

**STATE OF MINNESOTA  
BUREAU OF MEDIATION SERVICES  
IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN**

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**METRO TRANSIT,**

**EMPLOYER**

**and**

**ATU, LOCAL 1005,**

**UNION**

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**ARBITRATOR'S AWARD**

**BMS CASE NO. 23-PA-0856**

**EMPLOYEE DISCHARGE**

ARBITRATOR:	Rolland C. Toenges
DATE OF GRIEVANCE:	July 28, 2022
DATE ARBITRATOR NOTIFIED OF SELECTION:	December 28, 2022
DATE OF HEARING:	March 9, 2023
DATE HEARING BRIEFS DUE:	April 7, 2023
DATE HEARING CLOSED:	April 7, 2023
DATE OF AWARD:	May 5, 2023

**ADVOCATES**

**FOR THE EMPLOYER:**

Greg Wiley, President  
Wiley Reber Law  
5200 Willison Road, Suite 150  
Edina, Minnesota 55424

**FOR THE UNION:**

Timothy J. Louris, Atty  
Miller O'Brien Jensen, PA  
120 South Sixth St., 2400  
Minneapolis, MN 55402

**WITNESSES**

Timothy Bowman, Safety Specialist

Jacqueline Vaughn, Grievant

Pete Stumme, Asst. Transportation Mgr.

Chang Yang, Garage Manager

David Hanson, Asst. Dir. Field Operations

Steve McLaird, Director, Bus Operations

**ISSUE IN DISPUTE****EMPLOYER:**

Was termination of bus operator Jacqueline Vaughn following her fourth responsible accident in a rolling three-year period just and merited?

**UNION:**

Was the Employer's decision to discharge bus operator Jacqueline Vaughn just and merited?

If not, what is the appropriate remedy?

## JURISDICTION

The Arbitrator's authority is established by State Statute, Rules and Regulations of the Minnesota Bureau of Mediation Services and the terms and conditions set forth in the Collective Bargaining Agreement (CBA) between the Parties.<sup>1</sup>

The hearing record shows that the grievance at issue was duly filed by the Union<sup>2</sup> and processed through the grievance procedure. The grievance not being resolved by the Parties was then advanced to arbitration. There being no procedural or substantive objections raised, the disputed matter is properly before the Arbitrator for resolution.

Article 5, Grievance Procedures of the CBA provides for arbitration of unresolved grievances:

### "ARTICLE 5 GRIEVANCE PROCEDURE

Section 4, 2<sup>nd</sup> Step. . . . If no resolution is reached the dispute may be submitted to arbitration in accordance with Article 13, hereof, and the written request of either party to the Agreement.

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<sup>1</sup> Joint Exhibit #1.

<sup>2</sup> Union Exhibit #1.

Article 13 of the CBA sets forth arbitration procedure and the Arbitrator's authority:

ARTICLE 13, ARBITRATION PROCEDURES

In the event a dispute or controversy arises under this Agreement which cannot be settled by the parties within thirty (30) days after the dispute or controversy first arises, then Metro Transit or the ATU, whichever is applicable, in accordance with Article 2 or 5 hereof, may request in writing that the dispute or controversy be submitted to arbitration. The state Bureau of Mediation Services shall furnish a list containing the names of seven (7) persons from which the arbitrator shall be selected. Within five (5) days after receipt of such list, the parties shall alternately eliminate one name from the list until only one name remains. The arbitration hearing shall be held within forty-five (45) days from the date the arbitrator is selected.

In making such submission the issue to be arbitrated shall be clearly set forth in writing. The arbitrator's decision shall be final, binding, and conclusive and shall be rendered within thirty (30) days from the date the arbitration hearing is completed.

In the event the arbitrator resigns or dies, the method used to obtain said arbitrator shall be employed to obtain a successor.

The parties shall divide the cost of the arbitrator equally.

The parties agree to meet and negotiate no later than July 01, 2011, to explore an expedited arbitration process which will include a permanent arbitration panel. If the parties mutually agree to such process, said process will be used for mutually agreed upon cases.

The Parties selected Rolland C. Toenges as Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The arbitration hearing was conducted in accordance with applicable statutory provisions, Rules and Regulations of the Minnesota Bureau of Mediation Services and the Collective Bargaining Agreement (CBA). The Parties were afforded full opportunity to present evidence, testimony, and argument in support of their respective case. Witnesses were sworn under oath and were subject to direct and cross examination.

The hearing record consists of argument, testimony of six witnesses, over 800 documents in evidence and post hearing briefs.

