



parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

## **ISSUES**

Did the Employer have “just and merited” cause to discharge the grievant? If not, what is the appropriate remedy?

## **RELEVANT CONTRACT 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.

## **FACTUAL BACKGROUND**

Metro Transit provides light rail and bus transportation services throughout the Twin Cities Minnesota metropolitan area. Metro Transit is a part of the Transportation Division of the Metropolitan Council. The Union represents a unit of bus operators, light rail operators, and mechanics employed by Metro Transit.

Donald Buchanan began working for Metro Transit as a bus operator in 2014. He generally has a good work record with no current filed complaints on his record. He has one prior disciplinary incident on his current employment record – a Record of Warning that resulted from driving into a parked bus at a garage and causing minor damage.

The incident that gave rise to this arbitration proceeding took place on October 3, 2019. On that day, Mr. Buchanan was operating a bus on Route 68 which traverses St. Paul. Buchanan progressed through downtown St. Paul, arriving at the Robert Street stop at 11:02 a.m. where a large number of passengers boarded. The video recording of that stop shows that among those boarding was a passenger who placed a bicycle on the front outside rack of the bus and two passengers in wheelchairs. Since a lift was needed to assist the two wheelchair passengers board, the bus fell behind schedule.

A few minutes later, Buchanan noticed that the farebox on the bus was not properly printing transfer tickets. Buchanan called the Transit Control Center (TCC) while at a stop on State Street at 11:17 a.m. to report the problem. Buchanan received a responsive call from TCC a few seconds later as he was pulling out from the stop. Buchanan remained speaking on the headset phone as the bus proceeded to the next stop at State Street and East King Street.

The passenger who had boarded with a bicycle – a Mr. Deleon – exited from the rear of the bus at this stop. Buchanan testified that he observed the passenger walk away from the bus without making any verbal or physical signal that he intended to retrieve the bicycle from the front of the bus. The video recording shows that after walking away from the bus to a sidewalk, Deleon turned left and began to walk towards the front of the bus.

Buchanan testified that he pulled away from the stop only after checking both the left and right-side mirrors. The video shows that Deleon then began to run toward the front of the bus to a point adjacent to the front right door where he waved his arms and slapped the door. Buchanan, who was still on the headset, did not see Deleon and continued to drive away from the stop. The video recording shows Deleon falling to the right of the bus, but it does not show whether the bus struck Deleon.

Several passengers started to yell as they observed Deleon's fall. Buchanan testified that he stopped the bus and went outside to investigate. He saw Deleon lying on the street with an apparent injury to his leg. Buchanan testified at the arbitration hearing that he also observed a broken thermos, a liquor bottle, and a substantial amount of liquid nearby. Buchanan reported the incident to a TCC supervisor.

At the arbitration hearing, the Employer elicited testimony from four supervisors/managers as to their respective roles in the subsequent investigation and disciplinary determination:

Street Supervisor Idar Bilij

As a Street Supervisor, Bilij's role is to visit the scene of an incident, interview the operator, take pictures, and send information to the Safety and Risk departments. Bilij testified that Buchanan told him that while he wasn't sure what exactly happened, it appeared that Deleon fell between the curb and the bus and was "caught by the rear dual [tires]."

Safety Specialist Tim Bowman

Bowman is a Bus Systems Safety Specialist. His duties include investigating accidents to determine whether an operator was responsible for an accident. He does this by reviewing operator statements, supervisor reports, and by watching relevant video recordings. Based on Bowman's review of the video recordings, he concluded that Buchanan violated Employer safety policies by talking on the headset while operating the bus and by failing to check the right-side mirror before pulling away from the East King Street stop. Bowman also concluded that the wheels of the bus likely hit Deleon and that Buchanan was responsible for the accident because he had a reasonable opportunity to avoid the accident but failed to do so.

Investigator Chang Yang

Chang Yang is an Assistant Transit Manager who is responsible for determining whether discipline is warranted per Operating Policy 4-7d. That policy adopts a progressive discipline approach that presumes that a written warning is appropriate for a second responsible accident but that also provides that management can depart from that presumption based upon the existence of aggravating and mitigating factors. Yang conducted an investigatory interview of Buchanan who admitted that he had been distracted while pulling away from the East King Street stop due to being on the headset. At the conclusion of his investigation, Yang recommended that Buchanan be disciplined. At the arbitration hearing, Yang testified that operators who are deemed responsible for causing pedestrian accidents generally are terminated.

