

STATE OF MINNESOTA  
BUREAU OF MEDIATION SERVICES

---

In Re the Arbitration between

Amalgamated Transit Union, Local 1005,

Grievant,

and

BMS Case No.: 10-PA-1536

Metro Transit,

Respondent.

---

DECISION AND AWARD

BEFORE

Bernice L. Fields, Arbitrator

APPEARANCES:

For: Labor Union:

Roger Jensen, Attorney, Miller O'Brien Cummins, PLLP  
One Financial Plaza, Suite 2400, 120 South Sixth Street  
Minneapolis, Minnesota 55402

For: Metro Transit:

Mr. Andrew Parker, Attorney, Parker Rosen  
300 First Avenue No., Suite 200  
Minneapolis, Minnesota 55401

Place of Hearing:

120 South Sixth Street, #2400, Minneapolis, Minnesota

Date of Hearing:

October 7, 2010

Date of Award

November 5, 2010

Relevant Contract Provisions

Cell Phone/Electronic Device Prohibition – December 14,  
2009, Article 4, Article 5, Article 10, and Article 11

Contract Year:

August 1, 2008 – July 31, 2010

Type of Grievance

Discipline

## I. INTRODUCTION

This matter came on for hearing pursuant to the collective bargaining agreement (CBA) between the parties effective August 1, 2008 to July 31, 2010. A hearing occurred on October 7, 2010 in a conference room of the law offices of Miller O'Brien Cummins PLLP, 120 South Sixth Street, Minneapolis, Minnesota.

Attorney Roger Jensen represented the Amalgamated Transit Union Local 1005, hereinafter Union. Attorney Andrew Parker represented Metro Transit, hereinafter, Employer.

The hearing proceeded in an orderly manner. There was full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the Arbitrator. The advocates fully and fairly represented their respective parties.

The parties stipulated that the matter had been properly submitted to arbitration and that there were no issues of substantive or procedural arbitrability to be resolved. The Arbitrator officially closed the record on October 7, 2010 after final arguments from counsel.

## II. ISSUE

WHETHER THE EMPLOYER ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE THAT GRIEVANT COMMITTED THE ACTS ALLEGED? IF NOT, WHAT IS THE REMEDY?

## III. RELEVANT CONTRACT/POLICY PROVISIONS

### ARTICLE 4 MANAGEMENT RIGHTS

The ATU recognizes that all matters pertaining to the conduct and operation of the business are vested in Metro Transit and agrees that the following matters specifically mentioned are a function of the management of the business, including without intent to exclude things of a similar nature not specified, the type and amount of equipment, machinery and other facilities to be used; the number of employees required on any work in any department; the routes and schedules of its buses; the standard of ability, performance and physical fitness of its employees

and rules and regulations requisite to safety. Metro Transit shall not be required to submit such matters to the Board of Arbitration provided by Article 13.

#### ARTICLE 5 GRIEVANCE PROCEDURE

##### Section 1

Metro Transit reserves to itself, and the 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.

#### ARTICLE 10 MUTUAL COOPERATION

##### Section 1

The ATU agrees that each of the employees now or hereafter represented by it shall render faithful service in their positions and shall to the best of their ability, observe operating rules of Metro Transit and cooperate with management in the efficient operation of the system and in fostering cordial relations between Metro Transit and the public.

##### Section 2

The ATU agrees to require all of its members to comply with the provisions of the Agreement, and Metro Transit agrees to cooperate with ATU in its efforts to enforce compliance with its members with the provisions of this Agreement.

#### ARTICLE 11 WORK RULES AND PRACTICES

All practices and agreements governing employees enforced by Metro Transit or its predecessors on or after November 1, 1957, not in conflict with nor changed by the provisions of this Agreement may be changed subject to the following conditions:

- (a) Work rules and/or practices may not be in conflict with the contract;
- (b) Metro Transit must meet and confer with the ATU prior to making any such changes or new work rules;
- (c) New work rules and/or practices must be reasonable;
- (d) The Metro Transit must furnish the ATU with a copy of all bulletins or orders changing any such rules, regulations and practices;
- (e) Work rules and/or practices are subject to the Grievance Procedure.

