

**IN THE MATTER OF ARBITRATION BETWEEN**

<b>AMALGAMATED TRANSIT UNION</b>	)	<b>OPINION AND AWARD</b>
<b>LOCAL 1005</b>	)	
<b>AND</b>	)	<b>BMS 14-PA-0092</b>
	)	
<b>METROPOLITAN COUNCIL</b>	)	<b>Grievance re:</b>
<b>METRO TRANSIT DIVISION</b>	)	<b>File Memo</b>

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ARBITRATOR: Charlotte Neigh

HEARING: January 16, 2014

NO POSTHEARING BRIEFS

AWARD: February 4, 2014

**REPRESENTATIVES**

For the Union:

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For the Employer:

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**JURISDICTION AND PROCEDURE**

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

**ISSUE**

Whether the memo placed in the Grievant's file should be removed for not being just and merited.

## **PERTINENT AUTHORITY**

### **AGREEMENT**

#### **ARTICLE 5 - GRIEVANCE PROCEDURE**

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

**Section 2.** . . . 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. . . .

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

### **BUS OPERATOR'S RULE BOOK & GUIDE**

#### **Operator Fundamentals**

Your job as a metro Transit bus operator requires that you exercise good judgment and problem solving skills on a daily basis. Good decision making is expected in your role. . . .

. . . (Y)ou will come across a variety of different situations . . . there are four questions . . . to determine what action needs to be taken.

1. What is happening?
2. What is the safest way to deal with the situation?
3. What action would be in the best interest of the customers?
4. What is the Standard Operating Procedure for this situation?

Safety should always be the most important consideration for any decision. Doing the right thing for customers should be your secondary consideration . . .

#### **100 PERSONNEL RECORD (BUS OPERATOR'S JACKET/DSL/Customer Relations)**

A personnel record or "jacket" is maintained for each bus operator. Its purpose is to document job performance. It is consulted when you are being considered for promotion, recognition or discipline. DSL and Customer Relations records also contain operator contact and performance information. If you wish to examine or discuss your record you can do so by arrangement with your manager.

#### **151 PREVENTING INCIDENTS AND DISTURBANCES**

The same skills that make up good customer service will also help you greatly reduce the chance of incidents and disturbances on your bus. Here is what police and other experts advise:

1. Make eye contact with and greet or acknowledge every individual who boards your bus.
2. Communicate with your customers. tell them what you are doing, and why your're doing it.

. . .

#### **152 READING AND DEFUSING THE SITUATION**

. . . (A)ssess the individual's mental state. Does he/she appear agitated? Angry? High on drugs or alcohol? . . . clenching and unclenching fists? . . . conspicuously avoid making eye contact with you? . . . (A)ssess whether they may become a threat to you. . . monitor the situation . . . and know when you need to call for help. . . There are more steps you can take such as de-escalating a situation or defusing a conflict with an unstable individual.

Two training opportunities can help you build skills in this area. . . . Check with your manager or the Training Center for the next aerosol/self-defense training session or Transit Ambassador Training class is offered. This class will help you deal effectively with all customers to keep trouble from starting or escalating.

#### **153 DISTURBANCES OR CRIMINAL ACTIVITY**

If individuals are disturbing the peace, you should use your best judgment in handling the situation. Unless you believe that doing so would escalate the situation, you should ask them politely to cease their activity. If they fail to do so, then:

1. TCC should be notified by appropriate radio call. . . .
2. If the police are called, the TCC will help you determine whether to hold for police or continue en route. . . .
3. If holding for police, keep both doors open to allow an escape route for the perpetrator(s). . . .

## **BACKGROUND AND UNDISPUTED FACTS**

The Grievant has been with this Employer as a bus operator for nearly seven years, after several years experience elsewhere. In February 2012 he was placed on the highest disciplinary level of Final Warning for failing to properly report to the Transit Control Center (TCC) an altercation on his bus. This meant that during the following 36 months he could be discharged for any performance or conduct violation that merited disciplinary action.

On Sunday, March 3, 2013, at midday the Grievant was driving a route from south Minneapolis to the Nicollet Mall. At the intersection of Nicollet Avenue and 15th street, while the bus was stopped for a red light but not at a designated bus stop, a man approached the door and knocked, seeking to be admitted. Video from a bus camera shows that the man was holding a photo ID card up to the window of the door but the Grievant claims that he did not see it. The Grievant motioned for the man to proceed to the bus stop in the next block and a passenger called out the same instruction. At the stop a passenger exited the bus and then the bus proceeded. The Grievant claims that he checked his right mirror to see if anybody was approaching to board and saw nobody.

