

IN THE MATTER OF THE ARBITRATION OF A DISPUTE BETWEEN

**METRO TRANSIT DIVISION,
METROPOLITAN COUNCIL**

and

BMS Case No. 16-PA-0851
(Carter Discipline Grievance)

AMALGAMATED TRANSIT UNION, LOCAL 1005

Arbitrator Paul Gordon

Appearances:

Tony Brown, Labor Relations Program Manager, Metropolitan Council, 390 No. Robert Street, St. Paul, MN 55101 appeared on behalf of Metro Transit Division.

Attorney Emily Marshall, Miller Obrien Jensen P.A., 120 S. Sixth Street, Suite 2400, Minneapolis, MN 55402 appeared on behalf of Amalgamated Transit Union, Local 1005 and Grievant Lee Carter.

ARBITRATION AWARD

Metro Transit Division, herein Metro Transit or the Employer, and Amalgamated Transit Union, Local 1005, herein ATU or the Union, are Parties to a Collective Bargaining Agreement which provides for the final and binding arbitration of certain disputes. The Parties have been unable to resolve a dispute over the discipline of ATU member Lee Carter, herein Carter or Grievant. Pursuant to the provisions of the Minnesota Bureau of Mediation Services, the Parties selected Paul Gordon to serve as arbitrator. Hearing on the matter was held on August 26, 2016 in St. Paul, MN. No transcript was taken or prepared. The Parties made oral arguments at the close of the hearing. The record was supplemented with electronic copies of certain exhibits and the record was closed on September 3, 2016.

ISSUES

The Parties stipulated to a statement of the issues as:

Was the Record of Warning (ROW) issued to the Grievant on 12/27/15 just and merited?

If not, what is the appropriate remedy?

The Parties use the terms “just and merited” as equivalent to “just cause.”

RELEVANT CONTRACT PROVISIONS

ARTICLE 5 GRIEVANCE PROCEDURE

Section 1. Metro Transit reserves to itself, and this Agreement shall not be construed as in anyway interfering with or limiting, its right to discipline its employees, but Metro Transit agrees that such discipline shall be just and merited.

* * *

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.

* * *

ARTICLE 11 WORK RULES AND PRACTICES

All practices and agreements governing employees enforced by Metro Transit or its predecessors, not in conflict with nor changed by the provisions of this Agreement, may be changed subject to the following conditions:

- (a) Work rules and/or practices may not be in conflict with the contract;
- (b) Metro Transit must meet and confer with the ATU prior to making any such changes or new work rules;
- (c) New work rules and/or practices must be reasonable;
- (d) The Metro Transit will furnish the ATU with a copy of all bulletins or orders changing any such rules, regulations and practices;
- (e) Work rules and/or practices are subject to the Grievance Procedure.

BACKGROUND AND FACTS

Metro Transit operates public bus service throughout the Minneapolis and St. Paul metropolitan area. Lee Carter, Grievant, is a bus driver for Metro Transit with 23 years of service. He has received a Safe Driver Award approximately 18 times. He was issued a disciplinary Record of Warning (ROW) for failure to make a proper stop for a railroad crossing on December 27, 2015 at 46th Street and Hiawatha on route 74. This is not an Exempt railroad crossing under Metro Transit Rules. Buses are equipped with video cameras that record sight and sound while the bus is operated.

Metro Transit has promulgated rules for drivers to follow when approaching railroad crossings. The Bus Operators Rule Book & Guide provides in pertinent part:

29 LRT/RAILROAD GRADE CROSSINGS
ALL BUSES MUST STOP AT NON-EXEMPT RAILROAD CROSSINGS.

Activate your right directional signal, then your 4-way flasher lights. Stop as far to the right as legally possible. Stop the bus at a distance of no farther than 50 feet and no closer than 15 feet from the nearest track. Open the doors if it is necessary to hear. Look and listen for any approaching trains, or for signals approach of a train. Proceed only if it is safe to do so. Leave your 4-way flashers on until your bus has completely cleared the tracks. Activate your left directional signal before proceeding.

