

**In the Matter of Arbitration
Between**

Metro Transit)	BMS Case No. 07-PA-0544
)	
“Employer”)	Issue: Misc. Operator List
)	
and)	Hearing Date: March 1, 2007
)	
)	Award Date: April 3, 2007
Amalgamated Transit Union, Local)	
No. 1005)	Arbitrator: Mario F. Bognanno
)	
“Union”)	Hearing Site: Minneapolis, MN
)	

JURISDICTION

Pursuant to relevant provisions in the parties’ 2005-2008 Collective Bargaining Agreement the Issue in this case was heard on March 1, 2007, in Minnesota, Minnesota. Appearing through their designated representatives, the parties waived the provisions in article 13 of the Agreement, calling for a Board of Arbitration and a decision within forty-five (45) days of the hearing’s completion. Further, the parties jointly stipulated that (1) the issue was properly before the arbitrator for a final and binding decision; and (2) the undersigned was authorized to frame the statement of the issue.

Both parties were given a full and fair opportunity to present their cases; witness testimony was sworn and cross-examined; and exhibits were introduced into the record. At the conclusion of the parties’ evidentiary presentations, each side made closing arguments. Thereafter, the matter was taken under advisement.

APPEARANCES

For the Employer:

Mr. Andrew D. Parker, Attorney at Law

Mr. Samuel L. Jacobs, Director of Bus Operations

Ms. Jan B. Horman, Director of Employment Maintenance

Ms. Marcie Kerwin, Labor Relations Specialist

For the Union:

Mr. Roger A. Jensen, Attorney at Law

Mr. Paul A. Lucht, Grievant

Mr. Scott M. Tollin, Recording Secretary/Business Agent

Ms. Michelle R. Sommers, President/Business Agent

I. FACTS AND BACKGROUND

Mr. Paul A. Lucht, the Grievant, was hired on June 13, 1998, as a Bus Operator: a position he held until September 9, 2000. On that date, he voluntarily transferred to a Cleaner I position in the Metro Transit Maintenance Division (MTMD). On February 7, 2004, he voluntarily transferred from a Helper III position in the MTMD to a LRT Helper position in Metro Light Rail Maintenance Division (MLRMD). (Employer Exhibit 4).

On April 27, 2006, the Grievant was notified that the Employer intended to discharge him for violating Light Rail safety rules on April 19 and 25, 2006. (Employer Exhibit 1 and Joint Exhibit 3). The Union grieved and the parties ultimately entered into a reinstatement and last-chance agreement (LCA). (Joint

Exhibit 3). Under the LCA, the Grievant was (1) placed on a 10-day non-paid suspension, effective July 1, 2006 through July 10, 2006; (2) returned to work on July 1, 2006, in the demoted position of Cleaner III in the MTMD; and (3) made subject to the LCA's restrictive terms for a period of three (3) years.

After the Grievant transferred out of his Bus Operator position on September 9, 2003, he applied for and was placed on Employer's Miscellaneous Operator List (MOL), as is provided by article 20, section 32(b) in the Collective Bargaining Agreement. Thus, while working in the MTMD, he continued to operate a bus on a periodic basis. However, effective February 7, 2004, after voluntarily transferring to the LRT Helper position in the MLRMD, the Grievant's name was removed from the MOL. (Employer Exhibit 2).

While in the MLRMD from February 7, 2004 to July 1, 2006, the Grievant did not operate a bus. But, on July 1, 2006, when he returned to work as a Cleaner III in the MTMD under the LCA, he filed a Miscellaneous Operator Request. (Joint Exhibit 2). The Employer denied this request, and the Union grieved, asking that the Grievant's name be placed on the MOL and that he be made whole for foregone driving opportunities. (Joint Exhibit 5). The parties were unable to resolve the grievance and the dispute was advanced to the instant arbitration. (Joint Exhibits 4, 6 and 7).

II. STATEMENT OF THE ISSUE

Whether Metro Transit violated the Collective Bargaining Agreement and/or Last Chance Agreement by denying the Grievant's request to have his

name placed on the Miscellaneous Operator List? If so, what is an appropriate remedy?

