

In the Matter of the Grievance Arbitration Between

Amalgamated Transit Union Local 1005
Joseph Mitchell, Grievant,

And

Metropolitan Council
Metro Transit Division, Employer

Arbitrator Harley M. Ogata

Date and Place of Hearing:

April 8, 2010
Law Offices of Parker Rosen
Minneapolis, MN

Date of Award: May 3, 2010

Advocates:

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Factual Background

This matter came before this arbitrator under the grievance procedure contained in the collective bargaining between the parties. The parties agreed that the matter was properly before the arbitrator.

The grievant is a relatively short term employee of Metro Transit (employer), having been initially hired as a bus operator in September of 2007. He has had a long and varied career in a number of transit authorities here and on the east coast.

In 2009, the grievant became eligible for a transfer to a light rail operator position, after successfully completing training for that position. He began working as a light rail operator in July of 2009. Under the collective bargaining agreement, the grievant needed to successfully pass an initial evaluation period of 120 days.

Approximately 30 days into the evaluation period, the grievant was charged with two class A violations on the same day. A class A violation is considered a serious matter and subjects an operator to discipline under the rail operations rule book. Under the relevant policy, three class A violations within a rolling year subjects the operator to potential discharge.

After discussion among the relevant managerial personnel, it was decided to return the grievant to his position as a bus operator and to not pass him through the evaluation process as a result of the two violations.

The union challenged the employer's cause and basis for both violations and asked the arbitrator to reinstate the grievant into the light rail position within the evaluation period. Both violations will be discussed further below, but for purposes of identification, the first violation will be labeled "cell phone" and the second violation "red light". The parties agreed that if the cell phone violation was not upheld, the red light violation alone would not be enough for the grievant to not pass the evaluation period.

Discussion

Cell Phone Violation

Not much is in factual dispute regarding this infraction. During the time that the grievant was on duty and operating a train, the employer sent out a radio request for volunteers for overtime later that day. The grievant heard the request and used his cell phone to call the appropriate person to request the overtime.

The grievant had available to him other means to communicate his request for the overtime. Notably, he could have used the operator's radio which is situated right next to the operator. Alternatively, he could have used the portable radio which is normally clipped to the operator's belt.

Under Metro Transit Rule 107, "[e]mployees must not use any unauthorized appliance or electronic devices, including cell phones, while

on duty, unless such device is required in the performance of their duty.”

Exhibit 3, p. 5.

The grievant admitted that he used his cell phone. In sum, his position on this matter was:

1. He used it when he was stopped at a midrun station and that the conversation took longer than expected, so he had to continue while the train began to slowly pull away from the station.
2. He didn't think it was wrong to use the cell phone in this manner, despite his training and the policy on the matter.
3. He thought he could take care of the business before the train had to roll, but the supervisor kept him on the phone too long.
4. The policy allows for some use during duty hours (like when the operator is at an end station).
5. The supervisors kept the grievant on the phone too long to “set him up” for a violation.

The employer, on the other hand, cites the cell phone use policy as a “zero tolerance” policy, under which no usage is acceptable. The employer cites national tragedies, well known to the public, as a basis for the institution of the “zero tolerance” policy. Under this viewpoint, the only acceptable means of communication is the radio or portable radio, period.

The arbitrator finds weaknesses in both positions. First, as to the grievant's position, after listening to tapes of the phone conversation between the grievant and the supervisor regarding the request for overtime, there is nothing to indicate that the supervisor knew that the grievant was on duty or that they were purposefully prolonging the conversation so as to ensure a violation on the part of the grievant.

Second, while the employer's implementation of the policy does allow for some use of the cell phone during duty hours (while at the end of the run), such use is not within the confines of actually operating the train.

Finally, the arbitrator finds that the policy and training given to the grievant is reasonable and has a rational basis in the protection of the safety of the public.

On the other hand, the employer's testimony as to its "zero tolerance" policy on the use of the cell phone did not hold up during the hearing. It's clear to the arbitrator that the implementation of that policy was the result of the incident in question. The employer has the right to implement this "zero tolerance" policy, but not retroactively.

