

IN THE MATTER OF ARBITRATION) GRIEVANCE ARBITRATION
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between)
)
Metropolitan Council,) Paul Bibeau - Termination
Metro Transit Division) Grievance
)
)
-and-) BMS Case No. 20-PA-1648
)
)
Amalgamated Transit Union)
Local 1005) November 30, 2020
))

APPEARANCES

For Metropolitan Council, Metro Transit Division

Benjamin Reber, Attorney, Wiley Law Office, PC, Edina, Minnesota
Marcia Padden, Labor Relations Program Manager
Joy Hargons, Labor Relations Program Manager
Anthony Harris, Transportation Manager
Curtiss Carr, Safety Specialist
Steven McLaird, Deputy Director - Garage Operations

For Amalgamated Transit Union Local 1005

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John McConnel, Recording Secretary/Assistant Business Agent
Paul Bibeau, Grievant

JURISDICTION OF ARBITRATOR

Article 13, Arbitration Procedures, of the 2017-2020
Collective Bargaining Agreement or Contract (Employer Exhibit
#1) between Metropolitan Council, Metro Transit Division
(hereinafter "Employer," "Metropolitan Council" or "Metro
Transit") and Amalgamated Transit Union Local 1005 (hereinafter
"ATU" or "Union") provides for an appeal to arbitration of
properly processed disputes in Article 5.

The Arbitrator, Richard J. Miller, was selected by the Employer and Union (collectively referred to as the "Parties") from a panel submitted by the Minnesota Bureau of Mediation Services. A hearing in the matter convened on October 15, 2020, at 9:00 a.m. in the training room at the St. Paul Rail Facility Light Rail Operations-Lowertown, 340 Broadway Street, St. Paul, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his personal records. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions.

The Parties' counsel elected to submit summary post hearing briefs no later than November 16, 2020, which were submitted in a timely manner. The Arbitrator then exchanged the briefs electronically through his office on November 17, 2020, after which the record was considered closed.

ISSUES AS DETERMINED BY THE ARBITRATOR

1. Was the termination of bus operator Paul Bibeau following his fifth responsible accident in a rolling three-year period just and merited?
2. If not, what is the appropriate remedy?

STATEMENT OF THE FACTS

Metro Transit is a part of the Transportation Division of the Metropolitan Council. Metro Transit is the primary mass transit provider in the Twin Cities seven-county metropolitan area, covering 907 square miles that provides light rail and bus

transportation services to the public. In Bus Operations, Metro Transit provides over 50 million rides a year on over 120 different routes.

The ATU represents approximately 2,000+ members, most of whom are employed by Metro Transit as bus drivers, light rail operators, and mechanics.

Safety is the number one priority of Metro Transit. Consequently, there are several policies and standard operating procedures pertaining to the safe operation of buses for Metro Transit. Bus Operators have been thoroughly trained in all aspects of bus operation.

Part of the training operators receive is the Smith Safety System, which was independently created to guide all drivers in the safe operation of their vehicles in all manner of driving environments. (Employer Exhibit #6-001). The focus of the Smith System is contained in five Safety Keys, which teach operators on how to create space and time for themselves so that accidents are less likely to occur. These five Safety Keys are discussed by Metro Transit officials with operators on a regular basis.

The first three Safety Keys are: 1. Aim high in steering; 2. Get the big picture; 3. Keep your eyes moving. They address the necessity for operators to observe their surroundings at all times. Operators who fail to perceive and respond to known

warning signs are far more likely to be involved in an accident due to their lax driving behaviors. Operators must observe any and all possible hazards that could arise while operating a vehicle. (Employer Exhibit #6-002).

The last two Safety Keys have less to do with vision, but rather an operator's ability to avoid an accident. The Safety Key "Leave Yourself An Out" requires operators to leave enough space around their bus in order to provide room for error.

(Employer Exhibits #6-006; #8-023). This space cushion gives operators both time to respond to hazards, as well as space to avoid accidents when something happens quickly. While driving in a city environment, operators are trained to give themselves four feet of space between the bus and the curb or parked cars. (Employer Exhibit #8-023).

