
In the Matter of the Arbitration Between

METROPOLITAN COUNCIL TRANSIT OPERATIONS (MCTO)

and

BMS No. 16-PA-0170

AMALGAMATED TRANSIT UNION (ATU), Local 1005

OPINION AND AWARD

Appearances:

For MCTO: Attorney Andrew Parker, Parker Rosen, LLC

For USW: Attorney Timothy J. Louris, Miller O'Brien Jensen, P.A.

Arbitrator: Susan J.M. Bauman

Pursuant to the terms of the collective bargaining agreement between Metropolitan Council Transit Operations, hereinafter "Metro Transit" or "Employer", and Amalgamated Transit Union, Local 1005, hereinafter "ATU" or "Union", the undersigned Arbitrator was selected to hear and decide a dispute between the parties regarding the termination of employee JO. A hearing was held in St. Paul, Minnesota on January 7, 2016. Both parties had the opportunity to present evidence and make arguments. The parties made closing arguments and waived post-hearing briefs. The record was closed at the conclusion of the hearing. Based upon all the evidence presented and arguments made, the Arbitrator renders this Opinion and Award.

OPINION

ISSUE

The parties stipulated to the issue:

Did the Employer have just cause to terminate the Grievant? If not, what is the appropriate remedy?

RELEVANT COLLECTIVE BARGAINING AGREEMENT LANGUAGE

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.

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FACTS

This case involves the termination of a bus operator, JO, a nine year employee of Metro Transit as the result of an accident that occurred in the early hours of July 8, 2015. The Employer is a mass transit common carrier which operates in the metropolitan Twin Cities region. It provides both bus and light rail services throughout the area. The Director of Bus Operations is Christy Bailly, who has held that position for over six (6) years. Of the approximately 3000 employees of Metro Transit, about 2000 are employed in the Bus Operations Division, of which 1450 to 1505 are bus operators. There are over 900 buses in the fleet, some are standard 40 foot, 15 ton vehicles, and some are longer articulated buses. Bus service is provided on over 135 routes, with about 31,000,000 miles driven annually.

As a mass transit common carrier, safety is the number one priority at Metro Transit. This is conveyed to all employees through numerous publications, bulletins, and periodic trainings. The Bus Operator's Rule Book & Guide clearly states that "Safety should always be the most important consideration for any decision. Doing the right thing for customers should be your secondary consideration and Standard Operating Procedures should also be considered in any decision-making process." The same publication provides as Operator Fundamental 14:

SAFETY IS THE FIRST PRIORITY

Remember the Five Safety Keys. Following these driving rules at all times will give you the "space cushion" you need for operating buses safely in all conditions.

1. Aim high in steering.
2. Get to the big picture.
3. Keep your eyes moving.
4. Leave yourself an out.
5. Make sure they see you.

These Safety Keys are part of the Smith System in which every bus operator is trained. Since 2009, every operator, including the Grievant herein, has received Safety Keys training at least once every three years. In fact, in Fall 2014, JO had five (5) days of training on Safety Keys and became a certified instructor in Safety Keys.

Since shortly after Ms. Bailly became the Director of Bus Operations, the Employer has conducted a Look and See campaign designed to emphasize the need for bus operators to look for and see pedestrians and bicyclists. Metro Transit also emphasizes the need for operators to "rock and roll" in their seats in order to see around potential blind spots and to be aware of the presence of pedestrians, bicyclists and other vehicles. Drivers are instructed through written and oral communications to rock and roll both before moving a bus and while moving their vehicle.

The Employer also provides extensive training in entering intersections, making right and left turns, and since October 2012, making right turns on red signals. (Operators who had completed Certification Training and had a sign-off on file were permitted to make right turns on red lights starting on January 1, 2013.)

At the time giving rise to the instant grievance, the Grievant was not only a bus operator, but also a relief instructor providing Standard Operating Procedure (SOP) training and route training to drivers as well as coaching new operators after observing them driving. On July 8, his shift had started at 6:09 p.m. on July 7 and was scheduled to end at approximately 2:15 a.m. JO was driving route 724 which included a construction detour during the months of May to October.