III. RELEVANT COLLECTIVE BARGAINING AGREEMENT AND LAST CHANCE AGREEMENT PROVISIONS

A. 2005 – 2008 Collective Bargaining Agreement

Article 5. Grievance Procedure

Section 1. ... Metro Transit agrees that such discipline shall be just and merited.

Article 20. Transportation Department: Full-Time Bus Operators

Section 32 (b). If no operators are available, then ATU members from other departments who are qualified and volunteer may be used as operators at the applicable operator's rate, including overtime and report time; such employees shall only be used on week days for bus driving during normal rush hours, 5:30 a.m. to 9:30 a.m. and 3:00 p.m. to 7:00 p.m.

(Joint Exhibit 1).

B. Return –To-Work and Last Chance Agreement (Paul Lucht #5853)

On April 27, 2006, Mr. Lucht was discharged for light rail rule violations occurring on April 19, 2006 and April 25, 2006. The Amalgamated Transit Union, on behalf of Mr. Lucht, filed a grievance challenging the discharge. Mr. Lucht wishes to remain employed with Metro Transit. Metro Transit is willing to allow Mr. Lucht a last chance opportunity to continue as an employee so long as he agrees to and complies with all of the following conditions:

1. Mr. Lucht will be reinstated to a Cleaner III bus maintenance position effective July 1, 2006. Mr. Lucht agrees to withdraw his request for a veteran's preference hearing and to waive veteran's preference rights he may have with respect to his proposed discharge on April 27, 2006.
2. Mr. Lucht will serve a 10 day unpaid suspension which will commence July 1, 2006 and end on July 11, 2006. He will return to bus maintenance on July 12, 2006.
3. Mr. Lucht's re-instatement to bus maintenance from the Rail maintenance division will be non-precedent setting.
4. Mr. Lucht agrees that within the next three (3) years, effective with his re-instatement that he:
 - Cannot have more than one (1) safety related violation in a rolling calendar year
 - Cannot have more than one (1) responsible accident

- Must comply with all accident/incident procedures within the maintenance department
 - Must follow all directives given by a Manager/Supervisor
 - Cannot bid to a higher classification position in bus maintenance until the fulfillment of this agreement
 - Cannot receive any safety-related written warnings during the time frame of this agreement
5. This agreement and the related discipline shall remain in the employee's personnel file for 36 months from the date of this agreement.
 6. Failure of Mr. Lucht to comply with any terms of this agreement shall result in his immediate termination. Such termination will be deemed just and merited as interpreted in Article 5, Section 1 of the Labor Agreement between the parties;
 7. This agreement shall not operate to restrict Metro Transit's authority to terminate Employee for any reason not mentioned in this agreement, if that reason would have been a proper reason for Employee's termination in the absence of this agreement;
 8. Metro Transit may or may not invoke immediate discharge as provided for in this agreement at its sole discretion for future violations. If the employee decides to punish a future violation with a less severe disciplinary penalty other than immediate discharge, such a decision by the employer shall not in any way diminish its right to impose immediate discharge for any subsequent violation or violations;
 9. In the event Mr. Lucht is discharged pursuant to this agreement, he may file a grievance only to challenge whether his conduct constitutes a violation of any employer rules or regulations as stipulated in this agreement. Mr. Lucht specifically agrees that he may not challenge the propriety of the discharge penalty in any stage of the grievance procedure;
 10. If Mr. Lucht's grievance is submitted to arbitration, the jurisdiction of the arbitrator is limited to determining whether Mr. Lucht was in violation of this agreement. All parties agree that the arbitrator shall not have jurisdiction to modify the discharge penalty in the event such a violation is found;
 11. Mr. Lucht declares and represents that he has carefully read this Agreement, and understands its terms and conditions, has been advised regarding its meaning and effect prior to executing the Agreement, and had voluntarily and freely entered into this agreement. Further, Mr. Lucht declares and represents that no promise, inducement or agreement, other than those expressly set forth in this Agreement, has been made by any Council employee or Council member;
 12. In case any one or more of the provisions of this Agreement shall be invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained in this Agreement will not in any way be affected or impaired thereby.

\signatures\

\date\

(Joint Exhibit 3).