The final Safety Key, called "Make Sure They See You," pertains to operators utilizing the tools they have at their disposal, such as their headlights, flashers, and horn to ensure that other drivers are aware of their presence. (Employer Exhibit #8-023). Giving those on the road the forewarning they need to be aware of a bus's presence can mean the difference between life and death, especially in situations involving pedestrians.

In addition to being provided general guidance on operating buses safely, operators are given specific instruction on

actions they must take in certain scenarios through standard operating procedures and the Part-time Operators Training Manual. (Employer Exhibit #8-020-029; Union Exhibit 1). This guide states that while operating a bus in a city environment, operators should:

- * [N]ot drift over lane markings
- * Plan maneuvers when driving over lane markings
- * Leave 4 feet between bus and curb or parked cars
- * Stay behind stop lines and crosswalks.

Id.

In addition, Chapter 7 of the Employer's bus operator training manual specifically sets forth the following rules and guidelines pertaining to operating a bus in a city environment.

In this regard,

Operators drive in the right lane on city streets to safely make bus stops.

To avoid hazards when the bus is moving, the right side of the bus should be approximately four feet from the curb or parked cars.

The operator must protect the space on the right side of the bus staying close enough to the curb or parked cars to prevent vehicles from squeezing between the bus and the curb.

The operator may cross over lane markings to maintain a four foot clearance.

If the operator is not able to maintain the four foot clearance then the operator must slow down.

Be alert for car doors opening or pedestrians stepping in the roadway.

Be aware of clearances between the bus and large vehicles.

Do not unnecessarily drive over the centerline, make planned maneuvers as needed.

Operators must also be aware of hazards on the left side of the bus such as the mirrors of oncoming vehicles.

(Union Exhibit #1).

Metro Transit's progressive discipline policy for bus operators is contained in Operating Procedure 4-7d. (Employer Exhibit #5). Bus operators may be disciplined in cases of "responsible accidents" pursuant to the "Safety" section of Procedure 4-7d. Id., p. 5-006. A "responsible accident" is defined as one where the operator has a reasonable opportunity to avoid the accident but fails to do so.

The progressive discipline policy for bus accidents provides the following four steps:

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

(Employer Exhibit 5-006).

The progressive discipline policy also provides management with discretion to depart from progressive discipline based on the presence of mitigating and aggravating factors. (Employer Exhibit #5-001).

The Grievant, Paul Bibeau, began working for Metro Transit as a bus operator on August 7, 2017. During his employment, the

Grievant has received numerous formal customer commendations for his good work and service to the public, and he never received a single complaint. (Employer Exhibit #7-001). He has received 16 customer commendations and no complaints. (Union Exhibit #3). Additionally, although he has received standard warnings for absences under the Employer's no-fault attendance policy, he has no history of behavioral or conduct issues whatsoever. (Employer Exhibit #7-001).

Unfortunately, the Grievant has been involved as an operator in bus accidents, which have been deemed to be "responsible accidents," with all of the accidents causing minor damage to his bus. On September 7, 2018, the right-side mirror on the Grievant's bus came into contact with the side mirror on a truck in the adjacent lane. (Employer Exhibit #7-006). A Safety Conference and One on One Training was the Safety Action taken in this accident. (Employer Exhibit #7-008).

On September 9, 2018, the right-side mirror on the Grievant's bus came in contact with a tree as he attempted to pull in closely to a bus stop in order to assist a disabled passenger in a wheelchair. (Employer Exhibit #7-011). A Safety Conference and One on One Training was the Safety Action taken in this accident. (Employer Exhibit #7-013).