* * *

A violation of rule 29 is considered a Class A rule 21A violation under the Metro Transit operating policy on thresholds for warnings. The rule is based on Minnesota State Statute.

Before the incident herein, Grievant had been trained on rule 29 and has successfully passed testing on this and other operating rules. Metro Transit has also issued a number of bulletins to bus drivers that restate and reinforce this rule in various situations and locations. One such bulletin, No 54 dated July 8, 2011, mentions the stop no closer than 15 feet from the nearest track, but does not mention the 50 foot maximum distance. It does state, however, that the specific procedures are in section 29 and 30 of the Bus Operator Rule Book and Guide. Grievant did not see all of those bulletins, although they were available to him. No bulletins had been issued for the location at issue in this case.

On December 27, 2015 Metro Transit supervisor Bruce Otiso was making compliance check observations of Transit busses as they operated at and near the rail crossing just west of the intersection of E 46th Street and Hiawatha Avenue. He made his observations from a parking lot located at the northeast corner of the intersection between 8:30 a.m. and 10:30 a.m. During that time he observed what he felt were three possible Class A violations involving three separate buses for not stopping at railroad tracks or other crossing violation. He issued a notice of violation for each, one of them being for Grievant. Mr. Otiso also observed 28 other buses at the intersection during that time and did not observe any rule violations for them. All 31 buses faced the driving situation as Grievant.

The Notice of violation for Grievant stated in pertinent part:

Operator failed to stop at rail crossing. 4 ways were activated but operator rolled through the tracks without stopping as required and stated in the operator rule and guide book page 13 section 29 "ALL BUSES MUST STOP AT NON-EXEMPT RAILROAD CROSSINGS." He slowed down but never stopped. Show of more effort to make complete stoop will be helpful.

The violation Grievant was noticed for was for not stopping his bus no farther than 50 feet away and no closer than 15 feet from the nearest track, in violation of rule 21A. It is a Class A violation which automatically generates a report to an operator's manager for further processing. The video from inside Grievant's bus and Mr. Otiso's observations are consistent with each other.

The two other bus drivers that were observed committing rule violations for crossing the railroad received the same discipline. Some members of management felt that 3 such violations during that time period was a surprising number. Others in management felt it was not that unusual. The Union Business Representative who testified thought it was unusual.

There is a light rail crossing on the westerly side of Hiawatha Avenue at that intersection running parallel with Hiawatha. The tracks are busy with train travel. The tracks are close to the intersection. The intersection is at a slight angle and is controlled by stoplights. Hiawatha has two lanes of traffic in both northbound and southbound directions. There are also a turn lanes for south bound traffic on Hiawatha turning eastbound and westbound onto E 46th Street. There is a rail crossing stop arm just west of the furthest west southbound lane of traffic on Hiawatha, which is approximately 15 feet from the crossing.

The timing of the traffic control lights at the intersection varies for a number of reasons and can be unpredictable. Green lights can be a short as four or five seconds.

E 46th Street also has two lanes of traffic in each direction but, at the intersection it has only one lane for proceeding directly across Hiawatha. It has a turn lane for traffic to turn northbound. There is a southbound turn lane and traffic can turn southbound from the middle lane, which is the lane that also allows traffic to proceed straight across Hiawatha. There are no clearly marked stop lines on the pavement on westbound 46th Street that delineate where a 15 foot to 50 foot stop area is or where a bus is to stop near the railroad crossing. Many other railroad crossings do have such stop lines.

The bus Grievant was operating is approximately 40 feet long. As represented in Grievant's exhibit Tab 6 (Google Map of the intersection with a measured distance overlaid), a bus stopped at the rail cross arm location, and in front of the marked pedestrian crosswalk, would extend into the two southbound lanes of traffic on Hiawatha. The rear of the bus would be near the center of the intersection. This would potentially, and probably, block southbound traffic if that traffic had a green light.

Also, a bus stopped on E 46th Street behind the traffic control lights and before the intersection would be well in excess of 50 feet from the rail crossing.