Under these circumstances, the arbitrator finds that the grievant's use of his cell phone under these facts was a *de minimus* violation of the policy and should not be used as a basis for the grievant not passing the evaluation period. The grievant used it for a business purpose and not for a purely personal reason. His conversation was limited to requesting and

being granted the overtime and he did engage in any off topic conversation.

The arbitrator is specifically assisted in this determination by the fact that the grievant never denied using the cell phone. Most particularly, the grievant aided his own case when he testified that he now understands that such use is a violation of the policy and would not do so in the future. Had he not taken this position, the decision might well have come out differently.

Red Light Violation

There was extensive testimony on this infraction. The technical testimony and evidence on this matter conclusively proved to the arbitrator that the grievant moved forward under a red light, in violation of the rules.

The testimony of the employer's technical witness (Bruce Fenlason) was largely irrebuttable. The system has a number of checks that are all designed to prevent accidents, the worst of which would be to have two trains on the same track going in opposite directions heading straight at each other.

Among the technical indices evidenced at trial that supported the employer's version of what happened during this event:

1. In order for a permissive signal to be given to a train, the switches must be aligned correctly.

2. The rail control center cannot override the switch once the train is on the track within a few feet past the signal.
3. The interlocking tracks were clearly not routed for a train going in the direction of the grievant's. In fact, the grievant testified that he visually noticed this fact and backed his train up.
4. The computer system data showed that there was a red signal overrun at the time and place where the grievant's train was located.
5. All the sequence of events reports were consistent with the employer's version of events.

It is unrefuted that the grievant had a permissive signal to proceed at one time. All of the technical evidence presented at the hearing provides a firm basis for the conclusion that the light had changed to red by the time the grievant proceeded, even though he vehemently denied the same. The arbitrator is persuaded by the testimony of Sherri Gingerich, the Deputy Chief Operations Officer, who stated that she believed that the grievant believes that he had a permissive light to proceed but the facts show otherwise.

Decision

The testimony at the hearing made the ultimate decision in this matter easier. The parties agreed that if the grievant had only the red light violation, he would not have been returned to his bus operator position.

(See the testimony of immediate supervisor John McGuire and Deputy Chief Operation Officer Sheri Gingerich). Based on the foregoing discussion, the arbitrator orders a removal of the cell phone violation from the grievant's record and a return of the grievant to the light rail operator position he formerly held at the same point in the evaluation period he was in when he was removed. The red light violation stands and will remain a part of the grievant's record.

The arbitrator is not unmindful of the employer's arguments that it should not have to employ a person in such a sensitive position with such safety concerns. Under these circumstances, however, a return to the light rail operator position is warranted. The grievant is in a sensitive position with regard to the public whether he is a bus operator or a light rail operator. In either case, the employer will need to work with the grievant to ensure that the public's safety is ensured.

If this were a different case, however, the outcome might have been different. A careful analysis of the employer's testimony in this matter leads the arbitrator to conclude that the grievant might not have been returned to his former position had he displayed a more understanding and conciliatory demeanor with the employer during the initial stages of the process. There is no question that the employer was addressing legitimate concerns in its investigation into both infractions. If the grievant had acknowledged the legitimacy of the concerns and worked with the

employer to correct them, he very well might not have been in his current predicament. The arbitrator notes that the grievant is a relatively new employee and will need to make changes to address the legitimate managerial concerns raised at the hearing if he expects to continue his employment on a long term basis.

Award

Under the foregoing analysis, the grievance is sustained in part. The employer will remove the cell phone violation from the grievant's record and return the grievant to the light rail operator position he formerly held at the same point in the evaluation period he was in when he was removed. The red light violation stands and will remain a part of the grievant's record. The grievant will be reinstated in his light rail operator position at the same point in the evaluation period as he was in when he was returned to his bus driver position.

Harley M. Ogata

May 3, 2010
Dated