On October 5, 2018, the Grievant was making a left turn from 32nd Street onto Nicollet Avenue. While in the turn the

Grievant stopped for a car coming from his right and a car from his left made contact with the left side of the Grievant's bus. (Employer Exhibit #7-021). The Grievant was given a Final Record of Warning pursuant to Operating Procedure 4-7d (three responsible accidents within the last 36 months). (Employer Exhibit #7-022). He was given two additional One on One Training sessions. (Employer Exhibit #7-024). He was also warned that if he had another responsible accident within three years he could be placed in termination status. Id.

On December 20, 2018, the Grievant's bus came into contact with the side of a wall in the Leamington Ramp in St. Paul. (Employer Exhibit #7-034). This was held to be a responsible accident. (Employer Exhibit #7-035). Notably, because the Grievant had not been trained on how to enter the Leamington Ramp, Metro Transit opted not to terminate him following the December 20, 2018 accident, but could have under the progressive discipline policy (four responsible accidents in a rolling 36-month period). The Employer, instead, placed the Grievant on another Final Record of Warning and warned him that having one more responsible accident could subject him to further discipline up to and including termination. (Employer Exhibit #7-037). He was given One on One Training.

The operative facts underlying this matter occurred on August 25, 2019. On that day, the Grievant was operating Route

21 through Minneapolis, a route he had operated hundreds of times prior to August 25, 2019. The material facts began just after 5:00 p.m. as the Grievant operated his bus westbound on Lake Street. These facts were captured for the most part by several cameras located in strategic locations on the bus (windshield, front door, front to back, etc.) The placement of these cameras are commonplace on Metro Transit buses. A video recording is also retained for review, capturing the movements of the bus (speed, location, braking, etc.) and what occurs inside and outside the bus. In this case, the video recording, with audio, was an invaluable tool in ascertaining what occurred and it was repeatedly reviewed before and during the arbitration hearing.

As depicted in the bus video recording, this particular section of westbound Lake Street has two lanes of traffic, separated by staggered white markings, along with rows of parked cars to the right and moving traffic to the left, hazards which are especially prevalent at rush hour.

It is undisputed that this is a heavily traveled street, especially during rush hour at 5:00 p.m.. The speed limit on this stretch of Lake Street is 30 miles per hour. Accordingly, the video recording indicates that the Grievant appropriately operated his bus within that speed limit at all times, never exceeding 30 miles per hour.

The Grievant continued to operate his bus down Lake Street toward the Midtown Global Market building where the incident at issue took place. The Grievant's speed as he approached the intersection just prior to the block in question was 14.5 mph.

The Grievant testified, at this particular moment his attention was focused on several known hazards, even aside from the many other vehicles that were operating around him. Specifically, the Grievant explained that there are frequently pedestrians near the yellow awnings on the corner and at the bus stop that is staged just past the stop light. The bus stop also presents a unique hazard due to the opaque sign that is posted on the bus stop shelter.

It is important for bus operators to watch this bus stop area as the bus approaches because sometimes pedestrians can emerge from behind the sign. The Grievant testified that there are often pedestrians, scooters, and bicyclists on the sidewalk of this particular block due to the market, and in addition to keeping an eye on the surrounding traffic, as a bus operator he must also be sure to stay alert to the presence of jaywalkers.

As the Grievant arrived at this block, another hazard was also just starting to come into view-ahead in the distance, one can just barely start to see that one of the cars parked on the right side of Lake Street has its brake lights on. As the Grievant explained, this particular block of Lake Street is a

common drop-off/pick-up location for Uber drivers, and cars are often parked on this block with their brake lights on. As a result, when the parked cars came into view ahead, the Grievant would take appropriate protective action consistent with his training, including by moving his bus further to the left, slowing down, and—as always—keeping his eyes moving.

The video confirms the Grievant's driving practice in this regard. First of all, using the lane lines as a reference point, one can clearly see that the Grievant gradually moved his bus to the left as he approached the row of parked cars ahead.

The video also shows that at the beginning of block the Grievant was traveling 14.5 mph and then increased his speed to 19.7 mph while traveling down this block.

As the Grievant continued toward the next intersection (where we was to make a right turn onto Chicago Avenue), the parked vehicle's brake lights remain on until precisely 17:05:41.92, at which time the brake lights clearly turned off. His speed remained at 19.7 mph.

