

IN THE MATTER OF ARBITRATION BETWEEN

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AMALGAMATED TRANSIT UNION)	
Local 1005,)	ARBITRATION
)	AWARD
Union,)	
)	
and)	WASHINGTON
)	DISCHARGE
)	GRIEVANCE
)	
METROPOLITAN COUNCIL,)	
)	BMS Case No. 09-PA-0749
Employer.)	
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Arbitrator: Stephen F. Befort

Hearing Date: June 3, 2009

Post-hearing briefs received: N/A

Date of decision: June 24, 2009

APPEARANCES

For the Union: Roger A. Jensen

For the Employer: Anthony G. Edwards

INTRODUCTION

Amalgamated Transit Union Local 1005 (Union), as exclusive representative, brings this grievance challenging the decision of the Metropolitan Council (Employer) to terminate the employment of bus driver Steven Washington. The Union contends that the Employer violated the parties' collective bargaining agreement by discharging Mr. Washington without establishing a clear violation of the Last Chance Agreement

applicable to his continued employment. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits. The parties decided not to submit post-hearing briefs.

ISSUE

Did the Employer have cause to discharge the grievant pursuant to the terms of the parties' Last Chance Agreement? 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.

RETURN-TO-WORK AND LAST CHANCE AGREEMENT LANGUAGE

On April 30th, 2008, Mr. Washington was discharged for violation of the Metro Transit Operating policy and overall work record. The Amalgamated Transit Union, on behalf of Mr. Washington, filed a grievance challenging the discharge. Mr. Washington wishes to remain employed with Metro Transit. Metro Transit is willing to allow Mr. Washington a last chance opportunity to continue as an employee so long as he agrees to and complies with all of the following conditions:

1. Mr. Washington will be reinstated to his previous employment position effective May 22nd, 2008 with no loss of seniority. The time lapse between April 30th, 2008 and May 22nd, 2008, will be served as an unpaid suspension.
2. Mr. Washington agrees that within a rolling calendar year, effective with his reinstatement: he

Cannot exceed six (6) occurrences of absenteeism;

Cannot exceed one (1) late occurrence (excused or unexcused);
Cannot have any No Show occurrences;

Cannot receive more than one (1) Class B violation;

Cannot receive a Class A violation;

3. This agreement and the related discipline shall remain in the employee's personnel file for 36 months from the date of this agreement.
4. Failure of Mr. Washington to comply with any terms of this agreement shall result in his immediate termination. Such termination will be deemed just and merited as interpreted in Article 5, Section 1 of the Labor Agreement between the parties.

* * *

7. In the event Mr. Washington is discharged pursuant to this agreement, he may file a grievance only to challenge whether his conduct constituted a violation of any employer rules or regulations stipulated in this agreement. Mr. Washington specifically agrees that he may not challenge the propriety of the discharge penalty in any stage of the grievance procedure.
8. If Mr. Washington['s] grievance is submitted to arbitration, the jurisdiction of the arbitrator is limited to determining whether Mr. Washington was in violation of this agreement. All parties agree that the arbitrator shall not have jurisdiction to modify the discharge penalty in the event such a violation is found.

[Signatures]

May 20, 2008

FACTUAL BACKGROUND

The Employer, through its subsidiary, Metro Transit, operates the public bus transportation system in the metropolitan Minneapolis-St. Paul area. The grievant, Steven Washington, has been employed by Metro Transit as a bus operator for the past thirteen years. At the time of his discharge, he was assigned to drive route # 4 out of the Nicollet Garage. This route begins in Bloomington on the south end of the metropolitan area and proceeds to Columbia Heights, a suburb north of Minneapolis. Following a

brief layover of about ten minutes, the bus operator then drives the route in the opposite direction. Mr. Washington traversed this out-and-back route twice during a regular shift.