#### RELEVANT POLICY PROVISION

##### EFFECTIVE DECEMBER 14, 2009

##### Cell Phone/Electronic Device Use While Operating a Bus or Light Rail Vehicle

*All cell phones and personal electronic devices must be turned off and stowed off the person, not on vibrate or silent in a work bag or jacket not being worn, while operating a bus or train. (all emphasis in original)*

This applies to all persons operating a revenue vehicle, regardless of their primary job title. The penalty for violating this procedure has been elevated to reflect the seriousness of the procedure.

- The first time an employee is caught using an electronic device or with a personal cell phone on their person while operating a bus or train they will receive a final record of warning and a 20 day unpaid suspension. Day off overtime will not be allowed during suspension.
- The second time a person is found in violation of this procedure, they will be terminated from employment, regardless of the length of time between the first and second offense.
- A Rail Operator violating this policy during his or her evaluation period will be issued a Final Record of Warning and a twenty (20) day suspension and be returned to Bus Operations.
- Should an Operator be involved in an accident while violating this procedure, further disciplinary action up to and including discharge may be applied.

Because it will be more difficult for family members to reach Bus and Rail Operators, family members should contact dispatch who will work in conjunction with the TCC to reach an operator in the case of an emergency. Business cards will be made available for you to give to your family members with contact information for each garage.

#### IV. STATEMENT OF THE FACTS

Responding to a series of fatal bus and light rail accidents across the nation caused by bus/rail operators using cell phones, Metro Transit, the Employer, promulgated a new policy prohibiting the use of a cell phone or other electronic device while operating a Metro Transit vehicle. The policy took effect on December 14, 2009 after all personnel received training and signed acknowledgements of the new policy. Specifically, the policy requires cell phones or electronic devices be turned off and stowed off the driver's person while operating a Transit vehicle. Off the driver's person means that the cell phone cannot be on vibrate or silent in a work jacket or bag not being worn. Drivers may use cell phones on layovers. On February 26, 2010 the policy was re-issued to all drivers as a reminder of the change.

In recognition of the serious dangers inherent in cell phone use, the penalties for this violation are an exception on the normal discipline ladder. The penalty for the first violation of the cell phone policy is a Final Warning and twenty (20) days unpaid suspension. The penalty

for the second violation of the cell phone policy is termination regardless of the length of time between first and second violations.

On December 15, 2009, the day after the cell phone policy went into effect, the Union grieved the implementation of the policy without negotiation because of the exception to the existing discipline process. Under Article 5, Section 2:

...When contemplating disciplinary action, Metro Transit shall not give consideration to adverse entries to an employee's disciplinary record involving incidents occurring more than thirty-six (36) months prior to the date of the incident which gives rise to the contemplated discipline.

Arbitrator Carol Berg-O'Toole found in BMS Case No.: 10-PA-1030 that implementation of the cell phone policy without negotiation was a valid management prerogative under Article 4 of the Collective Bargaining Agreement.

CB, Director of Bus Operations for the Employer, is a thirty year Transit employee. For eleven years she worked in Street Operations observing driver behavior. On March 19, 2010, CB alleges that she observed Grievant, Gerald Snyder, operating Metro Transit bus 1129 while holding a cell phone to his ear. The incident occurred at approximately 8:10 a.m. on Olson Memorial Highway near the Heywood Garage where CB was on her way to work in her private vehicle. She was stopped at a traffic light and Grievant's bus was coming down the hill toward her. She did not allege that she saw Grievant's lips moving, only that he was holding the cell phone to his right ear.

Moments later when CB arrived at work, she telephoned her violation report to the Transit Supervisor while still in the garage parking lot. She reported that Grievant held the device up to his ear. The Transit Supervisor called Grievant's bus and told him that he had been

observed using a cell phone at a specific location on Memorial Highway. Grievant denied that he had used a cell phone. "She must have the wrong bus," Grievant replied.

When CB reached her office, she wrote a Notice of Violation to Grievant based on her observation. Then she viewed the video feed from Grievant's bus at approximately the time she believes she observed his cell phone use. The video shows two seconds of Grievant with his right hand up to his ear. CB alleges that she had a clear, unobstructed view of Grievant without any morning glare for at least five to seven seconds. On cross-examination, she admitted that at Grievant's Unemployment Hearing she testified that her observation may have been twenty seconds.