At the exact same time, by switching to another camera on the video recording, one can see that another vehicle was driving along side of the Grievant's bus in the left lane, something the Grievant needed to monitor at the time.

When the Grievant's bus was only approximately 1.5 seconds from the vehicle (17:05:42.59), one can first see the car door

from the same car that previously had their brake lights on and then went off begin to open. The Grievant's speed remained at 19.7 mph.

The Grievant testified that at this moment, he was not looking at this vehicle and, thus, he simply did not see the vehicle's door had begun to open because, pursuant to his training, his eyes continued to move in order to monitor the many other hazards in the area, such as the vehicle to his left, the upcoming intersection, and the sidewalk to the right. The Grievant claims that at this time he was adhering to two of the five "Safety Keys" taught to all bus operators ("Keep Your Eyes Moving" and "Aim High in Steering"). (Employer Exhibits #6-003, #6-005). Therefore, when the Grievant's bus reached the vehicle just a little more than one second later (at 17:05:44.18), one can clearly see that it was simply too late for him to take any sort of evasive action in a safe manner.

Then, as the Grievant's bus continued to pass this vehicle, the driver inexplicably continued to open the door to the point that it came into contact with a light at the rear of the Grievant's bus. The sound of that impact can be heard on the video at 17:05:45.12—less than one second after the Grievant's bus reached the car.

Following this incident, the Grievant immediately contacted the transit control center via radio and reported that the door

of the parked car had come into contact with his bus. (Employer Exhibit #3-003). The Grievant also appropriately filed an "Accident/Incident Report" later that day truthfully describing that "[w]hen I was approx. 20 Ft. past the car he opened his door too far and it caught on my door light and pulled it loose." (Employer Exhibit #3-002).

Notably, this incident did not result in any appreciable damage to the Grievant's bus. As the Grievant testified, he was able to simply plug the door light back in, and following an inspection the maintenance department reported that the "scuffs did not break paint," and "[b]us is OK to run with no repairs needed." (Union Exhibit #2).

Anytime a Metro Transit bus operator is involved in any kind of accident, the circumstances of the accident are reviewed by a safety specialist who determines whether the bus operator should be held "responsible" for the accident. In this case, Safety Specialist Curtiss Carr was assigned to investigate this accident. Notably, Safety Specialist Carr investigated two of the Grievant's previous accidents and deemed them to be "responsible accidents."

Following his review of the bus video and the accident documentation, Safety Specialist Carr then met with the Grievant on August 29, 2019 to discuss the circumstances of the accident. (Employer Exhibit #3-005). Following that conference, Safety

Specialist Carr determined that the Grievant was responsible for the accident based on his finding that the "primary cause" of the accident was that "Operator did not use 4 feet while passing park vehicles." Safety Specialist Carr, however, was not able to estimate how far the Grievant's bus was from the parked cars.

Following Safety Specialist Carr's determination that the Grievant was "responsible" for this accident, Garage Manager Amanda Walker reviewed the accident in order to determine whether the Grievant's actions warranted discipline. Garage Manager Walker interviewed the Grievant about the accident on September 6, 2019, and her notes from that interview were entered into evidence at Employer Exhibit #3-008. As indicated in Garage Manager Walker's notes, during the interview the Grievant explained that "[a]s I was approaching the intersection, I was slowly passing the parked vehicle and the man opened his door." (Employer Exhibit #3-008). The Grievant further explained that he did not recall experiencing any distraction prior to the accident, that he was abiding by his safety training, and that there was nothing that he could have done to avoid the accident from happening.