IV. UNION'S POSITION

Initially, the Union argues that this is a case of first impression. The Union points out that from June 13, 1998 to September 9, 2000, the Grievant was a Bus Operator; and that from September 9, 2000 until February 6, 2004, after leaving that position, the Grievant was placed on the MOL, and, therefore, that he periodically drove a bus, while working in the MTMD.

Next, the Union contends that on July 1, 2006, upon returning to his former position in the MTMD, the Grievant applied for re-inclusion on the MOL. In addition, the Union notes that the Grievant was told by someone in Human Relations that his status on the MOL would be reactivated upon his returned to the bus side of Metro Transit operations.

Further, the Union points out that the Grievant's application to be re-listed as a Miscellaneous Operator was denied because of the latter's "safety record," which is a specious reason inasmuch as his was qualified to drive a bus and the only safety demerits on his personnel record occurred on the light rail side of Metro Transit operations. Moreover, the Union contends that the LCA does not restrict the Grievant from taking up miscellaneous bus driving responsibilities, implying that when he was reinstated to a Cleaner III position in the MTMD he also should have been returned to the MOL. In this vein, the Union urges: first, since the LCA was drafted by the Employer, all omissions and ambiguities contained therein ought to be construed in favor of the Union; second, that for the Employer to observe that the Grievant returned to a Cleaner III position and not

to a Helper III position is a distinction without substantive meaning; and third, that to deny the Grievant's request to be re-listed as a Miscellaneous Operator for safety reasons, is to again discipline him for the light rail safety problems that resulted in the disciplinary actions spelled out in the LCA. This, the Union argues, is a form of impermissible double jeopardy.

Still further, citing three examples, the Union argues that similarly situated employees have been removed from the MOL after transferring out of the MTMD only to be re-listed upon their return to that Division and that there is no practice to the contrary, as the Employer contends.

Finally, the Union urges that the Grievant immediately be placed on the MOL, as it may not be opened to new names for years, and that he should be made whole for lost work opportunities because he was wrongly denied placement on the MOL.

V. EMPLOYER'S POSITION

The Employer initially argues the language in article 20, section 32(b) of the Collective Bargaining Agreement is permissive and discretionary in nature, stating essentially that the Employer "may" choose to use qualified volunteers from other departments as bus drivers. Moreover, the Employer notes that the established practices giving applicable force to this language is partly documented in the Miscellaneous Operator Request form. (Joint Exhibit 2). The Employer contends that this form makes it clear that bus drivers who transfer to non-bus driving positions may opt to be placed on the MOL, but that "[A] garage manager must review your work record and approve that you qualify for a Misc.

operator position based on the record...". (Joint Exhibit 3). The Employer asserts that the Grievant's work record shows that he was on a LCA and that he had violated safety rules while working in the MLRMD at the time he filed his July 1, 2006, Miscellaneous Operator request: a request that was denied for both of these reasons. In this regard, the Employer points out that other operators who were on LCAs have never been given the option to be on nor have been placed on the MOL; and that the disciplinary basis for these LCA did not always related to safety reasons. But, in this instance, for operator-related safety reasons Metro Transit did not want the Grievant driving buses. (Joint Exhibit 3).

Next, the Employer contends that the Grievant was removed from the MOL upon being transferred to the MLRMD, as is the established practice. (Employer Exhibit 2). Further, the Employer continues, that by the time the Grievant had returned to the MTMD, he had not operated a bus from February 6, 2004 to July 1, 2006; whereas, the established practice is that listed non-operators must drive a bus at lease 8-hours per year to continue to be listed.¹

Further, the Employer claims that the Grievant was not returned to his previous Helper III position upon his LCA-based reinstatement, as the Union claims and, therefore, this is not a credible basis for listing him as a miscellaneous operator. Further, as of July 1, 2006, no MLRMD employees who had previously been on the MOL were ever re-listed, the Employer urges: a practice that was reversed by a Letter of Agreement effective July 25, 2006. (Employer Exhibit 3).

¹ Apparently, in March 2003, there were 125 non-operators on the MOL, a number that now stands at 48. Around that same time the Employer wrote to the listed employees, advising them that their name would be dripped from the list if they did not drive at least 1-hour per year.

Finally, the Employer requests that the grievance be denied, arguing that it did not abuse its discretionary authority.