The Parties elected to file post hearing briefs due April 7, 2023. The hearing record was closed upon receipt of the post hearing briefs.

## **BACKGROUND**

Metro Transit (EMPLOYER) provides public transportation services throughout the seven county Minneapolis/St. Paul Metropolitan area. Transportation modes include buses, light rail, and commuter rail. Metro Transit employs some 3,200 employees, including 1,500 bus operators. Metro Transit has a comprehensive system of maintenance and overhaul facilities located throughout the Metropolitan area. Metro Transit's Engineering and Facilities department is responsible for the sustainability, capital planning, construction, and maintenance of its public facilities and support facilities. It does so through a combination of full-time staff and contractors. Metro Transit provides service to seven counties and 90 cities within the Twin Cities area covering 907 square miles. Bus operations provide over 50 million rides per year on over 120 different routes.

Amalgamated Transit Union (ATU), Local 1005 (UNION) is the Certified Exclusive Representative of some 2,000 Metro Transit employees. The Employer and Union are parties to a Collective Bargaining Agreement (CBA) that includes a grievance and arbitration procedure for the resolution of disputes.

The instant disputes arose from the discharge of Grievant, Jacqueline Vaughn, Bus Operator. Discharge of the Grievant is based on violation of the Employer's maximum accident policy. The policy provides for discharge of a bus operator having four (4) chargeable accidents within a rolling three-year period.

## **EXHIBITS**

### **Joint Exhibit:**

1. Collective Bargaining Agreement, August 1, 2020, to July 31, 2023.

### **Employer Exhibits:**

While it is the Arbitrator's practice to identify exhibits singly, the Employer's exhibit submission is extra-ordinarily voluminous consisting of over 100 exhibits totaling some 800 pages. Therefore, as an alternative to listing them here, relevant exhibits will be referenced via footnote else wherein this award.

### **Union Exhibits:**

1. Grievance, Jackie Vaughn, 7/28/22.
2. First Step Grievance meeting, 8/12/22.
3. Second Step Grievance meeting, 8/30/22.
4. Employee description of accident, 4/30/22.
5. Accident report, Jacqueline Vaughn, 5/02/22.
6. Safety Summary & Training Recommendation.
7. Notice of Disciplinary Action – Loudermill Hearing.
8. Notice of Investigative Hearing, Jacqueline Vaughn.
9. Recap: Notice of potential Disciplinary action, Jacqueline Vaughn.
10. Investigative Interview, 4<sup>th</sup> responsible accident occurring on 4/30/22.
11. Charges for Termination, Jacqueline Vaughn, 7/20/22.

12. Notice of Discharge, 7/28/22, Jacqueline Vaughn.
13. Metro Transit Operating Policy, Recognition, Tools, and Discipline.
14. Final Record of Warning, Jacqueline Vaughn, 12/12/19.
15. Events leading to Final Record of Warning, 12/12/19.
16. Record of Warning, Jacqueline Vaughn, 9/21/19.
17. Relief Dispatchers, as of 3/1/23, Jacqueline Vaughn rank #2.
18. Remain on Final Record of Warning, 4<sup>th</sup> Responsible Accident, Thomas Ruffenach, 4/17/17.
19. BMS Case No. 16-PA-0170

### **POSITION OF THE PARTIES**

#### **THE EMPLOYER SUPPORTS ITS POSITION WITH THE FOLLOWING:**

From the evidence it is abundantly clear that discharge of the Grievant was just and merited.

The evidence shows the Grievant cannot operate a bus safely.

The Grievant failed to follow Metro transit training, policies, and procedures, proving she is not trustworthy.

Video in evidence clearly shows that on April 30, 2021, the Grievant hit a parked pickup truck with such force that it produced a loud sound and shattered glass on the bus.

The collision was also noted by the comment of a bus passenger, with the Grievant asking if the passenger was ok.

The Grievant failed to stop and investigate the effect of the collision and failed to promptly report the collision as is required by policy.

The Grievant, having failed to stop and investigate damage to the parked vehicle and failing to promptly report the incident, can be considered commission of a "hit and run," which is a violation of law.

The Grievant made inaccurate, contradictory, and varied statements, failing to take responsibility for her accidents.

Given the several different accounts the Grievant has given of the incident, the Grievant cannot be relied on to provide truthful information.

It is axiomatic that Metro Transit would expect its employees are operating buses safely and provide truthful statements.

The record shows that the Grievant was involved in three other responsible accidents within a three-year period.

Following each responsible accident, the Grievant was provided individualized specialized training.

Given Grievant's accident history, Metro Transit cannot be expected to risk further accidents by the Grievant.