It is important to note that while Garage Manager Walker's notes indicate that the Grievant claimed to have been "driving 3 feet away from the vehicles," the Grievant testified without contradiction that Garage Manager Walker's notes were not

completely accurate, and that what he actually said in the meeting was that he was "driving at least 3 feet away from the vehicles." The Grievant, however, noted in his accident report, as well as his Loudermill Investigatory Hearing on September 19, 2019, that he was only three feet away from the vehicle when its door opened, and this was the distance he normally traveled from vehicles parked on the side of the road. (Employer Exhibits #3-002, #3-008). In any event, as noted previously, operators are specifically trained that "[i]f the operator is not able to maintain the four foot clearance then the operator must slow down." (Union Exhibit #1).

On September 17, 2019, Garage Manager Walker sent a Loudermill Hearing notice to the Grievant, which stated that "it is the intent of Metro Transit to terminate you from employment." (Employer Exhibit #3-012). Garage Manager Walker then met with the Grievant on September 18, 2019 for a Loudermill hearing during which she asked the Grievant a single question: "Mr. Bibeau was asked why he should not be terminated from employment with Metro Transit[.]" (Employer Exhibit #3-014). According to Garage Manager Walker's notes, the Grievant responded by noting, amongst other things that the vehicle's door "was only opened for a time period of 1 second. I did not approach an open car door. The camera shows that the driver opened his car door all the way to exit and that is why his door

hit the bus." Id. The Grievant also noted his consistent history of passenger commendations, his good relationships with his coworkers and managers, and that "I absolutely love my job and want to continue my employment here with Metro Transit." Id.

On October 7, 2019, the Employer terminated the Grievant's employment, citing his "[violation of Metropolitan Council Operating Policy 4-7d" and "4 responsible accidents." (Employer Exhibit #3-016).

The Grievant filed a written grievance on October 7, 2019, protesting his discharge, and seeking to be reinstated to his bus operator position. (Employer Exhibit #2). The grievance was denied by the Employer on October 28, 2019 and December 23, 2019. Id. The Union ultimately appealed the grievance to arbitration

UNION POSITION

The Grievant operated his bus consistent with his training and he should not have been charged with responsibility for this last accident.

This is not a case in which the Grievant was speeding or otherwise engaging in reckless driving behavior that proximately caused this accident. The Grievant was properly driving within his own lane at a reduced rate of speed and while leaving sufficient space on both the right and left sides of the bus,

the person in the car inexplicably opened their door into the side of the Grievant's bus just as he was passing the car. Given those circumstances, the Grievant should not have been held responsible for an accident that was clearly caused by the actions of someone else.

The Employer claims that the Grievant was properly held responsible for the accident because he did not sound his horn as he approached the vehicle. However, as the Grievant explained at the hearing, there is no black-and-white rule that operators must sound their horn at parked cars, and in the seconds prior to the accident, he simply "did not perceive [the vehicle] to be that kind of threat" that would warrant sounding his horn. Indeed, it should be remembered that the vehicle's brake lights were turned off before the Grievant passed the car.

Looking at the scene of the accident, it cannot reasonably be concluded that an operator traveling at a reasonable rate of just 19.7 miles per hour in the middle of the lane and with a clear path ahead could somehow be charged with violating the rules of operation and then fired. The only fair conclusion is that the accident was not reasonably avoidable. The Grievant should not have been held responsible for the accident and, consequently, he should not have been terminated.

Even if the Employer could demonstrate some failing on the Grievant's part, the grievance must still be sustained because

the punishment of termination is disproportionate in light of all the relevant circumstances of this accident and the Grievant's record of receiving accommodations for his driving.

This accident was exceptionally minor and it did little damage to the Grievant's bus. The industrial death penalty of termination is clearly disproportionate to the seriousness of the accident at issue in this case.

Although the Grievant had four other accidents on his record at the time of the incident, three of the four accidents caused only minor damage to buses.

The Grievant's undisputed record for exceptional customer service, attendance, and good relationships with his coworkers and managers should act as a mitigating circumstance in this case for reinstatement of the Grievant.

For the foregoing reasons, ATU respectfully requests that the grievance be sustained, and that the Arbitrator order Metro Transit to remove all references to the discharge from the Grievant's employment record, immediately reinstate him to his bus operator position with no loss in seniority and with full back pay and benefits.