Since the implementation of the cell phone policy on December 14, 2009, there have been other complaints from passengers and drivers in passenger cars about drivers using cell phones while operating Transit buses. The Employer's standard of review is that unless the video sustains the complaint no disciplinary action is brought against the driver. Although Metro Transit buses have at least five cameras, none of them is focused directly on the driver.

In this case, the Employer urges a different standard of review because of the person making the complaint. The Employer argues that CB should be believed even though the video is inconclusive as to the Grievant's alleged violation. The Employer argues that CB's many years observing bus drivers on the street is more reliable than the video. Shortly after implementation of the new cell phone policy, CB observed another violation of the cell phone policy by a different driver also while driving her private vehicle. Her observation was substantiated by the video of the driver actually using his cell phone.

Grievant is a nine-year part-time driver. He works thirty hours per week. He has no prior discipline in his record. His split shift is from 7:10 a.m. to 8:49 a.m. and begins again at

2:36 p.m. to 6:27 p.m. At the time of the alleged violation, Grievant's morning shift was over and he was headed to the Transit garage. The bus was empty.

Prior to beginning his afternoon shift, Grievant received the Notice of Violation and reviewed the video of his alleged violation in the office of his supervisor KB. Grievant responded to the Notice of Violation by alleging that CB's observation was incorrect. On the two seconds of video with his right hand near his right ear, he alleges that he was scratching in his ear.

On March 30, 2010 Grievant's First Step grievance hearing was heard. He sought to have the Final Record of Warning removed from his file and to be paid for the twenty day suspension. The grievance was denied based on CB's experience observing bus drivers.

Grievant's Second and Third Step Grievances were heard on May 3 and May 12, 2010. Grievant was unable to obtain his cell phone record for March 19, 2010 before the Step hearings. Both Steps were denied based on the expert observations of CB. Grievant filed for arbitration.

Although requested in March, 2010, Grievant did not receive his cell phone records from his Carrier until early June, 2010. He testified at the arbitration hearing that he has only one cell phone. His wife has an identical cell phone. On the day he received the records from the Carrier he took the envelope unopened to his supervisor, KB. His supervisor copied the documents; however, Grievant decided he was so angry with the Employer for unjustly imposing the twenty day unpaid suspension which he had already served that he asked the supervisor to destroy the records and not to pass them upward to management. The supervisor complied.

The cell phone record Grievant presented shows that no calls were made on the cell phone he identified as his until 4:04 p.m. on March 19, 2010. On cross-examination, Grievant admitted that he would lie to save his job.

## V. POSITION OF THE PARTIES

### UNION POSITION

The Employer did not meet its burden of proving by a preponderance of the evidence that Grievant was using a cell phone while driving a Transit vehicle during the 8:00 a.m. hour on March 19, 2010. The observer, Director of Bus Operations, CB, should not be given deference because of her position with the Employer. She is not a reliable witness. First, CB wears glasses; it is unlikely she could not have observed a two inch device in Grievant's hand from the distance shown on the Employer's exhibits. CB admits she observed Grievant's bus, accelerating toward her, for less than ten seconds.

Grievant has only one cell phone. He obtained cell phone records for his telephone number from his Carrier and the Carrier's business records establish that there were no calls from his phone before 4:04 p.m. on March 19, 2010. It is unreasonable for the Employer to refuse to give any weight to the business records of Grievant's cell phone use on March 19, 2010.

However, the most persuasive evidence to sustain the grievance is the on-board video. The video shows two seconds of Grievant's right hand to the right side of his head. Grievant's explanation that he was scratching in his ear is a plausible, alternative explanation of CB's observation. It is impossible to tell whether there is a device in Grievant's hand on the video from one foot over Grievant's head. That makes it even more unlikely that a person in a vehicle over one hundred feet away could spot such a device.

CB's observations do not deserve deference because of her experience. Eye witnesses are notoriously poor reporters. The unbiased video should decide this issue. Since the Employer has failed its burden of proof, the grievance should be sustained.

