelling. The Record incontrovertibly indicates the Employer imposed the initial disciplinary suspension and restriction upon overtime opportunities on the basis of the facts/scenario provided by the

Grievant who was deemed to have been involved in a "chargeable" driving accident with a single vehicle. Further, at the time of the initial investigation there was no basis to suspect and/or conclude the Grievant's account could be characterized as either inaccurate or less than truthful relative to the critical components of the second vehicle and the single passenger on-board at the time of the incident.

Therefore, the Record is void of any basis to conclude the Employer is imposing a "second discipline" (discharge) for the same offense. Rather, the discharge is clearly predicated upon the totality of the Record as subsequently developed and addressed above. Further, the Grievant could be characterized as literally "on the verge" of discharge at the time of the incident for his employment record inclusive of prior offenses, disciplinary actions, absenteeism and customer complaints.

Accordingly, the Employer properly considered the severity of the offense in terms of the complete and accurate details of the matter in combination with the Grievant's extensively negative performance record when it concluded the totality of such ought constitute sufficient cause for discharge, and such is reflected in the Award.

4) Finally, the Arbitrator is cognizant of a basic axiom of dispute resolution as initially articulated by Arbitrator Whitley McCoy over sixty (60) years past with a simple rationale totally applicable to the instant matter, that:

If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make originally, is no justification for changing it. The minds of equally reasonable men differ. A consideration which would weigh heavily with one man will seem of less importance to another. A circumstance which

highly aggravates an offense in one man's eyes may be only slight aggravation to another. If an arbitrator could substitute his judgment and discretion for the judgment and discretion honestly exercised by management, than the functions of management would have been abdicated, and unions would take every case to arbitration. The result would be intolerable to employees as to management. The only circumstances under which a penalty imposed by management can rightfully be set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved, in other words, where there has been abuse of discretion.¹

The Record clearly indicates the Grievant has an exceptionally diverse background of multi-cultural, military service, multi-lingual capabilities, education and training, and is clearly a "proud man". However, while such a resume' is extremely impressive, it must be construed as totally inconsistent with his equally exceptionally long list of prior warnings, disciplinary actions, etc., accrued during a rolling twelve (12) month period pursuant to the Agreement, inclusive of a "final warning" relative to safety, and with his critical contention of being "nervous, nervous, nervous" at the time of the incident and that such was the basis for any failure to comply with Employer policy or to correctly recollect all facts of the event. Frankly, the alleged tension and frustration of the instant matter literally "pale" in comparison to his attested prior experiences, and such functioned to dilute his credibility relative to the inexplicable failure to accept responsibility for the behavior modification required to address his pattern of prior warnings and disciplinary actions. Simply stated, had that prior employment record not been so extensively negative, it could/would have functioned to mitigate the

¹ See Arbitrator McCoy in Stockham Pipe Fittings Co., 1 LA 160,162 (1945)

discharge decision of the Employer and/or the Award. However, such must remain for conjecture.

Similarly, such is equally inconsistent with his instant behavior of non-compliance with the written and understood rules and objectives for action and submission of a factual report relative to the collision incident, that constitutes the basis for discharge.

Finally, the negative performance continued despite repeated offers of access to Employee Assistance and additional job performance training during the period.

Accordingly, the discharge shall not be construed as a discriminatory, unfair, arbitrary or capricious to the extent of constituting an abuse of managerial authority as addressed above.

Finally, the Record indicates the Grievant reacted in the affirmative to the Arbitrator's question of the extent to which the Union had afforded full, fair and/or adequate representation throughout the proceeding.

Therefore, on the basis of the analysis and conclusions above, the Arbitrator is compelled to render the Award.

AWARD

The decision of the Arbitrator is to deny the grievance of the Union.

John W. Boyer, Jr., Ph.D.
Arbitrator

Dated: September 29, 2007