METRO TRANSIT POSITION

The termination of the Grievant's employment was just and merited. The Employer has demonstrated that the Grievant received ample training and opportunity to improve his driving

and failed to do so. He did not follow his training and had a fifth responsible accident, exceeding the termination threshold of four responsible accidents in a mere 12-month period.

While the damage to his bus was minor, one can only imagine what would have happened had the driver of the car gotten out of his vehicle only a second earlier. Operators are entrusted to maneuver a huge vehicle through busy city environments where dangerous situations can occur in an instant.

The Grievant's driving history has shown that he is incapable of safely operating his vehicle in any environment. It is imperative to the safety of Metro Transit passengers and pedestrians on the street that the Grievant not maintain his employment as a Metro Transit bus operator.

There has never been an instance of a Metro Transit bus operator having five responsible accidents in a three-year period and maintaining his or her employment. The Grievant has done nothing to become the exception to this rule. The Grievant was responsible for the accident on August 25, 2019, and the grievance contesting his termination should be denied.

ANALYSIS OF THE EVIDENCE

Article 5, Section 1 of the Contract provides that the Employer has the right to discipline employees, but such discipline must be "just and merited." It is generally the function of an arbitrator in interpreting a contract provision

which requires "just and merited" (the same as simply "just cause") as a precedent to discharge not only to determine whether the involved employee is guilty of the wrongdoing as charged by the employer, but also to safeguard the interests of the discharged employee by making reasonably sure that the cause for discharge was just and equitable. The term "just cause" implies a standard of reasonableness under the unique circumstances of each case. An employee will not be discharged by action which is deemed by an arbitrator to be arbitrary, capricious, discriminatory, unduly harsh, or disproportionate to the proven offense committed by that employee.

It is undisputed that at the time of the August 25, 2019 accident, the Grievant had four responsible accidents in his work record and none of these were challenged by him in the grievance procedure. The Employer indicated in the Notice of Discharge that the Grievant was terminated based on "violation of Metropolitan Council Operating Policy 4-7d," which provides for discipline when bus operators are charged with a "responsible accident." Consequently, the resolution of this grievance essentially starts and ends with a determination by the Arbitrator as to whether the Grievant should be held "responsible" for the accident that occurred on August 25, 2019 on Lake Street. If the Grievant is held responsible for this accident, this would be his fifth responsible bus accident in a

36-month rolling period, which under the progressive discipline policy for bus accidents (Procedure 4-7d) would be grounds for termination. In fact, all that is needed under Procedure 4-7d to terminate an operator is four responsible accidents in a rolling 36-month period.

It is clear the safety of bus operators, passengers, and the public is the paramount goal of Metro Transit. To that end, operators receive extensive safety and operating procedures training. Specifically, the Grievant was provided ample safety and operating procedures training at the beginning of his employment with Metro Transit and continuous training on the safe operation of buses throughout his career. In fact, the Grievant received specialized One on One safety and operating procedures training after all of his responsible accidents, except for the last accident on August 25, 2019, which resulted in his termination.

In addition to this One on One Training, the training received by the Grievant included the Smith Safety System, which contains the five Safety Keys. The Grievant was trained on actions that operators must take in certain scenarios through standard operating procedures and the Part-time Operators Training Manual. The Grievant was also trained on how to operate a bus in a city environment, as noted in Chapter 7 of the Employer's bus operator training manual. Clearly, there was

no argument by the Grievant or Union that the Grievant had not been trained in the safe operation of his bus.

The Union argues that the Grievant should not be held responsible for the accident on August 25, 2019 for several reasons.

First, as the Grievant was approaching the block where the accident occurred he was focused on several known hazards, such as other vehicles around his bus, pedestrians near the yellow awnings on the corner and at the bus stop that is staged just past the stop light, and the opaque sign that is posted on the bus stop shelter.