The Union has not provided sufficient evidence that the Grievant was differently treated, and that discharge of the Grievant was not just and merited.

The evidence shows that Metro Transit was "just and merited" in terminating the Grievant on application of its progressive policy that an operator responsible for four responsible accidents in a three-year period is subject to discharge.

Safety is Metro Transit's number one priority. Metro Transit trains its operators and holds them to high standards for safe operations.

The Grievant's frequency of responsible accidents show that it would be contrary to safety and irresponsible to return the Grievant to bus operation.

The Grievance should be denied.

**THE UNION SUPPORTS ITS POSITION WITH THE FOLLOWING:**

Although the Progressive Discipline Policy calls for termination, for a 4<sup>th</sup> responsible accident within a three-year period, it also expressly provides discretion to depart from the policy based on mitigating and aggravating factors.

The Policy provides that it will continue the practice of the safety guidelines, including the practice of taking mitigating circumstances into account, in determining whether to issue a warning for minor accidents.

The testimony of Employer Witness McLaird acknowledged that the Employer does not always terminate bus operators who have four responsible accidents within three-years but could not provide a number.

The Grievant was employed as a full-time bus operator for almost a quarter century and has received numerous safe operator awards.

The Grievant consistently filled in for absent operators by working extra shifts on her scheduled days off.

The Grievant worked as a “10-hour operator,” approximately 9:00 am to 7:00 pm, Friday through Monday, most of her career.

For many years, the Grievant has consistently worked “more overtime hours than regular hours,” often working upwards of 16 hours per day.

In addition to working as a full-time bus operator, for many years the Grievant has also worked as a relief dispatcher. At the time of termination, the Grievant was second in to become a full-time dispatcher, which was her main goal.

Although the Grievant had received warnings for three prior responsible accidents at the time of termination, each were very minor in nature and two did not result in any damage or injury whatsoever.

On April 30, 2022, the Grievant worked her 10-hour shift without incident, which involved operating in rain and encountering pothole road conditions. Upon completing the 10-hour shift, the Grievant volunteered to work a stub route of about 4 hours, a route with which the Grievant was experienced. The weather conditions involved rain and pothole road conditions.

A video in evidence corroborates testimony of the Grievant that she was not fatigued, and the conditions encountered including rain, narrow two-lane residential streets with parked vehicles along-side.

Near the end of the route, at 12:46 am, the Grievant proceeds positioned to the right to allow space for oncoming traffic with no visible cars parked on the right side of the street. Within the next second, it can be seen that a vehicle is parked on the side of the street. The video shows the Grievant moving to the left around the parked vehicle as the white lane marker is visible in the video.

From the video recording, taken from the bus, it can be determined that as the bus passed the parked vehicle it struck its side, although impossible to determine exactly where, or with what. Another camera on the bus recorded damage to the Bus side door.

The Grievant has consistently maintained that, at- the-moment of impact, she did not realize the window had cracked. Buses are extremely noisy, especially when driving on bumpy roads. The Grievant simply thought she had driven over another pothole. Further, the Grievant could not see the broken glass due to obstruction of the fare box and darkness in the bus. From the video you can clearly hear the bus impacting numerous potholes, supporting the Grievant testimony about road conditions.

The Grievant first noticed the side door glass was broken, when about 1:00 am she returned to the garage and tried to close the side door. Before returning home, the Grievant returned to the site where she believed the accident may have occurred but found no evidence of any vehicle damage.

Later that same day (still April 30) the Grievant returned to work and turned in the completed "Accident/Incident Form", along with a report indicating that the bus she had driven on the 68 Route had alignment issues. The Grievant then proceeded to perform her usual scheduled work on Sunday, May 1<sup>st</sup> and Monday, May 2<sup>nd</sup> without incident.

Termination of the Grievant is not just and merited.

The just and merited standard is essentially equivalent to the more commonly used “just cause” language.

The Policy cited to support termination of the Grievant does not require automatic termination but provides any and all mitigating circumstances will be administered in a way that promotes consistency and equal treatment.

The record is completely devoid of evidence regarding identity of the actual decision maker and facts that the decisionmaker considered (or did not consider) in deciding to terminate the Grievant.

It is notable that none of the decisionmakers were present at the hearing to testify.

The Employer’s decision to terminate the Grievant must be overturned for the following reasons:

In the Employer’s rush to judgement critical mitigating and aggravating circumstances required by its Policy were ignored.

The Employer failed to consider the relatively minor nature of the accident.