About six (6) hours into his shift, the Grievant was driving southbound on Zane Avenue North and was approaching 63rd Avenue North. The usual route called for a left turn on 63rd, but the construction detour required that a right turn be made instead. As he approached the intersection, the Grievant saw that the traffic light was changing. In order to make a smooth stop

and not upset the passengers, JO entered the crosswalk before he came to a full stop. Although he looked to the left, the right, and the left again, he failed to notice a bicyclist who was wearing dark clothing and riding a bike without lights westbound on the sidewalk closest to the bus. He did see an eastbound car coming through the construction area and waited for it to pass. He did not, however, see the bicyclist who rode across the intersection on a green light and who was subsequently struck by the left front of the bus.

JO immediately stopped the bus. He notified dispatch of the accident and waited for the supervisor to arrive. He moved the bus around the corner out of traffic. The Brooklyn Park and Metro Transit police arrived, as did an ambulance. Although he initially denied injury, the bike rider decided that his left knee hurt and he was conveyed to a nearby hospital by ambulance.

The Grievant was relieved of his driving duties and taken back to the garage for post-accident testing. The video from the five cameras aboard the bus was requested and subsequently reviewed by Safety Specialist Jerry Larsen. Larsen determined that this was a responsible accident that the Grievant could have avoided by checking left, right, left to clear any danger of pedestrians, bicycles and other vehicles before moving the bus forward. Larsen concluded that the Grievant had a reasonable opportunity to avoid the accident but failed to do so. In addition, three other safety specialists concurred in the determination that this was a responsible accident.

Metro Transit held an investigative hearing on July 10, 2015. A determination to terminate the Grievant was made due to the severity of the situation. A Loudermill Hearing was held on July 14 to provide the Grievant the opportunity to provide any further information as to why he should not be terminated. A Notice of Discharge was given to the Grievant on July 20, 2015:

A determination has been made, following an investigation and Loudermill Hearing, to discharge you as an employee as of the above noted date. The grounds for discharge are:

Violation of the Metropolitan Council Operating Policy 4-7d
Responsible Bicycle Accident

A grievance was filed on the same day contending that Article 5, section 1 of the collective bargaining agreement had been violated in that the discipline was not just and merited and Article 5, section 3 in that any dispute constitutes a grievance. The remedy sought was that the chargeable accident dated July 8, 2015 be expunged and that the Grievant be made whole for any lost time and benefits.

The parties were unable to resolve the grievance at either Step 1 or Step 2 of the grievance procedure and the instant arbitration ensued.

Additional facts are included in the DISCUSSION, below.

POSITIONS OF THE PARTIES

Metro Transit

The management of Metro Transit believes strongly in safety and training. Something that happens in five (5) seconds or so can have life consequences. The harm to the bicyclist was predictable based on the way the Grievant handled the situation. There were egregious cardinal principle violations.

In a pedestrian accident situation, including bicycles, the Employer discharges the driver. In some cases, the operator is brought back for various reasons. The instant case is more egregious than any of those brought back; it falls into the not-brought-back category. The arbitrator should not supplant the expert opinions of Metro Transit. Only if the decision is found to be unreasonable can the undersigned overturn the determination of a responsible accident.

Could this accident have been prevented? Yes, if the Grievant hadn't stopped where he did, closing the space cushion to nothing. The Grievant didn't offer a reason why he didn't stop 15 feet in front of the crosswalk. He knew in advance that he needed to turn. There was no excuse to eliminate the space cushion. Then, he failed to clear the intersection, looking left-right-left. It was a significant problem that he failed to look all the way to the right.

The operator stopped in the wrong spot; he never looked all the way to the right. He looked right earlier, but he was too far back at the time. He never looked down the sidewalk, or he would have seen the biker. Either the operator was not rocking and rolling or he was not paying sufficient attention from the time the bus stopped until he hit the bicycle. He clearly started to move the bus before he cleared the front of the bus. If he had, he would not have removed his foot from the break. It is egregious.

The Union's argument that the video has more light than the actual scene is preposterous. The shadowing on the video shows there is light at the location of the accident. Furthermore, the operator told the supervisor and TCC that he had a green light; now he denies saying that. This was clearly a responsible accident.