Second, the Grievant was aware from previous runs on this portion of Lake Street that sometimes pedestrians, scooters, bicyclists, and jaywalkers are present. In addition, the Grievant was quite aware that this particular block of Lake Street is a common drop-off/pick-up location for Uber drivers, and cars are often parked on this block with their brake lights on. The Grievant stated that when he saw parked cars with their lights on he would move his bus to the left (but in the same lane), slowing down, and keeping his eyes moving.

Third, the Grievant saw the car's light go on and off but he could not move to the left lane because another vehicle was driving directly to the left of the Grievant's bus. The Grievant was at least three feet from the car in his own lane.

Fourth, when the Grievant's bus was only approximately 1.5 seconds from the car, its door began to open, but the Grievant did not see this happening because he was monitoring the other hazards in the area, such as the vehicle to his left, the upcoming intersection, and the sidewalk to the right. Therefore, when the Grievant's bus reached the car just over a second later it was simply too late for the Grievant to take any sort of evasive action in a safe manner.

Fifth, the accident did not result in an appreciable damage to the bus. The Grievant simply plugged the door light back in and there were only scuff marks where the car door hit the bus.

In summary, the Union alleges that the Employer's argument that the Grievant was simply driving too close to the parked cars and should have moved to the left at the time of the accident and did not sound his horn as he approached the vehicle represents hindsight bias and ignores the reality of the above mentioned hazards on both sides of the bus around him. The Union argues that only by breaking down the video with the benefit of hindsight does fault-finding become possible, which is simply not a fair means of attributing blame on the Grievant for this accident.

The Union concludes that the Grievant was properly driving within his own lane at reduced rate of speed and while leaving sufficient space on both the right and left sides of the bus,

when the person in the car inexplicably opened their car door into the side of the Grievant's bus just as he was passing the car. As a result, according to the Union, the Grievant should not have been held responsible for this accident that was clearly caused by the actions of someone else.

Safety Specialists are charged with conducting neutral investigations of the accidents in the workplace. They do not consider the cost of the damage caused by an accident, and they do not consider the operator's history when making their determinations of whether the accident will be considered a "responsible" accident. They instead provide their neutral analysis of the accident, determining whether the facts substantiate a finding of a responsible accident and recommendations for additional training. In this case, the Safety Specialist assigned to investigate the August 25, 2019 accident was Mr. Carr, who had previously investigate two the Grievant's prior accidents, finding him responsible for the accidents. Safety Specialist Carr found the Grievant to be responsible for the August 25, 2019 accident, as well.

The Arbitrator has reviewed the record many times, while considering the Union's argument that the Grievant was not responsible for the accident on August 25, 2019, and Safety Specialist Carr's determination that the Grievant was responsible for the same accident. The Arbitrator concludes

from this evidence that even though the Grievant did not cause the accident, as it was caused by the motorist opening his car door and hitting the Grievant's bus, nevertheless, the Grievant must assume some responsibility for the accident.

The evidence shows that while the Grievant was still almost a block away from the car with which he came into contact, the Grievant admitted he saw the car's brake lights come on. While the Grievant moved to the left in the same lane to avoid the vehicle he did not slow his bus down. Instead, the Grievant continued at the same speed of 19.7 mph as he passed the vehicle. In fact, from the time the Grievant comes to a stop at 17:05:24.70 on the video, to the time contact is made with the car's driver's side door, the Grievant does not even touch his brakes.

Moreover, the Grievant admitted in his accident report, as well as in his investigatory meeting with Garage Manager Walker on September 6, 2019, that he was only three feet away from the vehicle when its door opened, and this was the distance he normally traveled from vehicles parked on the side of the road. Even assuming the Grievant was at least three feet away from the car, as he now claims, Metro Transit trains its operators to be four feet away from parked vehicles and if this spacing is not available to slow down. Clearly, the fast speed and close distance of the Grievant's bus were in violation of Metro

Transit's training and policy, including failing to apply all five Safety Keys, and the Grievant was driving too fast and too close to avoid a possible door opening or driver emerging from the vehicle.