While stopped at 9th Street on the Nicollet Mall, the bus was boarded by the man who was not picked up at 15th street; he approached close to the Grievant and in a loud voice criticized him for not picking him up. The Grievant responded by loudly telling the man: not to raise his voice to him; he was not at a bus stop when he tried to board; and, three times, to “get off my bus”. The man refused to exit and said the driver should call the police. The Grievant radioed the TCC, explained that he had a rude passenger whom he did not want to haul, and requested the Transit Police. The TCC operator asked whether he wanted to hold in place for the police or proceed on his route. The Grievant said he would hold in place. The Grievant announced the delay to the passengers and suggested that they could exit and take the following bus, which most of them did. The driver of the bus following the Grievant’s bus called the TCC for permission to pass the bus but this permission was denied. It took the police about eight minutes to arrive and take the man off the bus. Later, as the Grievant was en route to the garage, he received a call from the TCC telling him that: the man was also a Metro Transit bus operator; and because the incident involved two operators, he was going to send the video from the bus cameras to management.

The following day the Grievant’s Supervisor was notified by the TCC of a Special Situation Report (SSR) involving the police, and the Supervisor had an informal discussion with the Grievant with no mention of disciplinary action. The Supervisor subsequently viewed the video of the incident and by a 3/12/13 memo gave the Grievant a Notice of Investigation to determine the facts surrounding the situation, and an investigatory interview to be held the following day. The notice stated that the “investigation will also be used as the basis for determining whether corrective action is required”.

The Grievant had a Union representative at the 3/13/13 investigatory meeting who requested that they view the video before questioning the Grievant. The Supervisor’s 3/15/13 report of the meeting states that the Grievant “explained the sequence of events” consistently with what the video showed. The Grievant also explained that: earlier on that same trip he had refused to board a woman who had tried to enter while he was stopped at a light; he had reported this event to the TCC, which told him he had done “the right thing”. The Grievant explained that, having denied boarding to a white

## Background and Undisputed Facts (continued)

woman, the passengers might suspect him of racial discrimination if he subsequently picked up a black man other than at a bus stop. The Grievant also said that he didn't know the complaining man was a Metro Transit driver until after the police removed him.

In response to questions the Grievant stated that:

- He doesn't board people other than at bus stops, except for an emergency, an elderly person or for security reasons.
- He was prompted to request police because the man was rude and threatening and customers were witnessing it.
- He raised his voice to get the man under control and out of his space.
- The announcement to the passengers was appropriate because they saw what was happening and needed to know what was going on and that help was on the way.
- He chose to hold in place rather than proceeding on his route because he wanted to keep his eye on the man.

A follow-up investigative meeting was held on 3/22/13, where the Grievant made the following responses to questions:

- He didn't know what the man was holding up to the door window at 15th Street.
- He didn't report the refusal to pick the man up because he had already been told by the TCC that he had done the right thing earlier that day when he refused to pick up the woman.
- The behavior that he perceived as threatening was: the man's demeanor as he entered the bus; he was loud and aggressive; my personal space was invaded. The Grievant also noted that the man backed up and became calmer after he raised his voice.
- He did not consider the inconvenience to the passengers from holding in place because the security situation was a priority.

The Supervisor wrote a 4/15/13 memo to file regarding the Grievant's conduct during this incident, stating:

*(Grievant's) conduct in response to a customer pass-up situation led to several negative consequences. Customers were needlessly delayed and Metro Transit's public image was tarnished. In addition to the service disruption and poor public image, Metro Transit's TCC and Police department resources were used unnecessarily.*

*Metro Transit is a servant of the public. As a provider of service, it has been entrusted to hire employees who perform their jobs in a professional manner at all times. The situation (Grievant) created was unnecessarily escalated by him and avoidable.*

*One of the central components of our customer cornerstones is listed on page one of Metro Transit Bus Operator's Rule Book and Guide. It states "Your job as a Metro Transit bus operator requires that you exercise good judgment and problem solving skills on a daily basis. Good decision making is expected in your role."*

*(Grievant's) decision making skills need improvement, the actions that (Grievant) took in addressing the perceived problem were in direct conflict with the core operating concepts outlined in the Metro Transit Operator's Rule Book and Guide.*

## Background and Undisputed Facts (continued)

The Grievant refused to sign this memo and filed a grievance seeking to have the memo removed from his personnel record. After the Second Step grievance hearing, the Director of Bus Operations wrote a memo that included a non-precedential offer to rewrite the memo in consultation with the Union, and to remove it from the file after 18 months rather than 36 months, if there were no similar instances. This offer was not accepted and the matter proceeded to arbitration.