The level of discipline is appropriate. When there is a pedestrian accident involving a person walking or on a bike it is of a serious nature. About six years ago, there were three very significant accidents involving pedestrians. Metro Transit instituted the Look and See campaign. It was reviewed and redone some years later precisely to avoid this type of accident.

Although the Grievant has no responsible accidents in the last three years, he violated three rules. There were 33 cases of terminations involving operators with comparable records over the last 6 years. Management looked at the full array of mitigating and aggravating circumstances. They always terminate the employee. In some cases, they bring the employee back on a Last Chance Agreement (LCA). They do not do so in egregious cases like this one.

It would erode the safety standards of Metro Transit if the Grievant were to be reinstated. Accordingly, the Employer asks that the grievance be denied.

The Union

To demonstrate that it had just cause to terminate the Grievant, the Employer must show that the employee breached a rule or expectation and that the discipline imposed is appropriate in light of all relevant factors. The Employer failed on both counts.

Metropolitan Council Operating Policy 4-7d distinguishes bicycle accidents from pedestrian accidents. This was not a responsible accident. The Grievant did not miss an opportunity to avoid the accident.

Safety Specialist Larsen, in concluding that this was a responsible accident, stated that the video shows the bus moving and the operator failed to clear the approaching bike from the right. The video clearly shows the Grievant looked left-right-left before and at the stop. Further, the testimony suggests that Mr. Larsen did not spend a lot of time looking at the case. His lack of credibility is revealed by stating he spent 12 hours on the case although he held the safety conference on the day after the accident. He did not spend 12 hours on the case.

The Employer has not provided any analysis or rationale as to why this case should not follow the progressive discipline laid out in Policy 4-7d, other than one sentence in Jay Kluge's First Step Grievance report where he states: "The seriousness of a bus on bicyclist accident and the potential for harm does raise the bar for discipline."

The video clearly shows that the Grievant looked to the right. It is entirely reasonable that he did not see the biker. It was midnight in July, it was dark everywhere, even according to the Street Supervisor. There were no lights on the dark colored bike and the cyclist was wearing dark colored clothing. The cyclist violated the Minnesota statutes; it is unfair to blame the Grievant who had no reasonable opportunity to avoid the accident.

The question is whether the Grievant did something unreasonable. He should not have been found responsible. The fact that he stopped in the crosswalk does not change the fact that he could not see the bike.

Even if this were a responsible accident, the Employer had failed to show that discharge is appropriate. Nothing in any written documents gives employees notice that they are subject to immediate discharge for bicycle accidents. In a 2008 arbitration award upholding a discharge, the arbitrator made it clear that the overall record of the employee is critical, the Employer must look at each case on its merits.

In this case, the Employer used the same reasons for finding it to be a responsible accident as it did to say that it was an egregious accident. If the Employer had a good reason for discharging the Grievant, it is not provided in the record. Further, Metro Transit failed to consider

mitigating circumstances: the Grievant's good record; the fact that he is an instructor; it was a dark night and the bike had no lights. Metro Transit has made a significant investment in this employee.

The Grievant had a clean record; he was terminated and not offered a Last Chance Agreement. Metro Transit does not want to give him another LCA. The prior one expired a year and a half prior to the accident in question and should not have been considered. However, the Employer raised it in the grievance meeting; it was considered in determining how to handle the case.

The LCA had expired. It contains a term that stated the Grievant would automatically be terminated if he had a bicycle or pedestrian accident during the term of the LCA. Metro Transit effectively extended the terms of the LCA by terminating the Grievant under the circumstances presented.

The Union asks that the Grievant be reinstated with appropriate relief.

DISCUSSION

The Grievant worked as a bus operator for the Employer for approximately nine (9) years. In addition, he was trained as, and served as, a relief instructor at the MJR garage. In the early hours of July 8, 2015, the bus he was driving struck a bicyclist. After investigation of the incident, Metro Transit determined that termination was the appropriate level of discipline and rejected the Union's offer of an LCA. The termination was grieved and the undersigned now must determine whether there was just cause for the termination.