It is also noteworthy that the Grievant was quite familiar with this stretch of road where the accident occurred and its dangers. For example, the Grievant was aware of Uber drivers pulling in and out very quickly. He was also aware that there are often pedestrians, scooters, and bicyclists on the sidewalk of this particular block due to the market, who were prone to jaywalking. In spite of all of these potential dangers, the Grievant never slowed down. He was going about 19.7 mph the whole way and never braked.

The Grievant admitted in his investigatory meeting with Garage Manager Walker on September 6, 2019, that if he noticed a parked vehicle with their brake lights on he would honk his horn to warn the driver. This would be consistent with the final Safety Key, "Make Sure They See You," which pertains to operators utilizing the tools they have at their disposal, such as their headlights, flashers, and horn to ensure that other drivers are aware of their presence.

The Grievant acknowledged that he did not honk his horn or flash his lights to inform the driver of his presence. While the Grievant may not have had time to honk the horn or flash his

lights when he was along side of the car when the door was being fully opened, the Grievant had enough time to do so when he first saw the door open or even before when he noticed the brake lights were on and then went off. Thus, the Grievant violated the final Safety Key by not adhering to his own past practice in this regard.

The fact that there was only minor damage to the Grievant's bus does not excuse or act as a bar from the finding of a responsible accident involving the August 25, 2019 incident. To the contrary, the amount of damage to a bus as a result of an accident, whether minor or major, is not the controlling measure of ascertaining whether a responsible accident occurred or not. In fact, the Grievant was found to have committed responsible accidents in his four prior accidents, which all caused minor damage to his bus, and yet the Grievant never challenged those determinations based upon the minor amount of that damage.

It is important to emphasize the reasonableness component as to the determination of whether a responsible accident occurred or not. Clearly, an operator should only be charged with responsibility for an accident if the operator had a "reasonable opportunity" to avoid the accident, but failed to do so. In this case, while the car operator caused damage to the Grievant's bus and is at fault for doing so, the evidence also establishes that the Grievant had a "reasonable opportunity to

avoid the accident." The Grievant was driving too close to vehicles parked on the side of the road, he was going too fast for the conditions, and failed to honk his horn or flash his lights in violation of Metro Transit policy. Most certainly, the Grievant failed to heed the warning signs he has been trained to look for as a Metro Transit bus operator.

The Arbitrator takes no joy in discharging an employee. Sometimes mitigating circumstances exist that will justify an errant employee to be returned to work. One well-recognized reason to mitigate a discharge is if an employee has a good work and discipline record, with a long record of service with the employer. In this case, the Grievant was hired on August 7, 2017 and terminated on October 7, 2019, which is only 26 months of employment with Metro Transit. The Grievant's short employment tenure with Metro Transit involved the Grievant being placed on three separate Final Records of Warning-the final level of discipline available before termination under Metro Transit policy. Thus, mitigation of the discharge penalty in this case is not warranted based upon the unique facts and circumstances of this case, in addition to the Grievant only being employed for a short time and having a poor discipline record.

An operator has two functions while driving his or her bus. First, an operator must provide a pleasant atmosphere for the

riders. This was proven by the number of excellent customer commendations and no customer complaints received by the Grievant. The second function is that the driver must provide a safe ride. While it is true that the riders on the Grievant's bus liked him, he did not give them a safe ride in that from September 2018 to August 2019, the Grievant was involved in five responsible accidents while operating Metro Transit buses. The evidence discloses that an operator has never maintained employment after incurring a fifth responsible accident in less than three years. It also must be remembered that the Employer gave the Grievant another opportunity for employment after the fourth responsible accident, so it would be difficult for the Arbitrator to give the Grievant yet another chance in light of the unique facts and circumstances of this case. As such, the only appropriate outcome, following the Grievant's fifth responsible accident in less than 12 months is termination from employment based on application of Procedure 4-7d.

AWARD

Based upon the foregoing and the entire record, the grievance is denied.

Richard J. Miller

Dated November 30, 2020, at Maple Grove, Minnesota.