On the date and location at issue, Grievant was traveling westbound on E 46th Street intending to continue west past Hiawatha Avenue. He is very familiar with the intersection. As he approached the intersection he was casually talking to a passenger. This did not interfere with his ability to observe the intersection, traffic, or any potentially approaching trains. At the intersection there was a red light for westbound traffic and there was one car stopped there in Grievant's lane, which was the middle lane. Grievant stopped the bus approximately one car length east of that

car, placing the front of the buss about two car lengths from the intersection. The front of the bus was well beyond 50 feet from the rail crossing. The lights for westbound traffic turned green and traffic began to move just after Grievant had stopped. He stopped completely for approximately two seconds as the car in front of him began to move.

When the traffic light turned green and traffic moved, Grievant went forward through the intersection. He put on his 4 way lights and slowly went through the rail crossing without making any other stop before crossing the rail tracks and continuing westbound.

When Grievant drove the bus through the intersection there was no train approaching and the cross arm and rail crossing lights were not lowered or flashing. As he approached the intersection and went through it he could see there was no train approaching, the cross arm was not down and crossing lights were not flashing. He put on his 4-way lights and slowed down as he went through the railroad crossing.

At the hearing in this mater Grievant testified that the stop he made on the east side of Hiawatha before the light turned was, he felt, his required stop before crossing the rail tracks. If the light turned green it was because no train was coming. He was also aware that a stopped bus at the cross arm location might block the southbound traffic on Hiawatha, and he was concerned about not blocking traffic. He has driven that route on an off for ten years and makes the stop there the same way he did in this incident. He also testified that over the years he had seen other supervisors in the parking lot area observing buses and he had not been told he was not stopping correctly, so felt he was doing it the right way.

At the hearing in this matter the Union introduced a video taken at a later date at the same locating in which westbound buses are seen, some stopping at the cross arm location and at least one going through the intersection without stopping at the cross arm location.

Metro Transit has disciplined other drivers for not making a proper stop at the same intersection and railroad crossing. Drivers have not been disciplined for blocking the box or blocking other traffic at the intersection.

At an incident on March 27, 2016 Grievant was at the same location when his bus was stopped at the cross arm location and westbound lights then turned red. He was unsure of what to do and called immediately on his radio to his supervisor, who instructed him to continue through the then red light and proceed westbound. No trains were approaching at that time and the cross arm was not down, nor were the rail crossing lights flashing. Grievant then continued through to the west.

After receiving the information from Supervisor Otiso on December 27th, Metro Transit issued a Record of Warning to Grievant on January 11, 2016. It referenced Grievant received a Class "A" violation (coded 21A) Railroad Crossings of 12/12/2015. It referenced a Transit Supervisor witnessed him failing to stop for a railroad crossing at 46th Street and Hiawatha. It referenced the Rule Book and Guide, and cited the language concerning the activation of traffic lights and stopping the bus no farther than 50 feet away and no closer than 15 feet from the nearest

track. The ROW also gave Grievant additional training, and a warning that failure to improve will result in further disciplinary action up to an including discharge.

Thereafter, Grievant participated in two separate training events that covered required stops at rail crossings. At one event the trainer felt, after discussing with Grievant what happened, that he was surprised Grievant got a Class A violation, and directed Grievant's attention to some white lights on the railroad apparatus as a warning a train was coming. This did not help Grievant too much as the lights often did not work. He was told where he was supposed to stop. The video of this training shows a bus go through the intersection and across the railroad tracks without stopping as Grievant had done. The second trainer did not express support for Grievant's actions, and trained in a different manner than the first.

There have been other locations in the Metro Transit system that have specific procedures for rail crossings where the crossing have been difficult for bus drivers to negotiate. A cited example is at the LRT Gate area crossing at the Mall of America. No such specific policy exists for the rail crossing at E 46th and Hiawatha.

The Union grieved the ROW. It alleged Metro violated Article 5 Section 1, discipline must be just and merited. It also alleged a violation of Article 5 Section 3, any dispute or controversy. The grievance sought a remedy to remove or reduce.