VI. OPINION

The Union argues that for several reasons the Grievant ought to be placed on the MOL. First, to deny the Grievant's request to be re-listed on the MOL is to impermissibly discriminate against him because other bargaining unit members have been re-listed after once being removed from the MOL. Second, the Employer wrongly based its denial of the Grievant's request on his safety record because his safety missteps have been on the light rail side and not on the bus side of Metro Transit's operations. Third, the Employer-drafted LCA that led to the Grievant's return to the MTMD is a comprehensive statement of the discipline that was to befall the Grievant. However, since it does not restrict his return to the MOL it ought to be interpreted to allow same. Finally, to deny the Grievant's return to the MOL is to subject him to double jeopardy.

The Employer demurs. First, as a matter of practice, employees who leave the MOL are not returned to it, except that effective June 25, 2006, current and future LRT employees that had previously been on the MOL would be allowed to be re-listed. (Employer Exhibit 3). And significantly, the Employer points out that the Grievant's application to be re-listed was dated June 1, 2006, well before the effective date of this Union and Employer agreement to deviate from past practices. Second, the Employer points out that it has never allowed an employee whose employment was restricted by a LCA to be included on the MOL.

Upon consideration of these and the other arguments raised by the parties, the undersigned concludes that on balance the Employer's theory of the case is the most persuasive. This conclusion derives from article 20, section 32(b) in the Collective Bargaining Agreement. Therein, the parties agree that Union members who are "qualified" may be listed as miscellaneous bus drivers. (Joint Exhibit 1). Determining who is "qualified" to be listed as a miscellaneous bus driver is clearly stated on the Miscellaneous Operators Request form, which states that applicants for inclusion on the MOL will have their "work record" reviewed by management. (Joint Exhibit 2). Indeed, Joint Exhibit 2 goes on to state that "Once qualified as a Misc. Operator you must maintain a good work record ...". In this case, the Employer determined that the Grievant was not "qualified," based on his "work record", which by any standard, was not a good work record.

Indeed, the Employer intended to terminate the Grievant's employment for reasons of safety, and it would have terminated him if the Union had not intervened on his behalf, and had the parties not agreed to his reinstatement on terms spelled in a LCA. (Employer Exhibit 3). The Union contends that the Grievant's rail side safety record is not relevant to bus side work. This contention, however, is not convincing. The violation of safety rules, regardless of the side of the Metro Transit's business on which it occurs, is relevant and significantly so. In this case, the identified safety violations constituted a reasonable basis for the Employer's decision that the Grievant was not "qualified" to be placed on the MOL. There is no proof that the Employer abused its managerial discretion in this

case. Moreover, when the Grievant returned to MTMD duty, he did so under the cloud of a LCA, and Mr. Samuel Jacobs, Director of Bus Operations, testified, without contradiction, that nobody on a LCA has ever been included on the MOL. He continued that if a LCA is apart of an employee's work record, then that employee is not considered to be qualified to drive. Further, he testified that generally such employees are not even given a copy of Miscellaneous Operator Request forms on which to make application to the MOL.

Mr. Jacobs also testified that once an employee is removed from the MOL because of a voluntary transfer, he/she is not returned to the list, as implied by the fact that the number of employees on the MOL has fallen by more than 50% in recent years. This testimony was partly contradicted by Michelle Sommers, President and Business Agent, ATU, Local No. 1005. She identified three individuals who were removed from the MOL after moving from the bus side to the rail side of the Metro Transit operation; but after their subsequent return to the bus side they were re-listed on the MOL. In rebuttal testimony, Mr. Jacobs stated that two of the three instances recited by Ms. Sommers did occur, but had he known about them at the time he would have disallowed the re-listings. More critically, however, Ms. Sommers also testified that if someone on a LCA transferred back to MTMD and subsequently applied for admission to the MOL, their application would be denied. This is exactly what happened in this instance. The Grievant was not treated in an impermissibly disparate way, and the LCA does not form the basis for upsetting an established practice.

VII. AWARD

For the reasons discussed above the instant grievance is denied. The Employer did not violate either the LCA or the Collective Bargaining Agreement in denying the Grievant's request to be placed on the MOL.

Issued and ordered on this 3rd day of
April 2007 from Tucson, AZ.

Mario F. Bognanno, Arbitrator