Director Christy Bailly

Christy Bailly is the Director of Bus Operations and the manager who ultimately made the decision to discharge Buchanan. Bailly testified that two aggravating factors made termination appropriate: 1) Buchanan failed to check the right-side mirror before pulling out from the stop; and 2) Buchanan violated policy by using the headset while operating the bus. Bailly also expressed the opinion that six years of service is too brief to establish tenure as a mitigating factor. Finally, while Bailly testified that most operators who cause a pedestrian accident are terminated, she acknowledged on cross-examination that there have been operators who have a pedestrian or bicycle accident following one to three prior accidents who have returned to work on last chance agreements.

At the arbitration hearing, Mr. Buchanan testified that he stopped the bus after he heard a thumping sound and passengers yelling. He testified that he does not know whether or not the bus struck Deleon, but after seeing a broken thermos on the street once he got out of the bus he

believed it likely that the thumping noise was caused by the bus running over the thermos rather than by the bus striking Deleon.

## **POSITIONS OF THE PARTIES**

### **Employer:**

The Employer contends that it had just cause to discharge Mr. Buchanan for improperly operating a bus and thereby causing a serious pedestrian accident. More particularly, the Employer claims that the grievant operated the bus in violation of well-established policies by failing to check the right-side mirror before pulling out from a stop and by using the headset while operating a bus. As to the remedy, the Employer argues that Metro Transit has a general policy of terminating operators responsible for a pedestrian accident and that this policy is necessary for the safe operation of the Employer's transportation system.

### **Union:**

The Union maintains that the Employer did not have just cause to support its discharge decision because the Employer's conclusion that the grievant was responsible for the accident is not supported by the evidence. More specifically, the Employer did not prove that Buchanan's bus struck a pedestrian or, that even if such contact did occur, that Buchanan caused the pedestrian to fall into the bus. Finally, the Union asserts that, in any event, discharge is too severe of a penalty under the circumstances of this case.

## **DISCUSSION AND OPINION**

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has

submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 15-25 (8th ed. 2016).

**A. The Alleged Misconduct**

The Employer alleges that Mr. Buchanan engaged in misconduct by violating two safety policies and by being responsible for a serious pedestrian accident. The component parts of that allegation are analyzed below.

**1. The Headset Policy**

The Employer has issued various policies to guide employee behavior. Part 6.3 of the Bus Operator's Training Guide and Rule 173 of the Operator's Rule Book both expressly provide that bus drivers should not use the transit handset while operating a bus. The handset, instead, is only to be used when a bus is not moving.

The evidence clearly establishes that Mr. Buchanan violated this rule. The video recording shows Buchanan talking on the handset while the bus is in motion. Buchanan does not contest this allegation and he admits that he was still talking on the handset as he pulled away from the East King Street stop. The Employer has adequately established this first alleged violation,

**2. The Exiting a Bus Stop Policy**

The Employer has adopted Leaving a Bus Stop standard operating procedures that operators are expected to follow. Bus operators are trained on these procedures which involve an eleven-step process for safely pulling away from a stop. The procedures include checking both the right-side and left-side mirrors two or three times before leaving a stop.

The Employer claims that Buchanan did not check the right-side mirror before pulling away from the East King Street stop. Both Safety Specialist Bowman and Director Bailly reached this conclusion after reviewing the relevant video recording. In contrast, Buchanan testified that he did check the right-side mirror on at least two occasions, and the Union contends that this testimony finds support in the video recording. Not surprisingly, I find the video recording to be inconclusive on this issue.

Nonetheless, circumstantial evidence supports the Employer's claim. Buchanan acknowledges that he was not aware of Deleon's presence on the right-side of the bus until he heard a thumping sound. It is likely that Buchanan would have noticed Deleon's movements on the right-side of the bus, however, if he had checked the right-side mirror as he claims. Accordingly, although not free from some doubt, I believe that the Employer also has established this second policy violation.

### **3. Responsibility for the Accident**

Based on its investigation, the Employer found that Buchanan was "responsible" for the pedestrian accident at issue. The Employer's policy is to find an operator to be responsible for an accident if the operator had a reasonable opportunity to avoid an accident but failed to do so. The Employer argues that the bus struck Deleon as a result of Buchanan's two safety policy violations.