The Employer initially discharged Mr. Washington on April 30, 2008 for “violation of the Metro Transit Operating Policy and overall work record.” The Union filed a grievance on Mr. Washington’s behalf, and the parties eventually agreed to settle the grievance by returning Mr. Washington to work under the terms of a Last Chance Agreement (LCA). The salient terms of the LCA, dated May 20, 2008, for purposes of this grievance are as follows:

- The Employer has the right to terminate Mr. Washington if he receives one Class A violation or two Class B violations during the 36-month period following execution of the LCA;
- Mr. Washington’s right to challenge such a termination is limited solely to the issue of whether his conduct constituted a violation of employer work rules; and
- The jurisdiction of the arbitrator hearing such a challenge is limited solely to a determination of whether Mr. Washington violated the LCA and does not include authority to modify the discharge penalty in the event such a violation is found to have occurred.

The events giving rise to the present grievance took place on January 2, 2009. On that day, Mr. Washington drove his usual # 4 route. Mr. Washington testified that during his layover in Columbia Heights, he read a newspaper on his i-phone and put the audio buds in his ears in anticipation of listening to voicemail messages. He stated that he was wearing a stocking cap over the ear buds. According to Mr. Washington, he yanked on the ear buds when it was time to depart, but only the right ear bud came out. At the hearing, Mr. Washington testified that the left bud was stuck inside the stocking cap adjacent to his ear lobe, but that he did not realize this fact until he was nearing the south terminus of his route.

Meanwhile, Transit Supervisor Tom Gurrola observed Mr. Washington wearing the left ear bud while driving southbound on route # 4. Mr. Gurrola instructed Mr. Washington to report to his manager upon completion of this route. Since Mr. Washington's direct supervisor, Barb Keener, was not available, Mr. Washington reported to another supervisor who issued the charge for an alleged rule violation. Mr. Gurrola then issued a Notice of Violation which stated as follows:

Operator 9656 [Washington] was observed driving bus 845 in service with white earbuds in his ears. I spoke to operator at 82nd St. Station and he told me that the i-pod was not [on] while he was driving. I told him there is no way I can tell if it is on or not. I told him to see his manager.

Mr. Washington, in turn, offered the following written response to the alleged violation:

My response to the violation is that I have a habit of leaving the "buds" in my ear although I wasn't listening to the device. I understand the street supervisor's position. I would like to not have the violation for the record due to the fact that I am on the Last Chance Agreement and care about the policy so I ask for the infraction to not be filed for the record. I will break the habit of wearing it. By primarily not having any more there for not violating the policy. Thank you.

The Employer decided to proceed with the violation and terminated Mr. Washington's employment on January 5, 2009. The basis for the termination was that Mr. Washington committed a Class A violation and the terms of the LCA by wearing ear buds while operating a bus.

The Employer introduced a number of work rule documents in support of its contention that Mr. Washington's conduct constituted a Class A violation. These documents include the following:

- Bus Operator's Rule Book & Guide (issued sometime prior to 2004) Section 294 making it a Class B violation to play any radio or use any cell phone while operating a bus. Section 477 additionally states that the ban "applies to headphones, which must not be worn on the ears or around the neck."

- Bulletin # 76, dated November 11, 2004, making it a Class A violation for a driver to talk on a cell phone, listen to an electronic device, or wear an earplug or head piece while a vehicle is moving. This “supersedes” a prior bulletin on the same topic.
- Operating Policy Procedure 4-7d, dated August 13, 2005, describing disciplinary policies and classifying offenses by severity. Violations of Cell Phone/Electronic Device policies are listed as most serious, Class A offenses.
- Reissue of Bulletin # 76, dated January 22, 2007, adding that bus operators should avoid reading text messages while the bus is in motion.
- Bulletin # 64, dated November 13, 2008, stating that “if you are observed talking on your cell phone, using any portable electronic device or have an earpiece or Bluetooth type device, while your vehicle is moving, a Class A violation will be written and a Record of Warning issued.”