The Employer refused to afford the Grievant leniency granted to other bus Operators with far worse records of bus accidents.

The Employer's Three-Year Rolling Policy is not a strict no-fault policy. In fact, the disciplinary policy itself states that managers have discretion to depart from the Policy taking into account mitigating and aggravating factors.

The Employer failed taking into account the following mitigating and aggravating circumstances:

The bus had issues pulling to the right during braking.

All the accidents on Grievant's record were minor.

The degree of penalty should be in keeping with the seriousness of the Offense.

The Grievant's long-term employment, essentially dedicating her life.

The Employer should have granted the Grievant the same leniency granted to other operators with far worse accident records (i.e. Ruffenach).

The Employer has invested in the Grievant who should be returned to work.

The Grievant routinely works overtime shifts and as relief dispatcher in addition to her regular schedule.

A key tenet of due process is that an inquiry or investigation be conducted before assessing punishment.

The Employer (McLaird) claimed he would not consider those factors prior to termination and only as consideration in post-discharge settlement negotiations.

There is no evidence in the record that the Employer gave proper consideration to full circumstances underlying the Grievant's record as required by just cause and the Employer's own disciplinary policy.

For the foregoing reasons, the Union respectfully requests the Grievance be sustained, all reference to discharge be removed from Grievant's record, immediate reinstatement to her position with no loss in seniority, full back pay and benefits, subject to any appropriate level of lesser discipline as may be determined by the Arbitrator.

### **DISCUSSION**

The issue to be determined by the Arbitrator is whether discharge of the Grievant (Jackie Vaughn) is Just and merited in accordance with provisions of the CBA.

The Grievant, a bus operator, was charged with violation of the Employer's "Safety Policy," which provides for discharge when an operator has four (4) chargeable<sup>i</sup> bus accidents within a rolling three (3) year period.

The Grievant's accident record during the past three years is as follows:

9/8/2019, sudden stop caused passenger to fall.

12/3/2019, struck concrete wall with bus.

8/28/2021, rear ended vehicle while making incorrect turn lane change – passenger fell.

4/30/2022, hit parked truck, didn't stop.

Following each of the first three accidents, the Grievant was provided one on one training and Safety Key Certification with the objective of avoiding further accidents. A Safety Specialist conducts an investigation of each accident to determine if it is a chargeable accident.<sup>3</sup> In the instant case, the Safety Investigators finding was that the Grievant had clearly failed to comply with the Operator's Training Manual and Rules.

The Employers Safety – Rolling Three-year Policy<sup>4</sup> provides for progressive discipline, subject to mitigating circumstances:

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<sup>3</sup> A responsible accident is defined as one where the Safety Specialist determines that the operator had a reasonable opportunity to avoid the accident.

<sup>4</sup> Operating Procedure 4-7d,

1<sup>st</sup> responsible accident – verbal warning.

2<sup>nd</sup> responsible accident – written warning.

3<sup>rd</sup> responsible accident – final written warning.

4<sup>th</sup> responsible accident – termination.

The record shows the Grievant was provided all the tenets of due process:

The disciplinary policy is to insure safety, well known having been in effect for a considerable time and is applied uniformly to all bus operators.

The Grievant received considerable training in job duties and expectations, including periodic Operator Recertification.

The Grievant received prior progressive discipline and was informed of consequences for failure to meet job expectations.

The circumstances surrounding the accident, giving rise to the termination, were thoroughly investigated by an independent experienced investigator.

The investigation, including real time video of the accident showing events leading up to and following the accident, was reviewed by several levels of management.

The Grievant was duly notified of pending disciplinary action and given full opportunity to respond.

The level of discipline administered is in accordance progressive discipline under the Safety Policy.

The Grievant was provided Union representation with the grievance as it was processed through steps of the grievance procedure. Consideration was given to lesser discipline subject to mitigating circumstances.

The Grievant has been provided appeal via this arbitration proceeding.

The hearing record is very extensive, and the facts of the instant matter are fully documented. The facts are essentially not in dispute. A video taken by cameras on the bus establishes in real time that the bus operated by the Grievant struck a parked pickup truck. The impact caused damage to the bus door and windshield. Damaged to the pickup truck and the owner is unknown as the truck had been removed before investigators knew of the accident and were able to investigate.

The video shows that, at the time of the accident, Grievant did not stop and investigate the accident or contact dispatch for assistance. A single passenger

commented about the accident and the Grievant inquired if the passenger was all right, to which the passenger responded in the affirmative.