The Union asserts two counter arguments. First, the Union contends that the Employer has not established that the bus actually hit Deleon. Second, even if such contact occurred, the Employer has not shown that Buchanan caused Deleon to fall against the bus. The Union, accordingly, argues that Buchanan should not be deemed responsible for the accident.

With regard to the Union's first contention, it is true that the video recording does not show the bus striking Deleon. But circumstantial evidence strongly suggests that such contact did occur.

Deleon suffered an injury to his leg after he fell down and a thumping sound could be heard on the bus. The most plausible explanation for the injury under these circumstances is that the bus hit Deleon. Indeed, this is the conclusion initially shared by both the Employer's investigators and by Mr. Buchanan himself.

The Union's second contention is that Deleon may have injured himself by falling into the bus without Buchanan doing anything to cause that fall. Put another way, Buchanan should not be held responsible for a fall that was not his fault. While there is no evidence that Buchanan somehow tripped Deleon or steered the bus in Deleon's direction, that fact that Deleon was running alongside the bus while escaping Buchanan's notice is at least partially attributable to Buchanan's two safety missteps. While Buchanan's actions might not have been the proximate cause of Deleon's loss of balance, the two safety missteps certainly contributed to the accident's occurrence.

Based on the above, I conclude that the Employer has adequately established the alleged misconduct.

### **The Appropriate Remedy**

The Employer contends that it has a policy of generally terminating the employment of bus operators who are responsible for a pedestrian accident. This policy is appropriate, the Employer maintains, because safety is Metro Transit's number one priority and responsible pedestrian accidents are serious failures of a safe transportation network.

The Union, on the other hand, asserts that at least two arbitrators have found Metro Transit's blanket termination rule to be inconsistent with the notions of a just cause standard. *See Metro Transit*, BMS Case No. 16-PA-0170 (Bauman, 2016); *Metro Transit*, BMS Case No. 09-PA-0223 (Jacobs, 2008). The Union also points out that Director Bailly acknowledged in her testimony that there have been operators who have a pedestrian or bicycle accident following one

to three prior accidents who have returned to work on last chance agreements. The Union argues that Buchanan deserves a similar last chance at continued employment.

I agree with the Employer that pedestrian accidents are serious shortcomings for a transit system and that the Employer has a legitimate need to avoid and deter such accidents. But, I also concur with the Union that the issue of just cause should be determined on the facts and circumstances of each case as opposed to being governed by a blanket rule. As Metro Transit's Operating Policy 4-7d provides, aggravating and mitigating factors are important to consider when determining the appropriate level of discipline

In this instance, the grievant's two safety policy violations along with his relatively short tenure constitute aggravating factors. I do not see any mitigating factors on the other side of the ledger. Accordingly, termination appears to be a presumptively appropriate remedy.

The Union cites to the discipline of Joseph Oladipo as an appropriate, off-setting comparator case. *See Metro Transit*, BMS Case No. 16-PA-0170 (Bauman, 2016). In that case, the Employer discharged Mr. Oladipo following a night-time accident in which Oladipo's bus struck a citizen on a bicycle. The Employer concluded that Oladipo had committed safety violations by failing to stop in front of a crosswalk, failing to clear the intersection by looking left-right-left, and by starting to move the bus before clearing the area in front of the bus. Arbitrator Bauman, however, reduced the level of discipline to that of a sixty-day suspension. The Union argues that the misconduct engaged in by Buchanan is similar in nature to that of Oladipo and should result in a similar outcome.

To be a proper comparator case for disparate treatment purposes, the factual contexts of the two incidents must be substantially similar. In this instance, however, the Employer has pointed out a number of dissimilarities:

- 1) Oladipo's degree of negligence was less severe since the bicyclist was wearing dark clothing and did not use any type of light;
- 2) The injury caused by Oladipo was very slight, i.e., a sore knee;
- 3) Oladipo had a clear three-year disciplinary record, while Buchanan has a prior written warning on his three-year record; and
- 4) Oladipo had a longer work tenure, i.e., nine years as opposed to six for Buchanan.

Given these dissimilarities, the Oladipo case is not an appropriate comparator, and the Union has fallen short in its attempt to establish disparate treatment.

Based on the above, I find that the Employer's discharge sanction is an appropriate remedy in this case.

#### **AWARD**

The grievance is denied.

Dated: November 11, 2020

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Stephen F. Befort  
Arbitrator