The Union filed a grievance challenging Mr. Washington’s discharge. The parties then addressed the grievance through the steps of the grievance process. According to memoranda prepared by Employer representatives, the Union and Mr. Washington asserted the following positions during the three grievance steps preceding arbitration:

First Step:

Mr. Washington accepts responsibility and acknowledges that the violation is accurate. He stated that he was at his layover and was focusing on leaving the terminal on time because he had previous violations for that issue. He would not have knowingly worn the earbud; he simply forgot that it was still in his ear.

Second Step:

Mr. Washington admits he had the ear piece in his ear, there is no dispute. The reason he had it in his ear was a mistake, an oversight. He had problems in the past with violations for leaving the terminal late and was concentrating on leaving the terminal on-time.

Third Step:

The Union said there is no disagreement regarding the facts in this case. Mr. Washington had his ear bud from his Ipod in his ear and forgot to take it out. . . . Mr. Washington testified that he knows the policy and accepts full responsibility for his actions.

The Employer denied the grievance at each step, and this matter proceeded to arbitration.

POSITIONS OF THE PARTIES

Employer:

The Employer initially contends that this dispute is not arbitrable. The Employer points out that the LCA only confers jurisdiction on an arbitrator to determine the existence of a violation of the LCA terms. The Employer argues that such jurisdiction is lacking in this case since Mr. Washington acknowledged during the grievance steps that his conduct violated the terms of the Employer's work rule policies.

Turning to the merits, the Employer claims that the grievant wore an ear bud in his ear while operating a bus in service. The Employer contends that this conduct constitutes a Class A violation of Employer work rules warranting discharge per the terms of the LCA. The Employer additionally asserts that the Employer's policy on ear buds is not vague and did not result in any prejudice to the grievant.

Union:

The Union maintains that this grievance is arbitrable because it appropriately challenges whether Mr. Washington's conduct constituted a violation of applicable Employer work rules. As to the merits, the Union asserts two arguments. First, the Union argues that Bulletin # 64, which prohibits a driver from "having" an earpiece while a vehicle is moving, is fatally vague since it could extend to the mere possession of an ear bud in a driver's pocket or under the seat. Second, Mr. Washington argues that he did not violate the Employer's policy in any event since the bud was not in his ear while operating the bus on January 2, but only was caught under a stocking cap close to the ear.

DISCUSSION AND OPINION

Arbitrability

The issue of arbitrability is a matter governed by the parties' contractual agreement. While the Supreme Court has counseled that a finding of arbitrability generally is favored, United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), the parties are free to withhold matters from arbitration by the terms of their contractual arrangement.

In a usual discipline and discharge case, an arbitral determination of just cause 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 948 (6th ed. 2003).*

In this case, however, the terms of the LCA limits the scope of arbitral jurisdiction. Paragraph 8 of the LCA states:

If Mr. Washington[‘s] grievance is submitted to arbitration, the jurisdiction of the arbitrator is limited to determining whether Mr. Washington was in violation of this agreement. All parties agree that the arbitrator shall not have jurisdiction to modify the discharge penalty in the event such a violation is found.

This language removes the typical second step remedial issue from arbitral jurisdiction. Based on this limitation, the Employer argues that there is nothing left to arbitrate in this matter since Mr. Washington acknowledged during the grievance step meetings that his conduct violated the terms of the Employer's work rule policies.

The Employer certainly is correct that the LCA removes the remedial issue from consideration in this matter. But, the Union's grievance is nonetheless arbitrable because it challenges the alleged LCA violation in two respects. First, the Union contends that Bulletin # 64 is so vague that it cannot equitably be applied so as to form the basis for Mr. Washington's alleged violation. Second, the Union claims that Mr. Washington's conduct cannot be deemed to be a violation under any circumstances because the ear bud was not lodged in his ear, but only stuck under his stocking cap. In both instances, the Union's claim goes to the permissible issue of the alleged violation rather than the impermissible issue of the appropriate remedy. As such, this grievance is arbitrable.

The Merits

The Employer maintains that the discharge is warranted because Mr. Washington violated the terms of the LCA. More specifically, the Employer contends that Mr. Washington, by wearing ear buds while driving a bus, committed a Class A violation of Metro Transit work rules. Under the terms of the LCA, the commission of a Class A violation within a 36 month period provides grounds for immediate termination.