The collective bargaining agreement provides that the Employer reserves the right to discipline employees, but that such discipline shall be just and merited. The Union states, without opposition from the Employer, that this language is synonymous with just cause and that a two pronged analysis must be conducted. That is, to find just cause for the termination, it must be found that the Grievant breached a rule or expectation and that the discipline imposed is appropriate in light of all relevant facts.

The Employer contends that the accident of July 8 was a "responsible accident". According to Bulletin No. 85 dated August 14, 2013:

Accident

An accident is an unplanned and unwanted event. These events are considered accidents:

- Collisions or contact with other vehicles
- Collisions or contact with objects

- Collisions or contact with pedestrians
- Passenger falls or injuries on bus

Responsible Accident

An accident will be considered responsible if the accident could have been prevented by the operator.

Metro Transit points to three safety violations by the Grievant prior to the accident in support of its assertion that this was a responsible accident: The operator failed to maintain a space cushion by failing to stop 15 feet in front of the crosswalk; he failed to clear the intersection by looking left-right-left; he started to move the bus prior to clearing the area in front of him.

Although the Union argues strenuously that this was not a responsible accident, the undersigned is convinced it could have been avoided. There is no question that the bus was stopped in the crosswalk, providing little to no room for a pedestrian or a bicycle to cross the street within the crosswalk. The video does show that the Grievant moved his head left-right-left as required, but it does not show that he moved as far to the right as he did to the left. Had he done so, it is quite likely that he would have seen the bicycle approaching on the sidewalk even though the rider was dressed in dark clothing and there were no apparent lights on the bike. The video does not clearly show the Operator looking out through the passenger door or rocking and rolling to look around any possible blind spots. The video also shows that the bus was moving when the bike was in front of it, supporting the Employer's position that the driver failed to clear the area in front of him prior to moving the bus, or at least prior to release of the break which would allow the bus to move forward.

The Grievant testified that he stopped in the crosswalk so as to make a smooth stop. In doing so, he violated the rule to put safety first and consideration for customers second. He should have anticipated the need to stop, especially since he was going to be turning right, and should have been able to come to a smooth halt 15 feet in front of the crosswalk.

The Union argues that it was a dark night, and that the cameras on the bus are light-enhanced making the area in question appear brighter than it actually was. These may be mitigating factors, but it do not change the fact that the Grievant could have avoided the accident, especially by stopping in the proper place.

This was a responsible accident. Therefore, the undersigned must decide whether termination is the appropriate discipline under all of the circumstances presented. The Notice of Discharge states that the discharge was due to a violation of the Metropolitan Council Operating Policy 4-7d. In pertinent part, this policy provides as follows:

Policy:

The primary focus for the Metropolitan Council's Operating Policy is to develop the capacity of the workforce to meet the mission of the Council. The

Metropolitan Council will use the Operating Policy in communicating the agency mission and purpose, to clearly define performance expectations, and provide feedback to employees to support work efforts linked to work unit and agency business goals.

Procedure:

The Operating Policy is a Bus Operator tracking tool and is the primary policy for employee assessment. It encompasses responsibilities, tools, and discipline.

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Manager Discretion

The Operating Policy is designed to promote consistency and equal treatment. Managers have discretion to depart from the Policy to take into account mitigating and aggravating factors. The Drug and Alcohol Policy, Sexual Harassment and Inappropriate Behavior Policy, Falsification to a Manager's Inquiry or an Official Document, Driving With a Suspended License, pedestrian accidents, serious safety infractions or customer service complaints, etc. are representative of situations which would be dealt with outside of this Operating Policy. In some situations, termination may be justified on the first offense.

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Discipline. Employees who continually fail to meet the responsibilities of the job are disciplined through a 3-step progressive discipline process. Discipline milestones are shown in Appendix B. In some situations, termination may be justified on the first offense.

Appendix B
METRO TRANSIT
2005 OPERATING POLICY
(THRESHOLDS FOR WARNINGS)

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Safety – within a rolling three (3) year period:

- 1st responsible accident – verbal warning
- 2nd responsible accident – written warning
- 3rd responsible accident – final written warning
- 4th responsible accident – termination

This policy will continue the practice of the safety guidelines, including the practice of taking mitigating circumstances into account in determining whether to issue a warning for minor accidents.