In the grievance process the Union contended the poor design and physical layout of the intersection is a mitigating circumstance and that a ROW is too harsh. There are multiple things for a driver to contend with there, with a difference in real time and perceived time. The policy doesn't say a complete stop. Operators are faced with blocking traffic and violating traffic signals if they stop at the cross arm location. Grievant did stop within 50 feet of a red traffic light. This action was safest for him and the passenger. The problem isn't the operators', as several were written up that day. There should be a procedure such as at Mall of America. Grievant slowed down; he didn't blow through the intersection. Other operators cross those tracks in the same way.

Metro Transit denied the grievance reasoning that the video established the violation, which is a Class A violation and MN State Statue 169.28, along with Grievant's knowledge of the policy regarding railroad crossings. In the denials and the steps of the grievance process, management considered the factors the Union argued were mitigating, but declined to find them mitigating circumstances. Management felt that even if those mitigating factors were in play, they still would not justify not making the required stop where it should have been made. The denials also referenced Article 11 of the CBA for requestor processes for changes or reasonableness of work rules, and that there are not varying degrees of a stop. This arbitration followed.

Further facts are as set out in the discussion.

POSITIONS OF THE PARTIES

Metro Transit

In summary, Metro Transit argues that the video from the bus shows that Grievant violated the railroad crossing policy. Safety is very important to Metro Transit and a Class A violation is so serious as to warrant a ROW. Metro Transit makes sure all bus operators are aware of all policies, especially operating the bus safely. In the grievance process the Union did not dispute that Grievant committed a Class A violation. The Union argues mitigating circumstances to reduce or eliminate the discipline. Management did listen to mitigating circumstances during the grievance process but determined those circumstances were not involved in the behavior here, and a one-year ROW was appropriate. There are no mitigating factors warranting a discipline less than a ROW.

Metro Transit argues it provided sufficient proof that Grievant engaged in the alleged misconduct and that the level of discipline was appropriate in light of the circumstances. Grievant did not stop at the railroad crossing. The video shows that Grievant was talking with the passenger and not concentrating on the crossing. It was a Class A violation.

Metro Transit also argues that the Policy defines the level of discipline for a Class A violation, which is what was issued. Grievant did not make a mistake by not reacting soon enough. He crossed and did not look both ways. None of the mitigating factors the Union proffers were present at the time of the violation. There is no excuse for the failure to stop. This is not about confusion. Grievant was trained to stop. The other drivers were treated the same. The video here is as conclusive as in another case involving Grievant.

Metro Transit requests that the discipline be upheld and the grievance be denied.

The Union

In summary, the Union argues that a ROW is not appropriate for Grievant, who is a highly experienced, safe bus driver who was confused at this intersection. In a serious discipline like this, the Employer should be held to a clear and convincing standard of proof as to both what the Grievant did, and what the appropriate discipline should be. In this case the discipline is out of step with the conduct, is punitive rather than corrective and, it neglects the mitigating factors in play here. No one disputes the rule of stopping between 15 feet and 50 feet of the railroad crossing. But the rail crossing is by a multi-lane highway and near a rail station creating a lot of pedestrian traffic. Train traffic does not stop and can cause traffic lights to change quickly. It is a peculiar and unpredictable intersection. Drivers were not trained how to navigate this tricky intersection. No standard operating procedure has been developed about how to do it.

The Union argues that drivers have been left to use their own judgment as to how to apply the different rules that apply to them and use their best judgment in making safety considerations. Sometimes safety trumps rules, sometimes one rule trumps a different rule. Because of the odd intersection and lack of specific instruction, there is a lot of room for error. It is not surprising that management witnessed a number of drivers, not just Grievant, making a mistake as they crossed the road. The only way to comply with the rule is to stop in the intersection, which blocks other traffic.

Management's response was extreme, and didn't recognize the number of errors at this intersection are from a training problem that can be corrected through instruction or a plainly written standard operating procedure. Three violations of this type in a year can end a career. Grievant has been driving this route on and off for years and has always made the crossing the same way without any other instruction for this or similar rail crossings.

The Union argues that management has not figured out how to manage this intersection. They need to figure it out first and then explain to drivers how to handle it. A serious violation here is not appropriate. Training the drivers is a better approach than mass discipline.