## EMPLOYER POSITION

Metro Transit is a common carrier and is therefore responsible for providing a level of care that the very prudent and cautious person would undertake for the safety of another. The prohibition against use and possession of a live cell phone on a driver while operating a Metro Transit vehicle is intended to prevent the fatal transit crashes attributed to “distracted driving” in other cities.<sup>1</sup> It is appropriate for Metro Transit to go to greater lengths to protect its employees, patrons, and the public at large while carrying out its core mission.

Distracted driving, specifically here, cell phone use and texting was the cause of 2600 fatalities and 330,000 moderate to severe injuries in 2009.<sup>2</sup> It is estimated that there are 100 million cell phones in use in the United States, 32% of the U.S. population.

Harvard’s Center for Risk Analysis in 2009 estimated that the average motorist uses cell phones between 300 and 1200 minutes per year. Assuming a typical usage time of 600 minutes per year, the principal researcher, Dr. Joshua Cohen, found that the risk of death to a driver using a cell phone, the so-called voluntary risk, is approximately thirteen per million drivers, although that could range between four to forty-two per million, per year. The risk of death to roadway users, known as involuntary risk, is approximately four per million per year (range, one to twelve per million).

---

<sup>1</sup> *Total Destruction: At Least 17 Die In Head-On Metrolink Crash*; LA Times, J. Rubin, A. Simmons and M. Landsberg, September 13, 2008(Rail driver missed signal when using cell phone); *TRA Bus Driver On Phone When Man Hit*, Plain Dealer, Donna Miller, March 21, 2009(Driver on cell phone when pedestrian hit); Philadelphia, PA, (a school bus driver charged with vehicular homicide after a fatal accident occurred when the bus driver missed ten stop signs before colliding with an on-coming car while listening to an Ipod and talking on a cell phone); Boston, MA, May, 2009, ( fifty people were injured when a trolley rear-ended another trolley. The driver admitted to texting when the crash took place); Clarendon, TX, May 28, 2002, (head-on collision of two BNSF trains when engineer of one train was talking on cell phone); NTSB Report, November 14, 2006, p.33 (NTSB concluded that a tour bus driver’s “cognitive distraction” was to blame for a November 14, 2004 accident, after the driver failed to notice road signs warning of a low-clearance bridge because he was talking on a hands-free cell phone. Top of bus ripped off resulting in 11 injuries, one critical).

<sup>2</sup> Harvard Center for Risk Analysis, *Risk Analysis for Cell Phone Use*, July, 2009, Dr. Joshua Cohen, Ph.D.

According to the National Highway and Traffic Safety Administration (NHTSA) drivers are four times more likely to get into an accident when using a cell phone. “Hands-free devices don’t minimize the hazard, as it is the conversation that creates the distraction, not the equipment.”<sup>3</sup>

Another study by Dr. William Horrey, Ph.D. and William Kidd, M.A. funded by the AAA Foundation for Traffic Safety in 2008 found that although drivers are generally aware that distractions are a safety hazard, they have inaccurate beliefs about their own ability to handle distractions while driving. “Drivers,” the study concludes, “are overconfident and have inaccurate perceptions of their driving ability.”

“Scientists are grappling too, with perhaps the broadest question hanging over the phenomenon of distracted driving: Why do people, knowing the risk, continue to talk while driving? The answer they say is partly the intense social pressure to stay in touch and always be available to friends and colleagues. And there is also the neurological response of multi-taskers. They show signs of addiction – to their gadgets.”<sup>4</sup>

John Ratey, an associate professor of psychiatry at Harvard University and a specialist on the science of attention, explained that when people use digital devices, they get a quick burst of adrenaline, “a dopamine squirt.” Without it, people get bored with simpler activities like driving. Mr. Ratey said the modern brain is being rewired to crave stimulation, a condition he calls “acquired attention deficit disorder.”<sup>5</sup>

---

<sup>3</sup> . Official U.S. Govt. Website for Distracted Driving

<sup>4</sup> *Driven to Distraction*, Matt Richtel, NYT July 19, 2009.