The Union argues that because bicycle accidents are not included in the section regarding “management discretion”, a bicycle accident falls within the progressive discipline scheme and that, even if this was a responsible accident, the Grievant should only receive a verbal warning. Despite the fact that bicycle accidents are not included in said section of Policy 4-7d, Ms. Bailly, the Director of Bus Operations for the past six (6) years asserted that Metro Transit includes bicycles within the definition of pedestrians and that it is the policy of Metro Transit, since she assumed her current position, to terminate all operators involved in pedestrian or bicycle accidents, although many are then brought back on LCAs. Thus, the Grievant’s situation does not fall into the 3-step progressive disciplinary scheme delineated in Appendix B, but warrants immediate termination. Ms. Bailly defended the failure to clearly specify that bicycle accidents are in the discretionary section by pointing to the age of policy 4-7d (adopted in 2005), as well as by referring to the Look and See campaign and other training and teaching materials wherein pedestrians and bicycles are always discussed together.

The Union introduced Safety Operating Policy, Document #I-09, dated June 28, 2011. This document references Policy 4-7d as well as numerous other bulletins. This document is designed to provide “guidelines for Garage Management staff.” It states that

This policy will continue the practice of the safety guidelines, including the practice of taking mitigating circumstances into account in determining whether to issue a warning for minor accidents.

This policy describes the steps to be undertaken in the event of an accident and provides options for management in dealing with an operator involved in an accident. This policy, like 4-7d, contains a section entitled “Managers Discretion”:

The Operating Policy is designed to promote consistency and equal treatment. Managers have discretion to depart from the policy taking into account mitigating and aggravating factors, or any of the following:

- Falsification into a manager’s inquiry
- Falsification of an official document
- Driving with a suspended license
- Driving without a license on your person as per Metro Transit Policy
- Pedestrian Accidents
- Bicycle Accidents
- Other Serious Safety Infractions

It is not clear from the testimony in this case that the Grievant or other employees actually see either this policy or 4-7d. The document was introduced by the Union, primarily for the purpose of demonstrating the procedures, including consideration of LCAs, which management should take in determining appropriate discipline in the event of a safety violation. The

document, however, undermines the Union argument that this case falls into the 3-step progressive disciplinary process. The accident at hand clearly requires the application of manager discretion, with the clearly stated goal of Metro Transit “to promote consistency and equal treatment.”

The Employer argues that it has a clear and consistent policy of automatically terminating all operators who are involved in either a bicycle or a pedestrian accident. Such a blanket policy does not satisfy the just cause standard and, in fact, many such employees are still employed by Metro Transit. Ms. Bailly reviewed all cases of operators who, like the Grievant herein, had a clean work record during the three (3) year period prior to the date of the infraction. She testified that of the 39 other drivers in the past six years, 33 were terminated. Of the three who were not terminated, all received some sort of lesser discipline based on the circumstances involved. Ms. Bailly also conceded that of the 33 discharged, 16 returned to work and 17 did not. Together with management, she looks at the egregiousness of the behavior causing the accident and determines whether the employee should return to work on a non-precedent setting LCA. It is her considered opinion that the case involving the Grievant is one that falls into the “not returning” classification.

The Employer did not review the number of operators who had prior accidents on their records during the past three (3) years to determine the number of those that were returned to work on a LCA after an accident with a pedestrian or bicycle. Ms. Bailly did acknowledge, however, that there are operators with one to three prior accidents who get into an accident with a pedestrian or bicycle and are returned to work on a LCA. Ms. Bailly also acknowledged that over the six years she has been in her position, there have been approximately 60 pedestrian or bicycle accidents. She was unable to say how many of the operators involved in those accidents were still employed by Metro Transit.

Safety Specialist Jerry Larsen also testified that this was an egregious accident. In fact, this was one of the most egregious accidents he has ever reviewed. Stopping within the crosswalk and failing to look all the way to the right were egregious behaviors. According to Larsen, the severity of the Grievant’s actions is not affected by what he hit.

Mr. Larsen’s statement stands in direct contrast to the disciplinary scheme adopted by the Employer, as laid out in the policies referenced above. Based on the policy, the Grievant would have received a verbal warning had he acted precisely as he did on July 8, but struck another vehicle instead of a bicyclist. Would the Grievant’s actions still be considered egregious by Ms. Bailly, would it still have resulted in termination?