The Union raises two defenses to this argument. Each is discussed below.

Vagueness

The Union asserts that the controlling Employer work rule – contained in Bulletin # 64 – is fatally vague. Bulletin # 64 provides that a Class A violation occurs

... if you are observed talking on your cell phone, using any portable electronic device or *have* an earpiece or Bluetooth type device, while your vehicle is moving
....

(Emphasis added.) According to the Union, the ban on “hav[ing] an earpiece” is so vague that it could encompass storing an earpiece under the driver's seat or possessing an

earpiece that is locked away in a secret vault. The Union argues that because this directive is so vague as to give no meaningful notice as to the type of conduct that it bans, it is inequitable for the Employer to rely on it as a basis for Mr. Washington's discharge.

The Employer counters that the meaning of Bulletin # 64 is informed by prior rules and bulletins that have not been superseded. In this regard, the Bus Operator's Rule Book & Guide prohibits drivers from both listening to radios or cell phones and wearing headphones "on the ears or around the neck." Bulletin # 76 updates this rule so as to ban "listening to an electronic device, or wearing an earplug or head piece while your vehicle is moving." Since neither of these two policies were explicitly superseded by Bulletin # 64, the Employer argues that these policies continue in force and that the obvious meaning of Bulletin # 64's ban on "having an earpiece" is to prohibit the *wearing* of an earpiece, but not the mere *possession* of an earpiece.

The Employer's position makes sense both as a matter of construction and as a matter of policy. In terms of the latter, Sam Jacobs, Director of Bus Operations, testified that wearing as well as listening to an audio device poses a potential safety danger because a supervisor cannot ascertain visually whether someone who is wearing an audio device also is listening through that device. This problem, however, does not extend to the unobtrusive possession of such a device. Since the logical import of Bulletin # 64 is to ban the wearing of an earpiece, but not its mere possession, the bulletin is not impermissibly vague.

Finally, it is important to note that Mr. Washington understood the Employer's policies to ban the wearing of an ear device while operating a bus. During the grievance steps, he acknowledged that wearing an earpiece is a violation of Employer work rules,

but argued that his violation of this rule was inadvertent. Since Mr. Washington understood that the Employer's rules banned the wearing of ear pieces, he cannot have been prejudiced by any arguable vagueness in the literal language of the rule.

The Alleged Violation

As an alternative defense, Mr. Washington contends that he did not violate the Employer's policies even if they validly prohibited the wearing of ear buds. In this regard, Mr. Washington testified that when he yanked on the ear buds to remove them after his layover on January 2, the left bud became stuck in his stocking cap and lodged next to his ear lobe. Thus, he claims that he was not "wearing" the ear buds during the period in question.

This purported defense falls short for two reasons. First, it is not credible. At each step of the grievance process, Mr. Washington admitted that he had an ear bud in his ear while driving route # 4. If this, in fact, was not the case, he surely would have denied this fact during the grievance process steps. The fact that the stocking cap explanation only emerged at the arbitration hearing clearly undermines its believability. Second, even if Mr. Washington's testimony is credited, the ear bud still was stuck next to his ear lobe under his stocking cap. Since one of the purposes of the "no wearing" policy is to provide assurance to passengers that bus drivers are not diverting their attention from driving duties, an ear bud stuck under a stocking cap fails to comport with this policy. In effect, even under Mr. Washington's version of events, he was "wearing" an ear bud while on duty in violation of the Employer's policy.

In the end, the fact that we are dealing with a last chance agreement rather than the usual just cause standard is controlling. Even if Mr. Washington's misstep might not

constitute just cause in the ordinary sense, the parties' LCA establishes a lower threshold that his conduct breached. As a result, the Employer has presented adequate proof to uphold its discharge decision.

AWARD

The grievance is denied.

Dated: June 24, 2009

Stephen F. Befort
Arbitrator