As has been noted, the facts surrounding the accident are well documented including a real time video. What is in dispute is whether mitigating circumstances warrant lesser discipline. The Safety Policy does not automatically require termination but provides that mitigating circumstances will be administered in a way that promotes consistency and equal treatment. The record shows the Employer considered mitigating and aggravating circumstances in determining the level of discipline administered to the Grievant.

The Grievant has been employed as a bus operator with Metro Transit for some 22 years. The Grievant regularly worked a 10- hour shift and volunteered frequently to work overtime covering open shifts. On the day of the 4<sup>th</sup> accident, the Grievant worked her 10-hour shift and volunteered to working another four (4) hours covering another route. The Grievant also worked as a relief dispatcher and was second in seniority to qualify for a full-time dispatcher position.

At the time of the of the 4<sup>th</sup> accident, driving conditions involved darkness, narrow residential streets with parked vehicles alongside, rain and spring potholes. However, due to the Grievant's lengthy operating experience, these conditions were not uncommon to the Grievant. At the time of the accident the Grievant had been operating for some 14 hours. Although some fatigue might be expected, the Grievant denied being fatigued. The Grievant first become aware

of the actual damage to the bus upon returning to the bus garage. The Grievant filled out an accident report when reporting for her next work shift.

The Union points to circumstances that could be considered mitigating in determining appropriate discipline. This includes the Grievant's long service and willingness to work overtime and as a relief dispatcher. The Grievant complained that the bus she operated pulled to the right on acceleration. The bus was fully inspected and, although a little wear was found, it was not sufficient to explain a notable pulling effect.

The Employer points to circumstances to be considered when determining the appropriate level of discipline. This includes the Grievant's most recent three-year work history which contain 34 notations, including the following:

- 4 Customer Complaints

- 7 Records of Warning, including two final Records of Warning.

- 14 Sick Calls

- 3 Documented Verbal Warnings on Operating Policy.

- 1 Late for Work.

- 1 Violation of Respectful Workplace Policy.

The Parties reference other cases in support of their respective positions:

The Employer cites some nine (9) cases<sup>5</sup> involving terminated Metro Transit bus operators appealed to arbitration. These arbitration cases involved terminations under the same disciplinary safety policy as applied to the Grievant. All these grievances were denied.

The Union references a situation in 2017, where a bus operator, having a 4<sup>th</sup> accident within a rolling three-year period was retained, subject to remaining on a Final Record of Warning and no further responsible accidents.<sup>6</sup> The reason(s) for no termination are unknown, The Union also cites an arbitration case involving termination of a Metro Transit bus operator in which the grievance was sustained<sup>7</sup>. The arbitrator awarded lesser discipline due to the Parties lack of information as to the discipline imposed in comparable situations. It is to be noted in this case that the bus operator had no previous accidents within the three-year rolling period and was not afforded progressive discipline as proscribed under the safety Policy.<sup>8</sup>

## **FINDINGS**

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<sup>5</sup> BMS 20PA2157, BMS 20PA1018, BMS 18PA0238, BMS 16PA0425. BMS 13PA0639, BMS 10PA0412. BMS 20PA1648, BMA 16PA0375, BMS 15PA0631

<sup>6</sup> Union Exhibit #18.

<sup>7</sup> BMS No. 16-PA-0170.

The hearing record is comprehensive with real time video essentially covering every detail of the incident prompting termination of the Grievant.

The Employer's Safety policy is reasonable and of long standing.

The Grievant, having been an employee of considerable length received much ongoing training in job duties, requirements, and expectations.

The Grievant having four (4) responsible accidents within a rolling three-year period was in violation of the progressive discipline Safety Policy and subject to termination.

Although there are mitigating factors they are outweighed by other factors when the Grievant's overall record is considered.

The evidence before the Arbitrator shows the progressive discipline Safety Policy is essentially administered in a uniform and consistent manner, there being one exception some six (6) years ago. The other references by the Union being of different facts where the operator had no previous accidents and was not afforded progressive discipline.

It is axiomatic that Metro Transit's emphasis on safety is warranted and essential to the welfare of passengers, pedestrians, operators, and other motorists.

Metro Transits essential requirement of safety outweighs the interest of less than fully competent operator performance.

**AWARD**

The Grievance is denied.

**CONCLUSION**

The Parties are commended on the professional and thorough manner with which they have presented their respective cases. It has been a privilege to be of assistance in resolving the grievance matter.

Issued this 5th day of May 2023 at Edina, Minnesota.

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ROLLAND C. TOENGES, ARBITRATOR

CC: BMS

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<sup>i</sup> A chargeable accident is when, with due diligence by the operator, it could have been avoided.