The Union argues that when following the decision making procedures in the Bus Operator's Rule Book & Guide, the priorities are safety, then best interest of customer, then Standard Operating Procedures, and here Grievant made his decisions about crossing in that order. He should not be disciplined for that.

The Union also argues that the discipline should be set aside because it is major discipline and out of step with progressive discipline, and Grievant had never been warned that he was doing anything wrong. It is punitive rather than corrective because he had no idea he needed to change how he handled the intersection. This was the first time he was notified there was something wrong. The discipline ignores the mitigating circumstance that a lot of other operators did not know what to do there, and ignores the unique nature of this intersection with a lack of site specific training creating a knowledge vacuum. That requires impromptu strategy. It ignores Grievant's long record of good service. He did not try to hide anything. He was lulled into thinking he was complying with the rules.

The Union argues that Grievant should have been counselled, not disciplined. A bigger issue is that management still has not issued a standard operating procedure to all the drivers for this intersection, and balance the competing directive about not blocking the box or impeding traffic, as well as where the 50 foot line actually falls. It is counterintuitive to stop in the middle of a busy highway. The Union needs a ruling that it is not OK to discipline drivers who are doing their best to figure out what to do at a dangerous intersection where they cannot follow all of the rules. A standard operating procedure is needed and Grievant should not be disciplined for this. Neither should anybody else.

The Union requests that the discipline be set aside.

DISCUSSION

This is a discipline case and the Employer has the burden of proof for production and persuasion. The CBA requires that discipline be just and merited, which the Parties agree calls for a just cause determination. Generally, just cause involves proof of wrongdoing and, assuming guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, whether the punishment assessed by management should be upheld or modified. See, *Elkouri & Elkouri*, Sixth Edition, p. 948. In essence, two elements define just cause. The first is that the employer must establish conduct by the Grievant in which it had a disciplinary interest. The second

is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest. See, e.g. AMERIGAS PROPANE, A-6129 (Gordon, April, 2006); Milwaukee County, MA-13562 (Gordon, August, 2007); LINCOLN COUNTY, OR ERB (Gordon, August, 2016). Inherent in just cause are principles of progressive discipline and Due Process.

The first inquiry is whether Metro Transit has established conduct in which it has a disciplinary interest. Metro Transit says it has because Grievant clearly did not stop the bus within the 15 feet to 50 feet space rovided by rule 21A. The Union contends that the Employer has not because this should not be a matter for discipline, but rather of instruction or the issuance of a standard operating procedure for this and like intersections.

The video from Grievant's bus during the incident, the photographs of the area, particular Union exhibit Tab 6, the testimony of Mr. Otiso and the testimony of Grievant all establish, clearly and convincingly, that Grievant did not stop the bus in the area at least 15 feet from the railroad tracks and within 50 feet of the railroad tracks. The stop he made behind the stoplights was well in excess of 50 feet. Grievant testified that he was not sure if the location of his stop was beyond the 50 feet requirement and that he may have been within 50 feet. The other evidence, however, is overwhelming that his stop was well beyond 50 feet from the tracks most probably closer to 100 feet based on the length of the bus and general widths of traffic lanes as well as lengths of admittedly small cars.

Metro Transit certainly has a safety interest in having buses stop within the limits prescribed by rule 21A/29. It has the rule and under Metro Transit Procedure 4-7d a 21A railroad violation is a Class A violation. Collisions between trains and motor vehicles sometimes, tragically, do happen leading to serious injury and even death. Crossing railroad tracks and making proper stops before crossing them is a very serious matter and Metro Transit has a serious disciplinary interest in rule 21A violations.

Grievant may have had his flashing lights on and may have driven slowly through the railroad crossing, but flashing lights and driving slowly do not in themselves avoid a collision. Stopping in the proper area defined by the rule is far more likely to avoid a collision with a train.

The Union may have some arguments mitigating the nature of the violation here, but that does not detract from the very serious nature of the disciplinary interest Metro Transit has in buses making safe and proper stops before a railroad crossing and in conformity with rule 21A/29. The rule is based on Minnesota State Statute Sec. 169.28. Metro Transit has clearly established conduct on Grievant's part in which it has a disciplinary interest.