Metro Transit considers the Grievant’s actions to be egregious, but it failed to provide other examples of egregious behavior, nor did it provide examples of behaviors that are not so egregious as to allow the employee to return to work on a LCA. Although each Last Chance Agreement contains a non-precedential clause, the failure of the Employer to provide any details regarding the 16 accidents in which the operator was returned to work, or the 17 in which the operator’s termination was the final outcome following a pedestrian or bicycle accident is

problematic. The Employer's statement that the Grievant's action fall on the side of the non-returning employees is conclusory and provides no guidance, whatsoever, to the undersigned in determining whether the Employer has treated its employees equally and consistently so as to uphold or deny the grievance. Although the Employer asks that the arbitrator not substitute her judgment for that of the professionals at Metro Transit, the failure to provide specifics regarding other accidents is the same as asking the undersigned to simply accept the Employer's determination to terminate.

To be sure, the record contains one example of a situation in which an operator's bus struck a pedestrian and the employee returned to work on a LCA. In 2011, the Grievant was involved in an accident when he lost sight of a pedestrian while making a left turn. The pedestrian, apparently, was startled by the approaching bus and may have moved into it. The Grievant was returned to work on a non-precedential LCA.

The Union contends that the Employer did not allow the Grievant to return on another LCA in 2015 because it considered the 2011 LCA in evaluating appropriate discipline for the July 2015 accident. Although vehemently disputed by the Employer, this allegation is supported by two facts. At the first step grievance meeting, an Employer representative mentioned the old, expired LCA when the Union pointed out that the Grievant had a clean work record. For purposes of determining discipline in 2015, JO did have a clean work record, as the incident giving rise to the LCA was more than three years old. The Employer's mention of the LCA indicates that, at the very least, it was in the minds of Metro Transit representatives at the time the grievance was being considered.

In addition, although Ms. Bailly testified that the 2011 accident was not considered, she stated that the fact that the Grievant was on an LCA during the three-year look back period can be considered. This, of course, is strongly contested by the Union and, in fact, flies in the face of the contractual language and the Employer's policy which provides that the records of warning (and discipline) are to be dated using the date of the infraction that "triggered" the warning. Thus, the Grievant's record was clean as of three years after the date of the 2011 accident and should never have been a consideration or thought in the minds of any management personnel.

Last Chance Agreements are generally used by employers to reinstate employees who have violated some term or condition of employment. They often place restrictions on employees which are more limiting than those included in company policies and procedures and the collective bargaining agreement. The Grievant's 2011 LCA included the following conditions:

- 1) This agreement will remain in force and effect in Mr. O's employment file for thirty-six (36) months from the date of the agreement.
- 2) Mr. O cannot have any responsible pedestrian or bicycle accidents.
- 3) Mr. O cannot have more than one (1) responsible accident for the duration of this agreement.
- 8) Mr. O agrees that within a 12 month period, . . . he cannot exceed six (6) occurrences of absenteeism, of which . . .

- 9) Mr. O agrees that within a rolling 12 month period, . . . , he cannot exceed one Class B Violation or have any Class A Violations.
- 11) Failure of Mr. O to comply with any terms of this agreement shall result in his immediate termination. Such termination will be deemed as just and merited as interpreted in Article 5, Section 1 of the Labor Agreement between the parties.

Items 3, 8, and 9 are more restrictive than the policies set forth in the collective bargaining agreement and policy 4-7d. Item 1 makes very clear that the LCA has a 36 month duration and, thereafter, it is null and void. Item 11 sets forth the consequence of violating the terms of the LCA. Of particular interest is item 2. In conjunction with Item 11, this sets forth a condition that the Grievant will be terminated if he has a responsible pedestrian or bicycle accident during the life of the LCA.

In July 2015, the LCA was no longer in effect. Nevertheless, the Employer terminated Mr. O for having a responsible bicycle accident. Metro Transit argues that it terminates all operators in the event of a pedestrian or bicycle accident. As seen above, at least 16 operators are currently driving for Metro who had such accidents. The Employer argues that this accident was so egregious that the Grievant cannot be allowed to return to work. But, Mark Lawson, ATU President, testified about an accident in which a pedestrian ended up under the bus which had to be lifted in order to release the person. That operator was not discharged. Lawson contends that dozens of operators are driving for Metro with responsible pedestrian or bike accidents on their records.