<sup>5</sup> *Id.*

The most sobering information against distracted driving is the study by David L. Strayer, Frank A. Drews, and Dennis J. Crouch, professors at the University of Utah.<sup>6</sup> The principal researcher, Dr. Strayer, professor of psychology and director of the Applied Cognition Lab at the University of Utah, is considered the ultimate authority on driver distraction in America. Dr. Strayer estimates that 30% of crashes on the road are caused by driver distraction.

“Cell phones cause a form of inattention blindness, wherein drivers look but fail to see important information in the driving environment. These impairments differ qualitatively from other seemingly similar sources of distraction such as listening to the radio or books on tape or talking to a passenger,” Strayer argues.

Strayer argues that, “Drivers using cell phones are more likely to miss critical traffic signals (traffic lights, a vehicle braking in front of the driver etc.), slower to respond to the signals that they do detect, and more likely to be involved in rear-end collisions when they are conversing on a cell phone.” Strayer’s research concludes that “driver impairment caused by cell phones is similar to the impairments associated with driving drunk.”

Metro Transit recognized the seriousness of the hazard associated with the use of cell phones while driving a Transit vehicle and adopted the language of the Best Practice recommended by the American Public Transportation Association on cell phones as a model for its December 14, 2009 policy.<sup>7</sup> The Employer believes that its cell phone policy, if complied with, will virtually eliminate the hazard of an accident caused by a transit operator using a cell phone while operating a transit vehicle.

---

<sup>6</sup> *A Comparison of the Cell Phone Driver and the Drunk Driver*, HUMAN FACTORS, Vol. 48, No. 2. Summer 2006, pp. 381-391, 2006.

<sup>7</sup> *Reducing Driver-Controlled Distractions While Operating a Vehicle on Agency Time*, APTA RECOMMENDED PRACTICE, December 31, 2009

In this case, CB, Director of Bus Operations, a thirty year employee, with eleven years observing drivers on the street, observed the Grievant holding a cell phone to his ear on March 19, 2010. CB should be believed because of the accuracy of her observation.

The on-board camera shows CB's vehicle clearly from the Grievant's viewpoint, so it is clear that CB could also see him as he approached her stationary vehicle on Olson Highway. There were no weather impairments to her vision. She wrote her observation before she viewed the video of Grievant operating his bus during the relevant time of her allegation. In the video, Grievant's hand is held to his right ear approximately at the time, about 8:10 a.m., that CB observed him.

CB has been correct before in another recent incident under similar circumstances. In the earlier case, CB observed a driver using a cell phone while operating a transit vehicle and wrote up a Notice of Violation. The driver denied the violation until the video showed him using his cell phone.

CB has no reason to report untruthfully. She had never met Grievant before this incident. The video does not discredit her testimony. Her prior training and experience makes her a more reliable witness than an ordinary motorist making the same complaint. There is sufficient evidence to establish that CB is a credible witness and should be believed. The grievance should be denied.

## VI. ANALYSIS AND FINDINGS

In the universe of conflicts there are only three categories. The first and most common category is the conflict of values. All the familial, interpersonal (co-worker/co-worker/supervisor), age, gender, race, national origin, harassment, threats, and workplace violence disputes fall into this category. The second category is instrumental conflicts: how

should things work? These conflicts involve interpretation of the universe of organization procedures i.e., work rules, seniority, craft differences, etc. Usually work rules are well defined in the collective bargaining agreement and employers' written policies, but ambiguities based on interpretation still arise that require good faith negotiation to resolve. The last and most difficult category of conflicts to resolve are disputes over the division of scarce resources, i.e., time, money, human resources, and space.

This is a category two conflict: How should things work? The Union disagrees with the accelerated discipline in the Cell Phone Policy. How things should work conflicts are best resolved at the negotiation table.

A collective bargaining agreement is like a brick and mortar wall. The bricks are the rights negotiated from the Employer's inherent management rights. The mortar surrounding and connecting the bricks represent the Employer's common law right to operate the business in any chosen manner, limited only by Federal and State legislation and the rights negotiated to the Union. Consequently, it is impossible to enumerate all of the Employer's management rights. These residual or reserved rights can never all be stated specifically in any labor agreement.