## SUMMARY OF THE PARTIES' ARGUMENTS

### THE EMPLOYER ARGUES THAT:

- The memo to the file is not discipline but merely outlines expectations and needs to remain in the file so that management can use it to remind the Grievant of expectations. The memo has not been entered into the Grievant's disciplinary record, is not part of the computer systems used to track discipline, and cannot be the basis for progressive discipline.
- The Grievant's 2/13/12 Final Warning was issued for extremely poor judgment in handling another customer service matter. This memo was to again make clear to the Grievant what is expected, in addition to the training he had received just three days prior to this incident.
- In reporting the problem to the TCC the Grievant never said that the man was a security risk or threatening anybody, only that he doesn't appreciate how he was being spoken to.
- No specific violation of policy was cited in the memo, however the Grievant used extremely poor judgment in handling the situation, contrary to the fundamentals required in the Rule Book and Guide.
- Wanting to document the ongoing concern about how the Grievant handles the customer service component is not improper. The way the Grievant treated the other operator, overreacted and escalated the situation, inconvenienced customers, and wasted police resources, on top of an egregious customer service incident the previous year and other customer service issues, made placing the memo in his file appropriate and did not violate the CBA.
- Similar memos to the file have been done in two other situations and is required by this situation. If management cannot document concerns, it hampers the ability to correct conduct in the future.
- The grievance should be denied and the memo should remain in the Grievant's file.

**THE UNION ARGUES THAT:**

- No violation has been charged and the Grievant is being punished for following the rules.
- The Grievant had to make a decision in the moment and did not have the benefit of hindsight used to second-guess his judgment.
- The Grievant was chased down and berated by a stranger who was raising his voice, refused to exit the bus, and said to call the police, which was the right thing to do. The Grievant was taken by surprise and is aware that assaults by passengers occur.
- The Grievant called the TCC as trained to do; choosing to hold in place while waiting for the police was not a violation but his best judgment in the interest of safety, and an option that was offered by the TCC.
- The service delay was caused by the conduct of the other employee, not the Grievant. The real instigator received no consequences except a talk with management. The same action could have sufficed for the Grievant.
- After a full investigation no violations were found. The language of the memo inappropriately attributes blame to the Grievant for: creating and escalating the situation; tarnishing the image of the Employer; needlessly delaying passengers; and wasting resources.
- A disciplinary situation allows review of an employee's entire file and history and if this memo remains in the Grievant's file it will be used against him in the future. It is a back door attempt and an insidious punishment without accountability. Such memos must be reviewed to protect employees.
- This adverse action was not just and merited and the memo should be removed from the file.

## ANALYSIS AND DISCUSSION

While maintaining that this memo to the file does not constitute discipline, the Employer has not contested the arbitrability of this grievance, acknowledging that Article 5, Section 3 of the CBA allows an employee to grieve any dispute or controversy between Metro Transit and the employee. Undermining its position are the facts that: the Employer intends to treat the memo the same as any disciplinary action in regard to how long it could remain in the Grievant's file; and the Supervisor's 4/24/13 memo to the Union lists the items that were used "in the determination of **discipline**"(emphasis added). It is disingenuous to argue that the memo blaming the Grievant for poor judgment leading to negative consequences for customers and the Employer is not part of his disciplinary record: Section 100 of the Guide expressly provides that such documentation of job performance "is consulted when you are being considered for promotion, recognition or discipline". The Union persuasively argues that Management must be held accountable for such memos to protect employees from having them unfairly used as a factor in a future adverse action. Although the Union has challenged the legitimacy of the memo in the Grievant's case, it has not sought to bar the Employer from ever using such a device, which it has done in two other situations. The parties agree that the issue to be determined here is whether this particular memo was just and merited, as required by the disciplinary language of the CBA.

Apparently Management's evaluation of this incident was affected by the knowledge that the angry passenger was also a Metro Transit operator. No explanation has been offered for why this fact should automatically render his conduct non-threatening. Furthermore, the Grievant did not have this information in the heat of the moment. He has consistently stated and credibly testified that he did not know the man's employment status: it was not revealed by any of the clothing items commonly worn by operators; and he did not see the photo ID card either when it was held up to the door window or when it was in the man's hand as he boarded the bus and approached. The contrast between the way these two employees were treated is troubling. No disciplinary penalty or memo to the file was issued to the employee who: went out of his way to chase down the bus and angrily confront the Grievant, refused to exit when so ordered, and insisted that the police be called.