The Employer clearly places an emphasis on safety. It spends a great deal of time, effort, and money in training its operators and ensuring that Metro Transit is operated in the safest manner possible. Pedestrian and bicycle safety is emphasized through bulletins and trainings. Accidents with pedestrians and bicycles can have significantly greater consequences than bus on car or bus on stationary object accidents. Metro claims that it terminates all operators who have responsible accidents with pedestrians or bicycles. However, Metro Transit re-employs many, if not most, of its operators who have such accidents. The Employer has failed to demonstrate that the discipline imposed on employees involved in pedestrian or bicycle accidents is fair and consistent. Its claim that it terminates all such employees is false. Although Metro Transit may initially terminate all such employees, it reinstates many, if not most, of them.

It appears that the test used by Metro in determining whether to reinstate an employee on an LCA after a responsible pedestrian or bicycle accident is how egregious the accident was. The Employer failed to provide examples of other egregious accidents that warranted termination, nor did it provide examples of accidents which were sufficiently not egregious that an LCA was implemented. Metro Transit summarily declared this incident too egregious to warrant an LCA. Egregious is synonymous with shocking, appalling, terrible and horrendous. Although it is clear that the Grievant could have taken steps to prevent the accident, the facts presented do not meet the definition of egregious. It is true that the bicyclist could have suffered more serious injury than a sore knee. The fact that, according to the District Supervisor's report,

the bicycle did not have any visible signs of damage indicates that the bus was not moving very fast and that the impact made by the bus was not forceful.

The Employer also contends that there were no mitigating circumstances despite the fact that the bicyclist was violating Minnesota statutes by riding without proper lighting. The law provides that a bicycle should have a front lamp that is visible from at least 500 feet. Had the cyclist obeyed this law, and possibly had he been wearing light or reflective clothing, this accident would not have happened.

The fact that the Grievant was a nine year employee of Metro Transit also serves as a mitigating factor in considering the level of discipline to impose for this responsible accident. The Employer has invested in this employee who should be permitted to return to his position as an operator.

The grievance filed in this matter asks that the Grievant be reinstated with full pay and benefits. While the undersigned finds that the degree of discipline imposed on the Grievant is excessive, I have also found that he did have a responsible accident with a bicycle. This is a serious safety violation and warrants serious discipline. Although there is authority for arbitrators to impose Last Chance Agreements on parties, the undersigned is not inclined to modify the terms of the collective bargaining agreement between the parties who were unable to negotiate an LCA themselves.

The nature of the serious safety violations committed by the Grievant is significant. However, the lack of information provided by the parties as to the discipline imposed in comparable situations¹, leads the undersigned to conclude that the termination should be reduced to an unpaid suspension of 60 working days.

Based on the above and the record in its entirety, the undersigned Arbitrator issues the following

¹ The Employer argues that all employees who are involved in bicycle or pedestrian accidents receive the same discipline: termination. Metro Transit ignores the fact that almost 50% of these terminations are actually suspensions of some unknown (to the undersigned) length with terms imposed through Last Chance Agreements. The fact that these LCAs are each, individually, non-precedential does not obviate the fact that the employees were effectively not terminated. In order to establish a pattern of equal and consistent treatment, the fact that at least 16 employees involved in these types of accidents have returned to work demonstrates that these LCAs are part of the practice of the Employer and that termination is not the sole form of discipline imposed by it in the event of a pedestrian or bicycle accident.

AWARD

The Employer did not have just cause to terminate the Grievant. The Grievant is to be reinstated as a bus operator² with back pay, seniority and all other contractual benefits, less a sixty working day suspension and any interim earnings. The undersigned will retain jurisdiction for a period of 30 days to resolve any questions of remedy.

Dated this 29th day of January, 2016 at Madison, Wisconsin.

Susan J.M. Bauman
Arbitrator

² The Grievant shall not return to his position as a relief instructor.