Here, however, the CBA clearly allows the Employer to make changes to previous agreements pursuant to its obligation to ensure public safety. Specifically:

#### ARTICLE 11 WORK RULES AND PRACTICES

All practices and agreements governing employees enforced by Metro Transit or its predecessors on or after November 1, 1957, not in conflict with nor changed by the provisions of this Agreement may be changed subject to the following conditions:

- (a) Work rules and/or practices may not be in conflict with the contract;
- (b) Metro Transit must meet and confer with the ATU prior to making any such changes or new work rules;
- (c) New work rules and/or practices must be reasonable;
- (d) The Metro Transit must furnish the ATU with a copy of all bulletins or orders changing any such rules, regulations and practices;

(e) Work rules and/or practices are subject to the Grievance Procedure.

The Union is resisting the implementation of the cell phone policy because violators of the policy receive a final warning and can be terminated if found in violation of the policy a second time. This accelerated discipline is appropriate for the hazard it seeks to prevent and absolutely within the Employer's inherent right to manage the business. In addition, the Union is obligated to cooperate with the Employer in implementation of the new policy pursuant to:

ARTICLE 10 MUTUAL COOPERATION

Section 1

The ATU agrees that each of the employees now or hereafter represented by it shall render faithful service in their positions and shall to the best of their ability, observe operating rules of Metro Transit and cooperate with management in the efficient operation of the system and in fostering cordial relations between Metro Transit and the public.

Section 2

The ATU agrees to require all of its members to comply with the provisions of the Agreement, and Metro Transit agrees to cooperate with ATU in its efforts to enforce compliance with its members with the provisions of this Agreement.

Article 5 of the parties' Collective Bargaining Agreement requires that any employee discipline be "just and merited." There is a fundamental understanding between the parties in the employment relationship.<sup>8</sup> A potential employer is willing to part with its money only in return for something it values more highly, the time and satisfactory work of the employee. The potential employee will part with his/her time and work only for something he/she values more, the money and fulfilling work offered by the employer. This fundamental understanding of the employment relationship can be easily summarized: both parties realize that the employer must pay the agreed wages and benefits and that the employee must do "satisfactory work."

---

<sup>8</sup>This discussion on the fundamental understanding follows the theory of Professors Laura Cooper, Dennis Nolan and Richard Bales, University of Minnesota, in *ADR in the Workplace. (2000)*

“Satisfactory work” in this context has four elements: (1) regular attendance, (2) obedience to reasonable work rules, (3) a reasonable quantity and quality of work, and (4) avoidance of any conduct, on or all duty, that would interfere with the employer’s ability to operate the business successfully. The main addition to the fundamental understanding that Unions seek in collective agreements is job security. Most frequently, the agreement protects job security by limiting the employer’s power to discipline and discharge.

The fundamental understanding, as amended in the collective bargaining agreement, can be stated as follows: employees will provide “satisfactory work” in return for which the employer will pay the agreed wages and benefits, and will continue the employment relationship unless there is “just cause” to terminate it.

“Just cause” is obviously not a precise concept. It cannot be applied to a particular dispute by an employer or an arbitrator without careful analysis and exercise of judgment. There will never be a simple definition of “just cause,” nor even a consensus on its application to specific cases, but this does not mean the phrase is devoid of meaning. On the contrary, it is possible to make sense of the term and give it substance. This can be done by viewing the just cause standard as an amended form of the fundamental understanding. Just cause, in other words embodies the idea that the employee is entitled to continued employment provided the employee attends work regularly, obeys work rules, performs at some reasonable level of quality and quantity, and refrains from interfering with the employer’s ability to efficiently conduct its business with activities on or off the job. An employee’s failure to meet these obligations will justify discipline up to and including removal.

There are three inquires to determine whether just cause exists. The first is whether the evidence establishes that the Grievant committed the offenses forming the basis of discipline.

The second is whether the Grievant was afforded due process. The last inquiry is whether the penalty is appropriate considering the nature and severity of the offenses and any mitigating factors.

A. DOES THE EVIDENCE ESTABLISH THAT THE GRIEVANT COMMITTED THE OFFENSE FORMING THE BASIS OF DISCIPLINE?

The Testimony Of CB Is Persuasive That Grievant Violated The Cell Phone Policy On March 19, 2010.