The next inquiry is whether the discipline of a Record of Warning for this Class A violation is reasonably related to Metro Transit's disciplinary interest. Class A violations are the most serious types of violations under the operating policy. Under Procedure 4-7d, one Class A violation is a written warning, which is what is involved in this case. A second Class A violation within a rolling calendar year calls for a final written warning and, a third within a rolling calendar year calls for termination. Various combinations of Class A violations and Class B violations can also lead to termination. This is basically a progressive discipline schedule based on the seriousness and number of violations.

The discipline here is a direct application of the rules, procedures and schedule of penalties established by Metro Transit. The Union is aware of these rules, procedures and schedules of penalties. Although rules and practices may not be in conflict with the collective bargaining agreement, must be reasonable and are subject to the grievance procedure, Article 11 of the CBA gives Metro Transit the right to make or change rules and practices. It has the right to classify railroad crossing violations as a Class A violation and to establish the schedule of offenses for discipline. The rule is consistent with state statute requiring the stop within those parameters. Therefore, in the first instance, the discipline here is in conformity with the schedule and is reasonably related to the disciplinary interest.

The Union argues that a Record of Warning for a Class A violation here is not progressive because it is a more serious discipline than other types of discipline. But, as noted, the schedule of violations is basically progressive. The discipline here is the first step in that. A Class A violation does carry a more serious penalty than Class B violations or Customer Service violations. But the interests reflected in Class A violations are among the most serious, and there is a reasonable relationship there. The discipline here does not violate notions of progressive discipline.

The Union points out that Grievant is a long term employee with a good work record. That is true. He is a valuable employee. But his length of good service does not make him immune from discipline for rule violations; nor does that makes the penalty less related to the disciplinary interest.

The Union contends that the discipline is punitive and not corrective. However, the ROW does provide for him to get additional training to turn his record around, and he did get that training; even if the trainers did have different views on the incident. Also, Grievant had received training on rule 21/29 and was aware of its requirements. Although the Union argues he was not trained on stops at this particular or similar intersection and crossing, that argument goes too far. It could be applied to almost any intersection or railroad crossing, or for any number of potential violations.

One of the Union's strongest arguments is that this is a difficult intersection and railroad crossing combination and it presents situations where conflicting rules may apply at once. The Union points out that to stop near the 15 foot point and within 50 feet of the tracks would require a bus to potentially block traffic on Hiawatha Avenue, to block the box in violation of state law and Metro Transit rules. Drivers are required to avoid this, and they are also to be mindful of pedestrians and other traffic further complicating their performance at this location. The Union points out that safety is the overriding concern, followed by customer satisfaction and then standard operating procedures. The Bus Operator's Rule Book & Guide provides for that order of considerations. Grievant and the Union argue that Grievant's actions in stopping where he did, rather than at the 15 foot mark and thus block the intersection, does provide for the best safety and avoids violations other rules and traffic laws. Grievant's good faith in wanting and attempting to be safe is appreciated. However, the problems outlined here by Grievant and the Union were not present during the incident at issue. Grievant had a green light all the way through the intersection and stopping near the 15 foot area would not have blocked southbound or other traffic. He needed to make a complete stop and look in both directions, but his stop need not have been for long so

as to block traffic. No train was approaching forcing the crossing lights to activate and stop arm at the crossing to come down, which would have caused a longer wait in the intersection or southbound lanes on Hiawatha. Grievant actually had a good view of the train tracks in either direction from his vantage point behind the stoplights and as he entered the intersection. He could see that no train was approaching. No pedestrians were present in the westerly crosswalk. The car that had been in front of the bus had turned to go southbound and there was no other traffic in front of Grievant to contend with. In this particular case, the design problems at the intersection and railroad crossing the Union identified did not amount to a reason why Grievant could not have stopped the bus between 15 and 50 feet of the tracks. Thus, in this particular case, those matters which might be mitigating in other circumstances were not mitigating factors here.