Items considered in the "determination of discipline" listed by the Supervisor in his 4/24/13 memo do not include the February 2012 disciplinary incident, although it has been relied on by the Employer in this arbitration. The Employer argues that this memo is necessary to make clear to the Grievant once again the expectations for customer service. The record does not reveal why the Employer chose to categorize this incident as a "customer service" issue, or how such categorization is generally done. A couple of exhibits show a computerized history of "incidents" that apparently originated primarily with calls of complaint or commendation from customers, or relatively minor violations observed by supervisory personnel (engine on at terminal). These records show whether the incident was: logged for reference and not used for discipline but for future consideration of similar issues; addressed by reviewing relevant policy in the form of non-disciplinary conversation or a coaching meeting; or filed for the record as a basis for progressive discipline or as a commendation. Thus the Employer does have a way of documenting concerns, obviating the claimed need for this memo to the file. There is no basis in the record for comparing the number or rate of the Grievant's customer-service incidents to those of other operators.

### Analysis and Discussion (continued)

The Grievant had reason to be concerned about his disciplinary status after the February 2012 Final Warning and to be diligent about following the rules. He reasonably could have expected that if had been caught allowing passengers to board other than at a designated bus stop he would be disciplined for it. To protect himself from a possible complaint by the woman he refused to pick up while stopped at a traffic light earlier on that same day, he radioed the TCC to report it and was assured that he had done the right thing. This was the Grievant's state of mind when the second attempt to board the bus at a stop light occurred a short time later. The Grievant has consistently denied that he could see the man approaching the bus before he pulled out from the next bus stop. Despite an extended investigation by the Supervisor, no evidence was produced to contradict the Grievant. Given the Grievant's concern about his employment security, it is unlikely that he would have deliberately passed up this customer.

The Grievant was understandably alarmed six blocks later when this same man entered the bus, berating him in a loud voice and standing closer than is normally done. The Grievant's reaction to this angry stranger was loud and authoritative. He told the man to get off the bus, which the man refused to do. The Grievant testified that this is unusual in his experience and that it constitutes trespass. It was this man's suggestion to call the police, which the Grievant prudently followed. Although the man backed off a bit, he remained standing not far away. Under the circumstances it was not unreasonable for the Grievant to decide it was necessary to keep an eye on the man while awaiting the arrival of the police. The TCC had given the Grievant the option of waiting in place for the police or having them catch up further along his route, and it was not unreasonable for him to choose to wait. He also showed proper consideration for the passengers by announcing the reason for the delay and suggesting that they could catch a following bus.

The Grievant talked to his Supervisor about this event on the following day and had no idea that his handling of the situation was a cause for concern until he was shocked by the notice of investigation nine days later. After a month-long investigation, including two interrogation sessions, no rule or policy violations were found. Nevertheless, a critical and accusatory memo was placed in the Grievant's file.

The memo is troubling on its face. Although management argues that it is meant as a tool for improving the customer-service component of the Grievant's performance, its subject is "Conduct". Its allegations are conclusory and vague, not citing any particulars about the facts or what the Grievant should have done differently. It converts a specific situation involving an angry and aggressive passenger into a general charge of poor judgment. It offers no plan or suggestion for how to address its conclusion that "decision making skills need improvement". It does not even reference Section 152 of the Guide regarding defusing a situation, which offers two training opportunities to build skills in this area. There is nothing about this memo that could assist the Grievant in improving any facet of his performance.

Analysis and Discussion (continued)

Furthermore, the memo is unfair in its characterizations and erroneous in its particulars. It incorrectly refers to “a customer pass-up situation”, which in the jargon of this workplace means failing to properly stop for and pick up a passenger waiting at a bus stop, which is not what happened here. It claims that customers were “needlessly delayed” while ignoring that: the Grievant had given a good reason for waiting for the police to arrive; and the passengers could have been on their way expeditiously if the TCC had granted the requested permission for the following bus to go around the Grievant’s bus. The allegation that “Metro Transit’s public image was tarnished” is unsupported and baseless. The allegation that the resources of the TCC and the Transit Police “were used unnecessarily” is conclusory with no supporting rationale and ignores the Grievant’s explanation of the situation and the choices he made. The charge that the Grievant “created” the situation is contrary to the known facts and unconscionable. The claim that he “unnecessarily escalated” the situation ignores that the situation calmed down after the Grievant’s reaction and presumes that the angry man would not have further escalated the situation if the Grievant had behaved differently. It is concluded that this memo to the file is not just and merited.

**AWARD**

The grievance is sustained. The memo shall be removed from the Grievant’s file.

February 4, 2014

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Charlotte Neigh, Arbitrator