The failure to have a camera on the driver makes discipline against drivers for alleged violations of the policy difficult to prove. Currently, this is the Employer's policy for reviewing violations of the policy. If a passenger on the bus or an ordinary motorist in CB's position on the roadway reports observing cell phone use by a driver, the driver is not disciplined unless the video supports the allegations. This policy will make it easy for drivers to violate the cell phone policy simply by keeping the cell phone on the left side of the bus cab where the driver's activities cannot be viewed. The left side of the cab is invisible to the four or five surveillance cameras on the bus. There is a prior agreement between the parties that there would be no direct video of the driver operating the bus. That agreement predates the epidemic of cell phone use.

The driver need not talk on a cell phone to pick up voice messages. Smart phones will even read aloud a user's emails. Without direct surveillance, it is also more likely that instead of just listening to messages from a cell phone, drivers will engage in the most dangerous and addictive driving distraction, texting, completely invisible to on-board cameras. Consequently, the Employer's belief that its current cell phone policy will virtually eliminate cell phone use by drivers is incorrect.

Without video of the driver committing the violation, the Employer has no other acceptable ways to establish its case. Even if the Employer requested a voluntary release of

information from the driver to the driver's Carrier for the driver's cell phone record for the day of an alleged violation, the Employer could not be sure that the record was for the cell phone used in the violation since it is not uncommon to have several cell phones. Although an arbitrator could make a negative inference if the driver refused to grant a release form to the Employer, the presentation of cell phone records are not conclusive that no violation occurred on another cell phone. The only absolute proof/exoneration would be the video of the driver.

In this case, the two-second video of the Grievant with his right hand to his ear is too brief to conclude that Grievant was using a cell phone, so under the Employer's current standard of review discipline is inappropriate. However, the Employer argues acceptance of different evidence. Here, the Employer asks for deference to an Employer witness. Deference to Employer witnesses is an arbitrary and capricious standard and will generally be rejected as conclusive proof of a violation.

In this particular case, however, CB is an exceptionally credible witness. Her training in quickly observing the activities of a bus driver on the street cannot be dismissed as easily as a mere motorist observer. Her description of the Grievant's hand to his ear and the corroboration of that behavior by the video at approximately the same time as her report are persuasive, even though no cell phone can be seen on the video because the Grievant's curled hand. It is possible that from CB's viewpoint, she could see a black object. She also observed longer than the two seconds of video.

There are other indicia of reliability in CB's testimony. First, CB made her report describing her observations before she viewed the video. Two, Grievant's bus was empty and he was on his way back to the garage, therefore, the perfect opportunity to use a cell phone without observation. Third, CB did not embellish her story by alleging that she observed Grievant

actually talking on the phone. Her report was that Grievant had the phone up to his ear. Fourth, CB was correct in another recent report of a violation which was substantiated by video. Lastly, Grievant admitted that he would lie to protect his job.

B. WAS THE GRIEVANT AFFORDED DUE PROCESS?

Grievant was afforded the complete array of due process available and mandated in the collective bargaining agreement.

C. WHETHER THE PENALTY IMPOSED IS APPROPRIATE, CONSIDERING THE NATURE AND SEVERITY OF THE OFFENSE AND MITIGATING FACTORS, IF ANY?

The penalty is set by the terms of the policy. The Grievant did not introduce any facts that would mitigate the penalty.

CONCLUSION

Although the Employer will have difficulty in future cases establishing this violation without video evidence, in this particular case, the quality of the witness testimony by the Employer is the scintilla more of evidence necessary to establish the violation against the Grievant. The Employer's implementation of discipline was "just and merited." Grievant breached the fundamental understanding. He did not do satisfactory work on March 19, 2010 because he did not obey reasonable work rules by having a cell phone on his person while operating a Metro Transit vehicle.

AWARD

After study of the testimony and other evidence produced at the hearing and of the arguments of the parties on that evidence in support of their respective positions, and on the basis of the above discussion, I make the following award:

1. The grievance is denied.

Respectfully,

Dated: \_\_\_\_\_11/05/10\_\_\_\_\_

\_\_\_\_\_/s/\_\_\_\_\_  
Bernice L. Fields, Arbitrator