The Union and Grievant point out that there are frequent bus drivers that make the same type of stop as Grievant did at that intersection and this supports their contentions that the rules are difficult to understand and apply there. They note two other drivers were given Notice of Violations that morning for improper stops at that railroad crossing. One of the other videos at the hearing showed another bus going through the railroad crossing without stopping in the 15 to 50 foot space required by the rule. Grievant testified that other drivers stop the way he does at that intersection and crossing. However, the record is also clear that of the 31 buses observed by management that morning, 28 of them did make the stop properly. The video showing the other apparent violation also showed a bus making an apparently proper stop in the proper area. This shows that drivers can and regularly do properly stop at that railroad crossing in compliance with rule 21/29. Contrary to an argument of the Union, everybody is not doing it wrong, although some clearly are.

Grievant and the Union argue that his stop before the intersection was a stop in conformity with the rule and he has never been warned or disciplined before about the way he made the stop at that location. They suggest this should be a reason for leniency here. He claims he has seen supervisors in the past observing the location and he had not been warned or disciplined for the way he made the stops there. However, Grievant's lack of a prior warning about stopping at this location is not persuasive. What management may have been doing or observing at those times is not in the record. Grievant had been trained on the rule for railroad crossings and knew what the rule was. He had gone through training that included railroad grade crossings and light rail in respect to the light rail line that was put in on the Blue line/Hiawatha line. He was not lulled into violating the rule because he had not been disciplined for it before.

The Union argues that drivers and Grievant are easily confused about how to make the stop at this and similar intersections and railroad crossings, given the potential conflict in rules. However, the record does not reveal that Grievant ever expressed his confusion to management or asked any questions about how to make that stop, or request specific instruction before this incident. It would seem that if this crossing was as challenging as the Union makes it out to be by virtue of several drivers not stopping according to the rule, that there would have been some inquiry by drivers to management about it. The confusion suggested by the Union may exist in some instances, but it does not appear to be as widespread as suggested. It is not sufficient to avoid the discipline here. An example of sorts on the other hand is the voice recording admitted into evidence at the hearing which was made after the incident here. In that recording Grievant was stopped at the proper location when the traffic light turned red. He was unsure of what to do and

whether to proceed through the red light. He was able to immediately speak with a supervisor on the bus radio and get a direction to proceed through the light because he had entered the intersection while the light was green. There appears to be no reason why Grievant or any other driver who questioned to location for the stop at that railroad crossing could not have contacted a supervisor and asked for direction on how to proceed and how to make the stop.

Metro Transit did consider those factors as mitigation brought forward by the Union and their written denials of the grievance outline the points and arguments made by Grievant and the Union in that regard. Metro Transit considered the arguments, but found the factors were not mitigating in view of the violation. The Union may not agree with the conclusion that those factors do not mitigate the level of discipline or serve to avoid discipline at all, but that does not mean that Metro Transit did not consider them.

Metro Transit also considered the Union's suggestion that a standard operating procedure be instituted for this and similar crossings, but referred the Union to Article 11 of the CBA in its written response and denial at the first step in the grievance process. The undersigned agrees that such a standard operating procedure could be the subject of discussion between the Parties such as was done for the Mall of America crossing issue. There is no foregone conclusion as to what, if any, resolution might be made in such an effort. However, the undersigned is not persuaded that a standard operating procedure for this intersection and railroad crossing should be made by an award in a grievance arbitration. That would be akin to the arbitrator adding to the terms of the CBA. It also falls outside of the just cause analysis.

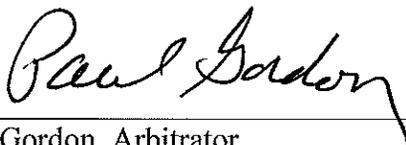
Metro Transit has established conduct in which it has a disciplinary interest and the discipline is reasonably related to that interest. There are no mitigating factors here which serve to lessen or avoid discipline. There are no progressive discipline or Due Process reasons why the discipline should not stand. Regardless of the standard of proof, Metro Transit has clearly and convincingly established just cause for issuing the Record of Warning as just and merited.

Accordingly, based on the evidence and arguments of the Parties, I issue my

AWARD

1. The grievance is denied and dismissed.

Dated this 25th Day of October, 2016 in Fuquay Varina, NC.



Paul Gordon, Arbitrator